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NORTON ROSE FULBRIGHT

Essential pensions news

Updater

February 2017

Summary

Essential Pensions News covers the latest pensions developments each month

HMRC publishes Pension schemes newsletter no. 84

Of general interest is the publication on **February 2, 2017** by HMRC of the latest edition of its online newsletter. Its contents include the following

- Changes have been made to the Provision of Information Regulations (see below) and changes will be made shortly to the online Pensions Tax Manual
- HMRC is continuing to review and update the online annual allowance calculator and seeks further feedback
- From **April 2017**, QROPS online will no longer be accessible and more about the pension tax rules on overseas schemes can be found on the overseas pension pages
- The extended pension drawdown tables apply from **July 1, 2017**, rather than **April 1, 2017**, as previously announced, to give schemes more time to update their systems
- Relief at source – warnings about missed annual return of individual information deadlines and that interim repayment claims will be stopped pending submission. The filing deadline for the annual return of individual information for relief at source has been brought forward to **July 5, 2017**. Administrators operating relief at source who have not received an information notice by the end of **February 2017** should contact HMRC
- A reminder that the deadline for applying for IP 2014 is **April 5, 2017**
- The "go-live" date for the look-up service for scheme administrators to check the protection status of members has been delayed and HMRC will inform further on its progress.

View the Newsletter

HMRC publishes Countdown Bulletin no 23

Of interest to all formerly contracted-out DB schemesis the publication on **February 6, 2017**, of HMRC's latest Countdown Bulletin. Its contents include the following

- Active members and scheme reconciliation – a reminder for scheme administrators to submit the closure scan request form to obtain active member data if this has not yet been done
- Details of expected HMRC reply times in relation to queries on the scheme reconciliation service (SRS) and details about SRS query automation
- A reminder that contracting-out certificates relating to schemes which ceased to contract-out before **April 6, 2016**, should be surrendered as soon as possible, and HMRC notified of the event
- There are no plans to hold pension forums this year but HMRC will accept requests for telekit or face-to-face meetings where administrators have specific issues; and
- A spreadsheet is available of all past issues of Countdown Bulletin and the articles they contain. It can be obtained by emailing HMRC at Mailbox.newstatepensionenquiries@hmrc.gsi.gov.uk.

View the Bulletin

Pension Schemes Bill 2016/17 – progress to date

The Pension Schemes Bill received its second reading in the Commons on **January 30, 2017**, and on **February 7, 2017**, entered the public bill committee stage. The main clauses of the Bill were agreed with minor amendments. Matters that arose during the debates included

- Confirmation that the Government intends to include "decumulation products" as part of any regulations made to extend the scope of pension schemes covered by the Bill's master trust provisions
- Agreement to allow a scheme funder to conduct activities in relation to the non-money purchase benefits where a scheme has mixed benefits
- A lack of agreement on the "scheme funder of last resort" clause that would apply where a master trust is unable to meet its wind-up costs, and which was introduced during the House of Lords report stage
- An amendment was agreed to extend the prohibition on increasing administration costs during a "triggering event" period to trustees of all receiving schemes, not merely master trusts
- A draft clause to protect the personal assets of owners of unincorporated businesses, when faced with a section 75 debt claim, was not agreed. The Pensions Minister confirmed that this issue was part of an ongoing consideration of employer debt by the Government, and that "we are looking to consult on specific proposals in the very near future"
- Allowing a scheme funder to carry out activities in relation to more than one master trust, and also carry out activities, such as due diligence, where it is considering becoming the scheme funder of a new master trust scheme
- Giving the Government power to create exceptions to the requirement for the scheme funder's activities to be limited to the master trust, for example, providing shared services to other schemes.

The committee stage is due to conclude by **February 21, 2017**, and the date for the report stage in the Commons has yet to be announced.

HM Treasury publishes consultation response and HMRC publishes new draft regulations introducing a pensions advice allowance

Of general interest is HM Treasury's publication on **February 3, 2017**, of a response to its August 2016 consultation on introducing a pensions advice allowance

The response notes that there has been strong support for the implementation of a pensions advice allowance by way of a new authorised payment for funds withdrawn from a registered pension scheme. The allowance will come into force from **April 2017** and consists of

- An allowance of a maximum £500 each use, but is available at any age
- Three permitted uses of the allowance in an individual's lifetime, but no more than once per tax year. A self-declaration system will operate

- The £500 will not be taxed on withdrawal from the pension pot, regardless of an individual's income. The allowance can also be used alongside the tax exemption for employer-arranged pensions advice
- The allowance may be withdrawn from defined contribution (DC) funds and hybrid pensions with a money purchase or cash balance element
- Redemption will be possible against regulated financial advice, including "robo advice" and traditional face-to-face advice. Retirement advice is intended to include a consideration of other factors, including other assets, that are relevant to an individual's retirement planning.

The allowance will be managed in line with existing FCA rules on adviser charging, which do not stop providers from applying their own reasonability checks, such as capping the percentage of an individual's pension fund that can be withdrawn to pay for advice.

HMRC has published the relevant draft regulations, and the draft Registered Pension Schemes (Authorised Payments) (Amendment) Regulations 2017 will amend the Registered Pension Schemes (Authorised Payments) Regulations 2009 to introduce the new authorised payment.

The conditions that must be met for the pension advice allowance payment to be an authorised payment include

- The payment must be made either for "retirement financial advice" provided to the individual or for the implementation of such advice. "Retirement financial advice" is defined as "advice in respect of the person's financial position, including their pension arrangements and the use of their pension funds"
- The payment must be requested in writing by the individual. The request must contain a declaration by the individual that no more than two pension advice allowance payments have been made in respect of him and that no other such payment has been made in the same tax year
- The advice must be regulated financial advice provided by a financial adviser regulated and authorised by the FCA
- The payment, which cannot exceed £500, must be made directly to the financial adviser.

HMRC will publish full guidance on the allowance shortly after it comes into force. The draft regulations are subject to a three week technical consultation ending on **February 28, 2017** and are intended to come into force on **April 6, 2017.**

View the draft regulations

Comment

The fact that the allowance is to be higher than the total of £500 originally suggested in the Treasury's consultation is welcome news. However, there have been criticisms that the rules are too restrictive, and of the £500 per tax year limitation, which some fear may make use of the allowance less appealing. There have also been criticisms that the Government has not legislated for a statutory override to apply to those schemes which will require rule amendments to implement the mechanism for allowing an additional authorised payment. While it will not be mandatory for schemes to permit members to use part of their pension pot to fund the allowance, those schemes which do not offer this facility may find themselves at a disadvantage.

Lump-sum death benefits: the Registered Pension Schemes (Provision of Information) Regulations 2017

Regulations that introduce a new provision-of-information requirement where a registered pension scheme pays certain taxable lump-sum death benefits on or after **April 6, 2016**, have been laid before Parliament and came into force on **February 6, 2017**.

Taxable lump-sum death benefits are, broadly, those lump sum benefits not paid within 2 years of death, or which are paid in respect of a member who dies age 75 or over.

Where there is a payment to a "qualifying person" (essentially an individual or a bare trustee), the lump sum death benefit is subject to income tax at the recipient's marginal rate. By contrast, where lump-sum death benefits are paid to a "non-qualifying person" (broadly speaking, company directors, partners and trustees (other than bare trustees)), tax is payable at a flat rate of 45 per cent.

The new Regulations amend the current provision-of-information rules so that the administrator of the paying scheme must confirm to the receiving trustee both the amount of the benefit and the tax paid within 30 days of the payment being made. The receiving trustee must then pass

this information to the beneficiary within 30 days of making payment to them. This will provide the beneficiary with sufficient information to make a repayment claim to HMRC for a refund of any excess tax that the scheme administrator has deducted, above the income tax due at the beneficiary's marginal rate.

The regulations also make some minor technical changes to the current annual allowance provision-of-information requirements that have applied to scheme administrators since **April 6, 2016**.

Auto-enrolment: the Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2017 extend statutory exceptions to those with fixed protection 2016 and individual protection 2016

Regulations have been made that will extend the statutory exceptions from the employer auto-enrolment duty to cover the two most recently created forms of transitional protection from the lifetime allowance (LTA) charge. Fixed protection 2016 (FP 2016) and individual protection 2016 (IP 2016) can be claimed by pension savers adversely affected by the reduction in the LTA to £1 million that took effect on **April 6, 2016**.

The Regulations come into force on **March 6, 2017**, and provide that if an employer has reasonable grounds to believe a jobholder has claimed LTA transitional protection, then the employer's duty to auto-enrol (or re-enrol) the jobholder in an automatic enrolment scheme is converted to a discretion to do so.

Currently, this statutory exception covers jobholders who have claimed primary or enhanced protection, FP 2012, FP 2014 or IP 2014. From **March 6, 2017**, the exception will also apply to jobholders who have claimed FP 2016 or IP 2016. The amending regulations make no other changes to existing legislation.

PPF compensation cap and levy ceiling set for 2017/18 – the Pension Protection Fund and Occupational Pension Schemes (Levy Ceiling and Compensation Cap) Order 2017

The PPF compensation cap and levy ceiling for the 2017/18 financial year have been fixed by statutory instrument laid before Parliament on January 30, 2017.

With effect from **April 1, 2017**, the compensation cap will rise from its current level of £37,420.42 to £38,505.61 to reflect a higher general level of earnings. The 90 per cent level of compensation that applies for members of schemes entering the PPF who are below their scheme's normal pension age will therefore equal £34,655.05.

The order also confirms that for the financial year beginning on **April 1, 2017**, the overall PPF levy ceiling will rise from £981,724,264 to £1,007,249,095. This increase reflects the 2.6 per cent increase in earnings for the period from August 1, 2015, to July 31, 2016.

Auto-enrolment – DWP consults on technical changes for post-staging new employers

Of interest to small and micro-employers due to implement auto-enrolment during 2017 are the draft regulations published for consultation on technical changes to the auto-enrolment regime. The consultation closes on **March 3, 2017**, as the intention is to implement the changes before the existing provisions in the Employers' Duties (Implementation) Regulations 2010 start to apply to new employers from **April 1, 2017**. It is possible further reforms to the auto-enrolment regime may be announced later in 2017, depending on the outcome of the DWP's current review.

In April 2016, the Government introduced simplifications to the auto-enrolment framework to ease the burden on employers, particularly having regard to the small and micro businesses enrolling their workers into a workplace pension scheme.

The two technical changes on which the DWP is now consulting relate to the position of new employers that do not fall within the existing staging timetable set out in regulation 4 of the Employers' Duties (Implementation) Regulations 2010.

This timetable currently covers new employers "where PAYE income is first payable in respect of any worker" before **September 30, 2017**. However, the DWP notes that, in practice, identifying when PAYE income is first payable can be difficult, leading to uncertainty about the correct trigger date for an employer's auto-enrolment duties.

The DWP therefore proposes changing the trigger date for new employers not covered by the staging timetable to the date when "the employer's first worker begins to be employed by the employer". As well as providing certainty for employers and payroll providers, this change will help TPR operate the compliance regime effectively.

The DWP also proposes allowing post-staging new employers to use the three-month postponement option currently available to employers falling within the staging timetable. For employers outside the staging profile, postponement will be described as the "deferral period". Provision-of-information requirements similar to those that apply in relation to postponement will apply to this deferral period.

View the consultation paper and draft regulations

Brewster, Re Application for Judicial Review (Northern Ireland) 2017 - Supreme Court grants survivor's pension to cohabitee

The Appellant, Denise Brewster, had been cohabiting with Lenny McMullan for 10 years, and engaged to him for two days, when he died suddenly on Boxing Day 2009. Mr McMullan was a member of the Local Government Pension Scheme (LGPS) in Northern Ireland (the Scheme).

Under the Scheme rules, a cohabiting surviving partner was eligible for a survivor's pension, but subject to various Scheme conditions relating to

- The longevity and stability of the relationship
- The financial dependence or interdependence of the couple (Ms Brewster satisfied both these conditions)
- Only where that surviving partner had been nominated by the member and a declaration to that effect had been signed by both cohabitees (this condition was not satisfied).

Ms Brewster believed Mr McMullan had completed and signed a nomination form in her favour, but the Scheme said it had not received one, and refused to pay the survivor's pension.

The High Court in Northern Ireland had allowed Ms Brewster's application for judicial review on the basis that the scheme's requirement for a valid nomination constituted a breach of the prohibition on discrimination on the basis of marital status founded in Article 14 of the European Convention on Human Rights. However, that decision was reversed in the Court of Appeal which held that the nomination requirement was neither unjustified nor disproportionate.

The Supreme Court (SC) found unanimously in the Appellant's favour and awarded her the survivor's pension. They noted that amending Scheme regulations had been geared to eliminate unwarranted differences of treatment between married or civil partner survivors on the one hand and, on the other, unmarried long term partners who were in a stable relationship with the deceased immediately before death.

The essential point was that there was no requirement for married members or those in civil partnerships to nominate their spouse/civil partner as beneficiary, so it was difficult to justify a need for cohabitees to do so (the cohabitees having satisfied the other requirements in terms of financial dependence and the relationship's stability).

The SC also noted that the nomination requirement had been removed from the England and Wales LGPS rules with effect from 1 April 2014 and the same change had been made to the equivalent Scottish scheme, but not to the Scheme in NI. In addition, previous consultation exercises and a Law Commission inquiry had concluded that it was generally desirable that local government employees should have "equivalent pension benefits right across the UK".

Comment

This decision brings the Scheme into line with the LGPS in both England and Wales and Scotland which removed the nomination requirement in April 2014, following the High Court decision in this case. Other public-sector schemes which contain similar nomination requirements for surviving cohabitees will need to review their rules to ensure that they comply with this decision. Equally, the decision could affect the pension schemes of outsourced public sector services.

However, it is improbable that the decision will affect private sector schemes operating under trust law, unlike the LGPS which is subject to Government regulations made in consideration of public policy. That said, occupational schemes may wish to review any differences between married and unmarried members' entitlement provisions for survivors' pensions, as the cost of future equalisation could be relatively low.

McCloud and others v Lord Chancellor and Secretary of State for Justice and another – employment tribunal rules age discrimination not objectively justified

Before April 1, 2015, the Claimants were all members of the Judicial Pension Scheme (JPS). After this date they were all compulsorily transferred into a replacement pension scheme, the New Judicial Pension Scheme (NJPS). The NJPS provided lower members' pension benefits but transitional provisions permitted older judges to either remain in the JPS until retirement or until the end of a period of tapered protection (a period between April 2015 and February 2022) depending on their age.

The Claimants argued that these transitional provisions amounted to age discrimination and in some cases indirect race and sex discrimination. The Respondents conceded that the transitional provisions involved less favourable treatment because of age and that they had a disproportional impact on female and black, Asian and minority ethnic judges. However, they argued that the transitional provisions were a proportionate means of achieving a legitimate aim of protecting those judges closest to retirement from the financial effects of pension reforms and therefore the differences in treatment were justified and lawful.

The employment tribunal (ET) ruled in favour of the Claimants. The ET found that the Government had failed to

- Provide any evidence of disadvantage suffered by the fully-protected and taper-protected groups or any social policy objective which was served by treating the older judges more favourably than the younger judges
- Demonstrate beyond the level of mere generalisations how consistency in the matter of transitional provisions was capable of contributing to their social policy objective. The transitional provisions were not a reasonably necessary means of achieving the Government's aim because they went beyond what was necessary to achieve consistency or protect those closest to retirement
- Demonstrate how consistency contributed to any social policy objective, especially given that much else in the judicial pension scheme was inconsistent with other reformed pension schemes, although the ET recognised that the desire for consistency across the public sector could in principle be a legitimate aim.

The ET found that, even if it had accepted the Government's proposed aims, it would have concluded that the transitional provisions were not proportionate, taking into account the severity of the impact of the pension reforms on those judges who were not protected, or who only had limited protection.

Since it was accepted that the ET's conclusion on objective justification in relation to direct age discrimination should apply equally to the indirect discrimination and equal pay claims, the result would be the same for the claims of indirect race and sex discrimination, and equal pay.

Pensions Ombudsman: Mrs B (PO-9253) – employer based refusal of ill-health early retirement on flawed medical evidence

The Pensions Ombudsman (PO) has given his determination in a complaint by Mrs B against Barclays Bank.

Background

Mrs B was an "After Work" (AW) member of the Barclays Bank UK Retirement Fund (the Scheme). Her employment was terminated by Barclays Bank in October 2011 on grounds of ill-health.

Under the scheme rules, an AW member could take ill-health early retirement "at any age at the discretion of the Bank" if retirement was due to "Incapacity", defined as "the situation where the Bank considers him or her permanently and totally unable to carry out any employment", or if the member satisfied the "HMRC Test", meaning the member "will continue to be medically incapable … of continuing his or her current occupation …" In both cases, entitlement was conditional on the trustee and Barclays receiving evidence from a registered medical practitioner that the member satisfied these medical criteria.

Barclays told Mrs B, who was in her early forties, that she did not meet the criteria to receive an ill-health pension and enclosed a copy of a report from July 2011 by Dr Gray, a doctor at its occupational health adviser, AXA PPP Healthcare. Dr Gray noted earlier opinions by an independent examining doctor and Mrs B's French GP that she was unlikely to return to work, but concluded that she "cannot be considered permanently medically unfit for work on the balance of probability" because it would be "reasonable to expect further improvement of her condition with both medical and psychological evidence based interventions from her pain management specialists over time". When Mrs B appealed against the decision, another AXA occupational physician, Dr Mason, reviewed the case but reached a similar conclusion.

Mrs B provided further letters written in early 2014 from her treating doctors in France but AXA's occupational physician Dr Tremlett disagreed with the treating doctors' poor prognosis. His report said there was no evidence that Mrs B had "ever received suitable psychological support or treatment", that "evidence from research demonstrated that there was a realistic expectation" that individuals with her condition could adapt enough to return to work and that he thought it "remained reasonably likely" that she could do so before age 60.

When Barclays turned down Mrs B's appeal, she approached the Pensions Advisory Service, who asked Barclays to reconsider and sent it a medical certificate from Mrs B's French rheumatologist, Dr Abdeddaim. This set out her treatment and stated that she should be regarded as "handicapped" and an "invalid". After obtaining a further opinion from an AXA occupational physician, Dr Westlake, which was in line with his colleagues', Barclays said that

to overturn its appeal decision it needed to see evidence that there was no anticipation of improvement in Mrs B' condition. Finally rejecting her claim in December 2014, Barclays said the medical certificate supplied had no reasoned arguments to support its conclusion and did not say how her treatments might affect her prognosis.

Mrs B complained to the PO that Barclays had decided not to award her an ill-health pension from the date her employment ended based on incorrect and incomplete information.

Determination

The PO upheld the complaint, noting that he agreed with the Ombudsman adjudicator's initial opinion that Barclays had failed to make a proper decision as it had based its decision as to whether Mrs B was incapacitated or satisfied the HMRC Test on incomplete medical opinions. Following the adjudicator's opinion, Barclays made further submissions.

Firstly, Barclays submitted that following the decision in *Edge and others v Pension Ombudsman and another* [1999], its decision could only be overturned if it had asked itself the wrong question or misdirected itself in law; had considered irrelevant factors or failed to consider relevant factors; or had reached a decision that that no reasonable body of trustees could reach. It said the adjudicator's findings did not appear to be on any of these grounds. Rejecting this argument, the PO held that the principles set out in Edge referred to the exercise of discretionary powers, but determining whether Mrs B was incapacitated was a finding of fact only (in contrast to Barclay's discretion whether to agree to retirement).

Secondly, Barclays referred to the High Court judge's comment in *Suffolk County Council v Wallis* [2004] that:

" ... it is impossible in my view to see how it can be said that the acts of [a medical practitioner] ... can be said to be lain at the door of the [person responsible for the management of the scheme] so as to find them guilty of maladministration".

Barclays argued that in the same way, omitting to ask a medical practitioner to provide more detailed evidence for their opinion could not amount to maladministration. It said that under the scheme rules, it was not required to request that registered medical practitioners provide "evidence-based reasons" as to why they have reached a particular view. The PO also rejected this argument. Although Barclays was not responsible for the acts of its medical advisers, it must understand the reasons for their opinions and make a properly informed decision.

If there was a shortfall, such as an omission, in a report, Barclays should not "blindly accept it" or "simply rubber stamp the adviser's opinion". If the evidence on which the decision was based was flawed then it followed that the decision had not been properly made.

The PO reiterated the adjudicator's finding that Barclays had accepted the opinions of Dr Gray, Dr Mason and Dr Westlake without knowing the treatments they had in mind, the improvement they expected and over what timescale. Barclays also accepted Dr Tremlett's opinion although he failed to say why unspecified psychological support or treatment was reasonably likely to allow Mrs B to return to work. As the adjudicator said, Dr Tremlett's reference to "research" was a generalised comment which he did not apply to Mrs B's situation and Barclays' position during the appeal that there must be no anticipation of improvement in Mrs B's condition was too stringent. Furthermore, when it came to the opinions of Mrs B's treating doctors, Barclays conversely dismissed them citing a shortfall of information. Given the difference of opinion, Barclays should instead have asked AXA to contact the treating doctors for this information and confirm if it changed their opinion.

The PO held that these failings amounted to maladministration. He remitted the decision whether to award Mrs B ill-health benefits back to Barclays, who must first obtain a new medical report from an AXA medical adviser not previously involved. This report must provide "evidence-based reasons for why recovery is to be expected" if it found against Mrs B. Barclays must also pay her £500 for the significant distress and inconvenience caused by its maladministration.

Comment

It is not uncommon for a scheme's own medical advisers to reach a different view about an ill-health applicant's state of health compared to the view taken by the applicant's own doctors.

The issue for decision-makers is how to deal with this kind of conflict of evidence.

In this case, the PO made clear that a decision-maker must carefully evaluate the available evidence and query any inconsistencies or omissions if necessary. While a decision-maker is not expected to have expert medical knowledge, they should ensure they understand all the evidence on which they rely in reaching a decision.

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