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NORTON ROSE FULBRIGHT

Essential pensions news

Updater

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Introduction

Essential Pensions News covers the latest pensions developments each month in an 'at a glance' format.

Corporate pension trustees – new requirements to maintain a register of 'persons with significant control' from April 6, 2016

From *April 6, 2016*, schemes which have a UK corporate trustee should ensure measures are in place to comply with a new requirement to keep a register of 'persons with significant control' (PSC). The information must be filed at Companies House from *June 30, 2016*, and non-compliance constitutes a criminal offence.

Background to the new requirements

The new 'persons with significant control' regime (PSC regime) comes into effect in the UK on *April 6, 2016*. This will require most UK-incorporated companies, including trustee companies, to maintain a register of people with 'significant control' over the company from that date. From *June 30, 2016*, information on the company's PSC register will need to be supplied to Companies House either with the company's confirmation statement (which will replace the annual return) or, in the case of a new company, on incorporation, so that it can be made publicly available.

In the interests of greater transparency around who owns and controls UK businesses, companies (with some exceptions) will need to keep a PSC register of individuals 'with significant control' and also of any company that is a 'registrable relevant legal entity', in that it is itself required to keep a PSC register, is subject to Chapter 5 of the Financial Conduct Authority's Disclosure and Transparency Rules, or has voting shares admitted to trading on certain other markets.

The PSC regime for companies is largely set out in new Part 21A to the Companies Act 2006 (CA 2006) and is being implemented under the Small Business, Enterprise and Employment Act 2015 and through related regulations which set out certain aspects of the regime in more detail.

The practical effect for many UK registered subsidiary companies, including corporate trustees, is that they will need to maintain a record of their immediate UK parent company in their PSC register. Typically, for pension scheme trustee companies, this will be the scheme's principal employer.

Published guidance

A person with 'significant control' over a company is an individual who meets one or more of the conditions set out in CA 2006. These are that:

- the person holds, directly or indirectly, more than 25 per cent of the shares in the company
- the person holds, directly or indirectly, more than 25 per cent of the voting rights in the company
- the person holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of the company
- the person otherwise has the right to exercise, or actually exercises, significant influence or control over the company
- the person has the right to exercise, or actually exercises, significant influence or control over an arrangement such as a trust, which is not a legal entity but which meets any of the other specified conditions in relation to the company, or would do so if it were an individual.

In determining whether any or several of these conditions are met in relation to a particular company, non-statutory guidance published by the Department for Business, Innovation and Skills (BIS) assists with interpretation. The BIS non-statutory guidance considers issues such as nominee arrangements, joint interests and arrangements and indirect ownership.

View the non-statutory guidance.

Draft statutory guidance for companies has also been published by BIS to explain the term 'significant influence or control'. The BIS statutory guidance notes that 'significant influence' and 'control' are alternatives. If a person can direct a company's, trust's or firm's activities, this will be indicative of control. If a person can ensure that the company, trust or firm generally adopts the activities which that person desires, this will be indicative of significant influence. However, the 'control' or 'significant influence' do not have to be exercised by a person with a view to gaining economic benefits from the policies or activities of the company, trust or firm.

View the statutory guidance.

Next steps

Corporate pension trustees will need to check with their company secretary (or whoever deals with their statutory filings) to ensure that they have measures in hand to set up and maintain their own PSC register from *April 6, 2016*. The information then needs to be filed at Companies House from *June 30, 2016*. Non-compliance may result in criminal sanctions being taken against a company or company officer who is at fault, in the form of a prison term of up to two years, a fine, or both.

We have published a detailed briefing on the PSC requirements. If you require assistance in identifying persons with significant control, please contact your usual advisor at Norton Rose Fulbright LLP.

The Budget 2016 – pension reforms

On March 16, 2016, the Chancellor delivered his Budget. The absence of any of the sweeping changes to pensions tax relief outlined in the consultation paper published in July 2015, had been trailed by Treasury sources in early March. However, this Budget was not without pensions content and future reforms are set out below.

Lifetime ISA

From April 6, 2017, the introduction a new Lifetime ISA for individuals under age 40 with an annual allowance of £4,000 in contributions. For every £4 saved, the Government will add a bonus of £1 on contributions made up to age 50. Funds, including the bonus, can be used to buy a first home at any time from 12 months after opening the account, and can be withdrawn with the Government bonus from age 60 for use in retirement. The intention is that withdrawals can be made at any time for other purposes, but the bonus element plus a five per cent charge returned to the Government.

Unfunded public sector schemes

A reduction will be made to the discount rate applying to unfunded public sector pension schemes. This is used to set employer contributions which will therefore increase from 2019–20 onwards.

A new 'pensions dashboard'

An online 'pensions dashboard' is envisaged from 2019, to help savers view all their retirement savings in one place.

Tax relief of financial advice fees

The existing £150 tax-free threshold for employer-funded pensions advice is to be increased to £500. In addition, there will be a consultation on a 'Pensions Advice Allowance', allowing individuals up to age 55 to withdraw up to £500 tax free from their DC arrangement to redeem against the cost of financial advice.

Salary sacrifice

The Government is concerned about the growth of salary sacrifice schemes and is considering limiting the range of benefits that attract preferential NIC and tax treatment. However, the current intention is that pension saving, childcare and health-related benefits such as Cycle to Work should continue to benefit from such arrangements.

Self-employed

Class 4 NICs will be reformed so that the self-employed can continue to build State Pension entitlement, following the abolition of Class 2 NICs.

Local Government Pension Scheme

There are proposals to establish a new LGPS infrastructure investment platform by 2018 via the creation of a small number of British Wealth Funds across the country combining their assets into much larger investment pools.

Comment

As recently as March 7, 2016, the Government published a briefing paper, *Reform of pensions tax relief* which details the three approaches to reform on which debate focused before the Budget:

- a shift to a single rate of tax relief
- moving to a TEE (taxed-exempt-exempt) system
- retaining the current system.

The very last line of the briefing paper states that the Institute for Fiscal Studies (IFS) was in support of reform of the NIC treatment of employer pension contributions. For now, salary sacrifice arrangements for pension savings have been given a reprieve.

Although it was made clear by the Treasury before the Budget that there would be 'no changes to pensions tax relief', many in the pensions world will be relieved that there were no major bombshells from the Chancellor this year. The 25 per cent tax free lump sum is retained, and the reductions in the Lifetime and Annual Allowances announced in 2015, and applying from April 2016, are no more severe than expected.

The new Lifetime ISA offers an opportunity for those under age 40 to boost their pensions (or property) savings and to receive a Government uplift of 25 per cent on up to £4,000 annually. At the risk of appearing cynical though, could the introduction of this modest new savings vehicle perhaps herald the gradual extension in future Budgets of the Lifetime ISA model for more pension savings and to apply it to a larger section of the population? That way, an application of the widely feared taxed-exempt-exempt model for pension saving could be introduced progressively, with the eradication of the tax free lump sum by default. Also of concern is whether the minimum pension age will rise to 60 over time to mirror access to the Lifetime ISA. However, under current provisions, the new Lifetime ISA will not be attractive to anyone other than those paying basic rate tax, who have not used their full existing ISA and pension saving annual allowances.

View the full Budget paper.

Pension Policy Paper – 'Pension Flexibility 2016'

On *March 16, 2016*, the Government also published a policy paper outlining a number of minor changes to be made to the pension tax rules to ensure they will operate as intended following the introduction of pension flexibility in April 2015.

Legislation will be introduced in the Finance Bill 2016 (and take effect the day after Royal Assent) to amend the Finance Act 2004 (FA 2004) as outlined below.

Most of the relevant provisions are set out in Part 4 of FA 2004. Schedule 28 FA 2004 provides the rules for authorised pensions and Schedule 29 FA 2004 provides the rules for authorised lump sums.

The current provisions are set out below and, in each case, followed by the proposed changes in italics:

Serious ill-health lump sums can be paid only out of funds that have not been accessed. If a serious ill-health lump sum is paid to an individual who has reached age 75, it is taxed at 45 per cent (section 205A FA 2004). Dependant's drawdown pension and flexi-access drawdown pension may be paid following the death of a member to the member's child who has not reached age 23.

If an individual would meet the requirements to take a serious ill-health lump sum but for the fact that they have accessed their pension, they will be able to take the remaining funds that have not been accessed as a serious ill-health lump sum.

Where a serious ill-health lump sum is paid to an individual who has reached age 75, it will be taxable at that individual's marginal rate rather than at a flat rate 45 per cent.

Where an individual has a dependant's drawdown pension fund or dependant's flexi-access drawdown fund because they are a child under the age of 23 of the member who has died, they will be able to continue to receive drawdown pension or flexi-access drawdown pension as authorised payments after reaching age 23. This would ensure that a child dependant who continues to draw down from their fund when they have reached age 23 does not have tax charges of up to 70 per cent on any payments received from that date, and aligns their tax treatment with that of a nominee of the member.

Charity lump sum death benefit – where the member has no dependants, a charity lump sum death benefit may be paid out of their drawdown or flexi-access drawdown pension funds irrespective of their age at death.

A change is made to align the tax treatment of a charity lump sum death benefit after a member has died under the age of 75 whether paid out of drawdown pension funds and flexi-access drawdown funds or out of funds that have not been accessed (uncrystallised funds). The need to pay an uncrystallised funds lump sum death benefit a drawdown pension fund lump sum death benefit or a flexi-access drawdown fund lump sum death benefit within two years when it is paid to a charity is also removed.

Trivial commutation – trivial commutation lump sums can be paid out of defined benefits funds whether or not the funds have been accessed.

A change is made so that a trivial commutation lump sum may be paid out of a money purchase scheme pension that is already in payment.

Uncrystallised funds lump sum death benefit (UFLSDB) – a UFLSDB must be paid out of money purchase funds valued at the member's death. Cash balance benefits are money purchase benefits that are not calculated on the basis of contributions to the scheme (section 152 FA 2004). They may be paid as an UFLSDB but the payment according to the scheme rules will be the amount promised to fund the benefits of the beneficiary.

Where a member with cash balance benefits dies and the scheme must top-up the remaining funds to meet the entitlement of the member's beneficiaries to an UFLSDB under the scheme rules, the full amount of the lump sum death benefit will be an authorised payment.

View the policy paper.

HM Treasury publishes response to the consultation 'Strengthening the incentive to save: a consultation on pensions tax relief'

HM Treasury has also published a summary of responses to the consultation on pensions tax relief published in July 2015, which mentions the four principles of:

- the new Lifetime ISA
- consideration of limiting the benefits that may be offered under a salary sacrifice arrangement
- the technical amendments to support DC flexibility (see above) [provided by previous email]
- the extension of tax relief available for employer-arranged pensions advice from £150 to £500 from April 2017.

The response also adds certain key themes that featured in those responses, namely the widespread desire for: stability, communication and education, a consistent outcome for all individuals, up-front incentives to save and the importance of getting implementation right.

HM Treasury's response featured in the Chancellor's main Budget speech. He stated that after consulting widely (there were 450 responses) it was 'clear there was no consensus' on the issue of pension tax relief. Therefore, to meet the particular concern that young people were not saving enough and the aim of giving people more freedom and more choice, he was 'providing a different answer to the same problem'. This will take the form of changes to the ISA framework from 6 April 2017 as follows:

- for everyone, by increasing the annual ISA subscription limit, from just over £15,000 to £20,000 a year
- for those under 40, 'many of whom haven't had such a good deal from the pension system, [by] introducing a completely new flexible way for the next generation to save' in the form of the 'Lifetime ISA'
- the Chancellor notes in his speech that ISA savings use the taxed-exempt-exempt (TEE) system of tax relief. There is no indication of the direction of long-term policy on pensions tax relief.

More detail on the Lifetime ISA

From *April 6, 2017* a new Lifetime ISA will allow individuals to save for a first home or retirement or both. Final details of the Lifetime ISA will be set out later this year, but a technical note published by HM Treasury sets out the key features of the Lifetime ISA, which include:

- From April 2017, individuals under the age of 40 will be able to open a Lifetime ISA and contribute up to £4,000 in each tax year.

- The Government will add a 25 per cent bonus on the individual's contributions at the end of each tax year. This bonus will be available only on savings paid into the Lifetime ISA before the individual's 50th birthday. Additional contributions can be made without attracting a bonus (subject to the overall annual subscription limit).

- Funds can be withdrawn after the ISA has been open for at least a year. The funds (including the bonus), can be drawn tax-free:

  - to purchase the ISA holder's first home worth up to £450,000 or

  - when the holder has reached age 60. Full or partial withdrawals can be made (interest and investment growth on funds that remain invested will be tax-free) or

  - at any age where the holder has been diagnosed with terminal ill health.

- If funds are withdrawn in any other circumstances, the ISA holder will lose the Government bonus (and any interest growth on this) and will have to pay a five per cent charge. However, the Government will consider whether to allow withdrawals including the bonus for other specific life events and whether to allow borrowing against the Lifetime ISA without a charge if the borrowed funds are fully repaid (along the lines of some 'section 401(k)' US retirement plans).

- A Lifetime ISA will be subject to inheritance tax on the holder's death and a surviving spouse or civil partner's Lifetime ISA allowance will be increased by the amount of the deceased holder's ISA at death.

- Qualifying investments for Lifetime ISAs will be the same as for a cash or stocks and shares ISA. The new overall ISA contribution limit of £20,000 from April 2017 will apply to an individual's total contributions to cash ISAs, stocks and shares ISAs, Lifetime ISAs and Innovative Finance ISAs.

The Government will bring forward legislation to implement the Lifetime ISA in autumn 2016 after discussions with industry to finalise the parameters of the scheme. Final details will be issued later in 2016.

Comment

It is unlikely that the Budget 2016 is the end of the pensions tax relief saga. The Lifetime ISA will run alongside the current pensions tax regime, with no interaction between two systems. Contributions to the Lifetime ISA do not affect the lifetime (LTA) or annual allowances (AA) for pensions tax relief. Auto-enrolment is also unaffected and continues as before, and those saving in a Lifetime ISA from 2017 will also make contributions under auto-enrolment (unless they have opted-out).

The existing pensions tax relief system remains complex and the reductions in the LTA and AA announced last year, along with the new tapered annual allowance, will be implemented with effect from *April 6, 2016*.

Those examining the Chancellor's speech closely will note he commented that now is not the *right* time for a change. What he did *not* say was that there would be no future changes. It is clear that the Government is treading carefully in the run-up to the referendum on the Brexit

question, and it could well be the case that pensions tax relief reform is back on the table at a later date.

The introduction of the Lifetime ISA does not address the question of the 'unfair' distribution of tax relief between basic and higher taxpayers. The possibility of a new 'pensions-ISA' could resurface if, in due course, the Lifetime ISA is heralded a success once it is up and running. Although by that time the Brexit question will have been answered, the 2020 general election will then be on the horizon, and the Chancellor would need to tread carefully if he was then minded to introduce a pensions ISA and TEE system.

Abolition of contracting-out: HMRC publishes Countdown Bulletin no. 14

Of interest to all schemes providing DB benefits is the most recent issue of HMRC's Countdown Bulletin, published on *February 26, 2016*. The contents are summarised below.

The Countdown Bulletin includes the following:

- A reminder that schemes need to register before *April 5, 2016* to use the Scheme Reconciliation Service (SRS). Schemes that previously indicated an intention to register are urged to complete the process as soon as possible. Although the SRS continues until the end of *December 2018*, HMRC have imposed a cut-off date so that they have an accurate figure for the number of schemes reconciling, and can resolve all scheme queries by the service end date.
- Feedback from SRS forums will be included in the March edition of the Countdown Bulletin.
- The Guaranteed Minimum Pension (GMP) Calculation Service will be made available to all administrators in *April 2016*. The service will provide GMP amounts, along with contributions and earnings information if required, at: date of leaving; revaluation to a specific date; GMP payable age; State Pension age; and date of death, where applicable.
- Various Q&A's in respect of the new State Pension, including information suggested for employers to provide to employees who currently have a contracted-out pension.

View the Countdown Bulletin.

Several new sets of regulations have now been finalised relating to the introduction of the new State pension and the abolition of DB contracting-out, and are outlined in the legislation section of this update.

Finalised secondary legislation relating to new State pension and abolition of DB contracting-out

Of interest to schemes currently contracted-out on a salary related (DB) basis are the several statutory instruments which have been finalised relating to the introduction of the new State pension and the abolition of DB contracting-out. Provisions in the new regulations include technical changes to existing pensions legislation to reflect abolition and deal with the treatment of accrued contracted-out rights with effect from *April 6, 2016*.

The following statutory instruments have been made relating to the introduction of the new State pension and abolition of DB contracting-out:

- The State Pension (Amendment) Regulations 201 6 – these set the full weekly rate of the new State pension at £155.65 with effect from *April 6, 2016*. They also amend the State Pensions Regulations 2015, which among other things set the minimum number of qualifying years (currently 10) needed by an individual to claim the new State pension).
- The State Pension and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2016 – these include a provision previously withdrawn from new regulations governing the treatment of accrued contracted-out rights after *April 6, 2016* following the realisation by the DWP that there had been a procedural error.

  Regulation 28 of the Occupational Pension Schemes (Schemes that were Contracted-out) Regulations 2015 was intended to replicate the wording of regulation 69B of the Occupational Pension Schemes (Contracting-out) Regulations 1996 concerning GMP conversion. However, last September the DWP revoked the regulation after realising that the correct Parliamentary process had not been used. Now, regulation 6 of the State Pension and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2016, made under the affirmative procedure, inserts the wording originally to be contained in regulation 28 as regulation 27A of the Occupational Pension Schemes (Schemes that were Contracted-out) (No.2) Regulations 2015.
- The Pensions Act 2014 (Consequential and Supplementary Amendments) Order 2016 – this makes a range of consequential amendments to existing pension legislation in light of the creation of the new State pension.
- The Pensions Act 2014 (Contributions Equivalent Premium) (Consequential Provision) and (Savings) (Amendment) Order 2016 – clarifies that a scheme which ceases to be contracted-out by operation of law on 6 April 2016 will not be obliged to pay contribution equivalent premiums (CEPs) to members remaining in the scheme merely by virtue of the members ceasing to be in contracted-out service on that date.

  From *April 6, 2016*, a CEP will be payable only where a member remains in pensionable service after the abolition of contracting-out and subsequently ceases to be a member with less than two years' service and without accruing any rights in the scheme (or if the scheme winds up).
- The Pensions Act 2014 (Abolition of Contracting-out for Salary Related Pension Schemes) (Consequential Amendments and Savings) Order 2016 – this makes a series of technical changes to existing secondary legislation to reflect the abolition of DB contracting-out. Some provisions in the Order come into effect on *April 6, 2016* and others in succeeding years. Topics covered by the Order include revised requirements that will in future apply on the transfer of accrued contracted-out rights between schemes, and a new 'connected employer' test in respect of the transfer of accrued rights without member consent under the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991. The DWP consulted on a draft version of the Order in October 2015. A consultation response has now been published which reveals that further measures can be expected at a future date on two complex issues:

  — the restrictions on the alteration of rules in schemes containing accrued section 9(2B) rights

- the interaction with HMRC rules on trivial commutation.

The DWP promises to consult on any possible legislative solutions.

- The Occupational and Personal Pension Schemes (Modification of Schemes – Miscellaneous Amendments) Regulations 2016 – these introduce a statutory modification power allowing schemes with restrictive amendment powers to amend their rules to reflect the post-*April 6, 2016* legislation regarding fixed-rate GMP revaluation.

All of the statutory instruments listed above come into force on *April 6, 2016*.

Occupational Pension Schemes (Requirement to obtain Audited Accounts and a Statement from the Auditor) (Amendment) Regulations 2016

Of general interest is the confirmation by the DWP of changes to modernise pension scheme accounting requirements for private sector occupational schemes. As well as improving alignment with current accounting practices, the proposals are intended to reduce costs, as set out in Chapter 4 of the DWP's related consultation paper. The regulations will come into effect from *April 1, 2016* and will be reviewed within five years.

The proposals arose in light of the introduction of the Statement of Recommended Practice (SORP) for pension scheme accounting periods commencing on or after *January 1, 2015* (which in turn reflects the implementation of Financial Reporting Standard 102 (FRS 102)).

The DWP's favoured option was for the current detailed scheme investment disclosure requirements to be replaced, requiring instead that the auditor provide a statement that the accounts have been prepared in accordance with FRS 102 and the pensions SORP, and to note any material departures from them. Specific information (relating to concentration of risk, employer-related investment and the total of investment purchases and sales) would be retained where disclosure was not covered by FRS 102. In addition, the DWP proposed to exempt multi-employer schemes with at least 20 participating employers from the requirement to obtain a statement from their scheme auditor on whether, in their opinion, contributions had been paid in accordance with the schedule of contributions.

The DWP has confirmed that it will proceed with the proposed investment disclosure changes, with only a few minor adjustments which relate in the main to clarification that the relevant financial reporting framework is that which is current as at the end of the scheme year to which the accounts relate.

As to the auditor's statement about scheme contributions, the DWP has kept the threshold for the exemption to a minimum of 20 participating employers. It rejected using other factors, as the number of employers would be a 'key factor' as to whether the auditor could provide the statement. It also declined to use a lower number. The DWP states in its response that it wants 'all large multi-employer schemes to benefit from this easement including group schemes', declining to use the DC governance-related definitions regarding multi-employer schemes.

To implement the changes, the Occupational Pension Schemes (Requirement to obtain Audited Accounts and a Statement from the Auditor) (Amendment) Regulations 2016 have been laid before both Houses of Parliament. They will come into effect from *April 1, 2016* and will be reviewed within five years.

Pension flexibilities: the Pension Protection Fund and Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2016 and the Pension Sharing (Miscellaneous Amendments) Regulations 2016

Of general interest are two sets of amending regulations reflecting the introduction of the DC pensions flexibility reforms. The Pension Protection Fund and Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2016 and the Pension Sharing (Miscellaneous Amendments) Regulations 2016, have been laid before Parliament and are due to come into force on *April 6, 2016*. These amending regulations make some significant changes but it is likely they will not be the last in relation to the new pension flexibilities, as the new freedoms take hold and further anomalies come to light.

Background

On November 23, 2015, the DWP published for consultation draft regulations intended to make a series of technical changes to pensions legislation. Most of the proposed changes were consequential amendments to reflect the introduction of the DC pension flexibility reforms as they affected different areas of pensions legislation.

Proposed changes included amendments to existing legislation in respect of pension-sharing and earmarking orders on divorce, the Pension Protection Fund (PPF) compensation rules and the discharge of a scheme's liabilities on winding-up. In addition, the DWP outlined proposals to put on a statutory footing the current recommendation made by TPR for trust-based schemes to provide generic risk warnings to members who are considering taking advantage of flexible access. The consultation also contained a call for evidence seeking views on whether changes were required to the existing legislation relating to guaranteed annuity rates (GARs) in pension policies.

In the consultation response published in March 2016, the DWP has confirmed that the majority of the changes announced in a consultation exercise in November 2015 have been included in two sets of amending regulations to reflect the introduction of the DC pension flexibility reforms. They include amendments to existing legislation relating to the treatment of pensions on divorce, the calculation of Pension Protection Fund (PPF) compensation, the discharge of a scheme's liabilities on winding-up and disclosure of information requirements.

The key amendments included in each set of regulations are set out below:

The Pension Sharing (Miscellaneous Amendments) Regulations 2016

- Extension of advice requirement to pension credit transfers – the advice requirement applying when a member with safeguarded benefits wants to transfer to another scheme to take advantage of flexible benefits, will be extended to apply to pension credit members where pension credit rights (in excess of £30,000) in the form of safeguarded benefits are transferred or converted to flexible benefits.

- Reduction in calculation of fund values for pension sharing to reflect scheme underfunding – the amendment proposed in the draft legislation, that a reduction in the calculation of fund values for pension sharing purposes to reflect scheme underfunding should take place only once, is included in the final regulations. This addresses an anomaly between the pension sharing regulations and the cash-equivalent transfer value regulations, which could be interpreted as requiring a deduction for underfunding to be made twice: once when the pension rights are valued and again if the pension credit rights are transferred out to another pension arrangement.

- Proposed requirement to notify a member's former spouse of member's decision to take flexible access where there is an earmarking order in place to be delayed – the proposed requirement in the draft regulations to notify a member's former spouse where there is an earmarking order in relation to a member's pension and the member decides to take advantage of a flexible access option will be delayed. The consultation responses revealed that there was little consensus on how best to meet the aim of this amendment, given the many different ways such orders could be drafted. In the interim the Government will explore the possibility of further guidance being provided to schemes, specifically on who should provide such guidance.

The Pension Protection Fund and Occupational and Personal Pension Schemes (Miscellaneous Amendments) regulations 2016

- Winding up – the Occupational Pension Schemes (Winding Up) Regulations 1996 are amended to allow trustees of a scheme that has started winding-up to discharge the scheme's liabilities by paying an uncrystallised funds pension lump sum (UFPLS), provided it constitutes an authorised payment for tax purposes and the member consents to the payment. This change will cover cash balance arrangements as well as money purchase arrangements.

- Disclosure – amendments relating to flexible access are made to the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (Disclosure Regulations) so that:

  - Trustees will be required to provide members with a 'retirement risk warning' at a point after they receive their retirement 'wake up' pack and where they become aware that the member is considering, or has decided to, take one of certain specified actions. The new requirement puts on a statutory footing guidance previously provided by TPR recommending that schemes provide generic risk warnings to members approaching retirement.

  - The consultation proposal that such warnings be given on transfers has been withdrawn. Instead, the Government will work with TPR to discuss whether the 'Scorpion' information regarding pension scams can include additional information on the possible risks around transfers.

  - Schemes will be able to tailor generic warnings to the options for which the member has the opportunity to apply rather than covering all the options available under the pension flexibilities.

  - The consultation proposal for a prescribed timescale to apply for the provision of risk warnings has not been included.

- Minor changes to the PPF rules – the PPF (Compensation) Regulations 2005 are amended to align the age-related limits for trivial commutation of a member's benefits under the PPF compensation rules with the position for trivial commutation lump sums generally. This means the upper age limit of 75 is removed and the lower age limit is reduced from 60 to 55. A minor drafting change has been made to prevent the proposed amendment unintentionally removing the absolute minimum age of 50 which applies in relation to PPF compensation.

Schemes will be allowed to pay an UFPLS during an assessment period in limited circumstances. Broadly speaking, this applies where a member has applied for an UFPLS before the start of the assessment period.

The entry criteria for schemes which may enter PPF assessment are extended to include employers based in the UK where the 'centre of a person's main interests' is in a EU member state outside of the UK. This broadens the scope of the PPF (Entry Rules) Regulations applying to schemes which are eligible for PPF entry but have sponsoring employers who are unable to have a qualifying insolvency event in order to trigger access to the PPF. This change reflects concerns that a number of employers would struggle to qualify for PPF entry based on the current legislation, and follows changes made to legislation dealing with the position of Olympic Airlines, and reported in our July 2014 update.

The current 28-day time limit, during which trustees of an eligible scheme, who become aware that the employer is unlikely to continue as a going concern, must make an application to the PPF, is extended to a maximum of three months where the PPF considers it reasonable to do so.

- Valuing pensions with a GAR – in the consultation, the DWP included a call for evidence on the best way to value benefits which are accumulated on a money purchase or cash balance basis, but with a built-in guaranteed annuity rate (GAR). Respondents made clear that the current system of valuations needed to be simplified for those carrying out such valuations and to reduce member confusion. Consultation on draft regulations to deliver the necessary changes will be conducted in summer 2016.

Ban on member-borne commission: the Occupational Pension Schemes (Charges and Governance) (Amendment) Regulations 2016 – new regulations laid and guidance published

Of general interest for schemes used for auto-enmrolment are the Occupational Pension Schemes (Charges and Governance) (Amendment) Regulations 2016, which have been laid before Parliament. The regulations implement a ban with effect from *April 6, 2016* on member-borne commission in occupational pension schemes providing money purchase benefits and which are used as qualifying schemes for auto-enrolment purposes. Primarily, they prevent service providers from levying a charge on members to recover the cost of commission paid to advisers under new commission arrangements entered into on or after *April 6, 2016*.

The DWP has also published guidance for service providers and trustees or managers of occupational pension schemes to assist those responsible for implementing the regulations.

The regulations

The regulations come into force on *April 6, 2016* and ban member-borne commission in occupational pension schemes being used as qualifying schemes for the purposes of auto-enrolment. The regulations are intended to prevent 'service providers' from levying a charge on members to recover the cost of commission paid to advisers in new commission arrangements. They do not apply to charges under commission arrangements entered into before April 6, 2016, 'unless such an agreement is varied or renewed on or after that date'. A member-borne commission payment is any charge on members used to pay an adviser to the employer or member, or to reimburse a service provider for such a payment.

The DWP's guidance

The accompanying non-statutory guidance is intended to assist service providers and trustees in complying with the regulations.

The responsibility for policing the ban falls mainly on the 'service provider', which the regulations define as a person (an organisation or an individual) providing a service directly to the trustees. In practice, the DWP says that service providers are likely to be an individual or a firm providing bundled administration services, such as an insurer or master trust provider, or third-party administrators and employee benefit consultants providing unbundled administration services. Excluded from the definition are those who do not provide any sort of administration services, such as providers of actuarial or investment advice.

The regulations allow for members to 'opt-in' to advice and services (such as independent financial advice) provided to them and have the costs met by their fund, as long as certain conditions are satisfied. The agreement must be set out in writing and the cost of the advice or service must be stated. A copy of the agreement must be given to the service provider and the trustees, as they are each separately responsible for managing and administering the scheme.

Where the adviser is aware that the charge relating to the member opt-in agreement may breach any charge cap which applies, the member will need to enter into a 'regulation 9 agreement' to pay for the additional services.

The guidance recommends that early in the process, to speed things up, advisers should check with the trustees that:

- the trustees are satisfied that a regulation 9 agreement is not required and that the member has sufficient funds to pay for the advice. This is because the trustees may, within one month of receiving an opt-in agreement, require the member to enter into a regulation 9 agreement and, where the member has insufficient funds, may inform the member and the adviser that the agreement will not take effect, provided this is done within one month of receiving the member opt-in agreement;

- the scheme rules do not prevent a member from charging the costs of any advice or service they opt-in to against their fund.

Regulatory duties

Trustees should note that they are required to inform their service provider whether the scheme is used for auto-enrolment within three months of the later of:

- April 6, 2016
- the employer's staging date or
- the date the service provider is engaged in relation to the scheme.

Service providers are under a duty to prevent charges being imposed on members to recoup the cost of advice and services provided by an adviser. Within two months of receiving the information above from the trustees, the service provider must confirm in writing to them that there are no prohibited charges applying to members.

Trustees must then notify TPR via the scheme return in 2017 whether or not their service provider has provided the required confirmation.

Auto-enrolment: the Occupational and Personal Pension Schemes (Automatic Enrolment) (Miscellaneous Amendment) Regulations 2016 – further exceptions to employer duties and new process for re-declaration of compliance

Of general interest are the new Occupational and Personal Pension Schemes (Automatic Enrolment) (Miscellaneous Amendment) Regulations 2016, coming into force on *April 6, 2016*. The regulations introduce a simpler process for the re-declaration of compliance and make it easier for employers to bring their staging dates forward. They also create further exceptions to the employer duties in relation to company directors and limited liability partnerships. We reported on the draft regulations, from which the final version differs in only minor respects, in our February 2016 update. Details of the new, finalised provisions are set out again below.

The amendments make technical changes to secondary legislation to further simplify the automatic enrolment framework. The Occupational and Personal Pension Schemes (Automatic Enrolment) (Miscellaneous Amendments) Regulations 2016 will amend the following sets of regulations:

- The Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010 (Automatic Enrolment Regulations)
- Employers' Duties (Implementation) Regulations 2010 (Implementation Regulations)
- Employers' Duties (Registration and Compliance) Regulations 2010 (Registration and Compliance Regulations).

The changes

Two new exceptions to the employer duty to auto-enrol (and re-enrol) workers are created:

- Company directors – an exception for workers who hold office as a director of the company that employs them is introduced in response to representations from small businesses. The extension of the exemptions is drafted widely to include directors of companies who employ workers as well as director-only companies.
- Limited Liability Partnerships (LLPs) – an exemption for individuals who are members of an LLP and not treated for income tax purposes as being employed by the partnership, referred to by the DWP as 'genuine partners' is introduced.

  This follows the case *of Clyde & Co LLP v Bates van Winklehof* [2014] in which the Supreme Court held that a member of an LLP counted as a 'worker' for the purposes of section 230(3) of the Employment Rights Act 1996, which protects whistleblowers. The definition of 'worker' under auto-enrolment legislation (section 88, Pensions Act 2008) is in substantially the same form as section 230 and so LLP members could have been subject to auto-enrolment.

Clarification of exception for workers who received winding up lump sum

The Automatic Enrolment Regulations are amended to reflect the policy intention that the duty to auto-enrol is lifted only where all the following events occur within a 12-month period:

- the worker receives a winding-up lump sum

- he ceases to be employed and is re-employed by the same employer
- he becomes eligible for auto-enrolment or re-enrolment.

If the worker who received the winding up lump sum becomes eligible for enrolment after the 12 month period has elapsed, they should be auto-enrolled in the usual way.

Extension of exceptions to cover new transitional protection from April 2016

Separate legislation was intended to be introduced to extend the current exemption from the employer duty where a jobholder has claimed lifetime allowance transitional protection to cover the new transitional protection available for individuals affected by the reduction in lifetime allowance from £1.25 million to £1 million from April 6, 2016. However, the DWP was unable to amend the Finance Act 2016 to allow backdating to April 6, 2016 and therefore intends to introduce regulations at the earliest opportunity after the Finance Act 2016 becomes law. In the interim period, HMRC and TPR will provide guidance for individuals wishing to take advantage of new transitional protection.

Deadline for re-declaration of compliance

Employers are obliged to re-register with TPR by providing a fresh declaration of compliance every three years. The current regulations contain two different deadlines for providing this re-declaration and the draft regulations replace these two deadlines with one five month re-declaration deadline for all employers. The new deadline will be five months after the third anniversary of the staging date, with subsequent deadlines being five months after the third anniversary of their last re-enrolment date.

Bringing the staging date forward

The regulations amend the conditions employers must satisfy if they want to bring their staging dates forward as follows:

- the current requirement to obtain the agreement of the scheme's trustees or managers will be removed for employers who have no-one to enrol (the DWP's evidence suggests that a proportion of the employers left to stage between now and 2018 will have no workers eligible to enrol)
- employers who have no-one to enrol will be allowed to bring forward their staging date to any date, rather than the first of the month as currently required
- the requirement for an employer who wants to bring their staging date forward to give TPR one month's notice will be removed. Instead, the employer may notify TPR at any point up to and including their new early staging date. Such employers may also submit their declaration of compliance to TPR at the same time.

Abolition of DB contracting-out: alternative quality requirements for DB schemes

In consequence of the abolition of DB contracting out in April 2016, the regulations amend the provisions of the Automatic Enrolment Regulations providing employers with an alternative quality requirement for DB schemes based on the cost of accruals. A transitional easement allows employers of schemes that satisfy the contracting out conditions on 5 April 2016 and have not changed the benefits in their schemes to apply the cost of accruals test at scheme level. Under the easement, the test can apply at scheme level even if there is a material difference in the cost of the benefits accruing to different groups of members. The

easement applies until the earlier of the effective date of the first actuarial report on or after April 6, 2016 or April 5, 2019.

The Registered Pension Scheme (Provision Of Information) (Amendment) Regulations 2016: tapered annual allowance – HMRC finalises information requirements

The regulations which require scheme administrators to provide a pension savings statement automatically each year have been amended to reflect the introduction of the new tapered reduction in the amount of the annual allowance for individuals from *April 6, 2016*.

The Registered Pension Schemes (Provision of Information) (Amendment) Regulations 2016 were laid before Parliament on March 9, 2016 and come into force on *April 6, 2016*.

Under the amended Registered Pension Schemes (Provision of Information) Regulations 2016, the default position will be that the 2015/16 tax year will be treated as a single tax year for the information requirements. The key change is that a scheme administrator will be required only to provide a pension savings statement in respect of the 2015/16 tax year if either:

- the member's pension input amount for that year as a whole exceeds £80,000
- the member's pension input amount for the post-alignment tax year exceeds £40,000.

A provision in the draft regulations that would have required administrators to provide a pension savings statement where the member's pensionable earnings for that tax year exceed £110,000 has been dropped from the finalised regulations. In addition, a new definition of 'pensionable earnings' which was to be included in the Provision of Information regulations has also been removed. This had been criticised for not being aligned with the bases for calculating an individual's 'adjusted income' or 'threshold income' that will be apply from April 2016.

Social Security (Contributions) (Limits and Thresholds Amendments and National Insurance Funds Payments) Regulations 2016: NICs limits and thresholds for 2016–17 confirmed

Regulations setting the earnings limits and thresholds for class 1 NICs for 2016-17 were made on March 10, 2016 and take effect from *April 6, 2016*.

The regulations, which are in the same form as the draft published in February 2016, specify the limits and thresholds set out below:

- Upper earnings limit: £827 per week. (Employees pay NICs at two per cent on earnings above this limit.)

- Upper secondary threshold: £827 per week. (Employers pay NICs at 0 per cent on earnings below this threshold in respect of employees under the age of 21 and, from April 26, 2016, apprentices under the age of 25.)

No changes are made to the following thresholds:

- Primary threshold: £155 per week. (Employees pay NICs at 12 per cent on earnings between this limit and the upper earnings limit.)

- Secondary threshold: £156 per week. (Employers pay NICs at 13.8 per cent on employee earnings above this threshold.)

The regulations also set the class 4 upper profits limit at £43,000. (Self-employed individuals pay NICs at nine per cent on profits between the lower profits limit of £8,060 and the upper profits limit, and at to per cent thereafter).

Sterling insurance: final salary link issue – High Court exercises discretion to correct mistake in trust deed

The case of *Sterling Insurance Trustees Ltd v Sterling Insurance Group Ltd* [2015] concerned the meaning of the phrase 'benefits accrued due' in a restriction on a power of amendment. The judge held that in this case the proviso should be construed as if the word 'due' was not there or as if it simply meant the benefits accrued for a member. This meant that the restriction protected the final salary link for members.

Background

The case concerned a point of construction regarding the scope of the power of amendment in a pension scheme trust deed. Such powers have been construed by the courts to contain restrictions against any changes to the scheme that result in breaking the link between past service benefits and future salary increases, the so-called 'final salary link'. There is debate about whether this construction is correct.

Facts

The claimant was the trustee of the Sterling Insurance Pension Scheme (the Scheme) established by way of an interim trust deed in 1996, followed by a definitive deed executed on September 7, 1998 taking effect from August 1, 1999. The definitive deed included the following power of amendment of the trust deed and rules:

'*The Trustees shall have power with the consent of the Principal Employer by deed or written instrument to alter modify or add to all or any of the provisions of the Trust Deed or the Rules except that no such alteration, modification or addition shall operate so as to substantially reduce in aggregate the value (as to which the decision of the Trustees acting on the advice of the Actuary shall be final) of the benefits accrued due in respect of any Member up to the date of such alteration, modification or addition. The Trustees shall notify in writing each Member affected by any such alteration modification or addition.*'

Under the Scheme's rules, the member's Final Pensionable Salary was calculated for each complete month of their pensionable service. The Final Pensionable Salary meant their highest Pensionable Salary on any January 1 in the last five years before their Exit Date, being the date they retired from or left service. There was therefore a 'final salary link' so that each member accrued during their service a right to a future pension measured by reference to their total pensionable service and final pensionable salary.

The Scheme was closed to new members on January 25, 2000 by a deed of variation which split the scheme into a final salary section for existing members and a money purchase section for those who became members after December 31, 1999. Further variations followed, culminating in a deed introduced on December 31, 2004 which closed the final

salary scheme to future accrual and purported to break the final salary link by way of the following amendment:

'Add at the end of Rule 4: Where the Member's Exit Date is after December 31, 2004, his Pensionable Service and his Contracted-out Service shall cease at the end of December 31, 2004, and his Final Pensionable Salary shall be determined as at the end of December 31, 2004 ...'

This amendment was challenged as being ineffective on the grounds that the proviso to the amendment power prevented an amendment which broke the final salary link.

Decision

This full update includes an analysis of the decision written by Jonathan Evans QC (who acted for the trustee). The decision focused on the meaning of the phrase 'benefits accrued due in respect of any member up to [the date of the amendment]' in the restriction on a power of amendment that prohibited amendments that substantially reduce in aggregate the value of such benefits. The question for the Court was whether the breaking of the final salary link was valid or ineffective as contrary to the restriction on the amendment power.

The judge accepted the parties' agreed position (subject to a reservation by the employer of the right to argue the contrary on appeal) that the meaning of the word 'accrued' in this context, when it is the only word used to describe the benefits, is such that it includes the final salary link. It was also common ground that the meaning of the word 'due' when used on its own, was to refer to benefits already payable, thus not including the final salary link. The question was what the meaning of the composite phrase 'accrued due' was in this context.

The judge (Nugee J) rejected the employer's argument that the phrase 'accrued due' meant 'become due' and thus referred to benefits already due to be paid. He held that it should be interpreted as meaning 'accrued for', recognising that this was not giving the phrase the meaning it commonly has among lawyers, which is indeed in the sense of 'fallen due'.

The judge reached his result by applying the process of 'correction by construction' and was satisfied that 'something must have gone wrong with the language' of the clause, principally, but not only, by reason of the fact that the protection accorded to members under the employer's interpretation of the phrase would have been less than that already conferred by section 67 of the Pensions Act 1995, which was in force at the date the deed containing the amendment power was executed.

The judge granted permission to appeal, recognising that the question of construction was a difficult one in relation to which the Court of Appeal might take a different view, and also expressing the view that it would be desirable for the Court of Appeal to consider the decision in In *Re Courage* regarding the meaning of the phrase 'secured' benefits, and consequently the meaning of 'accrued' benefits adopted in *Briggs v Gleeds* in reliance on In *Re Courage*.

Comment

This judgment includes several points of interest. First, the meaning of terms in amendment powers such as 'accrued' or 'secured' benefits has been under scrutiny for some time. In order to manage scheme costs, employers have often sought to break the final salary link for past as well as future service. The decisions In *Re Courage* and more recently *Briggs v Gleeds* have hampered these efforts, but not all practitioners agree that the correct construction has been applied to such terms.

Second, there is the wider issue as to the correct approach to construction where a party claims there has been a mistake in the drafting. In this case, Nugee J acknowledged that he was bound by what Lord Hoffman had said in Chartbrook (which was agreed to by the other members of the House of Lords) and this applied until the Supreme Court departed from it. However, this is not altogether an easy course to take and the facts in each case will be crucial. Nugee J was clear that a high threshold must be met, saying that:

'... [to correct the language] requires ... a strong case in which the result is not just one which is unduly favourable to one side or the other but is one which can be regarded as making no commercial sense and is arbitrary and irrational. I have come to the conclusion that this is a case in which the inclusion of the word 'due' can only be attributed to a mistake.'

Webber (PO 8094) – Pensions Ombudsman decides cut-off date for limitation purposes was first notification to member of overpayment

The Pensions Ombudsman (PO) has determined that the end-date for the six-year limitation period relating to an action for recovery of pension overpayments is the date when the scheme administrator first sought recovery of the overpayments. In this case, the administrator was statute-barred from claiming for overpayments more than six years before the cut-off date, but entitled to claim for overpayments within this limitation period.

The PO reached this conclusion in a complaint remitted back to him following a High Court judgment in December 2014. The Court had partially allowed an appeal against a previous determination of the Deputy Pensions Ombudsman (DPO) that had rejected a complaint by a member of the Teachers' Pension Scheme about the recovery of overpaid pension dating back to 2002.

The Court rejected a change of position defence relied on by the member, but accepted he had a limitation defence against the recovery of any overpayments made more than six years before the relevant date when the limitation period was to be regarded as having stopped (referred to as the cut-off date). The Court ruled that, with reasonable diligence, the scheme administrator could have discovered the mistaken overpayments during the 2002/03 tax year. An element of the overpaid amount was therefore statute-barred, but the administrator was entitled to claim for overpayments made in the six years before the cut-off date. Nugee J expressed a provisional view that the cut-off date was the date when the member filed his complaint with the PO, but declined to decide the point.

After the parties had failed to agree on the cut-off date or the amount to be repaid, these two questions were remitted back to the PO, who accepted the scheme administrator's argument that the cut-off date was the date the scheme administrator had notified the member of the overpayments and sought repayment (November 24, 2009). Noting that Nugee J had not heard any submissions on the point, the PO suggested that fixing the cut-off date as the date when the complaint was made to his office could encourage members who have been overpaid to delay resolution of a matter, and could lead to different outcomes according to the duration of a complaint under a scheme's internal dispute resolution procedure (IDRP).

Comment

The notable point in this determination is the PO's willingness to depart from the (albeit provisional) views of a High Court judge in relation to a point of law that has fairly wide application. If a further appeal is made to the Court, it is possible that the decision may be reversed, but the arguments made by the scheme administrator in favour of the November 2009 cut-off date seem persuasive. Essentially, in the context of the recovery

of overpayments, the member is effectively using a complaint to the PO as a pre-emptive measure to prevent formal recovery proceedings. It therefore makes no sense to allow the member to reduce the repayment amount by delaying through an IDRP process and beyond, as this could lead to different outcomes depending on the duration of the dispute procedure.

Cherry (PO-7096): pensions tax – employer had duty to inform member about impact of re-employment on protected pension age

The PO has upheld a complaint by a police officer who left police service and took his scheme benefits in June 2011 but was re-employed in materially the same role less than a month later. The Police and Crime Commissioner had a duty of care as employer to provide a police officer with relevant information about the tax penalties on his retirement benefits if he were re-employed within a month of becoming entitled to his Police Pension Scheme benefits.

In *Cherry*, a police officer who left police service and took his scheme benefits in June 2011 but was re-employed in materially the same role less than a month later lost his protected pension age. In addition, his past and future pension payments up to age 55 then became unauthorised payments.

In upholding the complaint as against the Commissioner, the PO noted that the provision of salient information set out in a 2006 Home Office circular did not amount to giving advice, which the Commissioner had no legal obligation to provide.

The complainant claimed that the Commissioner and the scheme administrator, Capita, should have informed him about the tax penalties resulting from his re-employment. He submitted that he should be put back in the financial position that he would have been in if there had been a sufficient break between his employment and re-employment.

The Commissioner submitted that it had no legal obligation to advise individual employees about their tax and pension liabilities. But in a letter to the PO it recognised that police offers such as Mr Cherry had begun re-employment to 'assist the needs of the force'.

In upholding the complaint as against the Commissioner, the PO noted that the provision of salient information set out in a 2006 Home Office circular did not amount to giving advice, which the Commissioner had no legal obligation to provide. The PO directed the Commissioner to reimburse the police officer for tax charges arising directly from his loss of the protected pension age. He dismissed the complaint as against the administrator.

Comment

The outcome of the *Cherry* case (alongside two virtually identical determinations published by the PO on the same day in relation to the Police Pension Scheme) may be contrasted with the August 2014 determination in *Ramsey*, which appeared in our September 2014 update.

In *Ramsey*, the DPO ruled that neither a pension scheme trustee, employer nor administrator had any legal duty to warn a member that the reduction in the annual allowance from April 6, 2011 would make him personally liable for an annual allowance charge if he elected to receive a major enhancement to his scheme benefits after that date.

However, employers and trustees should take note of both determinations and ensure that appropriate steps are taken to inform members about significant legal and regulatory

changes that may affect their benefits, so that members themselves may take appropriate tax advice, if required.

There is no indication that the *Cherry* decision will be appealed but the Police Pension Scheme now has a process in place to ensure that individuals are not re-employed until a period of at least a month has elapsed.

Mather (PO-5291): incorrect benefits quotation – member entitled to overstated benefits despite receiving refund of contributions in 1979

The Deputy Pensions Ombudsman (DPO) has determined that a scheme must honour annual pension statements that overstated a member's pensionable service and benefits because it was reasonable for the member to have relied on them in her pension planning and she was unaware of the mistake. This was the case although the statements indicated the quotations were not guaranteed since they also stated that 'Every effort has been made to ensure accuracy', which was not the case.

Facts

Mrs Mather was a teacher and a member of the Teachers' Pension Scheme between 1974 and 1978. Shortly before she stopped working, she wrote to the Department of Education and Science (DES) to enquire about receiving a refund of her contributions and in March 1979 she sent the DES the relevant completed form. The DES issued her a refund of £747.48 but failed to alter its records to show that her four years and 108 days of service were no longer pensionable.

Mrs Mather returned to teaching in 1986 and resumed her scheme membership. Teachers' Pensions (TP) subsequently inherited Mrs Mather's incorrect service record from the DES and sent her annual benefit statements from 2005 that correspondingly overstated her pensionable service and benefits. Each statement also noted:

'*The figures in this Statement are for illustration only. Every effort has been made to ensure accuracy, however this Statement confers no right to the benefits quoted.*'

When Mrs Mather applied for retirement at her normal pension age on August 1, 2013, TP spotted the error and amended its records. The notification of benefits and standard covering letter it sent her on July 13, 2013 did not mention the error but showed the revised figures, including pensionable service of 27 years and 211 days and an annual pension of £13,536.70. Mrs Mather telephoned TP to complain and after further chasing, TP informed her about the error in her records but rejected her subsequent formal complaint in June 2014. Meanwhile, her benefits came into payment on August 1, 2013 at the revised, lower level.

Mrs Mather complained to the PO that TP should honour its overstated annual benefit statements or else pay her compensation. She submitted that based on the statements, she had decided not to defer taking her scheme pension and had moved to a cheaper house (after selling at a loss) in the expectation that her benefits would cover the lower mortgage payments, as well as pay off her bank loans. She also submitted that she had no memory of having requested the refund of contributions in 1979 as her husband had completed the form and she was suffering from post-natal depression at the time. Mrs Mather also complained that TP should have notified her immediately when it discovered the mistake in 2013 as this would have affected her decision whether to retire.

Among other things, TP submitted that it was entitled to assume data inherited from the DES was correct. It also submitted that it could only pay benefits calculated in accordance with the statutory regulations governing the scheme.

Determination

The DPO upheld the complaint.

A member could not receive larger benefits than she was entitled to unless she met certain strict criteria; namely, that she relied on the misinformation to her detriment, and there was no suggestion that she knew, or should have known, that a mistake had been made.

The DPO held that the evidence supported Mrs Mather's submission that she had based her retirement planning on the overstated benefits and could not reverse her decisions when TP told her in July 2013 that its benefit illustrations were incorrect.

The DPO was also satisfied that Mrs Mather was unaware of the mistake when she elected to retire. TP had admitted that it sent Mrs Mather incorrect statements from 2005 onwards, but it argued that the wording of the statements indicated that benefit levels were not guaranteed. This was true, but their yearly assurance that 'Every effort has been made to ensure accuracy' was not. Although the DPO accepted that TP had inherited records from the DES and that it was not feasible to verify each member's record every year, in light of this it should not then have included wording that entitled Mrs Mather to expect that her details were accurately recorded. The DPO also accepted that Mrs Mather later forgot about the refund of contributions in 1979, given that her husband completed the relevant form in 1979 (as indicated by the handwriting) and the debilitating effect post-natal depression could have on memory.

Mrs Mather was therefore entitled to rely on the incorrect figures and it would be unfair for TP to reduce Mrs Mather's benefits, albeit that any remedy must take account of the benefit she had from the contribution refund in 1979.

The DPO also held that TP's communications following its discovery of the error in 2013 constituted maladministration. Its standard covering letter of July 13, 2013 failed to mention the mistake and Mrs Mather was obliged to contact TP several times to obtain full details. Although an earlier explanation would have made little financial difference as Mrs Mather had already irreversibly changed her position in 2013, it would have represented good practice.

The DPO directed TP to increase Mrs Mather's pension as if her period of service between 1974 and 1978 were pensionable. It must also pay arrears from August 1, 2013 (her retirement date) with interest, after subtracting an amount equal to the contributions refund plus interest on it from 1979. TP must also pay her £500 for the significant distress and inconvenience caused by its failings.

Comment

There is a general defence of 'change of position' to claims for repayment of overpaid benefits where a member has so changed his position that it would be unfair to require him to repay the benefits paid to him in error.

The change of position defence will not be available where the member acted dishonestly, but conduct short of dishonesty may also be sufficient to prevent a member from relying on a change of position defence. Actions falling short of dishonesty or a failure to act in a commercially acceptable way may also prevent individuals from relying on the defence. For

instance, members receiving benefits which far exceed previous quotations should have been aware that something was amiss and cannot then claim to have changed their position in good faith.

The PO has found previously that the test for the defence is whether a reasonable person in the position of the recipient (of the overpayment) should have realised the overpayment. An overpaid recipient should not benefit from being 'heedless, whatever the reason'. In *Webber* (see above), the High Court upheld the decision of the DPO that the change of position defence was not available in an action for recovery of overpayments, where the member appreciated that the payments he was receiving may be overpayments and could have made a simple enquiry to check but chose not to do so.

In addition, in cases where an overpayment has been the basis of a complaint for maladministration, the DPO has held that the member must prove maladministration, as well as change of position.

The position may be quite fact-dependent, especially in cases brought before the PO, and the overpaid sum does not need to be significant for a change of position defence to be successful. In *Dunne* (PO-165), the PO held that a change of position had arisen in relation to the slightly improved day-to-day standard of living for a pensioner member who had received a monthly pension that was around £20 higher than he was entitled to under the scheme rules. The overpayment had been 'subsumed' into his monthly income and was not recoverable. Nevertheless, when considering injustice, it is clear that a member's complaints of hardship will not generally be taken into account.

Generally speaking, the PO has in the past upheld claims to overstated benefits where a complainant has been able to prove the necessary detrimental reliance on an overstatement, and the reliance has been reasonable. It could be argued that in the *Mather* case, because the complainant received a refund of contributions, it must necessarily follow that it was not reasonable for her to rely subsequently on the overstatement made by the administrator. While many cases of overstatement arise from mistakes made by administrators alone, in this instance mistakes were made by both the administrator and the member herself. Perhaps a major factor contributing to the outcome of the complaint was the wording included by the administrator in its annual statements effectively vouching for their accuracy. This additional assurance seems to have conferred extra protection on the member.

Contacts

If you would like further information please contact:

Peter Ford
Partner, London
Tel +44 20 7444 2711
peter.ford@nortonrosefulbright.com

Lesley Browning
Partner, London
Tel +44 20 7444 2448
lesley.browning@nortonrosefulbright.com

Lesley Harrold
Senior knowledge lawyer
Tel +44 20 7444 5271
lesley.harrold@nortonrosefulbright.com

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