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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.

DWP clarifies costs and transaction charges disclosure requirement implemented by the ccupational Pension Schemes (Administration and Disclosure) (Amendment) Regulations 2018

Of interest to schemes providing DC benefits is the recent publication by the Department for Work and Pensions (DWP) of clarification on the meaning of the phrase "be made publicly available free of charge on a website" in relation to disclosure of information requirements.

We reported in our March 2018 update that the DWP had published its response to the consultation on the Occupational Pension Schemes (Administration and Disclosure) (Amendment) Regulations 2018 (the Regulations), under whichcosts and charges information is to be made available to DC members.

The new requirements seek to improve transparency in workplace pensions and investment disclosure. They do not affect DB schemes where the only DC benefits are AVCs. The Regulations amended Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (the Disclosure Regulations) and the Occupational Pension Schemes (Scheme Administration) Regulations 1996 and came into force on *April 6, 2018*. The new provisions require trustees and managers of schemes offering DC benefits to publish certain information on costs and charges on a website within seven months of their first scheme year end-dates falling on or after that date.

Following a request from the Joint Select Committee, the DWP has explained the difference between the phrase "be made publicly available free of charge on a website" used in new regulation 29A(1) of the Disclosure Regulations and the requirement elsewhere in the disclosure requirements to make information simply "available on a website".

The DWP has explained that the difference in drafting reflects the material differences in the context and purposes of the relevant provisions. Generally, unless a particular method of disclosure is specified, the Disclosure Regulations permit information to be sent by post, by email or by making it available on a website. In most cases, it need only be provided to the specified individual (or category of individuals) rather than to the public in general and therefore access could be restricted by requiring an individual username and password.

However, the purpose of new regulation 29A(1) is different in that it requires relevant schemes to make certain information on charges and transaction costs available "to the world at large", reflecting the underlying policy to improve transparency and enable comparison. Therefore, it was considered important to specify both that the information must be available to the public as a whole (not just to the scheme's membership) and also that access must be free of charge for all those who wish to view the information.

DWP publishes guidance for trustees on DC bulk transfers without consent

In our March 2018 update, we reported on the Occupational Pension Schemes (Preservation of Benefits and Charges and Governance) (Amendment) Regulations 2018 (the Regulations), which permit DC-to-DC bulk transfers on a without consent basis where, broadly, the receiving scheme is an authorised master trust or if the trustees have consulted with an independent professional. The Regulations came into force on *April 6, 2018*, with the exception of the provision removing the actuarial certification option on a "broadly no less favourable" basis for DC-to-DC bulk transfers, which does not apply until *October 1, 2019*.

On *April 30, 2018*, the DWP published non-statutory guidance aimed at assisting trustees in complying with the Regulations and in seeking the required "appropriate advice" where a transfer is made to a scheme that is neither an authorised master trust nor is it between schemes of a single employer or those of connected employers within a group.

The guidance sets out the considerations for trustees in obtaining this advice, how to confirm that the adviser is independent, and how to assess the receiving scheme. It confirms that the trustees are free to choose whom they "reasonably believe" to be qualified to give advice on the proposed bulk transfer. This could be an existing adviser, or one or more advisers in the same firm. In assessing whether the appropriate adviser is independent of the receiving scheme, the trustees should consider whether the adviser has received some form of payment from the receiving scheme in the year prior to providing the advice. The guidance sets out examples of the types of work which should be considered in such an assessment, and the circumstances under which the trustees could decide that the adviser is independent, even if such a payment has been made.

Certain points are suggested as being potentially of "significant concern" to transferring trustees, such as where

- The receiving scheme is an authorised master trust which has reported a triggering event which has not been resolved.
- The receiving scheme is in wind-up.
- Those managing the receiving scheme have been publicly sanctioned by TPR or the Financial Conduct Authority.

The guidance also sets out some examples of good practice for trustees to follow when carrying out a bulk transfer, such as taking reasonable steps to trace non-active members, making sure data is up-to-date, and considering any one-off costs such as investment costs associated with the transfer.

We will be publishing a briefing on DC-to-DC transfers and the related guidance in the near future.

Pensions Regulator publishes its corporate plan 2018-2021

On *May 10, 2018*, the Pensions Regulator (TPR) unveiled its corporate plan for the period 2018 to 2021, promising that it is committed to becoming a "clearer, quicker and tougher" regulator. The plan identifies eight priorities for TPR in the coming year, including

- Ensuring that DB schemes are effectively regulated.
- Improving standards of trusteeship and scheme governance.
- Authorising master trusts under the new statutory regime.
- Promoting the good administration of work-based pension schemes.

In relation to DB regulation, TPR pledges to work closely with the DWP to implement the recommendations in the March 2018 White Paper, including making revisions to its funding code and other policies where necessary.

As for scheme governance, TPR says it will be reviewing and consolidating its existing guidance concerning administration and data standards to make its expectations clearer.

On master trusts, TPR confirms that it will engage before authorisation applications are made and clearly set out the standards to be met.

A foreword to the plan jointly authored by Mark Boyle, chair, and Leslie Titcomb, chief executive, says that:

"Over the next year you can expect to see us improving our effectiveness further by taking action in a broader and more visible way to improve outcomes for retirement savers. We will ensure our expectations are better understood and use a wider range of regulatory tools, with the aim of putting things right and keeping schemes on the right track for the long term so members receive the benefits to which they are entitled."

Reflecting its new responsibilities and more interventionist approach, TPR intends to increase its headcount by 12 per cent in 2018/19. Overall expenditure will rise by 5.2 per cent compared to the previous year, funded by higher scheme levies. For 2017/18, TPR spent £84.3 million, compared to the originally budgeted figure of £84.1 million. One of the principal reasons for the overspending was higher than anticipated costs incurred in enforcement cases, though this was partly offset by savings in other areas.

In a separate press release issued on *May 3, 2018*, TPR has announced that it is to appoint High Court Enforcement Officers (HCEOs) to enforce court orders in England and Wales (and their equivalents in Scotland and Northern Ireland) on those employers that have failed to comply with their auto-enrolment duties and that have refused to pay the related fines. This mechanism can also be used to collect fines in relation to other duties, such as failure to produce a chair's statement or scheme return offences.

View the Corporate Plan 2018-21 (26 pages).

Comment

TPR has noticed that, although scheme governance and administration is generally improving across the board, it needs to remain committed to improving service quality where required so that every member is able to enjoy a consistently high quality of scheme. TPR no doubt has the high-profile pension failures of the recent past in mind (for example Carillion – see below) with its ongoing focus on specific regulatory initiatives to address public concerns, but even with extra headcount the priorities it has set are challenging as these are so wide-ranging.

With regard to the intended appointment of HCEOs, the vast majority of employers who comply with the auto-enrolment duties will no doubt welcome the introduction of effective non-compliance measures for use against the few who continue to flout the law.

Carillion – final report published

On May 16, 2018, the Work and Pensions Committee and the Business, Energy and Industrial Strategy (BEIS) Committee published the final report of their joint inquiry into the collapse of Carillion, which states: "Long term obligations, such as adequately funding its pension schemes, were treated with contempt."

The report also claims that the "key regulators", the Financial Reporting Council and TPR, were "united in their feebleness and timidity". According to the report: "TPR threatened on seven occasions to use a power to enforce pension contributions that it has never used. These were empty threats; the Carillion directors knew it and got their way."

In response to this criticism, TPR Chief Executive Lesley Titcomb said: "We actively seek to learn lessons to better protect members of pension schemes. In the past the balance between members and employers was not always right. The report underlines the significant changes already made at TPR but there is more work to do."

She added: "We are now a very different organisation; we are clearer about what we expect, quicker to intervene and tougher on those who do not act in the interest of members. We have reinforced our regulatory teams on the frontline and are embedding a new regulatory culture."

The report states that there is a danger of a crisis of confidence in the audit profession.

One of the recommendations of the report is that the "Big Four" audit firms be referred to the Competition and Markets Authority and the resultant review should explicitly include consideration of both breaking up the Big Four into more audit firms, and detaching audit arms from those providing other professional services.

Regarding dividends, the report notes that over the six years from 2011–2016, the company paid out £441 million in dividends compared to £246 million in pension scheme deficit recovery payments. It states that funding pension schemes is an obligation and paying out dividends is not. The committees welcomed the confirmation by the Department of BEIS that its review into insolvency and corporate governance will include considering "whether companies ought to provide for company pension liabilities, before distributing profits" through dividends.

Comment

Prior to the publication of the report, there had been speculation that the collapse of Carillion could have resulted in a recommendation that TPR be abolished. While that has not happened, the report will make uncomfortable reading for TPR. As noted in its three-year Corporate Plan (see above), work has already started to toughen up TPR and recent prosecutions have shown that it is willing to pursue employers which are failing their pension schemes. In addition, some commentators have recommended that TPR's statutory objectives may need changing, as two of them, promoting the sustainable growth of employers and protecting the PPF, are difficult to reconcile.

The Government is also taking steps through its Defined Benefits White Paper (as reported in our March 2018 update) to strengthen TPR, but it is a delicate balance between protecting DB members' pension interests and ensuring employers are able to continue with their normal business activities, the success and profitability of which are ultimately crucial to scheme funding.

Box Clever case – Upper Tribunal rules in favour of TPR

In our update for February 2012, we reported that five companies in the ITV group had been ordered by TPR to put in place financial support for the Box Clever Group Pension Scheme (the Scheme) in December 2011, despite never being participating employers.

In deciding that it was reasonable to impose financial support directions (FSDs), TPR's Determinations Panel (the DP) ruled that the five FSD targets were "associated" with the scheme's participating employers. Even though legal ownership of the shares of three of the employers was vested in a security agent, the DP was satisfied that the FSD targets controlled the exercise of voting power in those three participating employers through an intermediate company. The decision confirmed that the power to issue an FSD can relate to events that took place before the Pensions Act 2004 came into effect.

In March 2015, the Court of Appeal (CA) allowed ITV's appeal against a strike-out application made by the FSD target companies. The CA ruled that, while there is no statutory requirement relating to the precise contents of a warning notice issued by TPR, the notice must make clear to the target the case against it.

In the latest decision in this long-running case published on *May 18, 2018*, the Upper Tribunal (which rules on decisions made by the DP) has confirmed that TPR was right to use its powers to seek financial support from ITV for members of the Scheme which has 2,800 members and a deficit of approximately £115 million.

The judgment follows a two-week hearing in January 2018 of the substantive issues in the case. It was the first anti-avoidance case by TPR to be heard in full by the Tribunal, although there have been other referrals to the Upper Tribunal which have concluded through settlement prior to any substantive hearing taking place. The judgment clarifies a number of points of law regarding how and when TPR can use its FSD powers. In particular, the Tribunal agreed with TPR's position on the following

- *Retrospective use* – the purpose of the FSD regime is to provide a rescue framework for pension schemes in deficit. TPR could not meet its objectives if it could not take into account events which occurred prior to the Pensions Act 2004 coming into force – for example, many scheme and company structures were created prior to 2004.

- *Fault* – the regime is not fault-based and so does not require criticism or blame to be found against the targets for their conduct in respect of the pension scheme. It is instead a regime based on responsibility – in this case the targets chose the structure of the joint venture and should therefore bear appropriate responsibility for the risks.

- *Reasonableness* – this is assessed by balancing all the relevant facts to reach a conclusion, with the relationship between the targets and the pension scheme as the starting point. When making this assessment, terms from the legislation such as "benefit", "relationship with the employer" and "involvement with the scheme" should be given a wide interpretation. An FSD may still be issued against a target even if it has not received any substantial benefit from its relationship with the pension scheme's sponsoring employer, although in this case the Tribunal found that ITV had received valuable benefit from the creation of the employer.

Comment

The Tribunal stated in its judgment that no blame should be attributed to ITV concerning the transaction that formed the Box Clever joint venture, and ITV has confirmed its intention to appeal. If the appeal is unsuccessful, TPR would then be free to issue an FSD against ITV with a view to seeking funding to address the Scheme's deficit, failing which TPR would then have the option to issue a contribution notice. The Scheme members are currently being paid benefits at PPF levels.

EC outlines key post-Brexit issues for UK pension schemes in notice to stakeholders

Of particular relevance to cross-border schemes is the "notice to stakeholders" document published on *April 27, 2018* by the European Commission (the EC). The notice highlights some of the possible consequences for UK occupational pension schemes when Britain leaves the EU on *March 29, 2019*.

The notice is aimed at institutions for occupational retirement provision (IORPs -broadly, funded occupational pension schemes) and their sponsors. Subject to any transitional agreements which may be agreed, and any provisions that have already been incorporated into UK legislation, the EU rules for IORPs, in particular the IORP Directive (IORP II), will no longer apply to the UK. Member states must transpose IORP II into national law by *January 13, 2019*.

The issues highlighted include

- Before the withdrawal date, UK-authorised IORPs that are active cross-border in EU member states should contact the "competent authorities" of the relevant member state to confirm what conditions will apply if they wish to continue that activity. This may require contingency measures, such as transferring the IORP's "portfolio" to an EU member state to keep scheme members within the IORP II framework.

- EU-based sponsors of IORPs that pay contributions to a UK-registered IORP should assess the conditions for the continuation of the scheme based on the national law of the sponsor's host EU member state. If continued cross-border activities are not allowed, the IORP should either be transferred or an alternative IORP found.

- Post-withdrawal, members and beneficiaries whose relationship with an EU-based IORP is governed by UK pensions law will no longer benefit from IORP II even if the IORP is registered or authorised in an EU member state. How the scheme can provide for UK-based members will depend on the relevant law of the member state where the IORP is based.

View the notice (3 pages).

HMRC publishes Manage and Register Pension Schemes service newsletter

In April 2018 (and updated on *May 3, 2018*), HMRC published its first newsletter for scheme administrators relating to its new service called Manage and Register Pension Schemes which explains its plans to introduce a new digital platform for pension schemes.

In the newsletter, HMRC says it will

- Provide a new digital platform for managing and registering pension schemes.

- Provide a digital account for all pension schemes.

- Issue all HMRC notifications regarding registration through the new service.

- Hold details of existing pension schemes, pension scheme administrators and pension practitioners following migration from the existing Pension Schemes Online service.

Phase One of the introduction of the digital platform will begin on *May 8, 2018*, and new schemes will be able to use the service to register schemes with HMRC.

Existing schemes currently on the Pension Schemes Online service will be migrated to the new digital platform from 2019/20 onwards.

View the newsletter.

HMRC publishes Pension Schemes Newsletter no. 98

On *May 3, 2018*, HMRC published the latest edition of its Pension Schemes Newsletter. The contents include

- Notification of the launch of the new digital platform for scheme administrators (see above news item).
- Pension flexibility statistics confirming tax repayments totalling over £22.5 million were made in relation to the period January 1, 2018, to March 31, 2018.
- Scheme registration statistics, which have reduced by 36 per cent compared to 2016/17 applications.
- A confirmation that the link to the annual allowance calculator has been removed to allow the facility to be updated. This follows HMRC's recent admission that the calculator had been incorrectly informing users of remaining amounts of annual allowance to be used up before the end of the tax year 2017/18. Updates on the restoration of the calculator will be provided in a future newsletter.
- Additional functionality for members to tell HMRC online if they have lost or withdrawn their lifetime allowance protection.
- Details on relief at source for Scottish income tax and related pension flexibility payments.
- Details of changes to the guidance for those using the Trust Registration Service (TRS) to meet their schemes' obligations under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, where the scheme has incurred a tax liability. The guidance now clearly confirms that if the pension scheme is a trust which is already registered with HMRC under Pension Schemes Online or the new Manage and Register Pension Schemes (see above), trustees do not need to register anew on TRS. Trustees should, however, maintain their own records in relation to pension scheme assets and whether or not a tax liability is incurred and such records should be made available to HMRC if requested.

View the newsletter.

PRAG publishes guidance on assessing going concern for pension scheme accounts

There is a requirement for trustees and auditors of DB, DC and hybrid schemes to include in their audit report and statement of trustees' responsibilities an assessment about going concern, and for most schemes such disclosures are straightforward.

The Pensions Research Accountancy Group (PRAG) has published guidance for trustees and scheme auditors when making the going concern assessment and this is available for PRAG members via its website.

The guidance highlights the possible sources of information trustees could consider in making their assessment, and this should be available to them in the normal course of running the scheme. PRAG suggests that trustees should document their going concern assessment either as a short paper and/or ensure that a record is made in trustee board minutes.

General Data Protection Regulation: ICO publishes final version of consent guidance

On *May 9, 2018*, the Information Commissioner's Office (ICO) published the final version of its guidance on consent, which is intended to sit alongside the ICO's Guide to the General Data Protection Regulation (GDPR) and provides further detail on consent and when it should be relied on as a lawful basis for processing personal data.

The guidance considers

- The differences between consent under the Data Protection Act 1998 (DPA 1998) and under the GDPR and Data Protection Bill 2017-19.
- Why consent is important.
- When consent is appropriate.
- What is valid consent.
- How consent should be obtained, recorded and managed.

The key consent elements remain the same as under the DPA 1998 (namely it must be freely given, specific, informed and there must be an indication signifying agreement), however, Article 7 of the GDPR sets out a number of additional conditions for consent which must also be complied with, including the keeping of records concerning consent, that the giving of consent must be unambiguous, that consent cannot be a condition to a contract, the right to be forgotten and the right for consent to be withdrawn.

The GDPR also includes specific provisions relating to

- Children's consent for online services.
- Explicit consent for scientific research purposes.
- Increased rights for individuals where consent is the lawful basis for processing relied on.
- New accountability and transparency requirements concerning the lawful basis for processing being relied on and retention of data after consent is withdrawn.

The guidance reiterates the point that in order for processing to be lawful under the GDPR it must have a lawful basis, and one of the conditions for lawful processing is explicit consent.

The ICO guidance highlights the benefits of getting consent right (for example, enhancing an organisation's reputation and improving engagement) and the substantial penalties for getting it wrong (fines of up to €20 million or 4 per cent of an organisation's total worldwide annual turnover, whichever is higher).

View the guidance.

BEIS consults on amendments to protected persons regulations for Nuclear Decommissioning Authority schemes

The Department for Business, Energy & Industrial Strategy (BEIS) is consulting on plans to amend the "protected persons" regulations that apply to certain employees of formerly nationalised industries, in light of the government's commitment to switch to career-average revalued earnings (CARE) provision across public sector pension schemes. Most, but not all, public sector schemes have so far adopted CARE for future accrual.

The consultation concerns two final salary schemes sponsored by the Nuclear Decommissioning Authority (NDA), namely the Civil Nuclear Pension Plan and the SLC section of the Magnox Electric Group of the Electricity Supply Pension Scheme, which together have around 10,160 members. A change to a CARE structure would reportedly save approximately £200 million.

However, to enable the NDA and Magnox Ltd (the two principal employers) to switch to CARE, amendments are required to the statutory protections set out in the Electricity (Protected Persons) (England and Wales) Pension Regulations 1990. These regulations that protected employees are entitled to accrue future benefits on a basis that is no less favourable than the basis of accrual in place at the time the protections were put in place.

According to the consultation paper, the policy intent is to amend, as a one-off exercise, only those parts of the regulations required to enable the NDA to switch to a CARE basis of accrual. For the future, any protected persons involuntarily transferred to another employer will have to be offered future accrual on a basis no less favourable than the new CARE option.

The consultation also proposes granting the two principal employers formal amendment powers to enable them to introduce the CARE structure, alongside powers to make ancillary changes to ensure the schemes operate as intended. There would also be limits on future increases to member contributions. Consultation on the proposals ends on *July 5, 2018*.

Financial Guidance and Claims Bill receives Royal Assent

On *May 10, 2018*, the Financial Guidance and Claims Bill received Royal Assent to become the Financial Guidance and Claims Act 2018.

The Act provides for the creation of a single financial guidance body (SFGB) that will replace Pension Wise, the Pensions Advisory Service and the Money Advice Service. In addition to setting out the objectives, functions and powers of the SFBG, the Act makes provisions enabling regulations to be made that will

- Ban cold-calling in relation to pensions and other consumer financial products.
- Require trustees and managers of personal and occupational pension schemes to recommend that appropriate pensions guidance or independent financial is taken by members or their survivors in relation to decisions made about flexible benefits.
- Ensure that authorised persons under the Financial Service and Markets Act 2000 provide information about the availability of financial guidance to specified individuals.

The Act also provides for the transfer of the regulation of claims management services from the Ministry of Justice to the Financial Conduct Authority.

Master trusts: draft Occupational Pension Schemes (Master Trusts) Regulations 2018 laid before Parliament

A revised version of the draft Occupational Pension Schemes (Master Trusts) Regulations 2018 has been laid before Parliament, following publication in March of the DWP's response to its consultation on the initial draft version issued in November 2017.

For the most part, the revised draft closely matches the consultation version (see our February 2018 update note), though numerous technical drafting changes have been made in light of respondents' feedback. Among other things, the revised draft regulations

- Set out the amended authorisation fees announced by the DWP (£41,000 for an existing master trust and £23,000 for a new scheme) (regulation 4).
- Where there is a scheme funder, contain revised requirements for the scheme funder's accounts when submitted to TPR as part of the authorisation process. The provision that would have required an auditor's report to be submitted alongside the accounts, confirming the scheme funder's status as a going concern, has been removed (regulation 9).
- Include two additional exemptions from the scope of the authorisation regime; namely, schemes where the only money purchase benefits provided are attributable to pension credit rights or AVCs made by non-money purchase members in respect of a period where they have ceased to be active members because they have reached a maximum service limit (regulation 27).
- Provide for less prescriptive requirements concerning the contents of a master trust's business plan, on the basis that many of these requirements will instead be included in TPR's code of practice (Schedule 3).

Many of the provisions in the draft regulations will have to be approved in Parliament under the affirmative resolution procedure. This procedure is applied to more controversial or complex regulation and means approval from both Houses of Parliament is required by resolution. Subject to obtaining Parliamentary approval, the DWP plans to bring the draft regulations into force on *October 1, 2018*, alongside the relevant provisions in the Pension Schemes Act 2017.

View the draft regulations.

Network and Information Systems Regulations 2018

The Cybersecurity Directive (also known as the Network and Information Security Directive or NIS Directive) applies to operators of essential services (OESs), such as transport, health and energy, and to digital service providers (DSPs), such as online marketplaces, search engines and cloud services. Both are subject to security and incident reporting requirements. The Cybersecurity Directive contains some transitional provisions, but member states are required to adopt and publish by May 9, 2018, the laws, regulations and administrative provisions necessary to comply with the Directive and must apply those measures from *May 10, 2018*.

The Directive applies to OESs that are established in the EU and DSPs that offer services to persons within the EU. However, it does not apply to DSPs that are considered micro and small enterprises.

In its response of January 2018 to its consultation on the UK's implementation of the Directive, the Government omitted banking and financial market infrastructures from the scope of OESs to be covered, as equivalent provisions exist elsewhere, and introduced thresholds to capture only the most significant OESs in a particular sector.

Like the General Data Protection Regulation, the Network and Information Systems Regulations (the NIS Regulations) impose security and incident reporting requirements, but their focus is on security of IT systems, rather than security of the personal data processed by those systems. In practice, however, the two regimes are inextricably linked. The aim of the NIS Regulations and the Cybersecurity Directive is to ensure the security of IT systems on which both personal data and other (corporate) data may be processed. The NIS Regulations have been laid before Parliament and broadly, they are intended to provide

- A national framework for the security of network and information systems in the UK.
- For the designation of operators of essential services and the duties which apply to them, including security and incident reporting requirements.
- For the duties that apply to relevant digital service providers (RDSPs) and the Information Commissioner (ICO), including a duty on all RDSPs to register with the ICO.
- For powers of enforcement and penalties.

The NIS Regulations came into force on *May 10, 2018*.

Grenville Hampshire v The Board of the Pension Protection Fund [2018]: every individual member entitled to compensation of at least 50 per cent of benefits on employer's insolvency

Of interest to all schemes providing DB benefits is the recent opinion of the Advocate General (AG) in a preliminary reference concerning a claim by a member of the T&N Retirement Benefits Scheme (1989) against the Pension Protection Fund (PPF). The member, whose early retirement pension was reduced by 67 per cent on the scheme's entry to a PPF assessment period, argued that the compensation cap did not give full effect to Article 8 of the EU Insolvency Directive. Article 8 requires member states to "ensure that the necessary measures are taken to protect the interests" of employees (current and past) as regards pension benefits on an employer insolvency.

Background

Under current PPF rules, non-pensioner members receive compensation of 90 per cent of their accrued benefits, subject to a cap of around £39,000, and CPI revaluation of post-1997 benefits. Mr Hampshire was not a pensioner when his employer entered a PPF assessment period and he calculated that he would receive an annual pension from the PPF of approximately £20,000, compared to his pre-insolvency entitlement of over £76,000. The Court of Appeal referred the case to the ECJ in 2016.

The AG's opinion

The AG concluded that Article 8 should be interpreted to the effect that every individual employee is entitled to compensation of at least 50 per cent of the total value of his accrued rights on his employer's insolvency (not merely an average level of protection for all employees). This, she said, was clear from the words chosen by the ECJ in *Robins and others v Secretary of State for Work and Pensions* [2007]. Secondly, the aim of the Directive is to ensure a minimum level of protection for all employees, which can only be achieved if the minimum standard applies to, and can be relied on by, each individual employee.

Further, the AG considered that a lower level of protection could not be justified in this case since it went beyond what was necessary to combat moral hazard. In particular, senior executives who had already reached normal pension age, and who might possibly have been involved in high-risk business decisions contributing to the insolvency, were not affected by the cap.

The AG also considered that Article 8 could be relied on directly by an individual against the PPF as a State authority. It would have been clear to the PPF when judgment was delivered in *Robins* (January 25, 2007) that it would not be permitted to apply a basis for calculation under which certain employees would receive compensation of less than 50 per cent of their accrued entitlements. Therefore, the content of the obligation under Article 8 was unconditional and sufficiently precise on September 19, 2011, the date of the contested assessment decision by the PPF.

The final judgment of the ECJ may not follow the AG's opinion. Judgment is due within the next few months.

Comment

It is uncertain whether the ECJ will follow the AG's opinion and, if it does, the whether the UK will be required to follow the decision in the light of the form of Brexit which applies.

However, if the ECJ judgment does follow the AG's opinion, this will create significant administrative problems for the PPF as it will mean that the compensation cap is unlawful where it results in an individual receiving less than half of his or her expected scheme benefits. This would mean that future benefits would need to be calculated on a different basis, and past payments would have to be reconsidered.

Whether the level of the PPF levy would need to be increased would probably depend on the number of individuals affected by the required recalculation of their PPF compensation.

The scheme in this case eventually wound-up outside the PPF, although there were insufficient assets to secure full buy-out. A further difficulty may arise in future in respect of schemes that wind-up outside the PPF, as they may need to take into account the 50 per cent minimum in considering the winding-up priority order for securing benefits. In addition, where such schemes have used the level of PPF compensation as a starting point in the past, it is possible that benefit entitlements may have been incorrectly assessed.

Burgess v BIC UK Ltd [2018] – High Court rules retrospective changes were valid and no six-year limitation period applies on recoupment of overpaid pension

In a judgment handed down on *April 17, 2018*, the High Court has confirmed that the recovery of pension overpayments by exercise of the equitable right of recoupment is not subject to a six-year limitation period under section 5 of the Limitation Act 1980.

However, much of the ruling centred on whether an amendment to the deed and rules of the BIC UK Pension Scheme (the Scheme) had been made effectively to introduce pension increases. Owing to a legislative requirement to reduce a surplus in the Scheme in the early 1990s, BIC UK Ltd (the Employer), was advised to reduce its contributions and a decision was made by the trustees to use part of the surplus to increase pensions in payment by the lower of the Retail Prices Index (RPI) or 5 per cent.

The relevant trustee resolution was recorded in minutes of a meeting held on February 18, 1991 (the 1991 Minutes). In May 1993, a new deed and rules was executed (the 1993 Deed) and was expressed to be effective from August 6, 1990. The power of amendment gave the trustees power to make amendments by deed executed by the principal employer and the trustees or "by resolution (in writing) of the trustees in the case of the rules only."

The Employer claimed that the 1991 Minutes neither amounted to a trustee decision to increase future pension payments, not did the evidence the Employer's consent. The trustees argued that the 1991 Minutes reflected their decisions both to increase pension payments on a discretionary basis in line with inflation since the commencement of their payment and to increase future benefits for pensioners and other members by the lower of RPI and 5 per cent.

A 1992 member announcement stated that, with effect from April 6, 1992 all pensions in payment would be increased each year by 5 per cent or RPI, whichever was lower.

Arnold J concluded that the 1993 Deed gave effect to the increases. Although it was executed after the trustees' decision to award the increases was made, it was expressed to be retrospective to August 6, 1990. There was no presumption against a retrospective change and the key question was whether exercising the powers conferred by the 1993 Deed with effect from August 6, 1990 would involve impermissibly rewriting history. That in turn depended on whether it would have been within the scope of the power of amendment contained in the previous deed and rules of 1977. Arnold J held that if the substance of the change was within the power, back-dating by itself would not lead to invalidity. Whilst the 1993 Deed represented "an element of re-writing history" it did "not involve doing so impermissibly".

Although he had concluded that the increases had been properly paid, the judge accepted the position of the Employer that recovery of overpayments by way of adjustments to future pension instalments as a recoupment was "an equitable self-help remedy" and as such did not involve a claim for repayment of pension benefits, so the six-year limitation period on recovering overpaid amounts did not apply.

The decision does not overrule that of the High Court in *Webber*, on which we reported in our November 2016 update, and which ruled that the recovery of overpayments was subject to the limitation period of six years. This means there are two High Court decisions taking different views on the same issue and schemes should consider the treatment of overpayments on a case by case basis.

Comment

Most of the headlines in the legal press have emphasised the element of the judgment holding that the six-year limitation period does not apply to claims for equitable recoupment. However, this time limit was upheld in *Webber*, which was a claim for repayment, and it will be interesting to see how the PO applies this decision to his future determinations.

The issue of dealing with historic deed amendments continues to develop and here Arnold J was willing to take a practical and pragmatic approach in interpreting the history of the application of pension increases. Although the strict formalities to effect the change had not been complied with, he decided that the 1993 Deed could have a retrospective effect and validate what had already been decided and put into practice.

Trustees and employers looking for confirmation from judgments in future may need to consider whether what they are seeking to do will give rise to "impermissible re-writing of history". However, as so many similar cases hinge on specific facts and powers of amendment, this case may give no more than a useful indication of what a court may decide in a particular case.

View the judgment.

Pensions Ombudsman - Mrs T (PO-15526): insurer "failed to seek appropriate relevant evidence" when deciding allocation of death benefits

The Pensions Ombudsman (PO) has given his determination in a complaint by Mrs T against Zurich Assurance Limited (the Insurer), in which he upheld a complaint by a member's spouse, where a pension scheme administrator paid a member's death benefits without obtaining appropriate relevant evidence before doing so.

The member's spouse had initially been nominated as beneficiary for the member's pension benefits in the event of his death. However, in November 2013 a relative (Mrs Y) contacted the Insurer to notify them that the member had now nominated her as beneficiary and that the scheme administrator should only liaise with her.

When the member died in September 2015 the Insurer requested a copy of his will from Mrs Y in order to ensure that the information she had provided in November 2013 was correct. Mrs Y provided Zurich with a certified copy of the will, dated July 7, 2010, at the end of September 2015. The will did not confirm who was to receive Mr T's pension death benefits, but did include a passage saying:

"I declare that I have made no provision for my wife, having regard to the substantial provisions I have already made for her in my lifetime and to the fact that she has substantial resources of her own."

The Insurer interpreted this to mean that the deceased did not intend to make pension provisions for Mrs T and subsequently paid the Plan death benefits to Mrs Y on October 12, 2015.

The PO held that the Insurer had failed to seek appropriate relevant evidence before making its decision. If the Insurer had contacted the member's spouse it would have discovered that a Court of Protection Order was made in January 2013, which appointed the member's spouse as his interim deputy and made clear that the member did not have the mental capacity to nominate another beneficiary after that date. Further, the administrator had drawn an inference from the member's will that he would not have wanted the money paid to his spouse, which the PO found to have been made with "limited factual background".

The PO held that the Insurer should have taken further steps to obtain the relevant evidence from Mrs T, as well as that provided by Mrs Y, prior to making a decision about the distribution of the death benefits. He directed the Insurer to reconsider Mrs T's application to receive the death benefits and notify her of its final decision, with reasons.

Comment

The facts in this case clearly supported the PO's decision, particularly the fact that the Insurer had not enquired further on the change in nomination form, and the correspondent for future enquiries.

However, it is a useful example of the weight to be given to the deceased's will in such cases. The death benefit sits outside of the estate for administration purposes but the will can often be a useful aid to trustees to provide them with the full picture when making their decision. The PO's decision is a good reminder that the decision-making process should be wide-ranging and include all forms of available information, not just a will.

Pensions Ombudsman - Mr N (PO-17750): employer not required to backdate both employer and employee contributions to correct historic error

The PO partly upheld a complaint where an employer failed to make the correct employer contributions into a member's pension scheme and failed to deduct employee contributions.

The employer had notified the member in 2014 that, as of 2016, increased contributions would be made to his pension scheme. The changes were not properly administered and the member's employee contributions ceased to be deducted and paid into the scheme. The member, on noticing the error in 2017, asked that the employer compensate him for backdated employer and employee contributions. However, the employer was only prepared to backdate employer contributions, and then only if the member paid corresponding employee contributions.

The PO found that, while the employer had met its duties to contribute the required minimum level under the Pensions Act 2008, it had failed to make contributions in line with information given in 2014, which amounted to maladministration. He agreed that the employer's proposal to backdate its contributions at the correct level on the condition that the member did the same in respect of outstanding employee contributions, was a reasonable one. He instructed that the employer contact the member with a view to formulating an affordable repayment plan.

The member had suggested that he suffered significant distress and inconvenience due to the maladministration, which warranted an award in excess of £500. The PO did not agree and held that the member had failed to mitigate any perceived loss. He directed that the employer pay £500 to the member, as well as any investment shortfall in fund value by reason of the failure to pay the correct contributions.

Pension developments in the pipeline

Below is a summary of pension changes expected in the near future in addition to those outlined above. Changes since the last update are are italicises for emphasis*:*

Steria (Pension Plan) Trustees Ltd v Sopra Steria Ltd and others: High Court claim seeking declaration regarding the requirement to obtain a section 37 certificate. The case was heard on May 22, 2017. The claim has been stayed until *June 18, 2018*, with both parties having been ordered to update the court before *April 5, 2018*.

Clarification of trustees' fiduciary duties in relation to longer term investment risks – the DWP has confirmed in a response to a written Parliamentary question that it will publish its full response to the 2017 Law Commission report, *Pension funds and social investment, by June 2018*.

EMIR – new requirements to the exchange variation margin relating to derivatives applied from March 1, 2017. If an investment manager uses over the counter derivatives, schemes should check that arrangements are in place for trustees to comply with the new regime. A further EMIR exemption extension for pension scheme arrangements now applies to *August 16, 2018*. An additional 3 year clearing extension has been proposed *but confirmation of this is awaited*.

The Pension Schemes Bill 2017 received Royal Assent on April 27, 2017. The legislation is concerned principally with provisions relating to the authorisation of master trusts. The new regime for master trust regulation, upon which the Government's response to the consultation is awaited, is likely to be brought fully into force on *October 1, 2018*.

The DC scheme Chair's annual governance statement must be completed within seven months of the end of the scheme year. For example, schemes with a 31 March year end must submit the statement by *October 31, 2018*. TPR issued trustee guidance on the statement in November 2017.

IORP II – the expected transposition date is *January 12, 2019*.

Brexit should be achieved by *March 29, 2019*. The UK will then leave the EU from the effective date of withdrawal agreement or, failing that, two years after giving Article 50 notice unless European Council and UK unanimously decide to extend period.

New regulations - DC bulk transfers without member consent – the Occupational Pension Schemes (Preservation of Benefit and Charges and Governance) (Amendment) Regulations 2018 came into force on *April 6, 2018*. The easements are the removal of

The need to obtain an actuarial certificate stating that the transfer credits in the receiving scheme are broadly no less favourable than the rights to be transferred Coming into force *October 1, 2019*, to allow current transfers time to complete).

- The requirement for there to be a scheme relationship.

New regulations – the Occupational Pension Schemes (Administration and Disclosure) (Amendment) Regulations 2018 came into force *April 6, 2018*, setting out new requirements to improve transparency on DC benefit costs and charges to members. They do not apply to DB schemes providing only DC AVCs. Members must be provided with access to information via a website with 7 months of the scheme's year-end date – meaning the earliest date is *November 6, 2018*, for schemes with year-end *April 6, 2018*.

VAT – HMRC's existing practice on VAT and pension schemes is to continue indefinitely. Employers should consider taking steps to preserve (or enhance) their pensions-related VAT cover.

Auto-enrolment – cyclical re-enrolment now applies within a 6-month window related to the employer's staging date. e.g. employers with a July 1, 2015, staging date must complete the cyclical re-enrolment process between April 1, 2018, and September 30, 2018. Total minimum contributions were increased to 5 per cent (of which minimum employer contribution of 2 per cent) from *April 6, 2018. Total minimum contributions will increase to 8 per cent (of which minimum employer contribution of 3 per cent) from April 6, 2019.*

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