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Essential pensions news

Briefing

November 2016

Summary

Essential pensions news covers the latest pensions developments each month

Autumn Statement 2016 – money purchase annual allowance reduced to £4,000 and salary sacrifice arrangements scaled back

On November 23, 2016, the Chancellor, Philip Hammond, gave his first (and, he confirmed, last) Autumn Statement. From 2017, the Budget will be presented in the Autumn and a Spring Statement will be provided by the Office for Budget Responsibility. The pensions-related highlights are outlined below.

Money Purchase Annual Allowance – the Money Purchase Annual Allowance (MPAA) on tax-free contributions applies when a member has started to access pension benefits flexibly and will be reduced from £10,000 to £4,000 from April 2017. The intention is to reduce the potential for double pension tax relief which could be achieved by recycling pension savings. The intention is to retain some scope for those who have needed to access their savings to rebuild them subsequently. A consultation has been published and ends on February 15, 2017.

Pension scams – the Government intends to consult before Christmas on options to tackle pension scams, including banning cold calling, giving firms greater powers to block suspicious transfers and making it harder for scammers to abuse 'small self-administered schemes'.

Salary sacrifice to be scaled back – following consultation, the tax and employer National Insurance advantages of salary sacrifice schemes will be removed from April 2017. Arrangements relating to pensions (including advice), childcare, Cycle to Work and ultra-low emission cars will not be affected. Arrangements in place before April 2017 will be protected until April 2018, and arrangements for cars, accommodation and school fees will be protected until April 2021.

Foreign pensions – the tax treatment of foreign pensions will be more closely aligned with the UK's domestic pension tax regime and foreign pension arrangements will be brought fully into tax for UK residents, to the same extent as domestic arrangements. Specialist pension schemes for those employed abroad ("section 615" schemes) will be closed to new saving. The taxing rights will be extended from 5 to 10 years over recently emigrated non-UK residents' foreign lump sum payments from funds that have had UK tax relief. The tax treatment of funds transferred between registered pension schemes will be aligned, and the eligibility criteria for foreign schemes to qualify as overseas pensions schemes for tax purposes will be updated.

Authorised investment funds: dividend distributions to corporate investors – the Government will modernise the rules on the taxation of dividend distributions to corporate investors in a way which allows exempt investors, such as pension funds, to obtain credit for tax paid by authorised investment funds and will publish proposals in draft secondary legislationin early 2017.

In addition the "triple lock" is to be retained as the measure by which State pension increases are calculated until the end of this Parliament, with a review after 2020. The income tax personal allowance will rise to £11,500 as expected in April 2017, and to £12,500 by 2020. The higher rate tax threshold will increase to £50,000 by the end of this Parliament.

Comment

This was a relatively quiet Autumn Statement from a pensions viewpoint and will be greeted with a sigh of relief by the industry. The principal pensions changes were the reduction in the MPAA and the restriction of the benefits to which salary sacrifice advantages apply, and neither of these was unexpected.

That pension contributions are to continue to benefit from salary sacrifice is very welcome, as there had been fears earlier in the year that these, too, could have been curtailed. However, salary sacrifice arrangements are now firmly on the Chancellor's radar and pension contributions made this way may not be safe indefinitely. Scheme members should make the most of the advantages offered by salary sacrifice pension savings where they are available, together with using as much of their current annual contribution allowance as they can afford.

Database Group Ltd: section 89 report shows deterrent effect of anti-avoidance powers

Of interest to defined benefit schemes is the regulatory intervention report issued under section 89 of the Pensions Act 2004 (a section 89 report) published by the Pensions Regulator (TPR) illustrating how the potential exercise of anti-avoidance powers can act as a deterrent.

TPR threatened the use of its anti-avoidance powers in relation to the Database Group Ltd Retirement Benefit Scheme (the Scheme), a closed scheme with around 100 members and a buy-out deficit as at May 31, 2015 of £7.7 million. The Scheme's sole employer, Database Group Limited (TDG) was a trading company within the Database Group, a provider of database management services. From 2010 onwards, the income generated by TDG declined, due, among other things, to the transfer of significant client contracts to its parent company.

In 2015, Merkle Inc., an unconnected third party, made an offer to purchase the shares in the Database Group. The offer was conditional on no entity within the Group having any liability to the Scheme at the point of purchase and clearance being obtained from TPR. A proposal was made which formed the basis of a clearance application submitted in July 2015 by a number of Group entities, although Merkle did not apply for clearance itself.

TPR was concerned about the transfer of trade away from TDG in 2010 and considered that the offer, although in excess of the estimated market value as at 2015, did not reflect the covenant which had potentially been lost. In addition, the removal of the Scheme from the Group also generated shareholder value since the sale to Merkle was conditional on the Scheme and TDG being removed.

TPR concluded that in these circumstances, only an amount sufficient to secure members' benefits in full would constitute adequate mitigation. Believing that there was potential for exercising its powers to issue a financial support direction or contribution notice (or both), TPR continued negotiations with the applicants who then agreed to buy out members' benefits in full. TPR approved a revised clearance application and closed its avoidance investigation.

Nicola Parish, Executive Director for Frontline Regulation at TPR, said that the case *"illustrates how the existence of [anti-avoidance] powers can act as a deterrent against possible avoidance activity"*. The section 89 report states that protection of members' benefits can be achieved without a lengthy process involving either TPR's Determinations Panel or the Upper Tribunal, and that TPR will consider all credible proposals.

Comment

This is an interesting case which resulted in full buy-out of members' benefits being achieved as a result of TPR being involved in negotiations between the Scheme's trustee and the corporate Group. The potential use of TPR's anti-avoidance powers acted as a deterrent and ensured that members would continue to receive full benefits following the sale of the sponsoring employer.

Also of interest is the reduction in the number of clearance applications to TPR since the voluntary procedure was introduced, according to the details of a freedom of information request published online by TPR. In the financial year April 2005/06, there were 263 clearance applications, whereas in April 2015/16 there were only nine, representing a drop of 97 per cent.

Lesley Titcomb, chief executive at TPR, said that she was not entirely surprised by the reduction. She thought it should be viewed positively as an indication that the system was working to provide assurance to employers. Her view was that in the 11 years since the implementation of the moral hazard framework and the introduction of TPR's anti-avoidance powers, those involved now better understood how to structure deals in ways that did not cause detriment to the scheme, which reflected TPR's aims.

However, the freedom of information request also reveals that although TPR holds data relating to the number of clearance applications made annually, it had not carried out any analysis or research into potential reasons for the reduction in applications, and had no plans to do so.

TPR publishes scheme return guidance for DB and hybrid schemes

Of interest to all schemes providing DB benefits is TPR's new guidance documents to assist those completing a 2017 scheme return in respect of DB and hybrid occupational pension schemes. Additional questions have also been added to the 2017 scheme return form.

The Pensions Act 2004 requires that registered schemes must provide a regular scheme return to TPR, containing prescribed information. DB and hybrid scheme returns are requested annually, between November to January each year.

The two new checklists supplement the existing guidance on the scheme questions on Exchange and include a set of "questions and answers" specifically for DB and hybrid schemes. These cover matters such as the type of financial information about the scheme that needs to be supplied, the meaning of "period life expectancy" and "cohort life expectancy" and how to reflect that a scheme has more than one normal pension age.

Changes made to the 2017 scheme return for DB and hybrid schemes include

- Asking for more recent details regarding memberships, assets, contributions and scheme leavers
- Requiring confirmation that the chair of trustees statement has been prepared and signed, where applicable
- A new question to confirm whether the scheme is an "Executive Pension Scheme". This is defined as a scheme with only one employer which is a company and which is also the sole trustee and the members of the scheme are former or current directors of the company and include at least one third current directors.

See TPR's online scheme return checklist.

HMRC publishes pension schemes newsletter 82 – clarification of lifetime allowance protections

Of general interest is HMRC's publication on November 4, 2016 of the latest edition of its newsletter which highlights a number of topics for scheme administrators and trustees. The principal point to note is

- HMRC has confirmed the effective dates for the three forms of lifetime allowance (LTA) protection currently available for individuals to claim.
- For fixed protection 2016 (FP2016) and individual protection 2016 (IP2016), the protection applies retrospectively from April 6, 2016 or, if either is claimed on a dormant basis (that is, as an alternative protection when another form of protection has failed), from such later date as the individual's existing form of protection ceases to applyCorrespondingly, in the case of IP2014, the protection applies from 6 April 2014 unless claimed on a dormant basis, in which case it applies from the date when the existing form of protection is lost. This retrospectivity may create some challenges for scheme administrators, particularly as there is no closing date for 2016 protection applications.

View the newsletter.

Pension Schemes Bill 2016-17 introduced to Parliament

Of general interest is the progress through Parliament of the Pension Schemes Bill 2016-17, which had its first reading in the House of Lords on *October 19, 2016* and its second reading on *November 1, 2016*. The Bill contains details of several legislative changes that were announced in the Queen's Speech on May 18, 2016. The committee stage began on *November 16, 2016*. The Bill is due to have its second reading in the House of Lords on *November 1, 2016*.

The Bill introduces a two-pronged regime for master trusts covering authorisation and ongoing supervision. Transitional provisions apply to master trusts in existence on October 20, 2016, including the requirement to apply for authorisation within six months of the Bill's commencement date. Existing master trusts will be brought into the regime and required to meet the new criteria and the Regulator (TPR) will be provided with greater powers to take action where the key criteria are not met.

In addition the Bill will amend existing legislation to allow regulations to be made supporting the Government's intention to introduce a cap on early exit charges in certain occupational pension schemes. It will also give effect to the commitment the Government made in March 2014 to ban member-borne commission charges arising under existing arrangements in certain occupational pension schemes. Member-borne commission charges under new arrangements were banned from April 2016.

Authorisation

In order to become authorised, a new master trust would be required to meet five criteria, each of which is considered below

01 | The persons involved in the scheme are "fit and proper"

TPR will be required to decide if key individuals involved with the scheme are fit and proper to undertake their roles. The key roles are

- The person who establishes the scheme
- The trustees
- A person who has the power (alone or with others) to appoint or remove trustees
- A person who has power (alone or with others) to amend the rules of the scheme
- A scheme funder
- A scheme strategist
- Anyone else acting in additional categories set out in regulations.

In addition, TPR may determine the fitness and propriety of other individuals (such as those who promote or market the scheme) where it considers it appropriate to do so.In assessing whether an individual meets its criteria, TPR must take into account any matters to be specified in regulations, and may take into account other matters, including those relating to a person connected with the individual (emphasis added). Persons considered in connection with each other would be, for example, directors or shadow directors of the same company, or where a trustee is able to exercise a power under the trust to benefit a specific individual.

02 | The scheme is financially sustainable – strategy and resources

TPR must be satisfied that a Master Trust (as defined in clause 1 of the Bill) has a sound business strategy and sufficient financial resources to meet the costs of setting up and running the scheme. TPR must also be satisfied that the Master Trust is able to comply with requirements to protect members where a "triggering event" occurs. Triggering events cover situations where the scheme may fail or become de-authorised, and include where TPR gives notice to withdraw the scheme's authorisation, or an insolvency event occurs in relation to the scheme funder, or where a decision is taken to wind up the scheme. Where a triggering event occurs, the scheme must be able to meet its running costs for such period as TPR thinks appropriate (at least six months but no more than two years).

The scheme is financially sustainable – business plan

A Master Trust must have a business plan prepared by the scheme strategist and approved by the scheme funder and the trustees. The detail to be included in the business plan will be set out in regulations. The business plan must be reviewed by the scheme strategist at least annually and revised if appropriate, and must be revised in the event of significant changes occurring in relation to the information set out in the plan. The business plan and supporting documentation must be provided to TPR by the scheme strategist or the trustees when the scheme applies for authorisation, and within three months of any plan revision, or at any other time when requested by TPR.

03 | The scheme funder requirements

In order to meet the scheme funder criteria required for authorisation under clause 10, the scheme funder must be a separate legal entity. This means that it must be a legal person only carrying out activities that relate directly to the Master Trust for which it is the scheme funder. Regulations will detail requirements relating to a scheme funder's accounts.

04 | Systems and processes requirement

The systems and processes requirements relate are included for the purpose of enabling TPR to decide whether it is satisfied that they are "sufficient" to ensure that the scheme is run effectively.

There is a non-exhaustive list about which regulations may be made, and these include the functions and maintenance of IT systems, records management, risk management, the appointment and removal of trustees, resource planning and investment decision-making.

05 | Requirement for adequate continuity strategy

The scheme's strategist must submit a written continuity strategy to TPR, detailing how the interests of the members are to be protected if a triggering event occurs in relation to the scheme. The continuity strategy must also include details of administration charges that apply to members. TPR must determine that the continuity strategy is adequate as part of the authorisation decision. Measures are also included to ensure an "orderly exit" where a scheme fails or otherwise chooses to leave the market, aimed at providing continuity of member saving and support to employers in continuing to fulfil their automatic enrolment duties.

Ongoing supervision

TPR will be required to publish and maintain a list of authorised Master Trusts. There are requirements to submit to TPR the accounts of both the scheme funder and the Master Trust annually. There is also a requirement to report to TPR any significant events (to be detailed in regulations). The reporting requirements apply to those who are assessed under the "fit and proper" test as well as those who provide legal, financial or actuarial advice, and the scheme's administration manager.

Penalties

TPR will have a power to impose fixed penalties (up to £50,000) for failures to provide any requested information, and escalating penalties for failure to pay a fixed penalty.

Comment

For the first time, master trusts will be required to be authorised by TPR. The new regime should provide consumers and employers with confidence that the master trust is a safe environment for pensions savings, and tighter regulation in this area has been generally welcomed so that only good master trusts operate in the market.

The detail will be provided later in regulations which will need to be examined closely to ensure they are proportionate. Hopefully, the consultation will be widespread and on a realistic timetable, given the reliance that is to be placed on regulations to implement the detail of the new provisions.

However, the Bill has been criticised as it fails to make compulsory the existing voluntary Master Trust Assurance Framework, which some have said could have been built on and extended. There has also been criticism of the introduction of new defined terms, given that some of the existing statutory definitions could be used, which would avoid added complexity.

In addition, there is some confusion over the application of the current requirements in the Bill for master trusts to notify TPR of "triggering events". The Bill as it stands provides that once Royal Assent is received, master trusts must notify TPR within 7 days of any triggering event which occurred "on or after October 20, 2016 but before the commencement date". This attempt to back-date the notification requirement is unworkable as by the time Royal Assent is received, the 7 day period will already have expired, and detail in relation to the Bill's requirements is not yet available.

This and other points have been raised by various industry bodies in correspondence to the Select Committee considering the Bill.

The Registered Pension Schemes (Provision of Information) (Amendment No. 2) Regulations 2016 – lump-sum death benefits

Of general interest is the publication by HMRC of draft regulations that will introduce new provision-of-information requirements where a registered pension scheme pays certain taxable lump-sum death benefits to a trust. Consultation runs until *December 5, 2016*.

Since *April 6, 2016*, most forms of authorised lump-sum death benefits paid in respect of a member who died after reaching the age of 75 attract tax charges. A payment to a "qualifying person" (essentially an individual or bare trustee) is subject to income tax at the recipient's marginal rate. Where lump-sum death benefits are paid to a "non-qualifying person", the scheme administrator is liable for the flat-rate 45 per cent special lump-sum death benefits charge. Broadly speaking, "non-qualifying persons" include company directors, partners and trustees (other than bare trustees. A bare trust is one in which the beneficiary (or beneficiaries) has an immediate and absolute right to both the capital and income of the trust).

Under the proposed new provision of information regulations, where a scheme pays lump-sum death benefits to a trustee (other than a bare trustee) and the special lump-sum death benefits charge has been deducted, the scheme administrator will be obliged to give the trustee certain information within 30 days of payment.

The information comprises

- The amounts of the lump sum and tax charge
- Details of the deceased member (including their date of death)
- Details of the scheme making the payment.

The trustee will in turn be required to pass on this information to the beneficiary, within 30 days of payment to the beneficiary. The intention is to ensure the beneficiary is given the information needed to be able to claim a refund of any excess tax deducted by the scheme administrator above the income tax due at their marginal rate.

The regulations will also make minor technical changes to the existing provision-of-information requirements relating to the annual allowance taper that were introduced on April 6, 2016.

The Registered Pension Schemes (Bridging Pensions) and Appointed Day Regulations 2016: Finance Act 2016 bridging pension provisions brought into force

These regulations are of interest to DB schemes providing bridging pensions. Many occupational pension schemes provide such benefits, where a higher a higher level of pension which is paid to a member between retirement and the date he reaches his State pension age. After State pension age, the scheme benefit is reduced to reflect the member's receipt of the State pension.

The Finance Act 2004 provides that a scheme pension must not decrease except in the circumstances set out in legislation. These include permitting a reduction not earlier than when the member reaches State pension age, by an amount that does not exceed the relevant State pension rate. Regulations have been made bringing section 20 of the Finance Act 2016 into force. Section 20 amends the provisions of the Finance Act 2004 relating to bridging pensions in the light of the new single-tier state pension.

The Registered Pension Schemes (Bridging Pensions) and Appointed Day Regulations 2016, which came into force on *November 8, 2016*, appoint *April 6, 2016* as the date for the coming into force of section 20 of the Finance Act 2016. The changes will allow the payment of bridging pensions to continue as previously.

Early exit charges for members seeking flexible access to benefits before normal retirement age ...

... in personal and stakeholder schemes – the Financial Services and Markets Act 2000 (Early Exit Pension Charges) Regulations 2016

These changes are of interest to all schemes, both occupational and contract-based. On *November 10, 2016*, the Financial Services and Markets Act 2000 (Early Exit Pension Charges) Regulations 2016 were published online, together with an explanatory memorandum. The regulations come into force on *March 31, 2017*.

The Financial Services and Markets Act 2000 (FSMA) requires the Financial Conduct Authority (FCA) to make rules prohibiting authorised persons from imposing specified early exit charges on members of personal or stakeholder pension schemes who take, convert or transfer pension benefits after they have reached normal minimum pension age, but before their expected retirement date.

This means that, with effect from **March 31, 2017**, early exit charges in contract-based schemes

- Will be capped at 1 per cent of the value of a member's benefits being taken, converted or transferred from a scheme
- Cannot be increased in existing schemes that currently have early exit charges set at less than 1 per cent of the member's benefits under a scheme
- Cannot apply in schemes entered into after the new rules come into force.

... and in occupational pension schemes – DWP publishes consultation response

The DWP has published its response to the consultation on proposals to cap early exit charges payable by members of occupational pension schemes, confirming that the Government will legislate to allow a cap on such charges.

The cap will be implemented broadly along the lines outlined in the consultation document in May 2016, with the intention being to ensure that, so far as possible, the cap applies in the same way for members of occupational schemes as for members of contract-based schemes.

The FCA has separately published its final rules for the cap on exit charges in personal and stakeholder pension schemes (see above).

The cap will apply to early exit charges levied on a member who wishes to draw flexible benefits under an occupational scheme and has reached normal pension age (usually 55) but who has not yet attained the scheme's normal retirement age. In line with the FCA rules for contract-based schemes, the early exit charge cap will be set at 1 per cent for existing members of occupational schemes and zero per cent for new members. The relevant date for determining the applicable level of cap is the date on which the member joins the scheme.

The Government intends to legislate to ensure that where existing scheme rules provide for the application of an early exit charge lower than 1 per cent, this cannot be increased.

The DWP has confirmed that "early exit charges" are "all charges imposed on members (who are eligible to access their pension savings flexibly) when seeking to access their pension early, which they would not face if they carried out the same transaction at their pension age". The consultation had queried whether the definition of "early exit charge" that applies to personal and stakeholder schemes would be suitable for occupational schemes. However, due to differences in the underlying legislation, the DWP notes that the definition of early exit charge for occupational schemes is likely to look different, although it is intended to have the same impact.

The cap will be implemented by amendments contained in the Pension Schemes Bill 2016/17 currently progressing through Parliament. The Government will consult on draft regulations in early 2017 with a view to them coming into force in *October 2017*. This is later than the FCA rules on capping exit charges in relation to contract-based schemes which will come into force on *March 31, 2017*.

Buckinghamshire v Barnardo's RPI/CPI: Court of Appeal agrees with High Court that scheme rules did not permit switch from RPI-based revaluation and indexation

This case is of interest to schemes providing DB benefits. In our September 2015 update, we reported that the High Court had held that the rules governing an employer's DB pension scheme did not give the trustees power to switch from using the Retail Prices Index (RPI) to the Consumer Prices Index (CPI) in revaluing deferred pensions and indexing pensions in payment so long as RPI remained an officially published index.

The Court of Appeal has now upheld that decision on appeal, meaning that whether RPI can replace by CPI will continue to depend on individual schemes' rules.

Background

Most salary-related occupational pension schemes are required under the Pension Schemes Act 1993 to revalue deferred members' benefits until they come into payment and to increase pensions in payment by a minimum amount each year to protect against the effects of inflation. Broadly, a pension must be increased by the "appropriate percentage", which is specified each year under annual revaluation orders made by the Government. The appropriate percentage is also effectively capped by a limited price indexation (LPI) mechanism.

Primary legislation does not stipulate how inflation is to be measured for these purposes. Historically, the appropriate percentage was calculated by reference to the RPI. However, in 2011 the Government decided to switch to using the CPI as the measure of inflation instead.

There is no overriding or modifying statutory power allowing schemes to switch to CPI-linked indexation or revaluation if their rules provide otherwise. Therefore, the impact of the statutory change on revaluation and indexation in private-sector DB schemes depends on the specific drafting of the trust deed and rules.

Broadly, the rules in the Barnardo's scheme provided that pensions in payment are indexed and deferred pensions revalued by the "prescribed rate", defined as the lesser of 5 per cent and "the percentage rise in the Retail Prices Index (if any) ...". "Retail Prices Index" was defined as the "General Index of Retail Prices or any replacement adopted by the Trustees without prejudicing Approval".

The High Court held that there could be no "replacement" of RPI within the meaning of the definition in the rules so long as RPI remained an officially published index. Further, a decision by the authority which publishes RPI that it is no longer to be recognised as a national index would not constitute a "replacement" of RPI. Barnardo's (the employer) appealed.

The decision

The employer's appeal was dismissed by a majority with the High Court Chancellor, Sir Geoffrey Vos, dissenting. This means that whether RPI can replace by CPI will continue to depend on individual schemes' rules.

Lewison LJ held that the examination of the wording of different pension schemes cast no light on the meaning of the definition [of RPI] in the Barnardo's scheme. Had the employer's arguments been accepted, and had the trustees had the power to replace the index, they would also have had power not to replace it, which would have given them discretion to impose greater financial obligations on the employer without its consent, which was an unlikely conclusion.

The members' cross-appeal on a s67 issue was also dismissed, on the basis that if a member has a right to "A or B" he cannot be said to have accrued a right to "A".

McFarlane LJ agreed with Lewison LJ.

Chancellor Vos disagreed on the RPI point, holding that the definition in the rules should be construed as meaning the "General Index of Retail prices published by the Department of Employment or any replacement [index of prices which is] adopted by the Trustees without prejudicing Approval."

He agreed with the reasons for dismissing the s67 cross-appeal.

Comment

This decision confirms that the ability of scheme trustees to switch the basis for indexation and revaluation will depend on the wording of their rules.

However, the comments on the application of section 67 (which protects accrued rights) in such cases are of general interest. It has been clarified that a member does not have a right to a particular level of increase, and that the adoption of CPI in place or RPI is not a "detrimental modification" for section 67 purposes.

As there is no overriding statutory power allowing schemes to make the switch, schemes with rules which do not allow such a change will have to seek alternative methods to manage their funding liabilities.

There has been much industry comment on whether or not new legislation is needed to allow schemes with similar rules to make a change, and it is possible this may be considered in future. The DB green paper, announced during the second reading of the Pension Schemes Bill in the House of Lords recently, may address such concerns.

We understand that permission to appeal to the Supreme Court was refused by the Court of Appeal, but that a separate application may be made. Even if this does not happen, it is unlikely that this is the last RPI/CPI switch case we will see before the courts.

Webber v Department for Education and another [2016] – benefit overpayments: cut-off date for limitation purposes was date of written response to notice of Ombudsman complaint

This case is of interest to schemes providing DB benefits. The High Court has partially allowed a member's appeal against a determination of the Pensions Ombudsman (TPO) in which TPO had ruled that the cut-off date for limitation purposes was the date on which the administrator of the Teachers' Pension Scheme (the Scheme) had first sought recovery of an overpayment to Mr Webber in November 2011.

The Court held that the cut-off date should instead be the later date of December 19, 2011 when TPO had received the response from the Scheme that it opposed Mr Webber's allegations. The Court reasoned that this date was analogous to "action brought" by the Scheme's administrator under the Limitation Act 1980 (LA 1980).

Background and timeline

The rules of the Scheme provided (broadly) that if a member became entitled to a teacher's pension and then went back to work as a teacher, his pension would be reduced (if necessary to nil), to ensure that the salary from his new employment and his pension combined did not exceed the salary last earned, adjusted for inflation. Mr Webber worked as a teacher and was a member of the Scheme.

Below is chronological outline of events

April 1, 1997 – aged 50, Mr Webber took early retirement. He was then re-employed as a full-time teacher in September 2001 and completed a further period of pensionable service in the Scheme until August 2010. During 2001, he submitted the required "certificate of re-employment" to the administrator, Teachers' Pensions (the Administrator) but he did not submit any further certificates in subsequent years.

November 24, 2009 – the Administrator wrote to Mr Webber informing him that his earnings and pension combined had exceeded his index-linked salary of reference in each tax year from 2002/3 to 2008/9. His pension should have been abated over this period and, as a result, there had been a net overpayment of £36,282 (the November Letter). The Administrator wrote to Mr Webber again in June 2010 informing him that there had been a further overpayment in 2009/10, bringing the total net overpayment figure to £41,034.

August 3, 2010 – Mr Webber repaid to the Administrator £3,775, which was his calculation of the amount of pension overpayment in 2009/10. The Administrator acknowledged this payment, but stated that it had been "offset" against the total overpayment sum, leaving an overpaid balance of £37,259.

April 18, 2011 – having been through the IDRP of the Scheme, Mr Webber complained to TPO. The form was dated 2 April 2011 and stamped as received on April 18 2011.

November 2011 – having reviewed the complaint and established that TPO had jurisdiction to investigate it, the Administrator was informed of Mr Webber's complaint.

December 19, 2011 – the Administrator replied by letter opposing the allegations.

June 26, 2012 – the Deputy Pensions Ombudsman (DPO) published her determination that Mr Webber should have been aware that he was required to complete a certificate of re-employment in each tax year if he received a salary increase and rejected Mr Webber's complaint that he had changed his position in reliance of the overpayment.

November 22, 2012 – Asplin J upheld Mr Webber's appeal to the High Court (for reasons immaterial to the limitation question) and the matter was remitted back to TPO for reconsideration.

January 24, 2014 – the DPO published her second determination and again rejected Mr Webber's complaint. According to the DPO, Mr Webber had "turned a blind eye, for whatever reason" in the hope that the overpayment would go unnoticed. She again rejected Mr Webber's defence based on change of position. In addition, she rejected his argument that the Administrator's claim for recovery of the overpayment was statute-barred and held the Administrator could not, with reasonable diligence, have discovered its mistaken overpayments any earlier than it did.

Mr Webber appealed to the High Court for a second time.

December 2014 – Nugee J in the High Court agreed with the DPO that Mr Webber had no change of position defence but allowed his appeal in relation to limitation. Nugee J held that the Administrator could, with reasonable diligence, have discovered its mistaken overpayments at some point during the 2002/3 tax year and the six-year limitation period started running from that date. As a result, Mr Webber had a limitation defence for 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 (which Nugee J referred to as the "cut-off date").

Nugee J did not hear arguments on the point but expressed a provisional view that the cut-off date was likely to be the date on which Mr Webber brought his complaint to TPO, stating that he was *"firmly of the view that the closest analogy to the issue of a claim form is the formal bringing of the complaint by Mr Webber to the Ombudsman because at that point the question of the recovery of overpayments was in issue between the parties before the Ombudsman …"*.

However, Nugee J invited the parties to agree the cut-off date between themselves, as well as the amount of the overpayment that should be recovered. The parties failed to reach agreement and the issues were remitted to TPO.

February 2, 2016 – TPO ruled that the cut-off date for limitation purposes was the date of the November Letter (November 24, 2009). This was the date on which the Administrator first sought repayment of the overpayment. As a result, the Administrator was able to recover overpayments which were made up to six years before that date, which TPO fixed at approximately £18,000.

In arriving at this conclusion, TPO commented that Nugee J's view was simply a provisional one. Noting that Nugee J did not hear any submissions on the point, TPO suggested that fixing the cut-off date as the date when the complaint was made to his office could encourage members who had been overpaid to delay resolution of a matter, and could lead to different outcomes according to the duration of an IDRP process.

Mr Webber appealed to the High Court on the limitation issue. (He also appealed on the issue of maladministration, but this was dismissed by the High Court on the basis that the issues had already been adjudicated and had not been remitted to TPO).

October 14, 2016 – Mr Bartley Jones QC, acting as Deputy Judge in the High Court, allowed Mr Webber's appeal on the limitation issue, albeit identifying a slightly different cut-off date than that claimed by either party. He ruled that the cut-off date for limitation purposes was the date of receipt by TPO of the Administrator's written response to the notice of complaint dated 19 December 2011. It was receipt of this letter which was "action brought" by the Administrator by analogy with civil court action under the Limitation Act 1980 (LA 1980).

Decision

In arriving at this decision, the Deputy Judge considered Nugee J's judgment and concluded that it contained two separate propositions

Proposition 1 – that the closest analogy to the issue of a claim form (under the Civil Procedure Rules (CPR)) is some step in the complaint procedure (because the complaint procedure equates, by analogy, with proceedings commenced by a claim form)

Proposition 2 – for the purposes of the first proposition, it is the bringing of a complaint by Mr Webber that is the relevant step.

The Deputy Judge favoured Proposition 1. Underlying the judgment of Lewison J in *Arjo Wiggens* was the requirement to equate, so far as possible, a complaint before TPO (other than a complaint of pure maladministration) with the resolution of a dispute by the Court. Therefore, some event in the complaints process to TPO must be the cut-off date for limitation purposes by analogy with the LA 1980.

Although "deeply reluctant" to depart from the views expressed by Nugee J, the Deputy Judge considered that Proposition 2 was more difficult since the complaint was brought not by the Administrator, but by Mr Webber.

In *Barnes v St Helens MBC* [2007] the Court of Appeal (CA) held that a claim is "brought" for the purposes of the LA 1980 when the claimant's request for issue of a claim form is delivered to the Court office. The Deputy Judge considered that underpinning the CA's reasoning was the expectation that the expiry of the limitation period should be linked to a unilateral act of the claimant. One of the difficulties with Proposition 2 was that the act which stops time running was not the act of the claimant, but the act of the defendant.

The Administrator's argument that the November Letter should be taken as the relevant cut-off date for limitation purposes was rejected as, ultimately, it was up to the overpaid pensioner whether and when to bring a claim. The November Letter could not have constituted "action brought" for LA 1980 purposes had there been an action in Court, therefore to treat it as "action brought" for the purposes of a complaint to TPO would produce a different answer on liability for Mr Webber depending on whether he was sued in Court or whether the matter was referred to TPO. This would create fundamentally new principles of limitation applicable only to complaints to TPO.

Consequently, the Deputy Judge held that the cut-off date for limitation purposes was the date of receipt by TPO of the Administrator's letter of 19 December 2011. He concluded by stating that, in the circumstances, he hoped that "[the Administrator] would take a highly charitable view of any modest but sensible repayment programme put forward by Mr Webber".

Comment

The Deputy Judge's view that the cut-off date should be one analogous with that applying to the process under the CPR seems logical on the face of it. The ruling should serve as a warning to trustees and scheme administrators to be alert to the possibility of overpayments and when recovery may be time-barred. This is particularly the case in schemes (such as the Teachers' Scheme) where the rules allow members to retire and then resume employment, and make provision for pension payments then to be reduced. A scheme audit could produce information that suggests overpayments are being made, and where this is the case, prompt investigation should be carried out.

Failing to take prompt action to recover overpayments may result in the trustees losing their recovery rights on limitation grounds. Broadly speaking, there is a six-year window for overpayments to be recovered. This case shows that a long period of time can pass before a complaint is submitted to TPO, and that TPO's investigation process itself can be lengthy. Overpaying trustees will be keen to ensure that a significant period of time does not pass before the clock stops running for limitation purposes, as this will affect the amount that may fall to be repaid.

Mr E (PO-6567): trustees' exercise of discretion in not changing pension payment date was reasonable despite tax consequences

This case is of interest to schemes providing DB benefits. Mr E was a pensioner member of the Gibbs section of the HSBC Bank (UK) Pension Scheme (the Scheme), in which the rules provided for pensions to be paid on the first day of each month. The scheme executive was responsible for the day-to-day running of the scheme on behalf of HSBC Bank Pension Trust (UK) Limited (the Trustee).

In 2013, the Trustee informed Mr E that following the introduction of the real time information system (RTI) by HMRC, his pension payment on April 1, 2014 would be taxed as a 13th payment in the tax year ending April 5, 2014 and he would therefore have to pay an additional £582.30 in tax (previously, it would have been taxed in the 2014/15 tax year). When Mr E complained, he was informed that after careful consideration, the scheme executive had decided not to propose to the Trustee that it should change the Scheme rules to move the payment date to 6 April to avoid the additional tax.

Mr E's subsequent complaints to the Scheme administrators and under the Scheme's internal dispute resolution procedure (IDRP) were unsuccessful. At stage one of the IDRP, the Trustee said it took the following factors into account

- The Scheme rules governed when pensions were paid
- The Trustee had a discretion to change the payment date but must exercise it appropriately
- It was arguably not a proper use of it powers to change the date because of RTI
- It had no obligation to help members manage their individual tax affairs
- RTI had resulted in 358 out of 601 pensioners paying extra tax
- A rule change would have meant all pensioners waiting extra days for payment, which could have had a knock-on effect for members' own financial arrangements by impacting any existing standing orders and direct debits.

Mr E complained to the Pensions Ombudsman (TPO) that the Trustee should have changed the pension payment date to 6 April and that it had disregarded advice from its appointed advisers to do so. He claimed that the Trustee had ignored his legitimate expectations that his financial losses would be considered. The Trustee submitted that there was no requirement for it to consider the impact of HMRC changes on scheme members.

Determination

The Deputy Pensions Ombudsman (DPO) dismissed the complaint, noting that she agreed with the Ombudsman adjudicator's opinion, which Mr E did not accept. The adjudicator had found that

- The Trustee had properly considered all the relevant information available at the time and the decision made was therefore within the bounds of reasonableness and could not be said to be perverse
- The available evidence demonstrated that the Trustee had asked the right questions before considering all the relevant factors in reaching its decision
- The tax deducted from Mr E's pension has been properly calculated and paid in accordance with HMRC's requirements under RTI.

When considering how the Trustee exercised its discretion, the DPO said she generally looked at certain principles a decision-maker must follow

- It must ask the correct questions
- Interpret the applicable rules or regulations correctly
- Take into account all relevant but no irrelevant factors
- Arrive at a decision that was not perverse (that is, one no reasonable body would make).

The DPO held that the Trustee had acted in accordance with these principles and within its powers under the Scheme rules. The decision process was not flawed, nor was the decision perverse. Therefore, she could not overturn the exercise of the discretion, regardless of whether she might have acted differently herself. Even if the Trustee rejected advice from its appointed advisers to change the payment date, this was its prerogative and it was reasonable for it to prefer its own opinion. Noting that the tax deducted from Mr E's pension was properly calculated and paid in accordance with HMRC's requirements under RTI, the DPO did not uphold the complaint, albeit she did "fully sympathise with Mr E's unfortunate position".

Comment

TPO has found previously (see Ramsey (PO-3290 in 2014) that there was no legal duty on the employer or the trustee to warn member about possible adverse tax consequences. In Ramsey, the reduction in the annual allowance from 6 April 2011 meant the member was personally liable for an annual allowance charge if he elected to receive a major enhancement to his scheme benefits after that date. This was the case although the trustee was aware that the reduction might have tax consequences for the member and correspondence had been entered into with HMRC.

The DPO's determination in the case of Mr E considers a tricky question for pension trustees: to what extent are they obliged to consider the impact of extraneous changes, such as HMRC processes, on their members?

It seems that the result of the change to the RTI reporting system was to cause actual losses for those affected (for example, by triggering liability for income tax at a higher rate), rather than simply delaying the liability from one tax year to the next.

Even in this case, the decision seems to have turned on whether the Trustee's decision-making process could be impugned and the DPO held that it could not.

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