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Essential pensions news

Updater

November 2017

Introduction

Essential pensions news covers the latest pensions developments each month.

VAT on pension costs – HMRC confirms it's "as you were" and reverts to allowing 70/30 split for DB schemes' expenses

Of interest to DB schemes is HMRC's change of heart and allowing a reprieve for the "70/30 split" relating to VAT charged on investment management and administration services to funded pension schemes.

In past updates, we have reported on HMRC's proposed changes in approach to treatment of VAT on employer's DB scheme costs, following various judgments in European tax cases. It is over three years since HMRC first announced the proposed cessation of the 70/30 split concession, and the deadline for the end of the transitional period for its complete withdrawal has been extended several times.

Our December 2014 briefing gives some detailed background of the relevant case law. More recently, in our September 2016 update, we noted HMRC's confirmation of the extension to *December 31, 2017*, of the transitional period during which employers could seek to change existing arrangements to maximise their potential for recovery of input VAT incurred on pension fund management costs. HMRC then stated its intention to publish further guidance and, on *November 1, 2017*, that guidance was produced.

Background

Before the *PPG* case, HMRC accepted that employers could recover input VAT on administration services, even where the trustee paid for the services, although VAT invoices had to be issued to the employer. However, employers could not recover input VAT incurred on investment services because HMRC considered that those were not part of the employer's business. Typically, a third party fund manager would provide both the administration and the investment services, and where a single invoice was provided for a single supply comprising both types of services, HMRC allowed the invoice to be apportioned between investment and administration services (the so-called 70/30 split).

After the *PPG* judgment, HMRC accepted that an employer could recover the input VAT charged on both administration and investment management services, provided that the employer could show that the services were provided to it, rather than the scheme's trustees, requiring that the employer was a party to the contract for those services and had paid for them. Schemes and employers then made preparations to review their service contracts with third parties to ensure that they did not suffer an excess of irrecoverable VAT. In February 2014, HMRC withdrew the 70/30 rule but then allowed a transitional period when the rule continued to apply. The latest extension to the transitional period was due to expire on *December 31, 2017*. In 2015, HMRC outlined a number of possible arrangements intended to enable recovery of input VAT on both administration and investment management services. The threatened end of the transitional period for the 70/30 split meant that schemes which did not adopt one of these structures risked losing their existing recovery on administration services as well as failing to benefit from increased recovery following the *PPG* judgment.

New guidance

HMRC's revised guidance on input tax recovery for funded occupational pension schemes, is set out in the VAT Input Tax Manual (the VAT Manual). The guidance confirms that the 70/30 split concession will not be withdrawn and will be available to employers indefinitely. This concession allows employers to treat 30 per cent of the VAT element of a third party invoice for the provision of administration and investment services provided to a DB pension scheme as attributable to the administration element and as its input tax.

Possible alternatives

In addition, the VAT Manual gives guidance on alternative arrangements first proposed in 2015 that HMRC suggest might be adopted by employers and scheme trustees looking to recover input VAT on the costs of investment services, including:

Tripartite contracts
Under tripartite arrangements, the contract is between the third party supplier of administration and investment services, the trustee and the employer. The aim is to ensure that the employer is the recipient of the third party's supplies and is therefore entitled to treat the VAT charged on those services as its input tax.

Scheme trustee provides scheme management services to employer
In these arrangements, the scheme trustee contracts with the employer to supply the service of scheme management on the trustee's behalf as an onward supply. The scheme trustee would then be permitted recover input tax for administration costs. However, investment

costs incurred by the scheme trustee would be regarded as used for the trustee's investment activities as well as in making supplies to the employer, so an apportionment agreement would be required.

For corporate trustees
Including the scheme trustee in the employer's VAT group, so that third party services are treated as made to the representative member of the VAT group and input tax would be recoverable according to the VAT group's overall input tax recovery position.

Comment

As was noted at the time these alternative arrangements were first proposed, they are not entirely straightforward. Potential pitfalls remain, including a lack of clarity surrounding the availability of corporation tax deductions for the employer's expenses, as well as some broader implications for trustees in relation to the VAT grouping proposal.

Many employers and trustees will no doubt welcome HMRC's about turn on this issue and its acceptance that the current 70/30 split concession can continue. However, those schemes that were quick to put in place alternative arrangements when the previous split arrangement was due to disappear from the end of this year may still wish to review their current approach to reclaiming VAT against the new guidance to satisfy themselves that they have the most efficient system in place.

View the guidance on this and subsequent pages of the VAT manual.

Budget 2017 – no significant changes for pensions

Commentators who had concerns that the Autumn Budget 2017 would include yet further reductions to the tax-free pension savings allowances will be relieved that the Chancellor chose not to change the annual allowance, which stays at £40,000. There were also rumours that the higher rates of tax relief for pension contributions could be withdrawn, and that a single, flat rate of tax relief would be introduced. This change also failed to materialise, as did any remodelling of the current salary sacrifice system, so it was a quiet Budget for pensions.

As previously announced

- The Basic State Pension will increase by the triple lock, meaning the increase will be 3 per cent to reflect the increase in the Consumer Prices Index (CPI), to £125.95 per week. The new full State Pension will rise by the same percentage to £164.35.

- The lifetime allowance will increase in line with the CPI to £1,030,000.

- The income tax personal allowance will be increased from £11,500 to £11,850 and the higher rate threshold from £45,000 to £46,350.

These changes will all apply from April 6, 2018.

Also, as previously announced, legislation will be introduced to allow HMRC to register and de-register master trust pension schemes and schemes for dormant companies

From April 2019, tax exemptions for employer premiums paid into life assurance and overseas pension schemes will be widened. Tax relief will be "modernised" to cover policies when an employee nominates an individual or a registered charity to be their beneficiary.

The lack of significant change in this Budget has been welcomed by those who were hoping for a term of stability in pensions law, and pension savers should make the most of this reprieve. The UK's finances are still under pressure and the Government is committed to paying down the budget deficit. There are no guarantees that pension tax relief will not be a target again in future, and scheme members, particularly those in the higher tax bands, should consider increasing their contributions to make the most of their current tax free allowances.

PPF consults on updated contingent asset forms and related guidance

Of interest to defined benefit schemes is the latest consultation document from the Pension Protection Fund (PPF), "Consultation on contingent assets in the PPF levy".

In our October 2017 update, we reported that the PPF had published its draft 2018/19 levy determination and policy statement for consultation. The draft determination confirmed that the PPF intended to consult separately on proposed changes to its contingent asset certification documents. This second consultation paper has now been published and had a closing date of *November 21, 2017*.

The PPF is seeking views on the interpretation of some of the wording in the standard forms for Type A and Type B contingent assets, as it could be construed as limiting the obligations in agreements subject to a fixed liability cap.

Currently, security over assets granted in favour of the trustees of schemes or sections where the employers are not associated by a permanent community of interest must have a fixed cap to ensure that the credit given for such assets in the levy calculation is fair. The PPF states that the current wording could be regarded as meaning that any payments made in respect of the guaranteed obligations of the employer would erode the fixed cap on employer insolvency. The PPF does not agree with this interpretation and it intends to amend the standard forms to put the matter "beyond doubt". It is also seeking views in respect of how the caps on guarantor/chargor obligations in the standard forms should operate in future, as well as potentially simplifying the amendment and release criteria in contingent asset agreements.

If the proposed changes are adopted, the revised documentation would come into use from early January 2018 and the PPF would require contingent asset agreements entered into for the 2018/19 levy year to be on these new forms. It would not require existing Type A and Type B agreements to be re-executed for 2018/19, but is likely to require steps to be taken in relation to existing agreements for the 2019/20 levy year.

A summary of responses to this consultation and the Board's final determination and confirmed policy are due to be published in December 2017.

View the consultation paper.

Major changes to defined benefit provision to be delayed

In our March 2017 update, we reported on the long-awaited publication by the Department for Work and Pensions of the Green Paper setting out the Government's proposals to make major changes to the way DB pension schemes are run.

We understand that the subsequent White Paper is not due to be published before February 2018. This means any new Pensions Bill will not appear until 2020 and its implementation would be unlikely before 2022.

Pensions Regulator outlines new information requirements for 2017-18 scheme return

Of interest to all schemes providing DB benefits is a new checklist published by the Pensions Regulator (TPR) on *November 6, 2017* to help those completing the 2017-2018 scheme return in respect of DB and hybrid occupational pension schemes.

Most occupational and personal pension schemes should be registered with TPR and the Pensions Act 2004 requires that registrable schemes must also provide a regular scheme return containing legally required information. DB and hybrid scheme returns are requested annually, between November to January each year.

TPR's checklist sets out the new information being requested for all schemes, including

- The optional provision of the name of a contact for use by the Pension Tracing Service.
- Confirmation of whether or not the scheme consents to electronic delivery of documents from TPR.
- New information relating to common and conditional data. Common data is the basic information all schemes need to identify individual members, while conditional data is member data that trustees require to enable them to administer their particular scheme. These questions are being introduced in an effort to ensure better targeted intervention by TPR.

An annexe to the checklist focuses on the new "record-keeping and measuring data" questions, and includes a Q&A section to assist those completing the scheme return. The annexe confirms that although TPR will not base its decision on any enforcement action on a scheme's scores alone, if it has concerns that its standards are not being met, it may engage with individual schemes. If trustees fail to demonstrate they are taking "appropriate steps" to improve their records, action may be taken.

View the checklist.

The Money Laundering Regulations and HMRC's online trusts register – registration for tax-paying schemes further extended

In our October 2017 update, we reported on the deadlines relating to various registrations under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the New Regulations), which came into force on *June 26, 2017*, the deadline for transposition into UK law of the EU

HMRC has now confirmed that where a trust is not registered for self-assessment and has incurred either an income tax or CGT liability for the first time, then registration must now be completed by no later than *January 5, 2018*, rather than by October 5, 2017, (then December 5, 2017). This extension is only for the first year of the Trust Registration Service and also applies to the registration of complex estates.

In any event, the registration requirement will not affect the majority of schemes, although trustees should ensure that they maintain up to date and accurate records in relation to all scheme beneficiaries.

Given the possibility of criminal liability and civil fines, we recommend that trustees act as soon as reasonably practicable to determine which of the above duties apply to them. In particular, trustees should review their records to verify whether they contain the necessary information and check whether their schemes have incurred any of the taxes that would require the schemes to be registered with HMRC.

If trustees have any concerns in relation to this issue, their usual Norton Rose Fulbright contact will be able to offer scheme-specific advice.

The online guidance has been updated.

FCA publishes guidance on calculation of redress for unsuitable DB pension transfers

Of On *October 27, 2017*, the FCA published finalised guidance on how to calculate redress for unsuitable DB pension transfers. The guidance is stated to be effective from the date of publication.

The aim of the guidance is to update the methodology used to calculate redress for unsuitable pension transfers from a DB pension scheme to a personal pension. The FCA has published a summary of the feedback that it received to the March 2017 consultation on the draft version of the guidance and the policy decisions it has taken in response.

In the summary, the FCA highlights the changes that it has made to the guidance relating to the following issues

- Inflation rate.
- Pre-retirement discount rate.
- Post-retirement discount rate.
- Spousal age difference.
- Enhanced transfer values.

View the guidance.

DC pension flexibility: DWP publishes guidance on personalised risk warnings for members with GARs

This guidance is of relevance for schemes with safeguarded flexible benefits including guaranteed annuity rates (GARs).

In our July 2017 update, we noted that the DWP had published its consultation response on two sets of proposed regulations concerning the valuation of GARs and related advice to be provided to members with such benefits. On November 13, 2017, the DWP published non-statutory guidance for pension scheme trustees and administrators which is due to come into force on *April 6, 2018*, that will require personalised risk warnings to be issued to members who are considering giving up the benefit of GARs or other similar guarantees.

Under the Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) (Amendment) Regulations 2017 and the draft Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) (Amendment No.2) Regulations 2017, trustees and providers will be obliged to provide members who have "safeguarded-flexible benefits" with personalised risk warnings on the occurrence of certain trigger events such as a member's request for information about how they may transfer to another scheme. In addition, it has been confirmed that benefits containing GARs will in future be valued on the cash equivalent basis to establish whether a proposed transfer is within the scope of the so-called "advice requirement" that applies on a transfer or conversion of certain safeguarded benefits. Before the draft regulations were finalised, there was a degree of uncertainty about how GARs should be valued in this context, the key point being that if benefits are worth less than £30,000, the advice requirement does not apply.

The guidance sets out best practice for preparing and issuing risk warnings, and includes practical tips for complying with the obligations in the amending regulations that risk warnings must be "prominent" as well as "clear and intelligible". It also explains the operation of the transitional provisions applying to members who wish to transfer safeguarded-flexible benefits in the run-up to *April 6, 2018*.

View the guidance.

HMRC publishes Pension schemes newsletter no. 92

Of general interest is the publication on October 31, 2017 of the latest issue of HMRC's pension schemes newsletter, which includes the following items

- A summary of the quarterly release of statistics relating to flexible pension access, which show that HMRC repaid nearly £37 million in tax relating to the period July 1, to September 30, 2017.

- Confirmation that HMRC received 1,169 applications to register new pension schemes during the period April 6, to September 30, 2017, of which it has refused to register about 13 per cent.

- A reminder to scheme administrators to login to Pension Schemes Online to update their details so that data can be transferred to the new online digital service expected to be implemented in April 2018.

- A reminder to scheme administrators to be sure to include the relevant charge reference when paying tax to HMRC electronically. This is to avoid charges being shown as unpaid in HMRC's records and being referred to the Debt Management team.
- Members who wish to register for lifetime allowance (LTA) protection should do so through the LTA online service, rather than through their personal tax account, as the latter means of application is currently unavailable.

View the Newsletter.

HMRC publishes Countdown Bulletin no.30

Of interest to all administrators of formerly contracted-out DB schemes is the publication by HMRC of the latest edition of its Countdown Bulletin on *November 6, 2017*, and its subsequent updating on *November 10, 2017*.

Significantly, HMRC confirms that it will not be issuing individual statements to all those under State Pension Age detailing their contracted-out entitlements, which had been expected as the last step in the GMP reconciliation programme. However, the likely benefit of this expensive and labour-intensive exercise was questionable, and no doubt HMRC resources can be better allocated.

With just one year left for administrators to raise any queries using the Scheme Reconciliation Service (SRS), the Bulletin also sets out the process and timings up to the end of *March 2019* and can be viewed here. Schemes should note that the deadline for submitting membership queries under the SRS is *October 31, 2018*.

Financial Guidance and Claims Bill – update

The report stage of the Financial Guidance and Claims Bill began in the House of Lords on *October 24, 2017*.

Despite Government opposition, two cross-party amendments relating to pension cold-calling were passed on a division of the House. The amendments add a consumer protection function to the remit of the new single financial guidance body (SFGB) created by the Bill and require the SFGB to advise the Secretary of State for Work and Pensions to ban pension cold-calling if it considers a ban would be conducive to its functions.

While the Government is committed to introducing a ban on pension cold-calling, covering all unsolicited approaches (including texts and emails), it does not believe that imposing a duty on the SFGB is the right means of achieving the ban, as the amendments would not introduce any enforcement powers and the mechanism entailed by the amendments would be cumbersome and ultimately delay the ban's implementation. The Government intends (the DWP spokeswoman said) to publish its own proposals in draft legislation in early 2018 and has yet to announce whether it will seek to reverse the amendments when the Bill moves to the Commons.

Separately, an amendment that would require the SFGB to assume responsibility for introducing a single public service pensions dashboard was withdrawn without a vote. While the Government is "firmly committed" to the delivery of pensions dashboards, it considers that the remit of the SFGB will be wide enough to cover hosting a potential dashboard without any further amendment to the Bill.

The report stage continued in the House of Lords on *October 31, 2017*. Despite Government opposition, a cross-party amendment introducing a requirement for trustees to check whether a member has received information and pension guidance from the SFGB before accessing or transferring their pension was passed.

A number of other amendments to the Bill were agreed, including an amendment that makes it a criminal offence for someone to hold themselves out as a provider of information, guidance or advice on behalf of the SFGB when that is not the case and a requirement for specified authorised persons to signpost the SFGB.

A revised version of the Bill was published on *November 1, 2017*, with the third reading in the House of Lords to take place on *November 21, 2017*.

Finance (No.2) Bill 2017 – update

The Finance (No.2) Bill 2017 (referred to in Parliament as the Finance Bill 2017-19) commenced its Public Bill Committee stage in the House of Commons on *October 17, 2017*, and this stage was due to conclude on *October 26, 2017*.

The pensions-related measures were agreed without amendment and include the Bill's provisions regarding an income tax exemption for employer-arranged pensions advice (clause 3) and the reduction in the money purchase annual allowance to £4,000 from £10,000 (clause 7).

The draft Occupational Pension Schemes (Administration and Disclosure) (Amendment) Regulations 2018 – disclosure of costs and charges to DC members

In our October 2017 update, we noted that section 44 of the Pensions Act 2014 had come into force, requiring the Secretary of State to publish regulations that mandate the disclosure of information about the transaction costs in certain occupational and personal pension schemes.

The DWP has now published for consultation the above draft regulations which set out proposed changes to the way in which investment, costs and charges information is made available to defined contribution (DC) members. The consultation closes on *December 6, 2017*.

Under the draft regulations, trustees and managers of schemes offering DC benefits would be required to report on the costs and charges for each default arrangement and each alternative fund option which the member is able to select, rather than simply reporting on the range of costs and charges. The requirement does not apply where the only DC benefit provided by the scheme are AVCs.

There is also a proposal for trustees to provide an illustration of the cumulative effect over time of the costs and charges on members' pension pots, in line with the statutory guidance. As a minimum, trustees should publish costs and charges on a similar cycle to the Chair's Statement, which itself should include information on the default investment strategy and value achieved for members.

The draft regulations also require schemes to make costs and charges information available free of charge on a website, as well as providing an illustration of the cumulative effect of charges and transaction costs on the value of a member's pension pot. Draft statutory guidance published alongside the consultation sets out how trustees can satisfy these new requirements.

The second part of the consultation concerns investment disclosure. There is a proposed duty for trustees to disclose on request to members and recognised trades unions

- The name and identification number of each collective investment scheme in which the member is directly invested.

- For arrangements that invest in unit-linked contracts, the name and identification number of each underlying authorised fund (no additional disclosure is required where there are no underlying authorised funds).

Each member who receives an annual benefit statement should also be notified that they can request the investment disclosure information.

The regulations are intended to come into force on *April 6, 2018*, subject to receiving parliamentary approval. The FCA will consult on corresponding rules for workplace personal pensions in the New Year.

View the draft regulations.

View the consultation paper.

Comment

While the aim of the draft regulations to improve disclosure of costs, charges and investment to members has been welcomed, it is debatable whether the majority of members would understand the fairly complex information which is to be provided. Even supposing members become more aware of the costs and charges relating to their scheme and its specific investment offerings, this will be of little benefit where they have no choice of pension scheme, or where there are limited investment options.

The draft Occupational Pension Schemes (Preservation of Benefits and Charges and Governance) (Amendment) Regulations 2018 – consultation on proposals to amend the DC-to-DC bulk transfer without consent regime

The DWP has published a consultation on proposals to simplify the bulk transfer of DC pensions without member consent. The consultation closes on *November 30, 2017*, and the aim is to bring the regulations into force on *April 6, 2018*, subject to parliamentary approval. The consultation includes the Government's response to a call for evidence which ran until February 21, 2017.

The consultation seeks views on the draft Occupational Pension Schemes (Preservation of Benefits and Charges and Governance) (Amendment) Regulations 2018 (the Draft Amendment Regulations) which would

- Replace the requirement to obtain an actuarial certificate confirming benefits are "broadly no less favourable" in the receiving scheme for bulk transfers of DC pensions without member consent (DC to DC) with an alternative test and new member protections. The vast majority of the 45 respondents to the call for evidence considered the actuarial certification requirement as a barrier to efficient DC-to-DC transfers, particularly where a scheme actuary needs to be specially appointed.

- Remove the scheme relationship condition for these transfers, which was seen as making little sense to most respondents in a pure DC environment where members' benefits do not depend on the strength of the employer covenant.

- Maintain charge cap protections for those transferred without consent.

Changes will be implemented by amendments under the Draft Amendment Regulations to the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 as follows

- Transfers will be permitted of accrued rights to money purchase benefits on a without-consent basis from one occupational pension scheme to another, where one of two conditions is met

  — The receiving scheme is an authorised under the not yet introduced master trust regime.

  — If the receiving scheme is not an authorised master trust scheme, the trustees of the transferring scheme have obtained and considered the written advice of "a suitably qualified professional" who is verified by the trustees as independent from the receiving scheme in question.

Guidance is due to be issued in due course by the DWP or the Pensions Regulator.

These conditions will apply to without-consent transfers of members' accrued rights to pure DC benefits but not those "which would be safeguarded benefits or cash balance benefits (as defined in sections 48 and 75 respectively of the Pension Schemes Act 2015 if they were not secured by an insurance policy or annuity contract".

Where members are protected by the auto-enrolment default fund charge cap in the transferring scheme, the proposal is that the receiving scheme will be required to continue this protection. In addition, any funds into which members protected by the cap are transferred without making an active choice should continue to be subject to the cap.

The DWP is not proceeding with any changes to the restrictions regarding bulk transfers between stakeholder schemes.

View the consultation paper.

View the Draft Amendment Regulations.

Comment

It has long been a concern that the current regime, which was designed for DB schemes, has not been suitable for the transfer of DC benefits. However, certain problems which have been foreseen in the integration of the proposed changes with existing pensions tax law have been notified to HMRC. It is hoped that these will be addressed before April 2018 and that the promised guidance for trustees will also be provided in good time.

The draft Pension Schemes (Application of UK Provisions to Relevant Non-UK Schemes) (Amendment) Regulations 2018

The Government has published the above draft regulations for consultation by *December 15, 2017*.

Changes are proposed to the overseas pension scheme rules to determine how funds benefiting from UK tax relief are calculated and how the amount subject to UK tax charges is reduced.

The changes are necessary following introduction of the

- Overseas transfer charge from March 9, 2017.
- Revised member payment provisions from April 6, 2017.

The draft regulations include provisions relating to the following

- Calculation of the new “ring-fenced transfer fund”.
- Calculation of the new “ring-fenced taxable asset transfer fund”.
- Rules determining the order in which the reductions are made.

View the draft regulations.

View the explanatory memorandum.

Draft National Employment Savings Trust (Amendment) Order 2018 – DWP consults on changes to NEST

The DWP is consulting on proposed changes to the National Employment Savings Trust (NEST), the aim being to improve the operation and facilitate effective development of the scheme. Responses are requested by *November 27, 2017* and the intention is that the changes will come into force on *April 1, 2018*.

The proposed changes under the new Order are to

- Allow participating employers to contractually enrol their employees in the NEST pension scheme. Current provisions allow the NEST Trustee to accept workers who have been contractually enrolled or have joined by another form of consent *before* their employers’ staging date, but not afterwards. Staging is due to end in February 2018, so this change will allow employers to choose NEST for their entire workforce if they wish.

- Clarify that individuals may join NEST in the event of a “bulk transfer with consent” and require that any amount must be applied to a member’s account as a result of a bulk transfer. This is to complement the existing “bulk transfer without consent” joining event that has been effective from April 1, 2017.

In addition, the DWP is also proposing to

- Give the NEST Corporation the ability to close members’ pension accounts (following advance written notification to the member) where they have been open for longer than 12 months and have never received contributions.

- Require the NEST Corporation to carry out research with scheme members and participating employers and their representatives, in connection with the operation, development or amendment of the scheme.

View the consultation paper.

NEST Corporation consults on rule changes

The NEST Corporation is consulting on changes to its rules, which are intended in part to reflect those changes proposed by the DWP (see above).

The NEST rule changes would

- Allow for contractual enrolment and enrolment with consent on a bulk transfer.

- Give the NEST Corporation the ability to end the participation of “dormant” employers who have stopped contributing to NEST.

- Streamline the current rules regarding death benefits, so that they provide for death benefits to be paid as a lump sum irrespective of whether a member died before or after reaching the age of 75.

- Allow members to opt into a discretionary regime for the payment of death benefits, where they are concerned about the impact of inheritance tax (IHT). At the moment, death benefits are payable under a binding nomination process, meaning they form part of a deceased member’s estate for IHT purposes. The NEST Corporation acknowledges that the removal of the annual contribution limit and abolition of restrictions on transfers-in are likely to lead to higher pension pots in the long term, meaning some members may wish to take steps to ensure their pots do not attract IHT. The proposed amendments will allow these members to complete an expression of wish form instead of making a binding nomination, resulting in death benefits being paid on a discretionary basis and therefore outside the member’s estate.

The consultation runs until *December 29,2017*. Most of the planned changes are likely to be brought into effect in *April 2018*, though the new opt-in discretionary death benefit regime is likely to be delayed until later in 2018 to give the NEST Corporation time to adjust its processes.

View the consultation paper.

Smith v Sheffield Teaching Hospitals NHS Foundation Trust [2017] – High Court allows member's appeal over Pensions Ombudsman's award for non-financial loss

The High Court has allowed a member's appeal against an award of £500 by the Deputy Pensions Ombudsman (DPO) for non-financial loss caused by maladministration, holding that in the circumstances, the DPO's award resulted from an error of fact and/or principle.

The Court decided that in setting the award at £500, the DPO had concluded that there was only one instance of maladministration when the evidence showed a chain of inaccurate pension estimates and summaries each overlooking a key aspect of the member's entitlement, and each constituting maladministration. The number of instances was material to the likely level of distress.

A second ground of appeal, that the DPO was wrong in law in finding that the maladministration had not caused financial loss, was rejected.

What is non-financial injustice?

According to the PO's guidance, non-financial injustice is

- "Inconvenience" or "time and trouble" or "time and bother" suffered by an applicant. That is the time and effort spent by an applicant in relation to the maladministration and in having to pursue their complaint, including needing to go through a complaints process where the maladministration was both avoidable and identifiable at an earlier stage.

- "Distress", for example, concern, anxiety, anger, disappointment, embarrassment or loss of expectation that an applicant may experience. Distress can vary from mild irritation to (exceptionally) anxiety that requires medical treatment.

The non-financial injustice suffered must be caused directly by the maladministration.

Background

The power of the Pensions Ombudsman (PO) to make awards for distress and inconvenience has been accepted by the Courts. There is no statutory cash limit on the compensation the PO can award, although the PO's own guidance (published in June 2015) notes that the usual starting point for awards for non-financial injustice would be £500 and that in most cases, redress was likely to range from £500 to £1,000.

In *Swansea City Council v Johnson* [1999], Hart LJ held that the proper level of an award for distress was a matter of law and that, in the absence of exceptional circumstances, such awards should not exceed £1,000. However, in *Baugniet v Capita Employee Benefits Ltd (t/a Teachers' Pensions) and another* [2017], the judge commented that the upper limit of £1,000 for maladministration falling short of exceptional was "out of touch with the value of money" and urged the PO to rebase the upper limit at £1,600 (the present sterling equivalent of £1,000 in 1998).

Awards for financial loss in excess of £500 continue to be rare, but there have been higher awards in certain cases since *Swansea*, for instance

Lambden

In February 2011, the PO made an award of £5,000 for distress and inconvenience held to be caused by overstating the number of years of a member's service and communicating the mistake insensitively. This was seen as "highly exceptional" compensation for distress.

Payne
In May 2013, the DPO made an unusually high award of £2,500 for distress and inconvenience relating to the scale of difference between accurate and inaccurate pension illustrations supplied to the member, which she said was "critical" to his decision to take voluntary redundancy.

Tuttle
In September 2013, an award of £1,000 was made by the DPO in a similar situation relating to a wrongly unreduced benefits quotation for early retirement.

Hudspith
In August 2014, the DPO also awarded £1,000 as a result of a flawed decision-making process relating to an ill-health early retirement application, which included two rounds of applications and three rounds of internal dispute resolution procedures.

Facts

Mrs Smith was a member of the NHS Pension Scheme, employed by Sheffield Teaching Hospital (Sheffield Teaching) as a part-time healthcare support worker. This role qualified her for "special class status" (SCS) under the scheme which conferred an entitlement to retire at 55 on a full pension (instead of the normal pension age of 60) if certain conditions were met. These conditions included that the member must not have a break in pensionable employment of more than five years and must be in an SCS role during the five years' pensionable employment immediately before retirement. Mrs Smith combined this role with a part-time position as co-ordinator for Sheffield Children's NHS Foundation Trust (the Foundation Trust). The co-ordinator role did not confer SCS.

In November 2008, Mrs Smith was elected to a new role as Staff Side Chair at the Foundation Trust. This role did not confer SCS status but Sheffield Teaching agreed to second her from her position as healthcare support worker to the new role and to accept her back as a healthcare support worker. Her position as co-ordinator and Chair for the Foundation Trust did not qualify for SCS, but she was advised by her employer that, provided she did not have a five-year break away from Sheffield Teaching, she would retain her SCS status. This information was incorrect as it overlooked the requirement that she must spend the whole of the last five years of pensionable employment in an SCS role.

In August 2010, Mrs Smith again asked her employer about her pension entitlement. A handwritten pension estimate was produced which confirmed what her entitlement would be if she retired at age 55 with SCS status. She also asked how long she would have to be back in her "special class job" before she could apply for her pension and was informed "the least time we would recommend is a week but the choice is yours as long as the five years isn't exceeded". Again, this was incorrect as it ignored the requirement to be in an SCS role for the last five years' pensionable employment.

After 4 years and 11 months in her role as Chair and approaching her 55th birthday, Mrs Smith resigned and reverted to her SCS role as healthcare support worker. In March 2014 she was made redundant from her co-ordinator role and received a redundancy payment of £18,600. In April 2014 she went on long term sick leave from her healthcare support worker role.

She requested a pension quotation in May 2014 which was again calculated on the basis that she had SCS status with a normal retirement age of 55. She then applied for her pension. However, when it came into payment, the annual pension and lump sum were both less than the quotations she had been given. This was because she did not in fact qualify for SCS because she had not been in an SCS role for the five years immediately before retirement. Her normal pension age was therefore 60, not 55.

Mrs Smith complained to Sheffield Teaching arguing that in deciding to retire she had relied on the quotation informing her that she would receive a SCS pension from her 55th birthday. Had she been given the correct information, she submitted that she would not have retired and would have stayed in employment.

Sheffield Teaching acknowledged the distress which the incorrect information had caused and offered Mrs Smith £5,000, which she did not accept. Instead, she complained to the PO.

DPO's determination

In February 2017, the DPO found that the advice given in August 2010 was a clear and unequivocal representation that Mrs Smith could draw her pension on SCS terms so long as she was back in her SCS role at the time she applied for it. This was incorrect and amounted to maladministration. Mrs Smith relied on this information in resigning her position as Chair in February 2014 since she believed that by doing so, she would be preserving her SCS status.

However, Mrs Smith had not demonstrated that she had suffered financial loss as a result. Had she continued in her role as Chair, she would not have received the redundancy payment. It was also likely that she would still have retired in August 2014 at age 55, since that appeared to be her long term aim. Had she retired in August 2014 from her position as Chair and co-ordinator, her pension would have in fact been lower. The DPO concluded that since Mrs Smith had received both a substantial redundancy payment and a higher pension and lump sum than would have been payable in the counterfactual scenario, she had not demonstrated that she had suffered financial loss.

The DPO awarded £500 for distress and inconvenience.

Mrs Smith appealed to the High Court on two grounds

- That the DPO was wrong in law in finding that the maladministration had not caused financial loss.

- That the DPO was wrong in law to award only £500 as compensation, the figure being so low as to be perverse and unreasonable.

Decision

The Court dismissed the first ground of appeal. Whilst not everyone would have reached the same conclusion as the DPO, her finding that Mrs Smith had not demonstrated that she had suffered financial loss could not be described as lacking any evidential foundation or as perverse or irrational.

The second ground of appeal was allowed. The Court was satisfied that the DPO had made an error of fact and/or principle in awarding only £500 for distress since

- Here had been more than one instance of maladministration, but the DPO had found only one instance. The evidence showed a chain of pension estimates and summaries of the position, each of which overlooked the need for five years' pensionable employment in an SCS post immediately before retirement. Each of these constituted maladministration and the number of instances of maladministration was material to the likely level of distress.

- Distress at learning that the information provided over a six-year period had been inaccurate is likely to be of a different order from that occasioned by a single instance.

- Mrs Smith's distress and uncertainty was prolonged during a four-month period when those responsible for her pension debated her entitlement to a full or reduced pension.

- The level of offer (£5,000) made by Sheffield Teaching demonstrated an employer's understanding of the level and duration of distress (though the Court accepted that it undoubtedly included other elements).

The Court held that "an award of £500 (effectively, the starting point for awards) must in these circumstances embody an error of fact and/or of principle". It held that the award should be above the top end of the normal band (which the Court considered to be £1,600) because of the number of opportunities there were to correct the misinformation, the relative ease at which the true position could have been ascertained and the period through which the maladministration persisted.

Exercising the compensating power afresh, the court awarded Mrs Smith £2,750. The fact that she did not suffer financial loss should not reduce this award, there being "no logical connection" between the amount of the financial loss and the size of the award for distress.

Comment

This case demonstrates that the PO is sometimes prepared to award higher sums in circumstances where the member has suffered considerable distress. Although the amount awarded by the Court was less than the amount the employer had originally offered to settle the dispute, it is significantly more than the amount awarded by the DPO. It is also interesting that the judge in this case appears to have taken the upper limit of awards to be £1,600, the amount suggested by the judge in *Baugniet*.

The case gives an indication for schemes of the factors considered relevant when deciding where on the scale an award should fall. In this case, the repeated provision of incorrect information over an extended period of time where the true position could have been ascertained relatively easily were all key.

Nevertheless, in less severe cases, the PO will adhere to the more usual ceiling of £500, as in the case below.

Mr Y – DPO determines that non-financial loss award to be calculated on cumulative effect of errors and not each error individually

In the most recently published determination where there was an award for non-financial loss (October 26, 2017), the DPO upheld a complaint where a scheme administrator failed to complete the member's transfer as requested, instead only transferring a proportion of the funds. On rectifying the mistake, the administrator made a subsequent error in failing to backdate the transfer.

After the member complained to the PO, the administrator had backdated the payment and calculated the financial loss suffered by reason of the delayed transfer. The member was compensated for that amount. The DPO found that this element of the complaint had therefore been resolved.

With regard to the member's non-financial loss, the DPO held that her award should be calculated with regard to the cumulative effect of the respondent's errors and not for each error in turn, as the member had submitted. The DPO did not agree that the member should be awarded a higher sum and noted that non-financial loss payments are "not intended to punish". As such, the DPO found that £500 was reasonable in the circumstances and directed that respondent pay the member £500 for the distress and inconvenience suffered.

Comment

Although this case involves relatively small amounts in comparison to the High Court's decision in *Smith* above, the DPO's comments regarding awards for non-financial loss are interesting. In particular, she rejected the member's contention that each element of maladministration should be treated separately when assessing awards for distress and inconvenience, and made clear that such awards are based on an overall assessment of the complainant's position.

The principal issue for schemes is whether these comments are consistent with the *Smith* decision, where the Court found an award of £500 made by the DPO for distress and inconvenience was inadequate and increased it to £2,750. The Court's ruling was motivated in part by the fact there had been several instances of maladministration and, according to the judge, "the number of instances of maladministration is material to the likely level of distress" and it seems this will be assessed on a case by case basis.

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