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Essential pensions news

Updater

October 2015

Introduction

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

VAT and pension schemes: HMRC announces extension of the transitional period until December 31, 2016

Of interest to employers providing defined benefits is HMRC's latest Brief published on October 26, 2015, extending to *December 31*, 2016 the transitional period during which employers may seek to change existing arrangements to maximise their potential for VAT deduction. HMRC states that it intends to publish guidance 'later this year'.

View the Brief.

View our April 2015 update for background information.

In addition to announcing a 12 month extension to the transitional period, the Brief provides an update on HMRC's position on possible arrangements for employers to achieve VAT deduction on the costs of administering occupational pension schemes.

Although its position on tripartite agreements has not changed, HMRC acknowledges some of the concerns raised about the implications such arrangements may have for employers' corporation tax deductions. HMRC says that it is still considering representations which it has received in relation to asset management services and whether there are alternative tripartite structures that would enable a corporation tax deduction. Further guidance will be issued this year.

Chancellor to delay announcement on tax relief reforms until the Budget 2016

Of general interest is the confirmation that the Chancellor will not be making any major announcements concerning pension tax relief in the Autumn Statement in November 2015, and that he has been persuaded to take more time to consider further radical reforms. It is now likely that the relevant announcement will be made during the Chancellor's Budget Speech in Spring 2016.

State Pension top-up opportunity for those reaching State Pension Age before April 2016

Of interest to all individuals reaching State Pension Age before April 6, 2016 is the top-up facility via 'Class 3A' national insurance contributions, which can be made to secure additional State pension of up to £25 per week.

Details are available on the Department for Work and Pensions (DWP) website, along with updated guidance for advisers and fact sheets for individuals on the new state pension top-up scheme.

The DWP has also published a new *State Pension top up* booklet, which explains the new state pension top-up scheme for those who may be entitled to it.

The top-up scheme will remain open for 18 months.

PPF publishes draft levy determination for 2016/17 – information submission dates and 'last man standing' certification

Of interest to all DB schemes is the Pension Protection Fund's (PPF's) publication of its draft levy determination for 2016/17. This includes updated contingent asset guidance, together with deadlines for submission of information for calculation of the 2016/17 PPF levy. The consultation closed at *5pm on October 22, 2015*.

The draft determination also highlights the PPF's intention to re-invoice schemes that have incorrectly identified themselves in the past as 'last man standing' schemes, and which, as a result, have benefitted from reduced levy payments.

Information submission deadlines for calculation of the 2016/17 levy

PPF-eligible schemes should check their insolvency scores and diarise the relevant deadlines for submitting data and documents to the PPF. In particular, they should note the deadline for submitting certain items has been moved from *5pm to midnight on March 31, 2016* to align the position with the equivalent deadline for reporting to TPR.

The key dates for the various major reporting requirements are set out below.

Reporting requirement	Deadline
Monthly Experian Scores to be used in the 2016/17 levy	Between April 30, 2015 and March 31, 2016
Deadline for providing updated information (to Experian) to impact on Monthly Experian Scores	One calendar month before the 'Score Measurement Date'
Submit scheme returns on Exchange	By Midnight on March 31, 2016
Reference period over which funding is smoothed	Five- year period to March 31, 2016
Certification of contingent assets	By Midnight on March 31, 2016
Certification of asset backed contributions	By Midnight on March 31, 2016
Certification of mortgages (emailed to Experian)	By Midnight on March 31, 2016
Certification of deficit-reduction contributions	By 5pm on April 30, 2016
Certification of full block transfers	By 5pm on June 30, 2016
Invoicing starts	Autumn 2016

Re-invoicing of incorrectly identified 'last man standing' schemes

The PPF has announced its intention to re-invoice schemes that incorrectly identified themselves in the past as 'last man standing' (LMS) schemes and therefore benefited from a reduced levy. Following the PPF's request that LMS schemes should confirm their legal status by May 29, 2015, it has emerged that a number of schemes incorrectly classified themselves as LMS schemes in past years and received levy reductions by virtue of the application of a 'scheme structure factor'.

Where a scheme has incorrectly benefited from a reduced levy for previous years, the PPF indicates that it will re-invoice the scheme for levy arrears 'where it is economic to do so'. The consultation paper notes that the category of affected schemes includes some very large schemes, for which the levy reductions have been substantial.

In relation to schemes that chose not to take legal advice (or did not respond to the PPF's request for information), the PPF will give such schemes a further opportunity to report on the issue through their forthcoming scheme return. Schemes will also be given the opportunity to show they were correctly treated as an LMS scheme before they are re-invoiced.

Comment

Following the introduction of the new approach in 2015/16 on how ABCs are valued, the PPF has amended its guidance to clarify it is seeking a 'light touch' approach to recertifying arrangements that were previously certified for 2015/16. For example, a previous valuation and legal opinion can be updated rather than new material produced.

As far as any incorrect LMS certifications are concerned, where the PPF seeks payment of substantial amounts for underpaid past levies, it would be unsurprising to see such cases being referred to the PPF Ombudsman.

DC pension flexibility – House of Commons Work and Pensions Committee calls for reform on guidance and advice

On *October 19, 2015*, the Work and Pensions Committee of the House of Commons published a report examining the guidance and advice that is available for individuals taking advantage of the new pension freedom options.

The report's key recommendations are set out below.

- The Government is urged to publish quarterly statistics, as there is a dearth of data about Pension Wise and an absence of research tracking consumer outcomes. The range of information for each customer should include pension pot size, other sources of retirement income, and the decisions ultimately made.
- The Pension Wise website should be made more interactive and offer personalisation features. The requirements on providers to signpost Pension Wise to those approaching retirement should be strengthened in light of evidence presented to the committee suggesting lower than anticipated take-up.
- The Government should bring forward a timetable for introducing a 'pensions dashboard' that would allow individuals to see all their pension pots in one place.
- As confusion is widespread among consumers, the Government and the FCA should clarify the distinction between 'advice' and 'guidance' as part of the financial advice market review (FAMR) launched in August 2015. The FAMR should also clarify the definition of 'safeguarded benefits' (where advice is required on transfer), particularly in relation to guaranteed annuity rates. The committee received evidence that industry practice varies greatly, with some providers requiring advice even where this was not necessary as a matter of law.
- While the FAMR's main priority should be devising measures to close the 'affordable advice gap' for consumers, it should also consider whether further protections are needed for advisers in relation to insistent clients. However, the committee was not persuaded on the merits of providing regulatory 'safe harbours' from liability that would be available so long as advisers followed prescribed steps.

In the longer term, the committee plans to keep a watching brief over the development of the pension freedoms. As well as returning to issues concerning advice and guidance, it may investigate charging levels at a future date.

View the report.

FCA consults on proposed changes to its rules and guidance in light of the new pension flexibilities

On *October 1, 2015*, the Financial Conduct Authority (FCA) published a detailed consultation paper (CP15/30 – 139 pages) on the changes it proposes to make to its rules and guidance in the light of the new pensions environment allowing savers to access their pensions funds flexibly once they reach age 55.

The consultation closes to responses on *January 4, 2016*, although those who wish to comment on the shape and scope of the retirement outcomes review are invited to do so by *October 30, 2015*.

Overview

Over the past six months, the FCA has been reviewing its existing pension rules and guidance against its operational objectives. In CP15/30, it:

- sets out its expectations about how its existing rules and guidance operate in the new flexible environment, providing illustrative examples
- brings forward proposals for further changes to the FCA Handbook, to address the risks and challenges faced by consumers in the new retirement market
- requests views on the range of information it intends to examine under a new retirement outcomes review, to be launched in early 2016
- invites discussion on areas where it is minded to carry out further work.

The proposed rules are set out in a draft version of the Conduct of Business (Pensions Supplementary Rules) Instrument 2015, which is included as Appendix 1 to CP15/30.

The FCA will consider the feedback received to CP15/30 and publish final rules in a policy statement at the beginning of the second quarter of 2016. For the areas where the FCA is seeking views with the intention of developing regulatory policy, the FCA's next steps will be outlined in this policy statement.

In relation to the retirement outcomes review (set out in Annex 2 to CP15/30), the FCA will consider the feedback received before publishing the terms of reference and launching the review.

The FCA is aware that the market is still adapting and developing in the light of the pension reforms introduced by the government and through the consequential changes to regulation. It will continue to monitor the market and, where necessary, consider further changes to the FCA Handbook as a result of market developments.

Summary of the FCA's proposals

The FCA's key proposals in CP15/30 fall into the three categories below, which replicate its operational objectives:

Promoting competition

- Communications concerning accessing pension savings. The FCA proposes additional guidance to ensure that, in the new pensions environment, firms understand the FCA's requirements when communicating with their customers about accessing their pension savings. It also proposes additional rules and guidance requiring timely, relevant and adequate information to both encourage consumers to explore the full range of options for accessing their pension savings, and to enable informed decision-making about their options for accessing pension savings at retirement and beyond.
- Pension freedoms communications. The FCA proposes to make new rules on the methodology for providing illustrations to members wishing to access their pensions flexibly, including adding guidance to set out the type of ongoing information consumers are provided with once they start accessing their pension savings but still remain invested.

It also proposes to extend the rules and guidance in chapter 9 of the Conduct of Business sourcebook (COBS) to uncrystallised fund pension lump sums (UFPLS).

- Self-invested personal pension (SIPP) retained interest. The FCA proposes to clarify that SIPP retained interest charges should be included in projections and charges information.

Ensuring the market works well

- Design and distribution of retirement income products and facilities for accessing pension savings. The FCA proposes to remind firms of their obligations regarding the operation, distribution and communication of existing products, as well as when developing new products. It intends to set out some example scenarios to help firms in this area.

- Retirement risk warnings. The FCA proposes to retain its rules on the retirement risk warnings. It also proposes to remove the requirement for a firm to go through the question and answer process of the rules when a consumer has a pension pot of £10,000 or less and where there are no safeguarded benefits. In this situation, firms will still be required to give appropriate risk warnings.

Protecting consumers

- Cancellation rights. The FCA considers that the way in which its rules apply in the new pensions environment has not changed and, in many cases, cancellation rights will apply because an existing contract is being varied or a new contract put in place. CP15/30 explains that the FCA believes the risk that a consumer enters into an arrangement whose features, risks and consequences they do not fully understand should be mitigated by other measures, for example the availability of guidance from Pension Wise and the retirement risk warning rules.

  The FCA will monitor the market and, where necessary, take action. It welcomes views from stakeholders as to whether its cancellation rules expose some consumers to risks that are not appropriately mitigated and how the FCA might reduce those risks and improve consumer outcomes.

- Restrictions on the promotion and distribution of high risk investments. The FCA proposes to amend its ‘high net worth investor’ (HNWI) and ‘restricted investor’ (RI) certification criteria so it is clear that:

  — lump sum pension withdrawals, that are not intended to serve as income in retirement, are expressly excluded from the HNWI income criteria

  — net investable assets for the purposes of HNWI and RI certification excludes money released as cash from pensions (in addition to current exclusion of money held in pensions), where it is not intended to serve as income in retirement.

- Using pension savings to repay debt. The FCA proposes to add Handbook guidance to make explicit the application of existing rules in the Consumer Credit sourcebook (CONC), in the context of pension reforms, particularly in relation to debt collection and debt advice. It will also remind debt collection and advice firms that advising on the conversion or transfer of pension benefits is a regulated activity.

- Attachment orders. The FCA proposes to add Handbook guidance for providers and advisers on pension attachment orders following divorce or dissolution of a civil partnership.

- Determining maximum projection rates. The FCA proposes to standardise the methodology for determining maximum projection rates.

- Projections including guarantees. The FCA proposes to require firms to show contractually obliged future values in projections, including Guaranteed Annuity Rates.

- Projecting a future annuity: mortality assumptions. The FCA proposes to update references in its rules to the 2008 mortality tables and proposes that, in future years, firms use the improvement factors published the previous year.

- Glossary amendments. The FCA proposes to amend the Glossary definitions of ‘income withdrawals’, ‘short-term annuity’ (and, by consequence, ‘drawdown pension’) to ensure its rules align with relevant legislation.

Areas where the FCA is minded to carry out further work

The FCA welcomes comments on the following areas, where it is minded to carry out further work:

- remuneration for arranging the sale of non-advised annuity purchases

- reminding firms of their responsibilities to ensure lifestyling investment strategies remain appropriate in the new environment and to provide customers with sufficient information to make an informed decisions on their investments

- updating FCA rules on transfer value analysis

- possible future changes to the FCA’s key features illustrations and existing business projections or other information prepared

- the degree of Financial Services Compensation Scheme protection afforded to consumers who choose to invest their pension savings in non-insurance based products, as compared to the protection provided to those who invest through a life insurance contract.

Retirement outcomes review (Annex 2)

Annex 2 to CP15/30 outlines the scope and aims of the retirement outcomes review the FCA intends to carry out, to build on the work of its retirement income market study published in March 2015, which identified a number of risks to consumers making good decisions on a product or strategy to generate an income from their pension savings.

The FCA is keen to understand whether these risks have become more or less acute in the new pensions landscape and to examine these risks through its retirement outcomes review.

The first six months of post-reform market data will be used to inform the FCA’s view of how the pension reforms have affected the market in practice. Its initial thinking is that the review is likely to consider issues such as product innovation and charging structures, and the impact of the reforms on competition and switching in the market, including whether they have reinforced the grip of incumbent pension providers in the market.

The key issues for the review that the FCA has identified are:

- product options, features, charges and access
- consumer decision making
- impact of advised and non-advised distribution channels.

The FCA plans to launch the retirement outcomes review in early 2016, with the publication of the terms of reference. The key measurements will include product choices made by consumers, product charges, new and planned product options, sales by distribution channel, market shares and firm marketing data.

Before publishing the terms of reference and launching the retirement outcomes review, the FCA will be meeting interested stakeholders and seeking written comments on the possible shape and scope of the review. Comments should be provided by *October 30, 2015*.

Next steps

Having considered feedback received, the FCA will publish final rules in a policy statement at the beginning of the second quarter of 2016. For those areas where the FCA is seeking views with the intention of developing regulatory policy, the FCA will outline its next steps in this policy statement.

In relation to the retirement outcomes review, the FCA will consider the feedback received before publishing the terms of reference and launching the review in early 2016.

The FCA is aware that the market is still developing and it will continue to monitor the market and, where necessary, consider further changes to the FCA Handbook as a result of market developments.

A table on page 13 of CP15/30 indicates that the FCA intends that final rules and guidance will come into effect within various time-frames between 0–12 months, once the final rules made by the FCA board and the policy statement have been published.

Abolition of DB contracting-out: HMRC publishes countdown bulletin no. 10

In the latest edition of its Countdown bulletin published on *September 30, 2015*, HMRC includes a reminder that scheme administrators must register for HMRC's scheme reconciliation service by *April 5, 2016* in order to use it. There are also several technical tips on using the service.

In addition, HMRC reminds administrators that from *April 6, 2016* it will no longer track contracted-out rights. Formerly contracted-out schemes will no longer need to advise HMRC of any changes in their membership taking place after that date, though they will be obliged to keep track of such changes themselves.

HMRC also makes clear that, contrary to recent press reports, it has yet to decide whether the communications planned to be sent to individuals with GMP rights during 2018 will contain details of specific GMP amounts.

View the Countdown bulletin.

HMRC issues pension schemes newsletter no. 72: lifetime allowance protection, death benefits and Scottish rate of income tax

Issue no. 72 of HMRC's pension schemes newsletter includes information on the lifetime allowance and the new protections available, changes to the tax treatment of death benefits and scheme annual returns.

- Lifetime allowance – the legislation enacting the two forms of lifetime allowance (LTA) protection that will be available when the LTA is reduced to £1 million in April 2016 will not be in force until after the tax year has started.

  HMRC suggests that members considering claiming 'fixed protection 2016' should start thinking now about what arrangements they need to make to stop accruing benefits after *April 5, 2016*. HMRC plans to provide further information about the new regime soon, but meanwhile indicates that the claim process will be entirely online, with claimants receiving a protection reference number rather than a certificate.

- Death benefits – given the impending changes to the tax treatment of death benefits being enacted in the Finance (No. 2) Bill 2015, from *April 2016* scheme administrators will no longer be required to report taxable lump sum payments through the Accounting for Tax return. They should instead use the real-time information (RTI) system that applies to PAYE. RTI reporting must also be used for income payments under the various forms of beneficiaries' annuities and drawdown that are now permitted.

- Annual returns – HMRC is keen to ensure it has full and accurate relief at source (RAS) records in advance of the introduction of the Scottish rate of income tax (SRIT), due to come into force in *April 2016*, when the Scottish Government will be able to levy an element of its own tax. Schemes operating RAS which did not submit their annual returns by the deadline of *October 5, 2015* will have further interim payments of tax relief stopped from November pending submission of a return.

View newsletter no. 72.

HMRC issues pension schemes newsletter no. 73: SRIT, annual allowance pension flexibility, LTA reduction

Issue no. 73 of HMRC's pension scheme's newsletter was published on *October 23, 2015* and includes information on SRIT, the annual allowance, pension flexibility, the LTA reduction and individual protection 2014.

- SRIT – further to newsletter 72, HMRC has created a Scottish rate news page which it intends to update regularly.

- Annual allowance – HMRC asks schemes to remind members who have exceeded the annual allowance of £40,000 for 2014 – 2015 to declare this on their self-assessment tax return. It reminds members to use the online annual allowance calculators to work out their carry-forward relief, if required.

- Pension flexibility – more information is available on how administrators should tax lump sum death benefits through PAYE.

- LTA reduction – individuals wishing to rely on Individual Protection 2016 (IP2016) and Fixed Protection 2016 (FP2016) need to apply for protection *before* they take their benefits as they will need the HMRC reference number in order to rely on the protection. This means the application should be made before any benefits are taken on or after *April 6, 2016*.

Individuals can still apply online for IP2014 to protect any pension savings built up before *April 6, 2014* from the LTA charge (subject to an overall maximum of £1.5 million).

View newsletter no. 73.

HM Treasury consults on public financial guidance

On October 12, 2015, HM Treasury (HMT) published a consultation paper on the public provision of free-to client, impartial financial advice. The paper focuses on the roles of the various advisory services and considers the current service provision relating to debt advice, pensions guidance and money guidance. The consultation closes on *December 22, 2016*.

In the consultation paper, HMT focuses on the roles of the Money Advice Service (MAS), Pension Wise and the Pensions Advisory Service (TPAS). It considers service provision in relation to the areas below.

- Debt advice. HMT seeks views on the MAS' role relating to debt advice and asks what additional or alternative functions and structures a statutory body could put in place to co-ordinate debt advice provision.

- Pensions guidance. HMT highlights the current crossover between the MAS, Pension Wise and TPAS on the provision of public financial guidance concerning pensions and suggests that there may be an opportunity to rationalise the delivery of statutory pensions guidance.

- Money guidance and financial capability (that is, consumers' ability and motivation to understand and take control of their financial affairs and make financial decisions). HMT seeks views on the MAS' statutory objectives and the role, if any, that a statutory body should have in providing general money guidance and in supporting financial capability.

Views are also sought on whether a more cohesive approach could be taken and the extent to which public financial guidance could be rationalised. It suggests that there may be options for alternative models for the provision of public financial guidance, such as a government-backed voucher scheme for financial guidance sessions with accredited partners.

The consultation follows on from the independent review of the MAS that published recommendations in March 2015. It also stems from the need to identify a long-term home for Pension Wise (which will move in the short term from HMT to the DWP) and to ensure a more joined-up relationship between Pension Wise and TPAS.

The deadline for responses is *December 22, 2015*. HM Treasury will report on the outcome of the consultation before Budget 2016, at the same time that it publishes recommendations on the financial advice market review.

View the consultation paper.

NAPF becomes PLSA after re-branding exercise

The National Association of Pensions Funds (NAPF) has announced that it is rebranding as the Pensions and Lifetime Savings Association (PLSA). The PLSA will adopt a wider focus now that the lines between work and retirement, pensions and other forms of savings, and scheme and saver responsibility are blurring.

The change is symptomatic of the emergence of less defined boundaries between pension schemes and other forms of savings and assets being earmarked for retirement income. The PLSA explains that it considered the change of name desirable, as it represents a clearer description of what the organisation is and what it will be in future.

It will continue to publish its 'Made Simple Guides', the most recent titles being *Diversified Growth Funds, Foreign Exchange and Better Data, Better Governance*, which are now available on the PLSA website.

The draft Pensions Act 2014 (Abolition of Contracting-out for Salary Related Pension Schemes) (Consequential Amendments) Order 2016

Contracting-out on a salary-related (defined benefit) basis is being abolished on *April 6, 2016* when the new single-tier state pension is introduced. The DWP is consulting on a further series of technical changes to existing secondary legislation and the consultation period ends on *November 16, 2015*. The DWP plans to consult separately in due course on several further aspects of the new rules regarding the protection afforded to accrued rights in formerly contracted-out schemes.

Background

When defined contribution (DC) contracting-out was abolished in 2012, former 'protected rights' lost their special status. In contrast, accrued contracted-out rights in defined benefit (DB) schemes will continue to be protected after *April 6, 2016*, whether in the form of guaranteed minimum pensions (GMPs) or section 9(2B) rights. Therefore, in the run-up to abolition, the DWP is putting in place the necessary secondary legislation to ensure protection for accrued contracted-out rights. Earlier this year, the DWP finalised two main items of legislation that will govern the post-6 April 2016 environment:

- The Occupational Pension Schemes (Schemes that were Contracted-out) (No. 2) Regulations 2015 (the Schemes that were Contracted-out Regulations). These regulations, which were made following discovery of a parliamentary procedure error in the original version, set out the rules which schemes that were contracted-out will need to comply with following abolition.

- The Pensions Act 2014 (Savings) Order 2015. This instrument preserves a number of provisions in the Pension Schemes Act 1993 (PSA 1993) on or after *April 6, 2016*, in some instances indefinitely.

When its consultation response in relation to the above two instruments was published in July 2015, the DWP indicated it plans to revoke the Occupational Pension Schemes (Contracting-out) Regulations 1996 with effect from April 6, 2016. In addition, the DWP promised further consultation on a range of areas including how the rules will operate in relation to transfers between formerly contracted-out schemes, and the future treatment of schemes containing reference scheme test underpins.

The proposed changes

The draft Pensions Act 2014 (Abolition of Contracting-out for Salary Related Pension Schemes) (Consequential Amendments) Order 2016 (the 2016 Order) sets out provisions coming into force on *April 6, 2016* and succeeding years. The majority of the amendments are minor, and include amending definitions and changing tenses in various regulations, so that they continue to work post-abolition. However, of particular significance are the following points:

- The DWP proposes to change the 'connected employer' test in respect of the transfer of accrued rights without member consent under the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991.

- The definition of section 9(2B) rights in regulation 2(1) of the Schemes that were Contracted-out Regulations will be amended so that it no longer refers to section 9(2B) of the PSA 1993, as this provision will be repealed on April 6, 2016. Instead, the definition will refer to 'rights to the payment of pensions and accrued rights to pensions (other than rights attributable to voluntary contributions) under a scheme that was a salary-related contracted-out scheme'.

- Transfers between formerly contracted-out schemes – amendments to the Contracting-out (Transfer and Transfer Payment) Regulations 1996 are intended to ensure that transfers between formerly contracted-out schemes continue to be protected. Broadly, these provisions allow a transfer if the member acknowledges in writing that the benefits in the receiving scheme may be in a different form from those payable in the transferring scheme.

- Disclosure of information – the requirement for schemes to inform members 'which relevant employment is, and which is not, contracted-out employment' is due to be revoked from *April 6, 2017* as the DWP considers that schemes will have notified members of the abolition of contracting out under the 'material change to basic information' requirements.

- Auto-enrolment – formerly contracted-out schemes will be required to retain their contracting out certificate for six years after *April 6, 2016* in order to evidence that they met the relevant quality standard in relation to auto-enrolment prior to contracting out abolition.

Comment

Most of the proposed changes detailed the draft 2016 Order appear uncontroversial. However, the new 'connected employer' test for the purpose of the preservation requirements will require closer examination. Although the DWP says the new wording 'follows the same lines' as the current version in the Contracting-out Regulations, it is different and it is possible issues could arise and may need to be tweaked in the run up to April 2016.

In addition, in its July 2015 consultation response the DWP indicated it planned to consult on changes to the Contracting-out (Transfer and Transfer Payment) Regulations regarding transfers from salary-related schemes to allow members to take advantage of the new DC pension flexibilities. This topic is not included in this consultation and there is no indication whether the DWP plans to return to it in future.

Walker v Innospec – Court of Appeal rules same sex survivors' pensions may be restricted to post-2005 service

In a decision of interest to all DB schemes, the Court of Appeal has ruled unanimously that the calculation of pensions for surviving civil partners may be restricted to the period of the member's service on and after December 5, 2005.

The decision will not be referred to the European Court of Justice, as the Court of Appeal was sufficiently confident of its interpretation of the law to consider the case settled at a national level. Neither will there be an appeal to the Supreme Court.

Background

In November 2012, an employment tribunal (ET) decision cast doubt on the Government's implementation of the Equal Treatment Framework Directive through the Equality Act 2010 (EqA 2010).

In *Walker v Innospec Ltd and others*, Mr Walker, a retired member of the Innospec pension scheme since March 31, 2003, claimed that Innospec Limited had discriminated against him in relation to his pension benefits, in that the Scheme provided a spouse's pension to a member's civil partner, but only in relation to service after December 5, 2005 (the date that the Civil Partnership Act 2004 came into force).

The employer relied on the exemption in paragraph 18 of Schedule 9 to the EqA 2010 (the Exemption), under which civil partners must be treated in the same way as spouses on the death of a scheme member, but only in respect of pensionable service completed after December 5, 2005. The ET ruled that the company had directly discriminated against Mr Walker in refusing to provide a spouse's pension in relation to service accrued before December 5, 2005, and that such discrimination was prohibited by the Framework Directive. Further, the Exemption should be interpreted compatibly with the Directive, so as to preclude the employer from relying on it. The ET's decision was that it is unlawful for pension schemes to provide anything other than a full survivor's pension as a benefit for civil partners.

However, this decision was overturned on appeal, with the Employment Appeal Tribunal (EAT) deciding that the Exemption *was* compatible with the Directive. The EAT considered that it could not be asked to 'legislate rather than interpret' so as to conclude that it was incompatible. To do so would be 'diametrically opposed to the thrust of the legislation in this particular respect and to the apparent intention of Parliament'.

The appeal was heard together with that of Mr O'Brien QC. Mr O'Brien was appealing a decision of the EAT that the calculation of his pension should take into account only that part of his service which occurred after the transposition into domestic law of the Part Time Workers Directive on 7 April 2000. This appeal was also unsuccessful.

The relevant EU law

The Court of Appeal (CA) considered that the first two relevant principles of EU law – and by law in this context, it meant legislation and rules – were the 'no retroactivity' principle and the 'future effects' principle:

- The no retroactivity principle is that EU legislation does not have retroactive effect unless, exceptionally, it is clear that the legislator intended such an effect.

- The future effects principle is that amending legislation applies immediately, unless otherwise specifically stated, to the future effects of a situation which arose under the law as it stood pre-amendment. In deciding what is meant by 'a situation which arose' under the old law, the critical issue is whether the legal effects of the situation in question have been exhausted before the change in the law. If they have, then the situation could be described as 'permanently fixed'. In a previous case, the Attorney General had given as an example that of a claim for compensation arising out of a traffic accident which was held to have become permanently fixed at the date of the accident.

Which of these principles applies in a given case depends on whether the situation has become permanently fixed before the implementation of a new law.

Lewison LJ mentioned a technique used to avoid the practical retroactivity of court judgments, and that the ruling of a court could only be relied upon in the future. This is a mechanism used by the CJEU where the court takes a view which upsets a widely held understanding of what the law had been previously and the practical consequences of retroactivity would be prejudicial. An example is the ruling in Barber where equality in pension benefits may be claimed only in relation to periods of service after the judgment on May 17, 1990.

The Court of Appeal judgment

The following arguments were made on behalf of Mr Walker:

- The act of discrimination on which Mr Walker's case was based was the refusal of the Scheme to confirm that his civil partner (now his husband) would be entitled to a full survivor's pension. The act took place after the Framework Directive came into force; consequently, the future effects principle applied.

- In previous rulings of the European Court of Justice (CJEU) – namely *Maruko* and *Römer* – it had been argued that a claim such as Mr Walker's was permitted by the Framework Directive, even though his period of service ended before it came into force.

- The prohibition on discrimination on the ground of sexual orientation is a fundamental principle of EU law. Therefore, the Exemption must either be read in such a way as to make it compatible with the Framework Directive or, if that was not possible, it (the Exemption) should be disapplied.

Lewison LJ gave the leading judgment in the Court of Appeal and held that:

- The Scheme's trustees could not confer on Mr Walker a benefit to which he was not entitled. At the time Mr Walker earned his entitlements under the Scheme when he was in service, the discriminatory treatment of which he complained was lawful. Under the principle of no retroactivity, conduct which was lawful when it occurred cannot retroactively become unlawful.

  Neither did the future effects principle apply because Mr Walker's entitlement to pension was permanently fixed as he earned it, and could not be enhanced after his retirement. His entitlements must be judged by reference to the EU law in force at the time of his service.

- Mr Walker's argument based on the CJEU decision in *Maruko* was dismissed as the CA could not see how it supported his appeal. The CA held that the *Maruko* judgment had considered the effect of the *Barber* judgment and not the effect of the coming into force of the Framework Directive and was 'an unnecessary answer to the wrong question'.

In *Römer*, the CJEU held that entitlement to equal treatment on the ground of sexual orientation did not become part of EU law until the expiry of the time limit for transposing the Framework Directive. The CA agreed with the EAT's earlier consideration of Römer that the enforcement of equal treatment ran not from the date of his contracting a registered civil partnership, but from the date that the law recognised the relevant discrimination was unlawful.

Neither *Maruko* nor *Römer* led the CA to conclude that the Exemption was incompatible with the Framework Directive.

- The nature of the entitlement to pension benefits was analysed in the EU case of T*en Oever*, in which the Attorney General concluded that what the employee acquires at the time of his service is a vested right to a future payment. It was the service itself that gave rise to the employee's pension rights. The extent of those rights should be determined on the basis of the law which applied at *the time of the period of service* on the basis of which those rights were acquired (Lewison LJ's added emphasis).

  Underhill LJ, in agreeing with the principal judgment, expressed the decision in his own words:

  'The right to pension arises, and becomes fixed, during the currency of the service to which it is referable. That right was, when it became so fixed, a right for a pension to be paid to the employee and to a surviving spouse of the opposite sex. Mr Walker retired on March 31, 2003, and ceased to accrue pension rights, before the change in the law effected by the Directive came into effect, and to change the character of those rights so that they included a right to have a payment made to a same-sex spouse would be to give that change retroactive effect.'

Comment

In dismissing Mr Walker's appeal, Underhill LJ acknowledged that 'Mr Walker and his husband will find this conclusion hard to accept. But changes in social attitudes, and the legislation which embodies those changes, cannot fully undo the effects of the past'. The differences in survivor's benefits for heterosexual and same-sex partners in this case are particularly pronounced as Mr Walker's husband will be entitled to a pension of £500 a year, whereas a surviving widow would have received £41,000.

While it will be of no comfort to Mr Walker's husband, pension press headlines stating 'schemes spared £3 billion' seem a little over-dramatic in their assessment of future benefits payable. Many schemes have, in fact, already equalised survivor benefits for all periods of service irrespective of the sexual orientation of the members to whom they apply.

The essential message from this judgment is that the courts are not prepared to manipulate legislation to give it retrospective effect, no matter how desirable and fair such a step may appear in a particular case.

Dutton and Others v FDR Limited [2015] – High Court finds in favour of members regarding pre-1991 increases

The High Court has found in favour of members in relation to an issue of interpretation of the pension increase provisions applying to pensions in payment.

Background

The FDR Limited Pension Scheme (the Scheme) was established in 1972 and originally provided for pensions in payment to be increased by a fixed rate of three per cent per annum. In June 1991, the Scheme's rules were amended by deed to provide instead that pensions in payment should be increased by the lesser of five per cent and RPI, purportedly in respect of past as well as future service.

The Scheme's power of amendment contained a proviso which prevented both pensions in payment and members' accrued rights from being affected prejudicially.

The parties agreed that the 1991 deed of amendment was valid in so far as it operated prospectively. However, where past service was concerned, the 1991 amendment infringed the proviso in the Scheme rules that any amendment should not affect adversely any pension in payment or accrued rights up to the effective date of the amendment.

The employer argued that members' rights in respect of pre-1991 service were protected by an underpin by which pensioners were entitled each year only to increases at the higher of either three per cent fixed and five per cent/RPI calculated cumulatively on their starting pension. This would have resulted in members receiving increases of significantly less than three per cent per annum in respect of their pre-1991 service because of higher increases received by them in past years.

The trustees argued (on behalf of members) that pensioners were entitled to an increase of the better of three per cent fixed and five per cent/RPI. The increase should be applied on an annual basis to pensions in payment attributable to pre-1991 service.

The decision

Asplin J rejected the employer's argument, and said that if the consequences of construction are impractical or technical in practice, it is likely that interpretation is not the correct one. Adopting the employer's cumulative approach would produce an effect which in any year may produce an actual reduction in the pension paid rather than an increase, and that was obviously inconsistent with the rule itself, as well as being impractical.

The 1991 deed must be construed as having effect subject to the limitation contained in the proviso. Asplin J accepted the trustees' claim that members were entitled to the better of three per cent fixed and five per cent/RPI applied annually in respect of their pre-1991 pensions accrual. She held that the amendment power and its proviso should be construed so as to give reasonable and practical effect to the Scheme. The increase rule subject to the proviso was viewed by the Court as a 'blend' of the pre- and post-amendment provisions to the extent necessary to prevent prejudice to the member rather than as an 'underpin'.

Comment

The Court's decision means that the Scheme's deficit is to be calculated using the trustees' 'annual approach' to pension increases and stands at some £17 million, while using the employer's suggested 'cumulative approach' would have resulted in a substantially lower deficit calculation.

However, Asplin J found that it was necessary to test competing permissible constructions of a pension scheme against the consequences they produce in practice. If the consequences are over-restrictive or impractical, that was an indication that the interpretation was inappropriate (following *Stevens & Others v Bell* [2002]). It was also appropriate to consider the commercial circumstances prevailing at the date of adoption of the amendment in question.

No consideration was given to the GMP element of pensions in payment as they were dealt with separately under the Scheme's rules.

Contacts

If you would like further information please contact:

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

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

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

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