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NORTON ROSE FULBRIGHT

Essential pensions news

Updater

September 2018

Introduction

Essential pensions news covers the latest pensions developments each month.

PPF v Grenville Hampshire: each member entitled to minimum 50 per cent of scheme benefits in PPF compensation on employer's insolvency

The ECJ has confirmed the AG's opinion that members are entitled to an "individual minimum guarantee" of 50 per cent of the value of their entitlement to old-age benefits, rather than an average level of pension protection.

In our update for May 2018, we reported on an opinion of the Advocate General (AG) in a preliminary reference concerning a claim by a scheme member against the Pension Protection Fund (PPF). The member, whose early retirement pension was reduced by 67 per cent on the scheme's entry to a PPF assessment period, argued that the compensation cap did not give full effect to Article 8 of the EU Insolvency Directive. Article 8 requires member states to "ensure that the necessary measures are taken to protect the interests" of employees (current and past) as regards pension benefits on an employer insolvency.

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

As a result of this judgment, the DWP has dropped a proposal to aggregate transferred-in fixed pensions with other pension benefits when applying the PPF compensation cap. The proposed amendments to the PPF compensation regulations would have clarified that where a scheme member had a right to a pension derived from service in another scheme, this would be attributable to pensionable service for calculating PPF compensation, and the application of the compensation cap. The amendments were intended to reverse the effect of the High Court decision in *Beaton v PPF* [2017] where it was held that a member's transferred-in benefits were not attributable to pensionable service with the receiving employer and were not to be aggregated for compensation cap purposes.

The reversal of the DWP's original proposal recognises that the aggregation of pensionable service could have resulted in individuals inadvertently receiving less than 50 per cent of their expected benefits within the PPF which would be contrary to the *Hampshire* judgment.

The changes to the PPF compensation provisions come into force on *October 2, 2018* – see the legislation section below for more detail.

Comment

As the ECJ has now confirmed the AG's opinion, this creates significant administrative issues for the PPF as it means that the current compensation cap is unlawful where it results in an individual receiving less than half of his or her expected scheme benefits. We understand that the PPF has been in discussions with the Government to consider the necessary changes to both PPF and Financial Assistance Scheme compensation. A crucial consideration will be to assess the extent to which any changes will be backdated.

Whether the level of the PPF levy payable by defined benefit schemes will need to be increased will no doubt depend on the number of individuals affected by the future recalculation of their PPF compensation.

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

Government publishes its response to BEIS consultation on corporate governance and insolvency

In our July 2018 client briefing, "A 'stronger' Pensions Regulator – the DWP's consultation on increasing regulatory sanctions", we noted that the results of the consultation into corporate governance conducted by the Department for Business, Energy and Industrial Strategy (BEIS) was awaited, and this was published on *August 26, 2018*.

The BEIS response to the consultation on proposals to improve the corporate governance of firms that are in or approaching insolvency highlights that the Government plans to take forward the specific actions outlined below, subject to further consultation where necessary.

Dividend policy

- There should be no automatic bar on companies paying dividends where a company's pension scheme is in significant deficit.
- The Government will consider ways in which directors could provide stronger reassurances for shareholders and stakeholders that proposed dividends will not undermine the affordability of any deficit reduction payments agreed with pension fund trustees.

Director accountability for subsidiaries sold in distress

Proposals include

- Introducing measures "as soon as parliamentary time permits" so that a director of a holding company who does not give due consideration to the interests of the stakeholders of a financially distressed subsidiary when it is sold may be subject to disqualification action if that subsidiary enters insolvent liquidation or insolvent administration within 12 months after the sale. There is to be a defence of a reasonable belief at the time of the sale that it would be likely to deliver a no worse outcome for the stakeholders of the subsidiary than placing it into a formal insolvency.

Factors to be taken into account would include

- Whether professional advice on the sale was considered.
- The extent to which the board of the holding company engaged and consulted with the major stakeholders of the subsidiary prior to the sale.
- other steps taken by the directors to ensure, as far as within their means, that the sale was no worse an option than formal insolvency.

Insolvency regime

The following are being considered

- Measures to ensure greater accountability of directors in group companies when selling subsidiaries in distress.
- Legislation to enhance the existing recovery powers of insolvency practitioners in relation to value extraction schemes which have been designed to remove value from a firm which is ion financial distress at the expense of its creditors.
- In response to the practice of "phoenixing", giving the Insolvency Service the necessary powers to investigate directors of dissolved companies where they are suspected of having acted in breach of their legal obligations.
- Introduction of a new moratorium to help business rescue but for only 28 days (plus extensions).
- Prohibition of enforcement by a supplier of termination clauses in contracts for supply of goods and services during insolvency proceedings (with some exemptions to be determined).
- Creation of a new restructuring vehicle that would include the ability to bind dissenting classes of creditors who vote against it.

- Strengthening transparency requirements around group structures, with options including working with industry to improve guidance, or introducing a requirement for corporate groups of a significant size to provide an organogram of their corporate structures and an explanation of how corporate governance is maintained through the group.

BEIS states that these measures will be set out in further detail "in the autumn".

View the BEIS response (82 pages).

Single Financial Guidance Body to be launched in January 2019 and Government support for pensions dashboard restated

In a statement issued to the House of Commons on *September 5, 2018*, Parliamentary Under-Secretary for Work and Pensions Guy Opperman has confirmed that the Single Financial Guidance Body (SFGB) will be launched in *January 2019*. The appointment of the SFGB's first chief executive, John Govett, was announced in July 2018.

Opperman also confirmed the Government's support for the pensions dashboard, stating:

"An industry-led dashboard, facilitated by Government, will harness the best of industry innovation. We will continue to engage with industry on this model and Government will protect pension savers and personal information by legislating where necessary."

Comment

It remains unclear the level of Government support there may be for an "industry led" pensions dashboard. Is it to be funded entirely by the pensions industry? If there is to be no legal compulsion to participate in the dashboard, it will be of little use as a one-stop shop where DC members can review all their pension pots from various providers.

The status of other pensions policy matters was also addressed, specifically

- A formal consultation on the DWP's proposals for collective defined contribution (CDC) schemes is to be launched in the autumn, as recommended by the Work and Pensions Committee in its report of July 16, 2018.

- The Government is considering responses received following the DWP's consultation on proposals to strengthen TPR's powers and hopes to publish its conclusions towards the end of this year.

- The future of defined benefit consolidation "superfunds" is currently being considered and the Government intends to publish a consultation on this in the autumn.

Pensions Regulator publishes results of 2018 DB trust-based pension schemes survey and publishes document on its new approach

On *September 10, 2018*, the Pensions Regulator (TPR) published the results of its 2018 survey of governance and administration standards in DB trust-based pension schemes which was conducted in *March 2018*. The survey found that the majority of DB members were in relatively well-run pension schemes, but there were mixed results for smaller schemes which displayed poorer governance standards. The survey also highlighted a number of areas of concern, including an increase in the percentage of trustees reporting that they take no action to ensure their scheme is treated fairly among competing demands on the employer.

TPR's response, published alongside the survey, sets out how it intends to address the issues raised. In particular, TPR has already contacted smaller schemes ahead of their 2018 valuation setting out the issues it wants them to address.

Revised DB scheme funding code

The report also sets out TPR's plans in relation to revisions to its DB scheme funding code of practice (DB Code). The revised DB Code will "set clearer parameters around prudent technical provisions and appropriate recovery plans within the existing scheme specific funding regime". It will also introduce a "comply or explain" regime under which trustees and employers will need to demonstrate the effectiveness of their funding and investment strategies and risk management plans in delivering the long-term funding objective for the scheme. TPR comments that "increased clarity around prudence and appropriateness" combined with potential improvements to its powers will strengthen its ability to take effective and efficient action where funding standards set out in the DB Code are not met.

In terms of timing, TPR will consult on options for the funding framework "early next year" with a revised DB Code to be published later in *2019*.

View the summary report (39 pages).

New approach to workplace pension schemes

On *September 17, 2018*, TPR launched a document "Making workplace pensions work" (13 pages) at its annual stakeholder conference, which sets out its new, rebranded approach. TPR has changed its watchwords from "educate, enable, enforce" to "clearer, quicker, tougher" and has changed its approach in a "radical shake-up" so that it can act more swiftly to unexpected events affecting pension schemes.

TPR has confirmed that dedicated supervision will be rolled out to 25 of the biggest schemes in October 2018, with this being expanded to 60 schemes over the coming year.

Under a separate pilot scheme, a further 50 DB schemes will see heightened supervisory approaches from TPR, as compliance with the annual DB funding statement (18 pages) is assessed.

Comment

In the wake of a fairly turbulent 12 months for TPR, the watch dog is clearly upping its game. TPR now regulates DB, DC and public sector schemes and is responsible for the oversight of the auto-enrolment regime. Additionally, the authorisation and supervision of master trusts will also become TPR's responsibility from *October 1, 2018*, so a clear strategy is a must.

Master trusts: Pensions Regulator provides feedback on readiness review

TPR has published a report on its readiness review of authorisation applications by existing master trust schemes.

In advance of the date for applying for authorisation on *October 1, 2018*, TPR invited draft applications on a voluntary basis as part of what it called a "readiness review". It received 33 in total and, as well as providing detailed feedback to the applicants, has now published general feedback in a 12-page summary document.

TPR urges applicants to ensure their applications meet the statutory authorisation criteria, both in relation to satisfying the legal requirements and as regards meeting TPR's expectations set out in its code of practice and supporting guidance.

Four key tips are highlighted in the feedback and TPR says applicants should

- Meet the letter of the procedural requirements of the legislation and code of practice. For example, some documents may have to be filed twice to comply with the strict formalities of the process. TPR states that if material is missing from an application, it will not treat the application as full and complete and will not start its assessment.
- Follow TPR's guidance, for example as regards providing the necessary supporting evidence in relation to how applicants claim that they satisfy the authorisation criteria.
- Explain why information or documents have not been included, where relevant.
- Provide clear signposting to key documents in applications, including explaining why specific documents have been filed, and highlighting relevant parts of documents where necessary.

Further help is provided in detailed feedback on each of the authorisation criteria. For example, in assessing the fitness and propriety of the key individuals involved in running a master trust scheme, TPR says it will compare an application with open source data as well as existing information it holds. Applicants should therefore ensure that their scheme details on TPR's systems and other registers (such as Companies House) are up to date and that their application matches publicly accessible information.

Master trusts: Pensions Regulator publishes new authorisation forms

TPR has published new forms to enable those applying for authorisation of their master trust to supply the correct information for approval. This includes an updated guide explaining the process and setting out TPR's expectations. This document has been renamed "Guide to completing the systems and processes questionnaire" (40 pages) and includes an explanation of the fairly substantial changes made to the guide from the previous version following the readiness review (see above).

Authorisation for master trusts will be given by TPR if the scheme satisfies five authorisation criteria, including that the trustees and others involved in running the scheme are "fit and proper persons"; that the scheme is financially sustainable; and that it has in place a "continuity strategy" for dealing with certain "triggering events". These include losing authorisation and an insolvency event occurring in relation to the scheme funder and were outlined in previous updates.

The new guidance document goes into more detail, as well as including information templates, on the following matters

- A scheme financial template, and a guide to its completion.
- Guidance on the financial sustainability basic method.
- Guidance on identifying cash/near cash assets.
- A draft request for an exemption from the requirement that the scheme funder only carries out activities that relate directly to master trusts.
- The form to complete if there will be more than one scheme funder.
- A checklist to help schemes prepare a "continuity strategy".

TPR's website states that the Financial information checklist (including business plan checklist) document will be "available shortly" and forms and guidance to assist with the "fit and proper person checks" will also follow.

Comment

The volume and detail of the material emerging from TPR shows that an authorisation application will be a lengthy and time consuming process.

It should be remembered that TPR is also on a learning curve as far as authorisation goes. In due course, TPR will publish a list of approved master trusts but we understand this is 6-12 months away at least. TPR does not intend to publicise names of master trusts one-by-one as they are approved, and it is likely that the authorisation process will be conducted in tranches, so that there is no particular advantage in being first to submit an authorisation application. TPR hopes that applicants should concentrate instead on getting the application right and TPR does not seek to disadvantage those who spend time on their application to ensure it is accurate and complete, and who then, as a consequence, make their submission later than other applicants.

Master trusts: Pensions Regulator adds further guidance on fit and proper person test

TPR has published further information to assist those applying for authorisation of a scheme as a master trust. From *October 1, 2018*, when the Master Trusts Regulations come into force (see legislation section below), a master trust will be prohibited from operating unless it has TPR authorisation.

On September 13, 2018, TPR published further online guidance to assist those applying for authorisation, addressing the "fit and proper persons" test, which persons involved in the scheme must satisfy. Such persons include the person establishing the scheme, the trustee or trustees, any persons who have key scheme powers (for example to remove trustees and to amend the scheme), the scheme funder and the scheme strategist.

As well as standard forms for completion, the new documents include

- **Master trust authorisation fit and proper assessment guide** (19 pages). This provides examples of how someone who is subject to assessment can satisfy TPR that they are fit and proper to perform their role in a master trust.
- **Guide to identifying persons for the fit and proper assessment** (13 pages). This guide helps those applying for authorisation to identify those carrying out the three roles that TPR will assess, i.e. the trustees, the scheme strategist, and the scheme funder.

Pensions Regulator publishes its compliance and enforcement bulletin for Q2, 2018

TPR has published its latest compliance and enforcement bulletin, covering the second quarter of 2018.

The bulletin includes

- More detail on TPR's decision to revoke a number of mandatory fines imposed for non-compliant chair's statements. A total of 74 penalties were revoked over the quarter, which TPR says was due to a time delay on its part in explaining to schemes why their statement was non-compliant. TPR has updated its guidance to clarify what it expects from chair›s statements.
- Several case studies, one of which highlights TPR's first use of production orders under section 345 of the Proceeds of Crime Act 2002 as part of an ongoing criminal investigation concerning fraud and money laundering. This enabled TPR to access bank statements and details of accounts linked to the trustees of a pension scheme that would otherwise have been confidential. A total of five production orders were obtained this quarter.
- A report on TPR's recent success bringing a prosecution under the Computer Misuse Act 1990, and its decision to fine trustees £25,000 for failing to complete a scheme valuation. TPR notes that it is monitoring valuation due dates more regularly and taking tougher action on scheme valuation delays.

Data from the bulletin include

- 121 mandatory penalty notices for failure to publish a chair's statement (or non-compliant statements) (41 in Q1, 2018).
- 25 scheme return enforcement notices were issued (four in Q1, 2018).
- 27,219 compliance notices and 12,220 fixed penalty notices were issued in relation to auto-enrolment duties (19,986 and 11,156 respectively in Q1, 2018).

View the Compliance Bulletin (15 pages).

Pensions Regulator publishes online DC guidance documents

TPR has published online various documents intended to assist those involved in the management and administration of DC pension schemes, including

- **Quick guide to the chair's statement** (16 pages) – the guide is intended to be read alongside the DC code of practice.

  The quick guide, updated in September 2018, contains several checklists setting out the key items with which schemes should be able to demonstrate compliance on the various elements that must be included in the chair's statement, as well as examples of good practice and areas where common mistakes arise. It complements the technical appendix (10 pages) published to accompany the last revision to the guide in June 2018. The technical appendix is a useful summary of each of the chair›s statement requirements and the various legislative provisions underlying each of them.

- **A guide to communicating and reporting** (24 pages) – once more, this guide is intended to be read alongside TPR's DC code of practice, and is the latest in a series of six guides to support trustee boards in meeting the standards set out in the code. As with the previous guides in the series, it provides information on how trustees can meet their legal requirements by including practical examples of approaches that can be taken to member communications. This includes examples of when having a more detailed understanding of the makeup of the scheme's members is important, for example, tailoring communications to match (and improve) member engagement, monitoring changes in member demographics (which can affect the language and format of communications) and correctly planning "at retirement" communications.

Pensions Ombudsman publishes its Corporate Plan for 2018-21

On *August 20, 2018*, the Pensions Ombudsman (TPO) published its corporate plan, setting out its priorities for the next three years and how it intends to achieve its aims.

There are three strategic targets

- Providing one centre for the resolution of workplace and personal pension complaints.
- Supporting and influencing the pensions industry and the wider alternative dispute resolution sector to deliver effective dispute resolution.
- Transforming and improving its services and processes.

The Corporate Plan outlines TPO's commitments for the next three years along with the key deliverables for 2018/19.

View the Corporate Plan (20 pages).

Pensions Ombudsman publishes factsheet on redress for non-financial injustice

Where TPO makes a determination, under the Pension Schemes Act he may "direct any person responsible for the management of the scheme to which the complaint relates to take, or refrain from taking, such steps as he may specify".

The factsheet explains that non-financial injustice may be

- "Inconvenience" or 'time and trouble' 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. This includes needing to go through a complaints process where the maladministration was both avoidable and identifiable at an earlier stage.

- "Distress" suffered by an applicant. It could, for example, be 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.

in either case must be caused directly by the maladministration.

Following consultation, TPO has decided to introduce fixed amounts for non-financial justice awards. These awards will generally fall into one of five categories

- Nominal (no award)
- Significant (£500)
- Serious (£1,000)
- Severe (£2,000)
- Exceptional (over £2,000)

TPO states that account will always be taken of the circumstances of each individual case but similar complaints should result in consistent and broadly comparable awards. Not all maladministration will inevitably lead to an award for non-financial injustice and if sufficient offer of redress has already been made by the employer or the scheme to the member before or during the investigation, TPO will not normally add to it.

Separately, TPO has posted online a press release noting approval for the sensible approach taken by the DWP and TPR, as set out in Guy Opperman's signed letter to TPO on the move of the dispute resolution process from The Pensions Advisory Service (TPAS) to TPO.

DWP and TPR's joint statement confirms that, despite the current absence of legislation, there would be no purpose served in considering penalties for schemes referring disputes and complaints to TPO that have not first gone through the scheme's internal dispute resolution process.

The statement clarifies that all complaints and disputes about occupational and personal pension schemes should go to TPO and general requests for information and guidance to TPAS. TPO welcomed the news and said, "As TPAS' dispute resolution function transferred to TPO in March 2018, there has been some understandable reluctance on the part of schemes to change their signposting and risk non-compliance with existing legislation. This clarifies the situation for everyone".

HMRC publishes Pension schemes newsletters 102 and 103

Issue no. 102 of HMRC's Pension scheme newsletter was published on *August 30, 2018*, and includes several reminders on administrative matters including

- Pointers on how to use the new Manage and Register Pension Schemes service.
- The deadline for information provision where schemes use relief at source has passed (April 6, 2018) and a warning that interim repayment claims will not be paid until the outstanding information is received by HMRC.
- The new master trust authorisation regime comes into effect on *October 1, 2018*. Both existing master trusts and schemes that wish to change their status to become master trusts must register with HMRC. Such schemes must also apply for authorisation from TPR.
- Problems with tax coding notices issued in error for death benefit payments that are non-taxable should be rectified in September, and until the issue is resolved, the guidance in Newsletter 78.

View the newsletter.

Issue no. 103 was published on September 13, 2018, and contains various additional updates for scheme administrators in relation to the annual return of scheme information and the relevant forms on which it should be submitted.

View the newsletter.

Master Trusts: the Occupational Pension Schemes (Master Trusts) Regulations 2018 finalised

The Occupational Pension Schemes (Master Trusts) Regulations 2018 (the Regulations) have completed their progress through Parliament, with the majority of the provisions coming into force, as expected, on *October 1, 2018*.

From that date, a master trust will be prohibited from operating unless it has been authorised by TPR, and subsequently subject to TPR's supervision.

The regulations set out further detail of various aspects of the authorisation requirements, including

- The test for whether employers are "connected" for the purposes of the definition of a "master trust scheme" under section 1 of the Pension Schemes Act 2017.
- The different aspects of a scheme's implementation strategy, including issues such as timing for submission, administration charges, and content.
- The matters which TPR will take into account in assessing a "fit and proper person".
- The information TPR requires to assess whether a master trust is "financially sustainable".

View the Regulations.

The Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018

New investment and disclosure duties for pension schemes – DWP drops requirement for "statement on member views".

In our July 2018 update, we reported that the DWP was consulting on changes to regulations governing investment and disclosure of information by pension scheme trustees to better reflect environmental, social and governance (ESG) issues and stewardship concerns. The consultation also covered a proposed expansion to schemes' Statements of Investment Principles (SIPs) and closed on *July 16, 2018*.

On *September 11, 2018*, the DWP published the government's consultation response document Clarifying and strengthening trustees' investment duties, accompanied by new regulations, the Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018 (the Amending Regulations) that were laid before Parliament on the same date.

The Amending Regulations also include changes relating to the issues on PPF compensation for fixed pension benefits (see further below).

New SIP investment disclosure requirements

The Amending Regulations include several changes to the way schemes currently prepare and revise their investment disclosure documents, including their SIP. Before *October 1, 2019*, affected (principally DC) schemes will be subject to the following requirements

- **Duty to take into account financially material considerations**: the requirement in the Occupational Pension Schemes (Investment) Regulations 2005 (the Investment Regulations) which currently refers to the need to take into account "environmental, social or ethical considerations" in the selection, retention and realisation of investments has been replaced with a wider reference to "financially material considerations over the appropriate time horizon".

  "Financially material considerations" are defined as including ESG issues, including climate change. The "appropriate time horizon" is defined as the length of time that the trustees consider is needed for the funding of future benefits by the investments of the scheme.

- **Stewardship obligations**: as proposed in the consultation, affected schemes will be required to state in their SIP their policy on stewardship, including on voting, engagement and monitoring. Specifically, schemes will be required to set out their policies in relation to the following two areas

  - The exercise of the rights (including voting rights) attaching to the investments

  - undertaking engagement activities in respect of the investments, including the methods by which trustees monitor and engage with others about relevant matters.

  - Affected schemes with 100 or more members must also state a policy in relation to the stewardship of the investments in their default investment strategy.

- **Importance of non-financial matters**: affected pension schemes will be have the option of including a reference in their SIP as to the extent (if at all) to which non-financial matters are considered in the selection, retention and realisation of investments.

  Non-financial matters are defined as "the views of the members and beneficiaries including (but not limited to) their ethical views and their views in relation to social and environmental impact and present and future quality of life of the members and beneficiaries of the scheme". This has replaced the consultation proposal for the inclusion of a statement of members' views.

The new SIP requirements apply to affected schemes from *October 1, 2019*.

Inclusion of an implementation statement

From *October 1, 2020*, trustees of "relevant" schemes (broadly, DC schemes) will be required to include a statement on the extent to which the SIP has been followed during the scheme year and an explanation of any changes made to the SIP during that year in the scheme's annual report. This will be known as an "implementation statement".

In addition, trustees will be obliged to make available free of charge the SIP and the implementation statement on a website, or where appropriate, in hard copy form to the public to enable people to compare costs and charges of different occupational pension schemes. Furthermore, the trustees must include details about the availability of these publications in the annual benefit statement issued to members with money purchase benefits.

Application of the new requirements

The changes will apply differently depending on the type of benefits a scheme provides, and the number of members. For example, a defined benefit scheme (DB) with less than 100 members will not be required to update its policies on financially-material considerations, stewardship, and non-financial matters affected, while a DB scheme with 100 members or more will.

The consultation response includes (at page 11) a table showing how the new requirements apply to different sorts of schemes.

Updated guidance

The DWP has revised its statutory guidance (14 pages) on the reporting of costs and charges to take into account the requirements introduced by the regulations – specifically the requirement for certain schemes to publish their SIP and an implementation statement on how they acted on the SIP on a publicly available website.

The revised guidance replaces the DWP's previous statutory guidance published in February 2018.

TPR is expected to publish further guidance by the end of November 2018. The DWP also states that further legislation may be required depending on how the Shareholder Rights II and IORP II Directives are implemented.

What schemes need to do now

Schemes should start to consider how to implement the new requirements, as there may be a considerable amount of work to do before October 2019.

By *October 1, 2019*, some schemes will be required to do some or all of

- Updating their SIP
- Updating the SIP in respect of their default arrangement
- Publishing their SIP.

From *October 1, 2020*, some schemes will be required to produce and publish their implementation statement.

See the consultation response at page 11 for more details.

Comment

The most significant change from the consultation proposals has been the dropping of the requirement for schemes to include a “statement of members’ views” with their SIP. This had been seen as controversial and practically impossible to carry out, and its scrapping has been generally welcomed.

As an alternative, the proposed requirement for a statement of members’ views has been replaced with an optional policy on non-financial factors, including not only members’ ethical concerns, but also social and environmental impact matters and quality of life considerations.

The additional provision that “financially material considerations” can be assessed over the time horizon of the scheme means DC will be able to tackle risks that might affect members far into the future, and DB schemes considering bulk annuity purchases will be able to avoid unnecessary ESG policy burdens.

The Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018 – ECJ Hampshire decision results in changes to benefits under PPF compensation rules

The Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018 (the Amending Regulations) were laid before Parliament on September 11, 2018, and come into force on *October 2, 2018*.

On *September 6, 2018*, following the ECJ’s decision in *Hampshire* (see above), which confirmed that members are entitled to an “individual minimum guarantee” of 50 per cent of their benefit entitlements under an occupational pension scheme in the event of their employer›s insolvency, the Government recognised that it was necessary to review PPF compensation levels and the application of the compensation cap.

The DWP took the view that, following *Hampshire*, the best course of action was to change draft amendments upon which it had already consulted. The final form of the Amending Regulations ensures that benefits are not aggregated, and clarifies that the PPF can

- Pay survivor benefits to widows, widowers and eligible dependent children.
- Revalue PPF compensation which is not yet in payment.
- Apply inflationary increases to compensation payments.

Include a relevant fixed pension in the application of the 90 per cent level of compensation (subject to the cap) for those already receiving their pension and who were below normal pension age at the assessment date.

The Amending Regulations also amend the definition of "pensionable service" in the PPF compensation regulations and in the Pension Protection Fund (Multi-employer Schemes) (Modification) Regulations 2005 (the Multi-employer Regulations) so that the definition of that term in paragraph 36 of schedule 7 to the Pensions Act 2004 applies in both set of regulations. The changes, come into force on *October 2, 2018*.

The future

The Amending Regulations will not be the end of the Government's consideration of the Hampshire judgment and it intends to take steps to "fully remedy the negative effects of the Beaton judgment". Ultimately, this may also include measures to restrict the amount of compensation paid to deferred and active members below normal pension age, which was one aspect of the previous consultation in July 2018.

However, the response also confirms that Government's position on this issue may be affected by the outcome of any negotiations on Britain's exit from the European Union and any decision on the continued implementation of EU legislation.

British Airways: Airways Pensions Scheme Trustee confirms Supreme Court appeal

In our July 2018 update, we reported that in a judgment handed down on *July 5, 2018*, the Court of Appeal (CA) had overturned the High Court decision and held (by a majority of two to one) that the trustees had acted outside of their powers by granting the 0.2 per cent discretionary increase. The CA held that trustees should manage and administer the scheme rather than redesigning the benefits.

Following the CA decisions, the trustee board hesitated over whether an appeal to the Supreme Court would be a sensible use of scheme assets. This led to criticism from members who said failing to appeal would be a "breach of trust". The trustee board has now confirmed that an appeal will be made to the Supreme Court, and it is due to be heard in the second half of 2019.

Pensions Ombudsman (PO-17639): the Estate of Mr R – death benefits – trustees failed to inform terminally ill member that retirement options were only available during his lifetime

The Pensions Ombudsman (TPO) has given his determination in a complaint by The Estate of the late Mr R against the Trustees of the Simons Group Ltd Pension & Life Assurance Scheme (the Scheme)

TPO has upheld a complaint where the Scheme's administrator failed to inform a terminally ill deferred member that the retirement options presented to him were only available if taken prior to his death.

The options available under the Scheme

Following a request, the administrator informed the member of his retirement options by letter setting out two retirement options

- Option 1: a cash lump sum of approximately £19,000, an annual pension of approximately £12,000 and an annual widow's pension of around £7,000.
- Option 2: a cash lump sum of approximately £61,000, a reduced annual pension of about £9,000 and an annual widow's pension of around £7,000.

The letter also stated that in light of Mr R's terminal illness, he could potentially receive his retirement benefits as a tax-free lump sum if his life expectancy was less than 12 months. The Administrator asked Mr R to provide further evidence if he wished to pursue this last option.

The member did not act on the options and died four months later. His widow was subsequently informed that the options set out in the letter were only available if acted upon during the member's lifetime and, as her husband had not acted on them, he was a deferred member when he died and the widow's benefits were calculated on that basis. This resulted in her receiving a lower spouse's pension and no lump sum.

Determination

TPO determined that the trustees had a fiduciary duty to provide Mr R with all the relevant information to enable him to make a fully informed decision about his options. This duty had been breached since, despite being aware that the member had a terminal illness, the trustees had failed to mention that the benefits were dependent on the member making a choice in his lifetime. TPO also stated that in situations where options were conditional, the trustees should inform the member about the conditions to which those options were subject.

TPO did not agree with the trustee's submission that the member would not have taken action even if he had been presented with all the information. The member had not acted on the retirement options because it had not been made clear that he was compromising his wife's future retirement benefits by not acting. If there had been greater clarity and urgency, it was more likely than not that the member would have acted, and opted for the second option offered in the letter.

TPO also held that the trustees should have taken steps to check that the member had received the letter informing him of his options and understood its contents, given that they knew that the benefits payable to his spouse and estate on his death would have been considerably lower had no action been taken during his lifetime.

TPO directed the trustees to calculate the amount of lump sum the member's estate would have received he had applied for the second option in his lifetime and pay this to the estate directly. The trustees were also directed to calculate the difference in spouse's pension his widow was receiving and what she would have received had the member applied for the second option in his lifetime and pay this to his widow.

In addition, the trustees were directed to pay Mrs R £500 for the distress and inconvenience suffered.

Comment

Trustees should note that when they are asked for scheme information in circumstances where they are on notice that the member has a terminal illness, they should take care to explain both the options available, and how those would be affected by the member's death.

TPO said that the duty here was limited in scope to the provision of information, and was not a duty to bring to members' attention situations where it might be in their best interests to take a particular course of action. However, TPO did hold that since the benefits would be considerably lower if no action was taken during the member's lifetime, the trustees should have taken steps to ensure that the member had received the information and that he understood its significance.

Pensions Ombudsman – Estate of Mr Y (PO-13540): death benefits – employer should have brought forward member's retirement date to maximise his benefits

The Deputy Pensions Ombudsman (DPO) has given her determination in a complaint by the Estate of Mr Y against Belfast City Council (the Council).

Facts

Mr Y was a member of a local government scheme and, in 2012, was diagnosed with a form of aggressive cancer and underwent chemotherapy. He met with a counsellor appointed by the Council, his employer, who explained the difference between death in service and death in retirement for pension purposes and the financial implications of each. The counsellor, noted that he had informed Mr Y of his pension options in light of his illness and that Mr Y was to inform the scheme administrator and the Council if his condition worsened so that it could "provide the best possible financial option" for him.

In May 2013, Mr Y was recommended by the Council for early retirement on grounds of permanent ill-health. His notice period started on May 26, and was scheduled to end on August 17, 2013, at which point he would become a retired member. On July 24, 2013, Mr and Mrs Y were informed by doctors that his cancer had spread and his diagnosis was terminal.

On learning of the terminal diagnosis, Mrs Y contacted the Council by telephone on Mr Y's behalf on the same day. The discussion that took place between Mrs Y and the Council employee was disputed, but it was accepted that Mrs Y asked for some or all of Mr Y's pension to be paid so that they could fund a trip away before he undertook further treatment. The Council employee seemingly informed Mrs Y that this would not be possible.

Mr Y died on August 14, 2013. As Mr Y had died while he was in service, three days before his early retirement pension was due to come into payment, Mrs Y was entitled to receive death benefits comprising a death grant of £51,540.18 and a spouse's pension of £4,139.69 a year. The scheme administrator provided hypothetical figures to the DPO suggesting that if Mr Y had died as a retired member, Mrs Y would have received a death grant of £68,092.41 and a spouse's pension of £4,139.69.

The Parties' claims

Mrs Y complained that she was in receipt of lower benefits than she would have received had her late husband died in retirement. She submitted that during the disputed call on July 24, 2013, she had informed the Council that Mr Y's illness was terminal and requested that his pension benefits be brought forward so that they could take a family holiday. She said that the Council had informed her that this would not be possible and that she would need to wait until Mr Y's termination date on August 14, 2013.

The Council disagreed and submitted that, while further treatment had been mentioned, it was not given any reason to think Mr Y's condition had deteriorated. The Council also submitted that Mrs Y had made no request for the notice period to be waived and only asked that part of the lump sum be brought forward.

Determination

The DPO upheld the complaint, noting that much of it focused on disputed facts as to what information the Council received in the phone call on July 24, 2013. In the absence of call recordings or call notes, it was her role to establish what was said, on the balance of probabilities.

The DPO was satisfied that Mr and Mrs Y only became aware about the terminal nature of Mr Y's illness on July 24, 2013, the day Mrs Y had made the phone call. This had been substantiated by Mr Y's physician and, as such, it was likely that Mrs Y conveyed the change in condition to the Council in the phone call.

It was clear that Mrs Y had got in touch with the Council to explore the possibility of bringing forward some or all of Mr Y's pension benefits so as to release funds for a family holiday. The DPO held that whether this request sought full or a partial access to Mr Y's benefits was immaterial, as the Council had confirmed that Mr Y could have brought forward his notice period and therefore gained access to his pension from an earlier date.

The DPO found that, on the balance of probabilities, Mrs Y had informed the Council during the call that Mr Y's illness was now terminal and that she was looking to release some or all of Mr Y's pension funds to pay for a family holiday.

The DPO directed the Council to calculate the difference between the death benefits Mrs Y had received and those that would have been due if Mr Y's service been terminated two days after the phone call, on July 26, 2013. The Council should offset this against the additional income that Mr Y would have received between July 26, 2013, and the date he died and pay the relevant interest.

Additionally, the DPO recommended that the Council pay £500 to Mrs Y for the distress and inconvenience suffered, but noted that this recommendation could not be enforced as the complaint had been brought by Mrs Y in her capacity as Mr Y's personal representative.

Comment

It is understandable in the circumstances of treatment for a terminal illness that the member and his wife may not have been fully aware of technical details of their pension options in his final months. This no doubt contributed to the confusion surrounding the disputed phone call.

However, from an employer point of view the decision may be a concern as it implies a widening of the duty to advise employees (and their dependants) on the financial impact of their decisions about taking pension benefits. The scope of the duty on employers to advise on pension rights has to date, according to established case law, been fairly narrow. Although decisions of the Ombudsman are not precedent for future cases, employers should take note.

Pensions Ombudsman– *Mr S v Royal London Group Pension Plan* (PO 19400): discretion in payment of lump sum death benefits

The Deputy Pensions Ombudsman (DPO) found that Royal London (RL) had mistakenly adopted an incorrect interpretation of the scheme rules and had unduly fettered the administrator's power to use discretion in seeking out additional potential beneficiaries for death benefits.

In the Royal London Group Pension Plan (the Plan), the relevant Rule states:

"On the death of an individual who is a Member...any part of his Uncrystallised Fund ... to be applied in accordance with this Rule shall be paid to or for the benefit of ... such one or more of the following and in such proportions as the Scheme Administrator in its absolute discretion may determine

- The individual's Relatives
- Any person nominated for this purpose by the Member
- The individual's personal representatives"

and that the applicable sum should be paid "in accordance with the Rules and where applicable the application form completed by the Member".

The late Member had completed a nomination form in favour of a girlfriend with whom he seems to have had a brief relationship, who had no connection with him at his death, for whom his other friends had no contact details and who did not attend his funeral. His father, S, complained to TPO.

RL claimed that it had followed "the correct legal process" and that a signed declaration overruled the Scheme Administrator's discretion. The DPO ruled that RL had misinterpreted the Rules and that the Scheme's provisions did not allow the restriction of the payment of lump sum death benefits to a nominee without first identifying and considering all potential beneficiaries. The DPO held that there was no evidence that the Rules specifically allowed the discretion to be fettered in this way. In addition, while it was good practice forschemes to encourage members to update nomination forms, there was no legal obligation to do so.

She directed that RL should within 21 days

- Identify potential beneficiaries and make the decision wholly afresh, ignoring that fact that payment had already been made.
- Pay interest on any amount it decided to pay to S.
- Pay £500 compensation for distress and inconvenience to S.

View the determination.

Comment

This is yet another case where a successful claim has been made in relation to death benefits. Trustees must ensure that they follow their scheme's provisions accurately. There are frequently large sums involved and beneficiaries are likely to pursue claims where there is any chance of success.

Pension developments in the pipeline

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

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

Hearings in the High Court in relation to GMP inequality issues in relation to Lloyds Banking Group schemes began in July 2018. It is possible that the judgment may be handed down in September or October 2018.

The PPF will soon be consulting on its proposals for the 2019/20 PPF levy, and the determination is normally published before Christmas.

Clarification of trustees' fiduciary duties in relation to longer term investment risks – the DWP has published its full response to the 2017 Law Commission report, Pension funds and social investment. The FCA intends to consult on a single package of rule changes relating to the Government's suggested changes in the first quarter of 2019.

EMIR – new requirements to the exchange variation margin relating to derivatives applied from March 1, 2017. If an investment manager uses over the counter derivatives, schemes should check that arrangements are in place for trustees to comply with the new regime. A further EMIR temporary exemption extension for pension scheme arrangements applied to *August 16, 2018*, and has now expired. On *August 8, 2018*, the European Securities and Markets Authority (ESMA) published an updated communication on clearing and trading obligations for pension scheme arrangements (PSAs).

ESMA is aware of the challenges that certain PSAs would face to start clearing their OTC derivative contracts and trading them on trading venues on August 17, 2018. With two extensions already granted, there is no possibility of further extending the temporary exemption. However, as there is not yet a suitable technical solution, the European Commission's May 2018 legislative proposal to amend EMIR (known as the EMIR Refit Regulation) includes a further extension of the temporary exemption for PSAs. The positions adopted by the European Parliament and the Council of the EU on the EMIR Refit Regulation appear to support the view that a further extension of the temporary exemption is necessary.

Negotiations on the EMIR Refit Regulation have not finished, and the resulting text is not expected to start applying by the time the temporary exemption applies. This means there would be a timing gap during which PSAs would need to start clearing their derivative contracts before they are, once again, no longer required to do so.

During the limited period of time that the temporary exemption does not apply, ESMA expects national competence authorities not to prioritise their supervisory actions towards entities that are expected to be exempted again in a relatively short period of time. They should generally apply their risk-based supervisory powers in their enforcement of applicable legislation in a proportionate manner.

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

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

IORP II – the expected transposition date is *January 12, 2019*. The DWP is shortly expected to provide more detail on how it intends to implement the Directive.

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

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

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

- The requirement for there to be a scheme relationship.

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

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

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

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