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Essential pensions news

Updater

February 2018

Introduction

This edition of *Essential Pensions News* covers the latest pensions developments in January and February 2018.

PPF confirms 2018/19 levy determination and information provision deadlines

Of interest to all schemes providing defined benefits, is the publication by the Pension Protection Fund (PPF) of its final levy determination for the 2018/19 levy year, which starts on *April 1, 2018*. The 2018/19 levy year is the first year of the third levy triennium (the three-year period running from 2018/19 to 2020/21).

The published policy statement outlines responses to its draft levy rules which were issued for consultation in September 2017, together with the final determination and associated updated guidance appendices.

Key points in the 2018/19 levy determination

The PPF's policy statement confirms that

- The levy estimate is £550 million for 2018/19 (a reduction of just over 10 per cent on its estimate of £615 million for 2017/18).
- The Levy Scaling Factor will be set at 0.48.
- The risk-based levy cap will be reduced from 0.75 per cent of liabilities to 0.5 per cent. This reflects the fact that the proportion of schemes protected by the cap has fallen in recent years.
- The PPF has decided to maintain the existing 10-band levy band structure.

- The PPF has decided to retain the its proposal in the draft determination to narrow the levy rates for levy bands one to four through increasing the levy rates for the first three bands.

- Measurement of insolvency risk – the updated PPF-specific model, recognition of credit ratings and the credit model for financial institutions will be implemented as proposed in the March 2017 triennium consultation, with minor changes as set out in the September 2017 consultation.

- Since October 2017, it has been possible to track credit model scores in the PPF portal. The policy document confirms that the PPF plans to add a link to a Standard & Poor's (S&P) "what-if" tool from January 2018 that will allow stakeholders to understand how changes to accounting information will affect their credit model score.

- Capping for schemes with large levy increases – in response to the consultation, some respondents asked the PPF to consider capping levy increases for a small proportion of schemes whose levy would increase significantly as a result of the changes to the PPF-specific model. However, the PPF confirmed its view that capping is inappropriate, since a meaningful cap to levies would require a substantive compensating increase in levies to other schemes, which would be unlikely to gain broad support. In addition, significantly fewer schemes are expected to see substantial changes in levy as a result of rule changes for the third triennium than was the case for the second.

- Deficit reduction contributions (DRCs) – the process for certifying DRCs has been simplified. Schemes will now be able to exclude all expenses associated with investment, rather than just investment management expenses, from the calculation of the DRC amount that can be certified. This will keep the expenses calculation as simple as possible.

- Block transfer certificates – the PPF has clarified the requirements for certain transfers to be treated as Exempt Transfers. In particular, requests for treatment under the Exempt Transfer Rules should be made to the PPF by 5pm on *April 30, 2018*. If the application is not accepted, the usual deadline of June 29,2018 to submit a block transfer valuation would apply.

- Levy estimates – respondents to the consultation supported the proposal to provide estimates of levy amounts to schemes ahead of invoicing, and the proposes PPF to continue to work with schemes to consider the feasibility and possible options for providing estimates.

- Standard form contingent assets – consultation respondents generally supported the decision to take more time to update the standard form agreements.

  The PPF consulted separately on contingent assets in October 2017 and final versions of the standard forms, together with guidance documents, were published on *January 18, 2018*. Contingent assets entered into after the publication of the new standard forms must be on the new forms, although agreements entered into before that date can still be submitted on the old forms.

  One of the key changes to the new standard forms is that trustees certifying a Type A contingent asset where the levy benefit of the guarantee is £100,000 or more must first obtain a report of the strength of the guarantor which supports the realisable recovery amount certified.

The PPF concluded that wider changes explored in the consultation will not be necessary. As a result, while the PPF anticipates requiring existing Type A and B contingent assets which include a fixed cap to be re-executed in 2019/20, there will be no need to seek re-execution for those contingent assets limited solely to either a proportion of section 179 liabilities, or to the full section 75 liability. This will reduce the number of schemes for which an exercise to update their agreement is necessary. The PPF will provide additional guidance to schemes on this well in advance of the usual 2019/20 publication deadlines.

Key deadlines

The PPF has confirmed its deadlines and the timings are summarised in the table below. Schemes should note that *March 31, 2018*, is the Saturday of the Easter weekend, so the last working day when hard copy documents may be submitted before that deadline is *Thursday March 29, 2018*.

Reporting requirement	Deadline
Monthly Experian Scores	Between October 31, 2017, and March 31, 2018
Deadline for submission of data to Experian to impact on PPF-specific Monthly Scores	One calendar month prior to the Score Measurement Date
Submit scheme returns on Exchange	By midnight, March 31, 2018
Reference period over which funding is smoothed	Five-year period to March 31, 2018
Contingent Asset Certificates to be submitted on Exchange	By midnight, March 31, 2018
Contingent Asset hard copy documents to be submitted as necessary to PPF	By 5pm, March 29, 2018
ABC Certificate to be sent by e-mail to PPF	By midnight, March 31, 2018
Mortgage Exclusion (Officers) Certificates and supporting evidence to be sent to Experian	By midnight, March 31, 2018
Accounting Standard Change certificate	By midnight, March 31, 2018
Special category employer certificate	By midnight, March 31, 2018
Deficit-reduction contributions certificates to be submitted on Exchange	By 5pm, April 30, 2018
Certification of full block transfers to be completed on Exchange or sent to PPF (in limited circumstances)	By 5pm, June 29, 2018 (Exempt transfer application should be made to the PPF by 5pm, April 30, 2018)
Invoicing starts	Autumn 2018

View the PPF Levy Determination 2018/19 and related documents.

Comments

The PPF has previously confirmed that it will not require Type A and Type B contingent asset agreements existing before the publication of the new forms to be re-executed for the 2018/19 levy year but it is likely to require re-execution for the 2019/20 year. However, new agreements entered into after the publication of the new forms will need to be prepared in the new format.

Schemes are reminded that preparation and execution of contingent asset agreements can take several weeks, and the process should be started well in advance of the *March 31, 2018* (effectively *March 29, 2018*) deadline.

Auto-enrolment review: DWP announces reforms to reduce lower age limit and remove lower earnings limit for calculating contributions

The Department for Work and Pensions (DWP) has announced reforms to the auto-enrolment regime that will reduce the lower age threshold from 22 to 18 and ensure that contributions are calculated from the first pound earned, rather than the lower earnings limit. These reforms will be introduced “in the mid-2020s”, subject to consultation on the implementation approach, analysis of the increased costs for business and an assessment of the impact of the increases in statutory minimum contribution rates due in 2018/19.

These reforms are set out in the DWP’s Automatic enrolment review published on December 18, 2017, “2017: Maintaining the momentum”.

The main proposals are

- Reducing the lower age limit from 22 to 18 for auto-enrolment eligibility. The upper age limit will remain aligned with State Pension Age.
- Calculating contributions on all earnings up to the upper limit – currently, contributions need be paid only on earnings between the lower and upper earnings limits for NIC purposes (earnings between £5,876 and £45,000 in 2017/18). The intention is to remove the lower earnings limit which will increase the amount of pension contributions paid by the lowest earners.
- Removing the “entitled worker” category – currently, those earning less than the lower earnings limit are not entitled to employer contributions, even if they opt in. Removal of the category of entitled worker will mean all employees who are auto-enrolled will receive employer contributions.

However, the following issues are not addressed in the review

- Contribution increases – no further increases are planned except those previously announced to take effect in April 2018 and April 2019.
- Currently, where a worker has multiple jobs and earnings totalling more than £10,000 (but not more than £10,000 from one single job), there is no requirement for auto-enrolment, and no changes are announced.
- There are no measures to introduce a pension savings requirement for self-employed workers.

The DWP has also confirmed the earnings trigger and qualifying earnings band for 2018/19. The earnings trigger will be frozen at £10,000 and the lower and upper ends of the qualifying earnings band will continue to be set in line with the NIC lower and upper earnings limits respectively.

HMRC publishes pension schemes newsletter 94

HMRC's latest pension schemes newsletter, published on *December 28, 2017*, focuses largely on impending changes regarding relief at source in anticipation of the new rates of Scottish income tax that are expected to apply from April 2018. It also provides information relating to a number of other points of the reporting and paying of tax.

HMRC reminds those pension savers who have exceeded the annual allowance for 2016/17 that a tax charge will be payable and that the excess amount should be declared on self-assessment tax returns. The tax return deadline is *January 31, 2018*. Many such members will be dealing with the complexity of the tapered annual allowance for the first time and may need to seek specialist tax advice.

View the newsletter.

Section 89 report from the Pensions Regulator in relation to the British Steel Pension Scheme

Summary

The Pensions Regulator (TPR) has approved and granted clearance for a regulated apportionment arrangement (RAA) in relation to the British Steel Pension Scheme (BSPS).

A proposal for a successor scheme was made at the same time as the RAA application, with the aim of giving the highest number of members the possibility of better benefits than they would have received from the Pension Protection Fund (PPF).

The creation of a new scheme is not a prerequisite for the approval of an RAA, although in this case TPR requested details of the new scheme in the RAA application in order to assess the proposed future governance and level of funding. The report made in compliance with section 89 of the Pensions Act 2004 (the s89 report) therefore includes a section setting out the main features of the proposed new scheme and TPR's involvement with it.

Background

Although the origins of the BSPS go back to 1967 and the nationalisation of the steel industry, the current BSPS was set up in 1990 after the privatisation of British Steel in 1988. After a number of mergers, the BSPS was one of the country's largest schemes with 122,000 members and assets of £15 billion. In March 2017, the BSPS was closed to future accrual, at which point the deficit was approximately £2.5 billion and the estimated buy-out cost £7 billion. The PPF deficit was £2.9 billion in September 2016.

Tata Steel UK (TSUK) is the principal employer of the BSPS, with its ultimate parent company being Tata Steel Limited (TSL) based in India. The company was acquired in 2007 when TSL bought Corus Group plc, and the global crisis in 2008 and subsequent fall in steel prices had a significant impact on the fortunes of TSUK. Ever since, TSUK has relied on TSL and other companies within the Group for financial support, including support for the BSPS.

The BSPS held a minority shareholding in Tata Steel Nederland BV (TSN), which the trustee had negotiated as a contingent asset.

The position of TSUK

TSUK made a proposal to improve its financial position and reduce its reliance on Group support. However, in early 2016, TSL decided it was no longer prepared to fund TSUK without a restructuring of the BSPS. TSL had no legal obligation to the scheme as it was not a statutory employer.

Before seriously considering an RAA, the Group explored several other options, including

- Approaching the DWP to amend legislation allowing rule changes so that pension increases could be reduced to the statutory minimum. This option was not pursued as it would have set a precedent for other DB schemes.
- A failed attempt by TSL to sell TSUK.
- A possible pre-pack administration, which was rejected as there would have been no alternative but for the BSPS members to have entered the PPF.
- A possible joint venture with German steel company thyssenkrupp. This also failed due to the risk the BSPS posed to the UK business.

The preferred option was to use an RAA with an optional member transfer exercise to a successor scheme sponsored by TSUK.

The RAA

The RAA negotiations, which included the PPF throughout, focused on the mitigation package. Value was attributed to the TSN security charge based on what the asset might be worth in insolvency proceedings.

The Group eventually offered an upfront payment of £550 million to the trustee, along with a 33 per cent stake in TSUK. Both the TSUK holding and the £550 million were to be divided between the PPF and the trustee, depending on the uptake for the successor scheme.

How the RAA application was assessed

RAA test	How it was met
Was insolvency of TSUK within 12 months inevitable?	Separate financial advice to TPR and the trustee confirmed TSUK insolvency inevitable within 12 months without support from the Group. TSL announced that support for TSUK would be withdrawn if the RAA was not achieved. This would have triggered the insolvency of TSUK.
Could the BSPS receive more from an insolvency?	Cash mitigation of £550m paid upfront was significantly more than the estimated return to the BSPS on the insolvency of TSUK. No value was attributed to the ongoing sponsorship of the proposed new scheme.
The outcome of the proposal for other creditors.	There were no other directly comparable creditors involved. TPR concluded that the BSPS was being treated equitably when compared to other creditors.
Could a better outcome for the BSPS be achieved through other means such as TPR's use of moral hazard powers?	TPR concluded it would not be reasonable to issue a CN or FSD against any member of the Group. The Group had no legal obligation to fund the BSPS and had provided significant support to TSUK since its acquisition.

RAA test	How it was met
The circumstances of the rest of the Group.	The Group has supported TSUK and the BSPS through a prolonged period of loss-making and received no benefit in return. A significant proportion of TSUK working capital was provided by a Group financing company and a large part of this existing borrowing will be replaced by equity by 2020/21.

Outcome

Clearance for the RAA was granted on August 11, 2017. The Group was released from its obligations to the trustee, including the interest over the TSN shares. Formal approval for the RAA followed on September 11, 2017, releasing TSUK and other participating employers from their obligations to the BSPS.

The £550 million and 33 per cent stake in TSUK have been received by the BSPS and will be divided once the uptake for the successor scheme is known.

TPR is satisfied that the total mitigation package is a fair deal for the BSPS and more than would have been achieved had TSUK become insolvent. However, use of an RAA means that members will not receive their full pensions, so TPR accepts this cannot be described as a "good" outcome for members; it is merely better than insolvency. Jobs were preserved at Port Talbot and elsewhere.

The Group paid the costs of TPR's independent advice and the funds have been passed to HM Treasury.

TPR's approach to RAAs

TPR urges employers seeking an RAA to satisfy themselves that insolvency is the only alternative. It emphasises that an RAA is not a mechanism allowing employers to renege on their funding obligations, and to ensure the RAA framework is not abused, TPR will scrutinise all applications in line with its 2010 RAA statement.

Trustees and applicants will be expected to provide evidence that there are no other solvent solutions and that they have carried out robust due diligence to satisfy TPR's RAA criteria.

The successor scheme

A successor scheme was proposed along with the RAA to give members the option to transfer their benefits before the BSPS enters the PPF. Members who have not yet started to draw their pension will need to decide whether the reduction in a starting pension from the PPF is better than generous early retirement and cash lump sum options.

TPR states that its primary focus was to ensure that the proposed benefits under the New BSPS would be sustainable beyond the short term and that the scheme would have an appropriate governance structure in place.

The New BSPS will be a closed DB scheme offering the same benefits as the former scheme with the exception of future annual increases for both deferred and pensioner members. Pension increases will comply with legislation and deferred benefit revaluation will be linked to CPI.

The New BSPS will be run by six trustee directors, two from TSUK, two MNTDs and two independents.

Qualifying criteria for transfer to the New BSPS include

- Assets that transfer from BSPS to the new BSPS should be enough to manage the risks of paying benefits and expenses.
- The assets of the New BSPS would be at least £2 billion.

Whether these criteria will be met will not be known until March 2018, when members have decided whether or not to transfer. It has been reported that 86 per cent of respondent members have chosen to transfer, with 14 per cent choosing to enter the PPF. There were responses from 97,000 of the scheme's 122,000 members. Meeting the criteria may also depend on fluctuations in the current scheme's investments.

TPR highlights the importance of consulting with members and not transferring them without their consent. Member communications have been reviewed by TPR, along with materials for nationwide road shows. The trustee has been urged to talk to members about the importance of obtaining independent financial advice, and supplying members with TPR's anti-scam literature, as "reducing the benefits [members] have built up via a transfer to a new scheme is a step which trustees should approach with the utmost caution, even if members consent."

View the s89 report.

Comment

The s89 report emphasises that TPR will scrutinise all applications carefully to ensure that the RAA framework is not abused. Applicants and trustees must be satisfied that no other solvent solutions are available and they will be required to produce evidence showing that they have carried out robust due diligence to satisfy TPR's RAA criteria.

In this case, members have been left with the tough decision of whether to remain in the BSPS in the PPF or to transfer their benefits to the New BSPS. Pensioner benefits up to the compensation limit will be protected in the PPF but deferred and active members of the BSPS will need to consider their options carefully and should weigh up whether they could benefit from taking independent financial advice.

However, engaging a financial adviser prepared to advise an individual on the merits or otherwise of transferring out of a DB scheme, or taking a cash equivalent, may not be easy. Recently, it has been reported that as many as eight regulated firms have stopped advising consumers on pension transfers, and members should take great care to avoid falling victim to pension scammers.

Further news from the pensions regulator

Scheme returns

The Pensions Act 2004 requires that registered schemes must provide a regular scheme return containing the information set out in regulations, and for defined benefit (DB) and hybrid schemes, scheme returns are requested annually between November and January.

For schemes currently completing their 2017-2018 scheme returns, there is a checklist on TPR's website which sets out the new record-keeping information being requested for all schemes, including

- A request from TPR for schemes to provide an optional Pension Tracing Service contact.
- A request for confirmation on whether the scheme consents to electronic delivery of documents from TPR.
- New questions included regarding common and conditional data. Common data is the basic information all schemes need to uniquely identify individual members, while conditional data is member data that trustees require to enable them to administer their particular scheme. These questions are being introduced in an effort to ensure better targeted intervention by TPR.

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

View the checklist.

First section 231 warning notice issued

Section 231 of the Pensions Act 2004 (section 231) gives TPR the right to impose a contribution schedule on an employer for its pension scheme if it is not happy with the schedule agreed between the employer and the trustee. Speaking at a pensions conference, TPR confirmed that the first such notice had been issued to an unnamed scheme in 2017.

TPR’s Chief Executive said that TPR has particular concerns if it considers a scheme is not being treated fairly in comparison to other stakeholders, such as prioritising dividend payments over deficit repair contributions.

TPR seems to be increasingly willing to intervene in scheme funding matters and we understand there are more section 231 cases in the pipeline.

Chair’s statement

In the interests of improving standards in scheme governance, TPR continues to issue guides and checklists to be read alongside its more detailed Codes of Practice.

One such quick guide relates to the Chair’s annual statement, to be read in conjunction with the DC code of practice no. 13, and which TPR has produced to help clarify how the it expects trustees to meet the relevant legal requirements in production of the statement. The guide provides examples of “good” and “poor” Chair’s statements, together with a checklist of accompanying notes for trustees.

The checklist at the end of the guide addresses how Trustees can demonstrate that they have met certain requirements in relation to five key areas and presents a list of questions to be considered when providing relevant disclosures.

In producing the checklist, TPR confirms that it is not proposing any new requirements, merely seeking to clarify the expectations already set out the code and accompanying guidance.

View the quick guide and checklist.

DWP updates guidance on information requirements relating to safeguarded-flexible benefits

In our November 2017 update, we reported that the Department for Work and Pensions (DWP) had published non-statutory guidance for pension scheme trustees and administrators which is due to come into force on April 6, 2018. From that date, there will be a requirement for personalised risk warnings to be issued to members who are considering giving up the benefit of safeguarded-flexible benefits such as guaranteed annuity rates (GARs) or other similar guarantees. On *February 6, 2018*, the DWP published an updated version of the guidance.

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

The new regulations amend the Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) Regulations 2015 and require trustees and scheme managers to carry out the following activities when members seek to transfer, convert or flexibly access their savings

- Send tailored communications (personalised risk warnings) to members with safeguarded benefits.
- Use the "transfer value" of members' safeguarded benefits, when assessing whether the value of their pension pots is above the threshold at which they are required to receive appropriate independent advice.
- Make transitional arrangements to inform members with safeguarded benefits who are affected by the change in valuation methodology.

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

View the guidance.

The Draft Contracting-out (Transfer and Transfer Payment) (Amendment) Regulations 2018 – abolition of salary-related contracting-out and bulk transfers without consent to schemes that were never contracted-out

On *December 21, 2017*, the DWP published for consultation the draft Contracting-out (Transfer and Transfer Payment) (Amendment) Regulations 2018.

Since April 6, 2016, it has been possible to effect a without-consent bulk transfer of contracted-out rights only to a scheme which had itself previously been contracted-out. This proved to be a significant restriction on scheme transfer activity as new schemes could not accept such transfers as they would obviously not have had previous contracted-out status.

The aim of the regulations is to enable bulk transfers of contracted-out rights without member consent to schemes that have never been contracted out, provided certain conditions are met. Broadly speaking, the draft regulations will permit bulk transfers of guaranteed minimum pensions (GMPs) and section 9(2B) rights for active, deferred or pensioner members, without obtaining individual consent, so long as members' rights are not adversely affected and the same protections are provided by the new scheme.

The amendments will permit a connected employer transfer in respect of GMPs (for active, deferred or pensioner members) from a salary-related scheme to a scheme that has never been contracted-out if the same rules are applied relating to revaluation and indexation as before the transfer. The benefits must be treated for all intents and purposes as if they were still GMPs.

For section 9(2B) rights, the transfer must not alter these rights so that they are less generous in the receiving scheme, and an actuarial certificate will be required to confirm that the benefits are broadly no less favourable.

The consultation closed on *January 17, 2018*. The DWP anticipates that the draft regulations will come into effect on *April 6, 2018*, subject to obtaining parliamentary approval.

Comment

This has been a problem since the abolition of salary-related contracting-out in April 2016 and practitioners have been seeking changes to the bulk transfer rules for some time. The restrictions under current regulations have caused problems in restructuring situations, as it has not been possible to make a bulk transfer of contracted-out rights without consent to a newly established scheme.

However, there are concerns relating to some of the technical drafting of the new provisions, and it is hoped these will be addressed during the consultation process.

The Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) (Amendment No.2) Regulations 2017

DC pension flexibility: amending regulations made concerning valuation of safeguarded benefits with GARs and the advice requirement

The Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) (Amendment No.2) Regulations 2017 will come into force on *April 6, 2018*. These regulations amend the Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) Regulations 2015 to make it simpler to value members' safeguarded rights which include a guaranteed annuity rate (GAR) to determine whether the statutory "advice requirement" applies.

The exception to the statutory advice requirement will apply where the "transfer value" of the member's safeguarded benefits under the scheme is £30,000 or less.

The Financial Assistance Scheme (Increased Cap for Long Service) Regulations 2018 – DWP finalises regulations to extend long-service cap to include FAS assistance

The DWP has published a response to its consultation on the draft Financial Assistance Scheme (Increased Cap for Long Service) Regulations 2018. The regulations will extend the long-service cap, which currently only applies to PPF compensation, to cover assistance provided by the Financial Assistance Scheme (FAS).

Several changes have been made to the regulations in light of respondents' comments, some of which clarify the operation of the increased cap. Other amendments mean that the increase will now take effect from the date that the FAS long-service cap comes into force (not the next pay day as originally proposed) and ensure that survivors can be treated as having pensionable service and benefit from the long-service cap.

The regulations are intended to come into force on *April 6, 2018*, subject to Parliamentary approval.

The Registered Pension Schemes and Overseas Pension Schemes (Miscellaneous Amendments) Regulations 2018 – HMRC introduces new reportable event for master trusts

Regulations amending the requirements for the provision of information by registered pension schemes to HMRC have been made and will come into force on *January 30, 2018*.

The Registered Pension Schemes and Overseas Pension Schemes (Miscellaneous Amendments) Regulations 2018 make minor consequential amendments to the provision of information requirements to reflect the reduction in the level of the money purchase annual allowance from £10,000 to £4,000. These amendments have effect from *April 6, 2017*.

The amending regulations also introduce a new event to the list of those that a scheme administrator is required to notify to HMRC. From *April 6, 2018*, scheme administrators will be required to notify HMRC, within 30 days, if the scheme becomes, or ceases to be, a master trust scheme (as defined in section 1 of the Pension Schemes Act 2017). This will provide HMRC with the information it requires to consider the registration of such schemes in light of a new power contained in the Finance Bill 2018 for it to refuse to register, or de-register, a master trust that is not authorised by the Pensions Regulator.

Pension Protection Fund and Occupational Pension Schemes (Levy Ceiling and Compensation Cap) Order 2018 – PPF compensation cap and levy ceiling set for 2018/19

The PPF compensation cap and levy ceiling for the 2018/19 financial year have been fixed by statutory instrument, laid before Parliament on January 16, 2018.

With effect from *April 1, 2018*, the compensation cap will rise from its current level of £38,505.61 to £39,006.18, to reflect the increase in the general level of earnings. The 90 per cent level of compensation that applies for members of schemes entering the PPF who are below their scheme's normal pension age will therefore be £35,105.56.

The Order also confirms that for the financial year beginning on April 1, 2018, the overall PPF levy ceiling will rise from £1,007,249,095 to £1,024,372,330. This reflects the increase in the general level of earnings of 1.7 per cent for the period from August 1, 2016, to July 31, 2017.

PPF (Compensation) Amendment Regulations 2018 – commencement order allows regulations to be made for PPF compensation to take account of bridging pensions

Of interest to DB schemes offering bridging pensions is the DWP's recent consultation on technical provisions in the draft Pension Protection Fund (Compensation) (Amendment) Regulations 2018 (the 2018 Amending Regulations), on which we reported in detail in our December 2017 update. The Amending Regulations will allow the PPF to take account of bridging pensions where scheme rules provide for such benefits.

The relevant commencement order allowing new regulations to be made under the Pensions Act 2004 came into force on *January 22, 2018*, with the Amending Regulations due to come into force on February 24, 2018.

Master trust code of practice: new regulations in force requiring TPR to issue a code of practice

Regulations have been made under the Pension Schemes Act 2017 bringing into force the requirement for TPR to issue a code of practice in relation to the authorisation of master trust schemes.

The new requirements come into force on *February 1, 2018* and amend the list of issues on which TPR must issue codes of practice under section 90 of the Pensions Act 2004 to include

- The process for applying for authorisation of a master trust scheme.
- The matters that TPR expects to take into account in deciding whether it is satisfied that a master trust scheme meets the authorisation criteria.

We reported in our December 2017 update on the draft regulations setting out the detail of the new regime for regulating master trusts in the UK, on which the consultation ran until *January 12, 2018*.

From *October 1, 2018*, a master trust will prohibited from operating unless it has been authorised by TPR. An authorised master trust will then be subject to TPR's ongoing supervision, and those failing to meet the standard required will run the risk of being required to wind up and transfer their members to an alternative scheme. In order to obtain authorisation, master trusts will have to meet five criteria, which are

- The arrangement being run by "fit and proper" persons.
- Being financially sustainable.
- Having scheme funders which meet specific requirements.
- Having sufficient systems and processes to run effectively.
- Having an adequate continuity strategy.

Update on the Financial Guidance and Claims Bill

The Financial Guidance and Claims Bill continues its progress through Parliament and completed its Commons Committee stage on *February 6, 2018*. Its provisions include those to ensure that members of the public are aware of the importance of receiving guidance before taking advantage of pensions freedoms.

A cross-party amendment inserted by the House of Lords (HL) at the report stage in October 2017 introduced a requirement for the Financial Conduct Authority (FCA) to check whether a member had received information and pension guidance from the proposed new single financial guidance body (SFGB) before accessing or transferring a stakeholder or personal pension. Mirror requirements would be introduced for trustees for occupational pensions.

The Government's current proposed amendments replace this with a requirement for trustees to ask whether guidance has been received by the individual from the SFGB or an independent financial adviser and, where the member indicates that it has not been received

- Recommend that such guidance or advice is sought.
- Ask whether the individual wishes to wait until they have received such guidance before deciding whether to proceed, or if they wish to proceed without it.

Once the FCA has consulted on and finalised its approach, the DWP will produce regulations relating to occupational schemes. TPR and the FCA will also produce guidance on how occupational and contract-based schemes respectively should comply.

The original HL proposal was for individuals to be defaulted into a Pension Wise (in future, SFGB) appointment, which they were able to decline. The aim was that pension savers would be delayed from making a snap decision and hopefully afforded protection against pension scams and unnecessarily high tax bills. The Government's current proposal is arguably weaker as it simply encourages individuals accessing flexible benefits to seek advice, and prolongs the administration process without appearing to protect the member further, as the scheme will be compelled to carry out the member's wishes after asking the required questions.

Comment

Trustees should check whether their scheme rules mention individual guidance or advice specifically, as amendments may be necessary once the relevant regulations are finalised.

British Telecommunications plc v BT Pension Scheme Trustees Limited [2018] – High Court rules against change from RPI to CPI

Summary

Of interest to defined benefit (DB) schemes is a judgment handed down on *January 19, 2018*, in which the High Court rejected the employer's attempt to change the indexation measure applying to some members' pensions from the Retail Prices Index (RPI) to the Consumer Prices Index (CPI).

As there is no override provided under statute to change from RPI to CPI where a scheme's rules provide otherwise, the ability of individual schemes to change the basis on which benefit increases are calculated will continue to depend on the precise wording of the rules.

Legal background

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

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

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

Facts of the case

British Telecommunications plc (BT), the principal employer of the BT Pension Scheme (the Scheme), sought to change the index used for the calculation of increases to Section C members' pensions from RPI to CPI. This was proposed as part of an overall pensions review, in an attempt to reduce the funding deficit in the Scheme.

Of the many issues considered by the High Court, the two main ones were

- Which was the applicable increase rule, as there had been several re-drafts of the Scheme documentation since 1993.
- Whether or not RPI had "become inappropriate" as the measure to use for calculating Section C members' pension increases.

Decision

Having heard extensive argument from all the parties, and having considered the various Scheme amendments that had been implemented between 1993 and 2016, Zacaroli J considered that the applicable increase rule for all Section C members was that in the form it appeared in the Scheme rules dated April 5, 2016 (the 2016 Rule), which stated:

" ... The cost of living will be measured by the Government's published General (All Items) Index of Retail Prices or if this ceases to be published or becomes inappropriate, such other measure as [BT], in consultation with the Trustees, decides."

BT claimed that the wording of the 2016 Rule conferred on it as principal employer (or jointly with the Trustee) the power to determine whether RPI had become inappropriate. Having heard expert evidence, Zacaroli J disagreed with this interpretation and held that the question whether RPI had become inappropriate was an objective one. It was not enough that RPI had merely become undesirable, or was considered by BT to be less appropriate than any other index; the hurdle for inappropriateness was a higher one, and it had not been met.

The Judge also considered the decisions in other recent cases concerning the interpretation of provisions allowing the replacement in of RPI for indexing pension benefits (including that of Warren J in Thales). He concluded that they were of little assistance, as the terms of the relevant rules and the precise issues which gave rise to the decisions in those cases were materially different.

Comment

In a statement following the judgment, BT expressed its disappointment in the outcome of the case and said it was considering its next steps, including the possibility of an appeal. The Scheme is currently undergoing its triennial valuation, which is expected to show a funding deficit in the region of £14 billion. In an effort to reduce this deficit, BT has been consulting with members on a proposal to close the Scheme to future accrual.

Many schemes have considered adopting CPI as a means of reducing scheme liabilities and improving the scheme funding, as CPI (to date) has generally produced a lower uplift to benefits than did RPI. The ability of schemes to use CPI instead of RPI clearly depends upon the precise wording of the rules and the respective powers of the principal employer and the trustees in making any necessary amendments.

Some schemes' revaluation provisions are drafted in terms of reference to the relevant legislative provisions and where this is the case, amendments relating to deferred benefits will not be required. However, indexation provisions are likely to be set out in more detail, and in some cases may refer specifically to RPI. Where rule amendments are required to adopt CPI, any restrictions in the scheme's power of amendment will need to be taken into account, and CPI-based increases may be possible in respect of future service only.

Given that there are many variations on existing increase and revaluation rules, it is likely that questions such as those outlined above will continue to come before the Courts, and the law will develop accordingly. Whilst general principles may be drawn from these cases, they are of only limited use for schemes with as yet untested RPI definitions and clearly it is important for legal advice to be taken.

MB v Secretary of State for Work and Pensions: At what age should transgender people receive their State pension benefits?

Summary

In the 2016 case of *MB v Secretary of State for Work and Pensions*, the Supreme Court considered the issue of State pension entitlement for a transsexual person with an acquired female gender.

The Gender Recognition Act 2004 (GRA 2004) came into force on April 4, 2005, and provides for the issue of a gender recognition certificate to those who have undergone gender reassignment surgery. Once the certificate has been issued, the individual's new gender is legally recognised for most purposes but it does not have retrospective effect. Arguably, this means that pension accrued before the date of the gender recognition certificate must be treated as having accrued in the person's original sex. This, together with the requirement that a transgender person must be unmarried in order to obtain a gender recognition certificate, were the potentially discriminatory issues considered by the Advocate General in the European Court of Justice (ECJ).

Facts of the case

MB was born in 1948 and registered at birth as male and had been married to a woman since 1974. However, since 1991 MB had lived as a woman and underwent gender reassignment surgery in 1995.

Upon reaching age 60 (the State pension age for women in the UK at that time), MB applied to receive her State pension. Her application was rejected on the ground that she did not have a full gender recognition certificate, which was required under UK law in order to be treated as a women for the purpose of receiving State pension benefits. Without it, MB would have to wait until reaching age 65 (the State pension age for men) to receive her pension.

One of the requirements for obtaining such a certificate was that the applicant had to be unmarried (due to the UK not permitting same-sex marriage at that time). Therefore, unless MB obtained an annulment of her marriage, it was not possible for her to obtain a full gender recognition certificate. However, for religious reasons, MB and her wife wished to remain married.

MB brought a challenge in the UK courts against the UK government in respect of the decision not to pay her State pension from age 60. Her challenge was brought on the basis that the requirement to be unmarried was discriminatory and contrary to EU law. The decision to withhold her State pension was upheld in the lower courts and the Court of Appeal. However, the Supreme Court referred this point to the ECJ.

The Advocate General's opinion his reasoning

The Advocate General (AG) found that previous ECJ case law established that prohibited discrimination on the grounds of sex also covers discrimination on the basis of gender reassignment. The requirement to be unmarried for the purposes of accessing the State pension applied only to transgender persons, and this contravened the Equal Treatment Directive.

The AG decided that the correct comparator for establishing sex discrimination in the context of gender reassignment depends on the circumstances of each case and, as MB sought to receive her State pension from the same age as an individual who had been registered at birth as a woman – a cisgender woman – this was the correct comparator in MB's case. The requirement to be unmarried to receive State pension benefits does not apply to a cisgender woman.

The AG noted that discrimination on the basis of sex cannot be objectively justified unless it falls within specific circumstances set out in EU law, and the requirement for transgender persons to be unmarried did not fall within any of them. He therefore concluded that such a requirement could not be objectively justified.

Comment

Although the AG's opinion is indicative of how the ECJ will decide the Supreme Court's question, it is not binding on the ECJ (nor on the Supreme Court). The AG will have considered the submissions made to the ECJ, and his opinion will be considered by the ECJ as part of its own decision-making process. However, it is possible for the ECJ to reach a different conclusion, or the same conclusion but on a different legal basis.

If the ECJ follows the AG's opinion, this will be good news for married transgender persons such as MB who wish to receive their State pension from age 60. Despite this, the number of people who stand to benefit from such a decision in future is limited. The requirements for issuing full gender recognition certificates have changed now that same-sex marriages are recognised in the UK, and the requirement for a transgender person to be unmarried no longer applies. Furthermore, UK State pension ages for men and women are being harmonised, so the number of transgender persons potentially affected by this issue will diminish over time.

Mrs S (PO-16173): scheme administration: Ombudsman awards £2,500 for extremely significant distress and inconvenience over employer's failure to pay contributions

The Pensions Ombudsman (PO) has upheld a complaint where a member's employer failed to pay previously agreed contributions into her pension plan.

Following a TUPE transfer in 2010, the member (Mrs S) had agreed with her new employer that pension contributions (totalling £25,000 and agreed to be made in two instalments) to which she became entitled would be deferred. After a subsequent change in her employment terms in 2016, the member requested that her outstanding contributions be paid into her

plan. The employer failed to act on this request and failed to respond to the member's complaint. Mrs S then escalated the complaint to the PO. The employer also failed to issue a formal response, or reply, to the PO Adjudicator's opinion.

The PO held that failure to make pension contributions, without any good reason, amounted to maladministration. The PO directed the employer to pay Mrs S's pension contributions into the plan, as well as an amount representing the investment return that could reasonably have been obtained on that sum if it had been paid into the plan when the member requested.

The PO held that the employer's maladministration, paired with its failure to communicate with the PO office, amounted to "extremely significant distress and inconvenience", for which it should make a non-financial loss payment of £2,500.

Comment

This decision is notable for the employer's apparent refusal to engage in any way with the complaint process, despite having several opportunities to do so with both the Adjudicator and the PO.

The level of compensation awarded in the case is also of interest. Where the PO makes a finding of maladministration, there is no statutory limit on the amount of compensation he may award, although the PO's own guidance on remedies for non-financial injustice caused by maladministration notes that the usual starting point for awards would be £500 or more, and that in most cases, redress is likely to range from £500 to £1,000. Here, the PO chose to increase the amount recommended by the Adjudicator from £500 to £2,500. The compensation was thus among the higher awards granted by the PO, and shows that the PO will not hesitate to award a substantially higher amount where the facts merit it.

Employment appeal tribunal – *McCloud* and *Sargeant*: age discriminatory transitional provisions in pension schemes – can they be objectively justified?

In our March 2017 update, we reported in detail on two cases in which an employment tribunal (ET) had considered discriminatory pension scheme provisions. Both ET decisions were appealed, with the ET making an order to consolidate the two cases in the Employment Appeal Tribunal (EAT).

In *McCloud and Others v Lord Chancellor and Secretary of State and Another*, the ET held that discriminatory transitional provisions in the Judicial Pensions Regulations 2015, which mitigated the effect of compulsory pension reforms for older judges, could not be objectively justified (that is, whether they were a proportionate means of achieving a legitimate aim) and were therefore unlawful.

The Lord Chancellor and the Secretary of State appealed but the appeal was dismissed. In the EAT, Sir Alan Wilkie (sitting alone) identified a series of mis-directions by the employment judge (EJ) in respect of the question of legitimate aims, by reason of his misunderstanding and/or misapplication of the facts and the evidence. However, when the EJ considered the question of proportionate means, he did so on the assumption that the Appellants had established legitimate aims, and the EAT found that approach could not be faulted. As a result, the ET decision that the Appellants had failed to show their treatment of the Claimants to be a proportionate means of achieving a legitimate aim was correct, and accordingly the appeal was dismissed.

In *Sargeant and Others v London Fire and Emergency Planning Authority and Others*, the ET held that the transitional provisions for changes to the Firefighters' Pensions Scheme *were* objectively justifiable and therefore *were* not unlawfully discriminatory on grounds of age, race or sex.

The EAT held that the EJ's decision in the firefighters' case on the issue of legitimate aims was correct and did not contain any error of law, so the appeals on those grounds failed. However, the EJ did err in law in her consideration of proportionality by applying a "margin of discretion" approach as set out in ECJ/CJEU cases but in declining to apply the level of scrutiny described in domestic case law. The appeal was upheld on a limited basis in respect of the ET's findings on indirect race and sex discrimination, and in respect of those issues, the claims would be remitted to the ET.

Comment

It was difficult to reconcile the original ET decisions in the *McCloud and Sargeant* cases. The respective ETs reached the opposite conclusion on some of the key questions, including whether protecting those over a certain age was even capable of being a legitimate aim, because it was itself age-based. In addition, the ET in McCloud considered there was no rational explanation as to why the judges closest to retirement needed protection, as they were least affected by the changes.

It is helpful to have the EAT's clarification on these issues, which focus on the complex issue of the level of scrutiny applied in the ET in relation to proportionality. Once an aim has been identified, the means chosen to achieve it must be both appropriate and necessary. There must then be careful scrutiny in the context of the particular business concerned in order to see whether the aim does meet the objective and that there are no other, less discriminatory, measures which could be applied instead.

These decisions could have an impact across public sector schemes where similar transitional provisions have been implemented. They also provide a useful yardstick for private sector schemes on the considerations by the courts on the objective justification of discriminatory measures. The EAT decisions are binding on future tribunals.

The Government may appeal the *McCloud* decision, and the ET will reconsider the indirect race and sex discrimination issues in *Sargeant*.

View the *McCloud* judgment.

View the *Sargeant* judgment.

Wedgwood Pension Plan Trustee Ltd v Salt [2018] – High Court rules employers' termination notices effective in closing scheme to future accrual and breaking final salary link

In a hearing which took place over 4 days in November 2017, the High Court heard a Part 8 claim on whether the proposed closure of a defined benefits scheme to further accrual was effective and, if so, whether the final salary link would be preserved given its ties to the power of amendment and rectification. Judgment was handed down on *January 26, 2018*.

Background

As a result of the funding deficits in many defined benefits schemes, in recent years many employers have reduced the benefits provided under such schemes. When closing a scheme to future accrual, employers often seek to have past service benefits calculated as though members had left service, with no ongoing linkage to future levels of salary for those benefits while members remain in service. This is known as breaking the final salary link.

The power of amendment provisions in an occupational pension scheme's governing trust deed may include a restriction, or fetter, on the use of that power, the scope of which may be subject to debate. One of the best known examples of a fettered amendment power was considered by the High Court in *Re Courage Group's Pension Scheme* [1987] (*Courage*).

The *Courage* decision

The fettered amendment provisions in *Courage* provided that the power could not be used to "vary or affect any benefits already secured by past contributions in respect of any Member without his consent in writing".

In *Courage*, Millett J held that the benefits protected by the restriction included "the prospective entitlement to pensions based on final salary". He could see:

"no reason to exclude any benefit to which a member is prospectively entitled if he continues in the same employment and which has been acquired by past contributions, and no reason to assume that he has retired from such employment on the date of the employer's secession when he has not."

The Court held that this proviso protected final salary linkage in respect of members' accrued rights. Similarly, in *IMG Pension Plan HR Trustees Limited v German* [2009], (IMG) an amendment power providing that "no amendment shall have the effect of reducing the value of benefits secured by contributions already made" was interpreted consistently with.

However, for many commentators, the suggestion that the *Courage* judgment allows wording such as "accrued rights" and "benefits secured" to confer a link to final salary is incorrect. It has been argued that future increases in pensionable salary may never happen and should not be included within the concept of "benefits secured". Applying the *Courage* logic, every future, potential or contingent benefit, to the extent that it can be attributed to pensionable service up to the date of the amendment, must be treated as having been already "secured", and could not be removed by amendment. Thus, where "benefits secured" are being tested at a specific point in time, it has been suggested that no account should be taken of anything that has not already happened, because it cannot be said to have been "secured".

Facts

The case of *Wedgwood Pension Plan Trustee Ltd v Salt* concerned the Wedgwood Group Pension Plan (the Plan), a multi-employer final salary scheme. On June 26, 2006, the Plan's participating employers served notice terminating their liability to contribute further in respect of members currently in pensionable service. After the Wedgwood Group's financial position deteriorated further, most of the participating employers became insolvent in the following years. The last remaining participating employer went into administration in April 2010. At the date of the High Court hearing, the Plan was in a Pension Protection Fund assessment period and heavily in deficit.

Key provisions in the scheme rules

The relevant rules governing the Plan at the material time were those adopted in 1995 and replacement rules adopted in 2001.

Rule 48 in the 1995 rules (the Amendment Power) provided that

"The Principal Company may at any time and from time to time by instrument under its Common Seal alter or modify all or any of the Rules for the time being in force or make any new Rules to the exclusion of or in addition to all or any of the existing Rules aforesaid and any Rules so made shall be deemed to be Rules of the same validity as if originally embodied herein and shall be subject in like manner to be altered or modified and any alteration modification or addition of or to the Rules which may be effected in exercise of the power contained in this Rule shall be notified to the Members by posting the same in some conspicuous place in all the works and offices of each of the Participating Companies *provided always that no alteration modification or addition shall be made which (i) shall prejudic*e or adversely affect any pension or annuity then payable or the rights of any Member." (Emphasis added). The words in bold comprise the Fetter on the Amendment Power.

Rule 62 in the 2001 rules (the New TerminationRule) provided that

"A Participating Employer

(a) can stop contributing in respect of all or some of its employees by giving written notice to the Trustees

(b) will stop contributing

(1) if it stops being a Qualifying Employer, from a date 12 months after it stops being a Qualifying Employer, unless the Board of the Inland Revenue has agreed it can contribute after that date,

(2) if it stops carrying on business because of liquidation or otherwise, or

(3) if it fails to observe and perform all or any of its obligations under the Plan and the Trustees give written notice to the Participating Employer that its participation in the Plan is to end

and, as soon as that happens, Member's Contributions in respect of any Members affected will stop.

If a Participating Employer stops contributing and Rule 63 (Winding Up) does not apply the provisions of Rule 17 (Benefits on leaving the Plan) will apply to each Member then in that Participating Employer's service and for whom contributions have been stopped. If a Member is not a Qualifying Member, the Principal Employer can direct the Trustees to treat him as a Qualifying Member for the purpose ... "

Rule 45 in the 1995 rules (the Previous Termination Rule), the predecessor to the New Termination Rule, provided that:

"If an Order shall be made or an effective resolution passed for the winding-up (otherwise than for the purpose of reconstruction or amalgamation with any other Participating Company) of any Participating Company other than the Principal Company or *if from any*

cause it shall at any time thereafter be found by any such Company other than the Principal Company to be impracticable or inexpedient for such Company to continue to participate in the Plan or if any Company for the time being participating in the Plan shall cease to be a Subsidiary or Associated Company (as defined in the Rules) such Company shall retire from the Plan and the following provisions shall apply…" (Emphasis added).

Therefore, the circumstances in which an employer could terminate its participation in the Plan were widened considerably under the New Termination Rule.

Issues for the Court

The trustee issued representative proceedings, seeking the Court's directions on several questions of construction. The purpose was to determine whether the employers' termination notice served under the New Termination Rule was effective to

- Close the Plan to future accrual of benefits by active members.
- Break the link to members' final salaries in the calculation of their benefits.

The Court looked at two separate main issues.

Issue 1 – the scope of the Fetter

This was divided into two parts

i Did the Fetter in apply only to members' accrued rights at the date of the amendment or did it also protect members' future rights which would accrue following completion of further pensionable service? The trustee argued that the Fetter protected only members' accrued rights, though it accepted for this purpose that accrued rights should be calculated on the basis of a final salary link. The representative beneficiary argued that both future rights and accrued rights were protected by the Fetter.

ii Was the New Termination Rule validly introduced, such that it permitted future accrual to be terminated by the employers' termination notice, with no continued final salary linkage? The answer to this point depended on whether the Amendment Power could be exercised to change the Previous Termination Rule to the New Termination Rule without infringing the Fetter.

The trustee argued that the New Termination Rule was validly introduced and the employers' notice was effective both to terminate future accrual for all members and to break the final salary link. The representative beneficiary took the opposing view.

Issue 2 – the validity of the New Termination Rule

If the introduction of the New Termination Rule had been achieved via means outside the scope of the Amendment Power, was future accrual terminated and the final salary link nonetheless broken by the employers' termination notice on the basis that the introduction and exercise of the New Termination Rule was valid subject to an overriding limitation that brought it into line with the Fetter? The trustee argued that the New Termination Rule should be construed as subject to whatever additional overriding protection was required under the Amendment Power, relying in particular on the High Court decisions in *Bestrustees plc v Stuart [2001]* and *Betafence Ltd. v Veys* [2006].

Decision

The Court held that the employers' 2006 termination notice was effective both to stop future accrual and to break the final salary link.

Issue 1(i) – did the Fetter in apply only to members' rights accrued at the date of the amendment or did it also protect members' future rights which would accrue following completion of further pensionable service?

The Court ruled that the natural meaning of the words "the rights of any member" in the Amendment Power was the rights which had accrued to a member as a result of past service. The word rights did not cover benefits which might in the future be obtained as a result of future service with an employer. This conclusion was consistent with the proper approach to construction of pension scheme rules, as referred to by the Court of Appeal in *Buckinghamshire v Barnado's* [2016]. It also took account of the requirement to construe a scheme's rules so as to give reasonable and practical effect to the scheme bearing in mind that the scheme "has to be operated against a constantly changing commercial background", in the words of Arden LJ in the Court of Appeal in *Stevens v Bell* [2002]. This construction would protect rights gained by members through past employment while enabling the employer to stop those benefits accruing in the future.

In construing the scope of the Fetter, the judge (Penelope Reed QC) noted that none of the authorities cited by the parties were helpful as they concerned the construction of "very specific wording, quite different from the words used in [the Amendment Power]". On the other hand, decisions where the Court had found future rights were *not* protected (notably *Courage*) also featured significantly different wording.

In *Courage*, as in the subsequent decision in *IMG* (and several other cases considering the meaning of specific restrictions in amendment powers), the real issue was whether the relevant fetter required final salary linkage to be maintained. In both *Courage and IMG*, for different reasons, it was concluded that it did.

Issue 1(ii) – was the New Termination Rule validly introduced, such that it permitted future accrual to be terminated by the employers' termination notice, with no continued final salary linkage?

The Court ruled that the New Termination Rule had been validly introduced, such that it allowed future accrual to be terminated by the employers' termination notice. However, its introduction engaged the Fetter that protected the final salary link for existing members. As a first step, the Court held that the Previous Termination Rule had enabled a participating employer to retire from the Plan if, for any cause, it found that it was impracticable or inexpedient to continue to participate. There was no corresponding requirement in the New Termination Rule and the absence of such wording made it easier for a participating employer to stop contributing to the Plan than previously. This change therefore fell foul of the Fetter by prejudicing or adversely affecting the rights of the members.

Issue 2 – was the New Termination Rule validly exercised?

The Court held that the introduction and exercise of the 2001 Rule was valid, but subject to an implied limitation that notice of termination could not validly be served by the employers unless it had first for any reason been found by the employer to be impracticable or inexpedient to continue to participate in the Plan. In finding that this limitation should be implied, the Court noted that the thrust of the decided cases was that if a limitation could be implied that prevented the members being prejudiced, then the Court "should not be slow to make that implication".

The next question was whether the principal employer would have exercised the Amendment Power to introduce the New Termination Rule had they been aware that exercise of the power would be subject to the implied limitation. This question arose in light of the Court of Appeal decision in *IBM United Kingdom Holdings Ltd. v Dalgleish* [2017]. The judge commented that in IBM, the Court appeared to have considered it necessary to deal with an issue which, if not

dealt with, would have left the exercise of the power open to attack. On the facts, the Court held that the principal employer would on balance have amended the Plan to introduce the New Termination Rule if told of the necessary limitation. The amended rules adopted in 2001 were designed to govern the Plan on a long-term basis and it was foreseeable that the participating employers' financial position might change in the future. The greater flexibility imported by the New Termination Rule would allow the employers to make a "more nuanced decision should there be financial difficulties".

A further question was whether, in exercising their power under the New Termination Rule, the employers could have proved that it was impractical or inexpedient for them to continue to participate in the Plan. Although there was no evidence any party turned their mind to this specific issue in 2006, it was clear that the Waterford Wedgwood Group was experiencing financial difficulties at the time. Continued participation would have jeopardised the possibility of turning round the Group's financial position. These factors were sufficient for the employers to have concluded legitimately in 2006 that it was impracticable and inexpedient for them to continue to participate in the Plan, had they asked this question at the time.

Comment

This judgment is a useful addition to the competing authorities on *Courage*-type fetters in amendment powers, particularly in confirming that future rights are not covered by a fetter which protects "the rights of any Member". It is not yet clear whether the representative beneficiary intends to appeal the decision, but it should also be noted that leading counsel for the trustee reserved his right to argue on appeal that *Courage* was wrongly decided in relation to final salary linkage.

One of the more difficult aspects of the judgment arises from the fact the trustee accepted for the purpose of Issue 1 that the Fetter protected final salary linkage, and argued for the purpose of Issue 2 that the Fetter *was* not engaged at all. The Court found that the Fetter was engaged by the introduction of the New Termination Rule, but concluded nonetheless that the final salary link was broken on termination. The Court's reasoning in this respect appears to be based on the proposition that introduction of the wider power under the New Termination Rule, although a prejudicial change, was permissible if there was compliance with the implied limitation that notice of termination was invalid unless the employer had first concluded it to be impracticable or inexpedient to continue to participate in the Plan.

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