NORTON ROSE FULBRIGHT

Essential UK Pensions News

February 2021

Introduction

Essential UK Pensions News covers the key pensions developments each month.

Pension Schemes Act 2021 receives Royal Assent

The Pension Schemes Bill was approved by the House of Lords on January 19, 2021 and received Royal Assent to become the Pension Schemes Act 2021 on February 11. The Act provides the framework for a number of important reforms, including stronger powers for the Pensions Regulator, defined benefit funding changes, climate change reporting requirements and pension dashboards.

For more information on what this means, read our short Stop Press. For a more detailed look at the Pensions Regulator's stronger powers under the Act, read our briefing.

PASA publishes GMP equalisation tax guidance

The GMP Equalisation Working Group established by the Pensions Administration Standards Association (PASA) has published good practice guidance on the tax issues schemes may encounter when equalising benefits for the unequal effects of GMPs. This guide pieces together and comments on the various guidance provided by HMRC in its newsletters over the last year and draws out a series of practical tips and key messages. It covers aspects such as lifetime allowance, annual allowance, deferred member carve-outs and the treatment of lump-sum payments to members.

GMP conversion is not covered in any detail, *"because of the ongoing uncertainty around the tax implications of conversion, and our understanding that no further guidance is expected from HMRC at this time"*. However, the PASA working group does intend to publish separate guidance on conversion (including tax issues) by the end of April.

PPF consults on changes to valuation assumptions

The PPF is consulting on changes to the assumptions (including mortality and discount rates) used for PPF valuations, to ensure they are in line with estimated pricing in the bulk annuity market. It estimates the changes would improve the aggregate PPF funding ratio from 93.5 per cent to 97.6 per cent, move 261 schemes from deficit to surplus and reduce the deficit of schemes from £253 billion to £204 billion on the PPF basis.

The PPF proposes to introduce these changes for valuations with an effective date on or after May 1, 2021. The consultation closes on March 18, 2021.

Government to consider increasing advice allowance

In giving oral evidence to the Work and Pensions Committee's inquiry into pension scams, the Pensions Minister indicated that HM Treasury was evaluating whether the pension advice allowance should be increased and would report back in 2021. Currently members of DC schemes can withdraw up to £500 up to three times in order to pay for retirement pensions advice, but this has been criticised as insufficient.

The DWP is also considering introducing a "mid-life MOT", to encourage people to engage with pensions issues at an earlier stage in their lives. The concern is that by the time people are approaching retirement age, they may already have made certain pensions choices which could have been better informed with financial education earlier on.

Government confirms normal minimum pension age rise from April 2028

HM Treasury has published a consultation confirming that the Government will legislate to raise the normal minimum pension age from 55 to 57 from April 6, 2028. This is to reflect longevity and to encourage people to save longer for their retirement.

HM Treasury is seeking views on the proposed protection regime. It proposes a "protected pension age" of 55 specific to the individual as a member of a particular scheme (i.e. similar transitional protections to those which applied when normal minimum pension age was increased from 50 to 55 from April 6, 2006). Protection would only apply to individuals who have an existing right within their scheme rules at the date of the consultation (February 11, 2021) to take pension benefits before age 57. For everyone else, the normal minimum pension age would increase to 57 from April 6, 2028.

It is also proposed that the "block transfer" tax rules would apply, which would mean the member's right to take benefits from age 55 would be lost on an individual transfer to another scheme.

The consultation closes on April 22, 2021.

Increase in Pensions Regulator enforcement activity

The Pensions Regulator's latest quarterly enforcement bulletin (covering the period October to December 2020) shows an almost 50 per cent increase in the Regulator's use of its statutory powers compared with the previous quarter. The Regulator described this as being *"in line with expectations"* given that it had relaxed enforcement in the early months of the pandemic to support businesses, but certain easements, particularly in relation to auto-enrolment, have since been lifted.

The total number of times TPR used its powers for automatic enrolment breaches between October and December was 24,799 compared with 16,599 in the previous quarter.

Uber ruling may have implications for auto-enrolment

The Supreme Court has dismissed an appeal by Uber, finding that Uber drivers are "workers" rather than self-employed for the purposes of certain employment rights, including the national minimum wage and paid annual leave. This may have implications for pensions, if gig workers go on successfully to press for a decision that they are within the scope of the automatic enrolment legislation.

Government consults on further changes to survivors' benefits in NHS Pension Scheme

Following the Supreme Court judgment in *Walker v Innospec and others* in 2017, public sector schemes were amended so that male and female same-sex spouses and civil partners would receive equal benefits to those received by widows in opposite-sex marriages. An employment tribunal decision in July 2020, *Goodwin v Secretary of State for Education*, highlighted potential discrimination against male spouses of female members where they are entitled to lower survivor benefits than comparable same-sex survivors.

The Government is now consulting on changes to the NHS scheme to equalise the benefits. The consultation closes on April 8, 2021.

Decision not to pursue NHS tax-related flexibilities

The Government consulted in September 2019 on making the NHS Pension Scheme more flexible in relation to accrual and contributions in order to address the impact of the annual allowance taper on high-earning clinical staff.

However, since then the Government has amended the taper by substantially increasing the applicable thresholds. It has therefore concluded that there is no further need for the proposed flexibilities and it is not proceeding with the proposals.

EAT confirms Equality Act "non-discrimination rule" overrides discriminatory rules in a statutory scheme

The Employment Appeals Tribunal (EAT) has held (in *London Fire Commissioner and others v Sargeant*) that the fire and rescue authorities cannot rely on a defence in the Equality Act 2010 which applies where an action is taken in order to comply with the *"requirement of an enactment"*.

Background

In 2018, the Court of Appeal decided in *Lord Chancellor and another v McCloud and others; Secretary of State for the Home Department and others v Sargeant and others* that transitional provisions in judges' and firefighters' pension schemes were age discriminatory. The transitional provisions allowed members who were nearing retirement age to remain in their legacy schemes, thereby protecting them from changes to future benefits planned as part of the 2015 reform of the main public service pension schemes.

EAT appeal

A recent appeal to the EAT examined the argument by the fire and rescue authorities that they should not be liable for age discrimination claims because the discrimination arose from implementing the rules of the firefighters' scheme. They argued that as these rules are set out in various statutory instruments they benefit from the Equality Act defence that their actions were "required by an enactment".

The EAT has dismissed the appeal, holding that the discriminatory rules of the firefighters' scheme were overridden by another provision of the Equality Act (Section 61), which says that *"an occupational pension scheme must be taken to include a non-discrimination rule"*. The Fire and Rescue Authorities were not required to implement the discriminatory rules, because they had been overridden. The defence was therefore not available.

Decision on reform of public service pensions

The Government has confirmed that it will reform public service pension schemes to remove discrimination following the *McCloud* judgment (see above) by introducing a "deferred choice underpin". This will allow all eligible members a choice between the benefits they would have had under their "legacy" scheme or the benefits offered under the new scheme for their period of membership between April 1, 2015 and March 31, 2022. That decision can be deferred until retirement, rather than having to decide at a time when the member does not know with certainty how long they will continue working.

Government revokes new public sector cap on employee exit payments

The Government has decided to revoke a set of regulations, which was introduced as recently as November 2020 and which capped at £95,000 the total exit payment that most public sector employees could receive on loss of employment. This follows several legal challenges to the cap. The Government has concluded that the cap could have unintended consequences.

This development is likely to mean that reforms to early retirement pensions in the Local Government Pension Scheme (LGPS) will be abandoned.

Mr G (PO-21110) – Maladministration caused investment losses

Summary

In the context of a pension transfer, the Pensions Ombudsman agreed with the member that he should be compensated for his estimated investment losses, holding that they were caused by a delay by the transferring scheme trustee in providing information required by the receiving scheme to invest the member's transfer payment.

Background

Mr G was a member of Lloyds Bank Pension Scheme No 2 (the Scheme) and decided to transfer his benefit to the James Hay Personal Pension Plan (the SIPP). The Scheme administrator received his completed transfer paperwork on November 30, 2016, together with a request from James Hay for certain information, including *"details of any court orders against the policy, i.e. divorce or bankruptcy".*

Shortly afterwards, WTW took over as the new Scheme administrator and dealt with the transfer request. The transfer payment was made on January 6, 2017 but the information about court orders was not provided. Both Mr G and James Hay chased WTW for the information on several occasions, explaining that without complete information the transfer payment could not be invested.

James Hay received WTW's confirmation that there were no court orders on February 27, 2017 and invested the transfer payment on March 1, 2017.

Mr G complained to the Pensions Ombudsman that if WTW had provided the requested information without undue delay, the CETV could have been invested in the SIPP on January 10, 2017 and so he should be compensated for loss of investment returns. He calculated these to be £20,022 but with an additional £5,500 to reflect the fact that as a member with lifetime allowance "fixed protection" he could not pay the compensation into the SIPP and would lose the tax-free growth. For the tax-free growth element, he estimated his life expectancy and applicable tax rates.

The Trustee and WTW argued that it was not standard practice for receiving schemes to require explicit confirmation that there were no court orders, and James Hay should have taken a "common sense approach", assuming none was in place unless informed otherwise. The absence of this information should not have prevented James Hay from investing the monies and the Trustee should not be held responsible for the SIPP's failure to do so.

Pensions Ombudsman's determination

The Pensions Ombudsman agreed with the member, holding that:

- The information request from James Hay was reasonable and WTW ought to have complied with it in a timely fashion.
- If it had done so, James Hay would have been able to invest the transfer payment on January 10, 2017.
- Its failure to do so amounted to maladministration on WTW's part as did its failure to treat the information request as urgent after being told that the failure to supply all the information was preventing investment of the CETV.
- The maladministration caused Mr G actual financial loss because of the excessive amount of time his investments were out of the market.
- Mr G's calculation of his financial loss, including the assumptions used for the part of it reflecting loss of tax-free investment growth, was credible.

The Pensions Ombudsman ordered:

- WTW to pay Mr G compensation of £25,522 in recognition of the investment loss and estimated loss of tax-free growth, and
- The Trustee to pay £500 to Mr G for significant distress and inconvenience.

Comment

This case gives an interesting insight into how the Ombudsman will deal with a loss of investment opportunity and "out of market" risk, including where certain assumptions need to be made in order to calculate the loss. As WTW pointed out, the tax-related element of the compensation (£5,500) was based on "speculative tax and mortality rates".

While WTW and the Trustee suggested the blame for the loss lay with James Hay for not investing the monies, the Ombudsman concluded that James Hay was protected from Mr G's claim by a term in the contract between them that clearly said James Hay would require satisfactory transfer information from the transferring scheme before monies could be invested in the SIPP.

It is unclear from the Ombudsman's reasoning whether WTW could have escaped liability if it had simply refused to provide the further information requested, which it considered non-standard. This arguably leaves administrators in a difficult position, potentially having to comply with the business practices of receiving schemes even if they consider them unreasonable.

It is also worth noting that the Ombudsman refused to make allowances for the fact WTW had just taken over as the new Scheme administrator and its work volumes were therefore unusually high.

As discussed in our December 2020 webinar, this indicates a consistent trend from the Pensions Ombudsman in taking Scheme administrators to task for causing members investment loss through poor processes. Trustees and administrators may wish to review their transfer paperwork and processes in the light of this case.

The determination can be viewed here.

Mr N (PO-29382) – Non-disclosure of minutes did not constitute maladministration

Summary

The Pensions Ombudsman has held that a refusal by scheme trustees to disclose trustee meeting minutes to a member was not maladministration. The minutes concerned the trustees' policy on how to exercise a discretion and *"would not 'supplement or alter' the documents establishing the Plan or the Plan Rules".* Therefore there was no legal obligation to disclose them and it was not improper to refuse to do so.

Background

In 2019, Mr N brought a complaint about the level of pensionable service credit he had received in the Innospec Ltd Pension Plan (the Plan) when he transferred his additional voluntary contributions (AVCs) in from another pension scheme in 1997.

He also complained about the decision of the Plan trustees (the Trustees) in 2011 to use CPI for determining pension increases in future, rather than RPI. Mr N claimed that he had received documents and communications from the Trustees which confirmed that pension increases were guaranteed always to be by reference to RPI. He said this assurance had been a key reason for his decision to transfer his benefits into the Plan in 1997.

Mr N made a subject access request for the Trustees to disclose minutes from the 1997 trustee meeting which he believed recorded their decision always to increase benefits in line with RPI. The Trustees argued that they were not required to disclose the requested information. They had a discretion under the Plan rules as to which index to apply for increasing pensions. Their past practice for exercising the increase discretion was irrelevant to how they now chose to exercise this discretion.

Pensions Ombudsman's determination

Mr N's claims were not upheld as they were time-barred, having not been brought within three years of the point when the member knew or ought to have known about the act he was complaining about.

The adjudicator initially found that the Trustees improperly refused to disclose the minutes and that this amounted to maladministration. However, the Pensions Ombudsman disagreed, arguing that the Disclosure Regulations only required the disclosure of documents that would *"supplement or alter in any way"* the Plan rules. The Ombudsman considered the minutes of a trustee meeting discussing its policy for exercising its discretion would not have been able to bind the Trustees always to exercise their discretion in a certain way and therefore the minutes did not "supplement or alter" the Plan rules. It followed there was no obligation to disclose the information Mr N had requested.

Comment

The interesting aspect of this case is the decision on disclosure obligations.

The Disclosure Regulations do not require the sharing of trustee meeting minutes with members. However, the Ombudsman has previously decided that refusing to disclose them can amount to maladministration (Mr C Allen (L00370), April 2002).

This new decision is more trustee-friendly. Mr Allen's case can be distinguished because in his case the minutes considered his particular circumstances and therefore helped show the reasons for the trustee's decision in relation to his benefits specifically. By contrast, the minutes Mr N wanted to see did not relate to his particular case and – being about past practice – were not in the Ombudsman's view sufficiently relevant to require disclosure. The Ombudsman noted that the Trustees had separately provided Mr N with their reasons as to why, in 2011, they reached the decision that CPI was the appropriate index for the calculation of pension increases.

The determination can be viewed here.

And finally...

You may have seen a recent update to HMRC guidance about the Trusts Registration Service (TRS), which is the register of trusts which HMRC maintains for anti-money laundering purposes. This update was of a mechanical nature and does not change the position reached in the course of last year for pension schemes, which is broadly that:

- Registered pension schemes are exempt from the TRS registration requirement (but unregistered pension trusts could be required to register).
- However, schemes do need to keep certain records about beneficiaries, employers, advisers, trustees and individuals with control.

Pensions issues in the pipeline

March 10, 2021 – End of consultation on climate change governance and disclosure regulations and statutory guidance.

March 18, 2021 – End of consultation on revised actuarial assumptions for PPF valuations.

April 8, 2021 – End of consultation on changes to survivors' benefits in NHS scheme.

April 22, 2021 – End of consultation on transitional protections for rise in normal minimum pension age.

October 1, 2021 – New requirements apply for trustees to publish information on a publicly available, free website relating to voting and capital structure of investment companies under the Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019 following the transposition into UK law of the revised Shareholder Rights Directive (SDR II).

October 1, 2021 – New requirements for trustees of DB schemes to publish an implementation statement online under amendments to the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013. For "relevant schemes" (broadly, money purchase schemes with 100 or more members), the requirement to publish an implementation statement online applies as soon as the accounts have been signed after October 1, 2020 (but in any event no later than October 1, 2021).

Revised Funding Regime – A revised Code of Practice is expected by the end of 2021, after the DWP has issued and consulted on draft funding regulations.

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