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Essential Pensions News

Updater

July 2019

Introduction

Essential Pensions News covers the latest pensions developments each month.

Court of Appeal confirms Pensions Regulator can look back before 2005 in Box Clever case

The Court of Appeal has confirmed in the Box Clever case that the Regulator could look back to periods before its moral hazard powers were introduced.

As a reminder of this long-running saga, the Regulator decided to issue Financial Support Directions against ITV and a number of its subsidiaries. The FSDs related to the financial position of the Box Clever group following ITV's highly leveraged acquisition of the group. Although the ITV group companies had ceased to own shares in the sponsoring employers, the Regulator was satisfied that the ITV group companies were deemed still to be associates of the sponsoring employers. The ITV group companies appealed the Regulator's decision to issue these FSDs. In May 2015, ITV appealed successfully against dismissal of a strike-out application made by the targets of the FSD.

The Court of Appeal ruled that, while there is no statutory requirement relating to the precise contents of a warning notice issued by the Regulator, the notice must make clear to the target the case against it.

In May 2018 in the hearing on the two substantive issues (of whether ITV was sufficiently "connected" or "associated" with Box Clever, and whether the Regulator acted "reasonably" in issuing a FSD in respect of actions which pre-dated the relevant legislation), the Upper Tribunal ruled in favour of the Regulator.

ITV appealed on the question of whether the relevant legislative provisions could be given the retrospective scope claimed by the Regulator.

The Court dismissed the appeal on three main issues

- The targets had argued that the FSD legislation was not retrospective, and there was no power to issue an FSD where all the facts that fall to be considered related to events that occurred before the Pensions Act 2004 came into force. Rejecting this argument, the Court held that the FSD legislation contained no express time limits and was "neutral" as to the factors that are relevant and admissible as part of the Regulator's decision on whether to issue a FSD, stating

  "It is unlikely that Parliament intended in effect to limit the scope of the power to issue an FSD to future circumstances rather than to give it a wide and immediate effect".

- Agreeing with the decision of the tribunal, the Court held that the targets were associated with the relevant employers and so were "connected with or an associate of" them for the purposes of the FSD legislation, on the relevant date.

- The Court rejected the targets' submission that the tribunal erred in law by reaching a decision that no reasonable tribunal could have reached. It found that the tribunal's conclusion that the factors in favour of an FSD clearly outweighed the targets' position on retrospectivity "involves no error of law". It was irrelevant whether the court or a differently constituted tribunal might have come to a different conclusion. The tribunal was entitled to reach the conclusion which it did.

Comment

This case provides the most detailed ruling to date on the retrospective focus of FSDs. The Court confirmed that FSDs can relate to events which occurred before the introduction of the Regulator's applicable powers. It also retracted from framing FSDs purely within the moral hazard regime and instead considered the much broader distinction "between blame and responsibility".

Box Clever also provides judicial guidance on the concept of reasonableness in relation to FSDs. The case establishes that, in certain circumstances, it can be deemed reasonable to issue an FSD where a target has not received a benefit from the employer. In addition how well funded/resourced a target is should be not be a consideration when determining whether or not it is reasonable to issue an FSD.

A curious finding of this case is that, as a fault-based issue, liability for contribution notices is deemed to be capped. The court concluded that liability under this heading can only be imposed for conduct that occurred within six years of action being brought and in any event only after April 27, 2004 (when the legislation was first proposed). Conversely, as it is not deemed to be a fault-based issue, liability for FSDs remains uncapped and has a look-back period which is theoretically unlimited.

While the FSD does not itself impose financial obligations, ITV will be expected now to make plans for its future funding of the Box Clever scheme. Over the last several years, ITV has raised repeated legal challenges to the Regulator's attempted enforcement actions. However, both the Upper Tribunal and the Court of Appeal have now confirmed that the broadcaster should provide the scheme with financial support.

Pensions Regulator consults on forcing higher standards on trustees

On July 2, 2019, Regulator issued a consultation paper on the *Future of trusteeship and governance*. The paper is wide-ranging, contemplating for example

- Raising the standards required of all professional trustees (whether accredited or not) and requiring all trustee boards to have an accredited professional trustee/trustee director.
- Changing the Trustee Knowledge and Understanding (TKU) Code of Practice to introduce competency-based standards, for example, through relevant training or qualifications plus a continuing professional development structure.
- Greater contact with schemes to require trustees to demonstrate how they meet TKU requirements and other regulatory initiatives (that is, via direct contact with trustees) testing investment governance, record-keeping, and promptness and accuracy of financial transactions, costs and charges.
- Encouraging consolidation of schemes where trustees are persistently unable or unwilling to meet the expected standards, including via investigations and enforcement measures; a greater focus on and support for diversity in recruitment of trustees, requiring trustees to report on trustee board diversity (but without forcing quotas on boards).
- Digging deeper into potential issues with sole trustees.
- Improving routes to wind-up to avoid members losing the benefit of guarantees.

The consultation closes September 24, 2019.

View the Consultation paper here.

Pensions Regulator updates its DC investment guidance

On June 27, 2019, the Regulator published a significant revision to its investment guidance for DC schemes, which accompanies its DC Code of Practice. The new guidance now covers the new investment requirements around financial and non-financial factors including environmental, social and governance considerations and policies. It also reflects a much greater focus on documentation and reporting, establishing investment beliefs and priorities for investment decisions, value for money and better understanding of costs, trustees' own skills and performance, and the arrangements that trustees have with their asset managers.

In our June update, we reported on the new investment and disclosure duties for pension schemes which will apply from October 1, 2019 and October 1, 2020, implementing pensions aspects of the Shareholder Rights Directive II. The Regulator's guidance has been updated to incorporate new requirements regarding pension schemes' statements of investment principles and the disclosure of information. These requirements are contained in two sets of regulations, the Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018 and the Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019.

One of our future client briefings will cover these changes in detail.

View the investment guidance.

Comment
This guidance is somewhat late in the day given that trustees must have formulated their views on non-financial factors by October 1, 2019. However it is a useful overview and we would recommend trustees read it in full.

Pensions Regulator issues joint declaration on climate change with FCA, FRC and PRA

On July 2, 2019, the Regulator, the Financial Conduct Authority, the Financial Reporting Council and the Prudential Regulation Authority (collectively the regulators) issued a joint declaration on climate change.

The regulators recognise that climate change is a major issue and presents far-reaching financial risks that are relevant to their respective mandates. This includes physical factors, such as extreme weather events, and transition risks, which can arise from the process of adjustment to a carbon neutral economy.

Firms are advised to consider the likely consequence of climate change on their business decisions, in addition to meeting their responsibility to consider the firm's impact on the environment, as financial risks will be minimised by achieving an orderly transition and via a collective response.

The regulators welcome the action being taken as part of the UK's Green Finance Strategy (see below) to ensure a co-ordinated approach. They look forward to further collaboration to advance progress in the near term on climate-related issues.

Alongside the declaration, the FCA has published a statement that it looks forward to participating in the Government's new taskforce, announced as part of the Green Finance Strategy, to look at the most effective way of enhancing climate-related disclosures.

The statement also summarises some of the FCA's recent work related to climate change, including a discussion paper on the topic (DP18/8) and a consultation paper on environmental, social and governance disclosures for independent governance committees (CP19/15). The FCA will provide an update on its work on climate change in the coming months, providing feedback on responses to DP18/8 and setting out next steps.

Pensions Regulator launches online re-enrolment tool

The Regulator has launched a new online re-enrolment tool to enable employers to re-enrol their staff into a workplace pension more simply. While the vast majority of employers are carrying out re-enrolment successfully, some are failing to complete the task correctly – which could lead to a fine.

The new re-enrolment tool is being launched by the Regulator as thousands of small and micro employers reach their re-enrolment dates in the coming months. Re-enrolment must be carried out every three years and it is a two-stage process. Firstly, employers must check whether they have any staff to re-enrol and ensure those who are eligible are put back into a pension scheme. They must then complete and submit their re-declaration of compliance. So far, more than 176,000 employers have completed their re-declaration of compliance showing TPR how they have met their re-enrolment duties.

While the majority of employers will not have staff to re-enrol, they must still complete their re-declaration of compliance to confirm they have carried out the relevant check, even if none were re-enrolled.

The new online re-enrolment tool can be accessed here.

PPF publishes new insolvency guidance note on situations involving new or successor schemes

The Pension Protection Fund's latest insolvency guide sets out its approach to proposals for restructurings involving a new or successor scheme. The document provides more detailed guidance on this issue and complements the PPF's Guidance on the PPF's approach to Employer Restructuring document.

The guidance is for use by those involved in restructurings where there is a proposal to reduce rather than remove an employer's pension liabilities. This is done by offering members the choice of transferring to a successor scheme that offers less generous benefits, or remaining in their current scheme which will undergo PPF assessment. To be successful, the successor scheme proposal must demonstrate that the company is insolvent and satisfies the PPF's restructuring principles.

The new guidance sets out the PPF's minimum requirements in such situations, including setting fair transfer terms between the schemes (the PPF will not accept a situation where the successor scheme takes a greater share of the assets than the proportion of the PPF liabilities), equality of terms for any asset split, and establishing benefit terms to ensure that members are no worse off if they take the opportunity to move to the successor scheme.

The guidance confirms the PPF's position that no precedent will be set that would permit transfers to a successor scheme where it cannot be shown that it will provide a viable long-term alternative to the PPF.

View the guidance.

Experian and PPF finalise 2019/20 insolvency scores

Company insolvency scores for the 2019/20 PPF levy season have now been finalised and will feed into the levies which are to be invoiced in autumn 2019.

The Insolvency Risk element of the 2019/20 PPF levy is calculated from the average of the 12 month-end insolvency risk scores recorded between April 2018 and March 2019. These average scores are then converted into a levy band with a corresponding levy rate, with further adjustments applying to multi-employer schemes and those with a parental guarantee.

Trustees should check that the process has resulted in their scheme being included in the expected levy band.

View the Experian Pension Protection Score portal.

Government launches Green Finance Strategy

On July 2, 2019, the same day as joint regulators issued their declaration on climate change (see above), the Department for Business, Energy and Industrial Strategy published the Government's Green Finance Strategy. The Strategy sets out the actions that the Government will take to

- Ensure that current and future financial risks and opportunities from climate and environmental factors are integrated into mainstream financial decision-making, and that markets for green financial products are robust. The Strategy refers to this as "greening finance". It includes a Government expectation that all listed companies and large asset owners will disclose in line with the Financial Stability Board's task force on climate-related financial disclosures (TCFD) recommendations by 2022.

- Accelerate finance to support the delivery of the UK's carbon targets and clean growth, resilience and environmental ambitions, and international objectives. The Strategy refers to this as "financing green".

- Ensure that UK financial services capture the domestic and international commercial opportunities arising from "greening finance", such as climate-related data and analytics, and from "financing green", such as new green financial products and services.

TCFD guidance will be developed for pension schemes and the Pensions Regulator expects to consult on the guidance in late 2019 with a view to putting it on a statutory footing during 2020.

Pension Advisory Group publishes guide to the treatment of pensions on divorce

On July 1, 2019, the Pension Advisory Group published a detailed Guide to the Treatment of Pensions on Divorce. The report has been produced by the multidisciplinary PAG team of family judges, practitioners and pension experts chaired by Francis J and HHJ Hess. It is endorsed by Sir Andrew McFarlane P, who commends it to all judges and practitioners as formal guidance to be applied when any issue regarding a pension is to be determined in financial remedy proceedings.

The report aims to de-mystify pensions on divorce and establish the proper approach to be taken in every case. The hope is that this encourages fairer settlements, and safeguards clients' interests and practitioners from negligence claims. It covers the essential stages of a typical case, from information gathering through to post-order implementation, and the relevant considerations and issues that may arise at each stage together with key recommendations.

Although lengthy at more than 160 pages, the guidance is comprehensive and includes the valuation of pension rights, how to deal fairly with such rights, an explanation of pension offsetting, the tax treatment of pension benefits on divorce and state pension issues.

The authors hope that the guide will lead to more predictable pension settlements on divorce.

View the guidance.

HMRC publications deadline imminent for Scheme Financial Reconciliation and no GMP equalisation guidance before the autumn

Countdown Bulletin 46, published on July 2, 2019, reminds scheme administrators that the deadline for updating details for the latest Scheme Financial Reconciliation refunds and billing exercises was to expire on July 19, 2019. The Bulletin gives an overview of how HMRC will offset receipts and receivables within the same scheme.

View Bulletin 46.

In Newsletter no. 111, published on June 26, 2019, HMRC admits that solving the tax challenges from GMP equalisation is not straightforward and may need legislative change. No updates to the guidance can be expected before the autumn. This means trustees need to be careful about fixing GMP inequalities where it may impact members' tax-protected status, such as enhanced or fixed protection.

In addition, the Newsletter notes the Regulator's powers to supervise Master Trusts, provides a copy of the technical specifications required for notification of residence status, and highlights some new functionality on the online Managing Pension Schemes service. Scheme administrators may now update director/ trustee details and scheme establisher details online.

View the Newsletter 111.

GMP equalisation: cross-industry working group publishes its Call to Action on initial steps for trustees and sponsors

In our June update, we reported the announcement of the formation of a cross-industry GMP Equalisation Working Group to assist schemes following the High Court's ruling in the Lloyds Bank case on the equalisation of guaranteed minimum pensions. The GMPEWG had published an open letter setting out its current progress, intended focus and anticipated timeframe for publication of its promised best practice guidelines. It recognised that this work will be significant and had created five sub-groups focusing on specific areas such as methodology, data and reconciliation and rectification.

The working group has now published its promised Call to Action, encouraging schemes to begin working now on understanding and progressing GMP reconciliation, reviewing their quality of data, and managing impacted transactions, including preparing for future transactions. The Call to Action aims to provide assistance to the industry in the form of initial information and guidance for the first steps on what could be a complex project, although the total cost to schemes and members could be "relatively modest". The GMPEWG calls on all stakeholders to work together to help the plan succeed and seeks to identify good practice in the planning, management and efficiency of the project.

Taking early action, it says, will help trustees to ensure they are in the best possible position to deliver on equalisation by managing the process effectively. The Call to Action is due to be followed by a guidance paper on the relationship between GMP rectification and equalisation. Later this year, the first version of full guidance documents for data, impacted transactions, methodology and tax are also due to be issued.

View the Call to Action.

Professional trustee accreditation framework delayed

Our June 2019 briefing focused on the proposed new standards and accreditation framework for professional trustees, which had been due to launch on July 1. However, the Professional Trustee Standards Working Group has disbanded following an announcement that the trustee accreditation process has been delayed until “later this year”.

The Association of Professional Pension Trustees said the delay is due to the framework proving to be “more complex than first envisaged” and commented that final details are expected to be published later this year.

When eventually launched, the framework will be run by the Pensions Management Institute and overseen by the council of the Association of Professional Pension Trustees. It will comprise seven standards to which professional trustees will be expected to adhere.

The new framework is designed to drive up governance standards across schemes. In particular, it focuses on the need for professional trustees to demonstrate appropriate knowledge, skills and conduct. It will include a fit and proper persons test, a technical qualification and a soft skills element.

Age discrimination – *McCloud* and *Sargeant*: Supreme Court refuses Government permission to appeal in judges’ and firefighters’ cases

We have reported previously on two cases in which separate employment tribunals (ET) had considered potentially age discriminatory pension scheme provisions. Both ET cases were appealed, with the ET making an order to consolidate the cases in the Employment Appeal Tribunal (EAT).

The Court of Appeal then held that transitional provisions in judges’ and firefighters’ pension schemes were directly age discriminatory. It was admitted that the provisions were less favourable to younger judges and firefighters and so the cases turned on objective justification. The Court held that the Government had failed to demonstrate any legitimate aim. In matters of social policy, the Government had to be accorded some margin of discretion in relation to both aims and means. Nevertheless, it was for the tribunal in any particular case to determine what the appropriate margin was.

This decision showed that any employer operating directly age discriminatory policies or practices must be prepared to evidence the legitimacy of its stated aims. In this case, the Government had asserted an aim of protecting those closest to retirement from the financial effects of pension reform, since they would have least time to rearrange their affairs before retirement. However, there was no evidence to support this and, in fact, this group was the least affected by the changes because benefits already accrued under the old schemes for past service were protected for all. This meant the employment tribunal was entitled to find that the provisions were irrational.

By an order dated June 27, 2019, the Supreme Court has refused permission to appeal against the Court of Appeal judgment on the grounds that the applications do not raise an arguable point of law. This is a significant decision and, from the Government’s perspective, the amounts involved are thought to be in the region of £4 billion per annum and there could be a wider impact in relation to other public sector pension schemes with similar transitional provisions. It has recently been reported that the British Medical Association is planning to take legal action against the Government on behalf of a group of younger doctors regarding alleged age discrimination as a result of transitional protection arrangements.

Supreme Court denies BT right to appeal in £2bn in benefit indexation battle

The Supreme Court has denied BT the opportunity to appeal against the Court of Appeal's ruling preventing the company from downgrading the inflation protection given to some of its defined benefit members. As a reminder, the Court of Appeal concluded that a rule allowing a switch of index from RPI "if this ceases to be published or becomes inappropriate" was an objective test and RPI had not become inappropriate (see our previous briefing).

Comment

Whether a scheme is allowed to switch increases to CPI from RPI still depends on the precise wording of the rules governing that particular scheme.

See our bulletin on this topic.

Same sex spouse benefits left to schemes to regularise

On July 4, 2019, the Government published a statement in response to the Supreme Court's 2017 decision in *Walker v Innospec*.

Mr Walker took the Innospec Pension Scheme to court because his civil partner would not be entitled to the same pension as if they had been an opposite sex couple. In 2017, the Supreme Court ruled in his favour. See our previous briefing.

The Government has now agreed to implement the necessary changes for public sector pension schemes. However, the legislation will not be changed – the statement confirms that the Government will not make any further retrospective changes to legislation to equalise survivor benefits. Private sector pension schemes are simply expected to follow the judgment to the extent that they do not already do so. The rationale given for this is that private sector schemes are individually responsible for ensuring that they are compliant with the judgment.

Comment

Leaving the legislation at odds with overriding law is unhelpful. On its face the Equality Act 2010 retains an exemption allowing discrimination by reference to service before the Civil Partnership Act came into force on December 5, 2005, but such discrimination is now prohibited.

DWP updates Departmental Plan

The DWP recently updated its Departmental Plan. The overarching objective of these updates is to "ensure financial security for future pensioners" and to "make Britain the best place in the world to retire". More specifically, these updates provide confirmation that the DWP still intends to "drive forward" plans to strengthen the protection of DB schemes – this includes a commitment to strengthen the powers of the Regulator, protecting private pension schemes by introducing punitive fines, a new criminal offence for those who wilfully risk or neglect member benefits and strengthening the clearance framework in respect of corporate transactions. The DWP is still committed to establishing a delivery group to lead the industry's development of pensions dashboards.

View the Departmental Plan.

Issues in the pensions pipeline

October 31, 2019 – the UK withdraws from the EU, although it is (currently) unclear exactly what form Brexit will take.

October 1, 2019 – new SIP requirements in force relating to environmental, social and governance (ESG) factors.

GMP equalisation – DWP conversion guidance has now been published. The cross-industry working group has now published its Call to Action paper (see above) and guidance is expected throughout the rest of 2019.

Revised funding regime – consultation on a revised Code of Practice is expected "in the summer" with technical provisions expected to remain broadly as they are, with the main change being the addition of a secondary LTFT.

New pensions bill is now unlikely before the Autumn 2019, as the Queen's Speech has been postponed. It is expected to include provisions covering the Pensions Dashboard, the Regulator's powers, the revised Funding Regime, DB Consolidators and the Money and Pensions Service.

EMIR – new requirements to the exchange variation margin relating to derivatives applied from March 1, 2017. A further EMIR temporary exemption extension for pension scheme arrangements applied to August 16, 2018 and has now expired. On May 28, 2019, the EMIR amending regulation was published and was implemented on June 17, 2019. Under the amendments, the clearing requirement is not activated for the first two years, and the exemption may also be extended twice more, each time by a further year if "*... no viable technical solution has been developed and that the adverse effect of centrally clearing derivative contracts on the retirement benefits of future pensioners remains unchanged.*" The UK Government has confirmed that, as far as possible, the regime set out in the EMIR legislation will not change after the UK has left the EU.

October 1, 2020 – new disclosure obligations apply for trustees in relation to scheme's Statement of Investment Principles 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 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).

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