



UK Pensions briefing – GMP equalisation

Some tips and tricks

Briefing

October 2019

Introduction

Many UK pension schemes are in limbo, still not in a position to do anything substantive about equalising benefits for the effect of unequal guaranteed minimum pensions. Guidance from the GMP Equalisation Working Group in September 2019 tries to fill some of the gaps. We've pulled together a few dos and don'ts on equalisation from that guidance and our own thoughts.

DON'T wait for a solution to *de minimis* cases

When the [Lloyds Banking Group](#) judgment on GMP equalisation was delivered in October 2018, the judge parked consideration of whether trustees could apply a different approach to members where the estimated cost of calculating and implementing equalisation would match or exceed the expected benefit adjustment (known as *de minimis* cases). While the [LBG](#) trustees are going back to court to ask about the rights of transferred-out former members, we understand the question of *de minimis* cases will not now be considered.

The [GMPEWG guidance](#) suggests that trustees do not apply any *de minimis* test to benefits in payment. Working out who genuinely qualifies will mean that the lion's share of pre-equalisation analysis is already done, and the cost of putting the consequent adjustment into payment along with all the other members should be minimal.

We would add to that that it would in any event be difficult to persuade a court that not paying benefits when you can easily do so is justified. Where *de minimis* may be much more relevant is when you are looking at tracing former members (or their estates).

DON'T wait until you have a solution for every member

There are some categories of member where equalisation may be relatively straightforward, and some where tax or data obstacles will make it more difficult. There are obvious cost-efficiencies to be had from applying all changes to benefits as a single exercise, but this must be balanced against a trustee's duty to pay the benefits as they fall due. From an individual member's perspective, how can trustees justify not equalising their benefits just because the trustees are not yet sure how to address equalisation for another member?

We would suggest a triage of the membership so that the equalisation project prioritises categories that are more urgent and/or more quickly sorted. As an example, pensioners who are already receiving incorrect benefits would take priority over deferred and active pensioners. Members with chunks of transferred-in benefits might need to be carved out for special consideration while we wait for the second court application in the *LBG* case. The same might apply to transferred-out members and deceased members who trustees may decide should form part of a second work stream later down the line.

DO adopt notional comparators

Equalisation laws generally rely on comparing the treatment of people with a particular characteristic with a different group. With GMPs, it is almost impossible to compare men and women directly. The Government is insistent that actual comparators are not required for GMP equalisation and the parties to the *LBG* case agreed beforehand that actual comparators would not be required. The GMPEWG guidance goes one step further and suggests that you assume the member's notional comparator had done exactly what the member had done, even if an actual member of the opposite sex could not have acted in that way.

A good example is early retirement. As the male GMP does not come into payment until age 65, very early retirement may not be permitted for some men where the reduced benefit would be less than the GMP. But the notional comparator for a woman would still be assumed to retire when she did.

DO watch out for members paying the "married woman's stamp"

Before 1978 married women could elect to pay reduced rate national insurance contributions on the assumption that they could rely on their husband's pension in retirement. Over 4 million women were paying it in the 1970s, and they were allowed to continue on the reduced rate when the option was withdrawn in 1978. The effect is that their GMPs are lower than they would otherwise have been.

For these members, the GMPEWG guidance suggests the notional comparator needs to be a man who had also paid the married woman's stamp, even though this was not actually available to men.

DO decide what you are going to do about forfeiting past underpayments of benefits

The starting point is that where trustees have not paid a member the benefits he was due, the trustees owe the member those benefits. The judge in the *LBG* case decided that there are no limitation periods applying in these circumstances because of the way EU equality laws work with UK laws. However the judge made up for this by interpreting forfeiture clauses in the rules of the various *LBG* schemes to apply to shortfalls on instalments of pension. If a scheme has a valid forfeiture clause that removes the member's right to individual past underpayments after an appropriate period, the trustee cannot ignore that provision. In the *LBG* case, a number of the relevant schemes' forfeiture clauses effectively prevented the trustees from correcting instalments of pension dating back more than six years.

It all hangs on the drafting whether trustees of other schemes cannot correct past instalments, cannot unless they consciously decide otherwise, or can freely do so, and there are a very wide variety of forfeiture clauses out there (and some schemes with nothing). Our [blog post on forfeiture](#) considers some of the issues and how trustees might approach the issue. This is something that trustees can get on with now – work out what you can, and cannot do – and feed that into the calculations that will determine which equalisation route the trustees settle on.

DO tie your equalisation exercise to the scheme's pension increase date

Applying any changes to benefits at the same time as applying the usual annual pension increase minimises both communication costs and administrative costs.

DO consolidate benefits with different normal retirement dates before applying GMP equalisation

Members who are affected by GMP equalisation requirements may have a number of different normal retirement dates if their period of pensionable service straddles the date of the original 1990 *Barber* judgement requiring equalisation and/or the date their pension scheme completed its main equalisation exercise. The GMPEWG guidance suggests that for members in this category, trustees should calculate the aggregate benefit for all tranches of benefit in the period from May 17, 1990 and April 5, 1997, before applying GMP equalisation principles.

DO look at spouses separately

Surviving spouses have a freestanding GMP and therefore have to be tested for equality in their own right. That does not apply to dependants' and children's pensions unless, for example, the scheme's administrative practice is to treat part of the pension as a notional GMP for pension increase purposes.

Quite separately from this, the amount that comes into payment on the death of the original member needs to be checked against that member's equalised entitlement. The spouse's pension entitlement may as a result be higher than that actually paid. Equally, if the trustees adopt a cumulative approach to equalising past payments to the member (Method C in the *LBG* judgment), they may conclude that the member was being overpaid at the date of death, and that the spouse's benefit should be lower.

The GMPEWG guidance suggests that overpayments to the member should not be offset against underpayments to the spouse.

DO remember about top-up schemes

There are quite a few executive top-up schemes out there where the benefit is expressed along the lines of "£x less what the main scheme pays". The GMPEWG guidance has some interesting observations to make here: does the top-up benefit need to be reduced to reflect the higher benefit payable from the main scheme following. However do be careful here: if the top-up scheme benefit is expressed as "£x less what the main scheme can pay under old Inland Revenue limits", it may be that it is the top-up scheme that has to top up the benefits.

DON'T treat the guidance as gospel

GMPEWG is self-appointed so adhering to the guidance will not by itself protect trustees from claims. However it does represent the collective thoughts of a selection of participants from across the industry and it makes some sensible suggestions.

And finally, DO watch this space

We expect the court to hear the next *LBG* court application on GMP equalisation in April/May 2020. We hope to hear from HMRC sooner than that on how to treat small increases in members' benefits resulting from GMP equalisation for tax purposes. Rumours suggest any such guidance may not be as helpful as we have hoped, which could leave the industry having to feel its way through tax treatment. We will update you as and when there are developments.

In the meantime if you have any questions on your own pension scheme's equalisation obligations, please contact your usual Norton Rose Fulbright advisor.

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