Financial institutions
Energy
Infrastructure, mining and commodities
Transport
Technology and innovation
Life sciences and healthcare

NORTON ROSE FULBRIGHT

Essential pensions news

Updater

March 2018

Introduction

Essential pensions news covers the latest pensions developments each month.

DWP publishes long-awaited pensions White Paper: Protecting Defined Benefit Pension Schemes

Introduction

Following the Green Paper of March 2017, the long-awaited White Paper on defined benefit pension schemes from the Department for Work and Pensions (DWP) was published on *March 19, 2018*. Protecting Defined Benefit Pension Schemes sets out the Government's approach in relation to the defined benefits (DB) pension system, and its proposals to clarify the relevant rules and to strengthen the Pensions Regulator (TPR).

The proposed principal changes include

- Protecting private pensions by strengthening the regulatory framework and the Pensions Regulator's (TPR's) powers.
- Improving the way the scheme funding regime works.
- Providing new opportunities for DB schemes to benefit from consolidation options.

These proposals are examined in turn.

More effective powers for TPR

While the Government does not believe there is wide-scale deliberate employer activity to avoid DB liabilities, the system must be tough enough to protect scheme members from detrimental activity by ensuring TPR has sufficient power to take any action necessary.

Proposals to enhance TPR's effectiveness include

- *Punitive fines* – introducing an express power for TPR to issue a punitive fine to the targets of a contribution notice.
- *Criminal sanctions* – legislating to introduce a criminal offence where directors have behaved in a wilful or grossly reckless manner in relation to a DB pension scheme.
- *Director disqualification* – building on the existing legislative provisions for the disqualification of company directors whose behaviour falls short of the expectations of the role.
- *Notifiable events and clearance* – strengthening the existing clearance regime by reinforcing the notifiable events framework and taking further measures to support clearance. The DWP believes improvements could be made in the areas of both coverage and timing of the notifiable events framework. Currently, TPR must be informed "as soon as reasonably practicable" where certain transactions taking place which could have a detrimental effect on the pension scheme. In practice, such notification may be made after the event. Consideration will be given to whether the range of transactions should be widened and whether TPR should be made aware of the proposed transaction earlier in the process. There was a suggestion in the Green Paper that clearance, which is currently a voluntary process, should be made mandatory for certain transactions. While this proposal is not being developed, the effectiveness of the whole clearance framework is to be reviewed and TPR will be asked to ensure its guidance is clear and captures all relevant transactions.
- *Information-gathering* – harmonising TPR's existing information-gathering powers across auto-enrolment, master trusts, defined contribution (DC) and DB arrangements to increase effectiveness.
- *Interview attendance* – broadening TPR's existing power to compel a relevant person to attend an interview and provide information and documents relevant to an investigation.

The intention is to improve significantly TPR's ability to act quickly and to strengthen its deterrent against irresponsible employers putting their schemes at risk.

Improving scheme funding standards

The Government does not believe that evidence gathered to date indicates a general affordability problem across DB schemes as a whole, but it does believe that schemes and employers could benefit from clearer scheme funding standards. TPR has concluded that, in a number of cases, the technical provisions for a scheme have not been set "prudently", or the recovery plan has not been set "appropriately". There have been concerns raised that many trustees and employers find it hard to set discount rates taking into account their scheme and employer business circumstances, which in turn suggests a lack of clarity about setting the scheme's technical provisions prudently.

Proposals for change include

- Publication of a revised, enforceable DB funding code of practice including a description of how trustees and employers should set their scheme funding objective in the specific context of their scheme.

- Encouraging trustees and employers to collaborate on a long-term funding strategy, rather than concentrating on the three-year valuation time span, which is what TPR believes some trustees do currently.

- Requiring the appointment of a trustee Chair and a Chair's statement to be submitted with the triennial valuation. The Chair's statement would be intended to improve accountability and to demonstrate collaborative decision-making between the trustee and the sponsoring employer. It would set out the long-term financial destination and a scheme's strategic plan for reaching the statutory funding objective. Although the statement would normally be produced on a three-yearly basis, TPR would be able to request an "out of cycle" statement where there were concerns.

- Encouraging members to engage with the scheme to improve their understanding of funding.

The Green Paper sought views on whether shorter valuation reporting cycles would be more appropriate, such as nine or 12 month cycles. While some respondents favoured a reduction to 12 months, in view of the proposed revisions to the DB funding code and funding guidance, the DWP has decided to retain the current 15-month completion time and the triennial valuation span.

Consultation on new forms of consolidation vehicles

There are already several options for DB schemes to benefit from consolidated functions, such as shared administration services, asset pooling, fiduciary management and master trust arrangements. New forms of consolidation are being developed and consultation will be conducted on a system of "commercial consolidation vehicles" under which a private company would set up a new DB scheme and take over other schemes' liabilities in return for a one-off payment or a structured payment schedule from the previous sponsoring employers. The covenant would be provided by additional capital supplied by external investors who would expect a return on their investment.

It would be recognised that such commercial consolidation vehicles would not offer funding at the buy-out level required of insurance companies but it is suggested that the funding level could be around 80-85 per cent of the buy-out cost. This could equate to around 110–120 per cent of technical provisions for a typical scheme.

Further issues

The White Paper also includes the Government's response to the consultation held in May 2016 in respect of what might be done to help the British Steel Pension Scheme (BSPS) in the wider context of the British steel industry. The Government has concluded that the eventual decision to separate the BSPS from employers by means of a regulated apportionment arrangement and the creation of a new scheme into which members could choose to transfer was "a very positive outcome". As a result, the Government's view was that it is neither necessary nor appropriate to bring forward new legislation to permit the scheme's trustees to reduce future pension increases or to allow the transfer of members to a new scheme paying lower benefits without individual member consent.

Other areas live areas considered in the general pensions context are

- *Regulated apportionment arrangements (RAAs)* – under the RAA regime, an employer faced with impending insolvency can apply for TPR approval to separate itself from its DB scheme. The DWP recognises that the use of an RAA has allowed some struggling employers to restructure and avoid insolvency. However, it is recognised there is a risk in allowing more employers to use RAAs and there is a commitment to consult of improvements to the process and possible simplifications.

- *Deferred debt arrangements (DDAs)* – new legislation, allowing employers to enter into DDAs, will come into force as planned on *April 6, 2018*. A DDA allows an employer in a multi-employer scheme that has ceased to employ active members to defer its section 75 debt, provided that the trustees consent and that the employer continues to support the scheme on an ongoing basis.

- *Employer debt* – the current buy-out level of calculating employer debt in multi-employer schemes will be maintained and “orphan liabilities” will continue to be shared between participating employers.

- *Indexation of pensions* – there will be no statutory override “at this time” allowing schemes to change their rules to apply inflation increases to scheme benefits using CPI instead of RPI.

- *Guaranteed minimum pensions (GMPs)* – some minor changes to GMP conversion legislation will be considered. The intention is to support benefit simplification, and to help reduce complexities in existing benefit structures.

Delivery of the White Paper reforms

The DWP recognises that the pensions landscape has undergone a great deal of change in recent years, with the introduction of auto-enrolment, pension flexibilities and master trusts. The White Paper proposals form a programme of further work which will take a number of years to implement and which will require a phased delivery.

Stage one – those measures which do not require primary legislation and can be implemented quickly, or are already underway, such as making TPR clearer, quicker and tougher by building on existing powers.

Stage two – those requiring new legislation will be the subject of consultation during 2018 and 2019, with legislation to follow where Parliamentary time allows. Where primary legislation is required, this unlikely to be before the 2019-20 session.

Policies requiring further work include

- Strengthening powers of TPR to introduce the penalty fines regime and criminal sanctions options.

- Further research and consultation on scheme funding measures and decision on whether further change is needed to complement the new DB Chair’s statement.

- Commercial consolidation – consultation is planned towards the end of 2018.

Stage four (there is no stage three) – some measures, such as the how the current RAA is used, are to be kept under review.

Comment

Anyone hoping that the White Paper would present a suite of firm decisions in relation to the future shape of the DB pensions world is likely to be disappointed. Although the consultation expresses the view that there are no systemic problems in the DB regulatory and legislative environment, there are several suggestions of ways in which member protection can be reinforced. These include: the consolidation of DB schemes; strengthening the powers of TPR; criminalising certain “grossly reckless” acts adversely affecting DB schemes; reviewing whether the notifiable events regime is suitably robust; and requiring from trustees and employers “statements of intent” that certain business transactions have been examined for potential detrimental DB scheme impact.

Those hoping that a statutory override in respect of RPI to CPI calculation of pension increases (for those schemes unlucky enough to have hardwired the statutory provisions into their rules) will also consider the White Paper to be a missed opportunity to offer struggling DB schemes with a straightforward way of reducing liabilities. The DWP confirms it has “ruled out” a statutory override for now, although it also says it will continue to monitor developments in the use of inflation indices across Government, in pensions and more widely.

Obviously, any recurrence of the recent high-profile problems experienced in relation to large DB schemes (such as Carillion, BHS and Toys R Us) is something the Government and the pensions industry are united in wishing to avoid but legislative changes will be subject to consultation and are unlikely to be processed quickly with the current pressures on Parliamentary time. There is a difficult balance to be struck between preventing unscrupulous behaviour by a small minority of scheme sponsors and allowing legitimate corporate activity to continue with as much freedom as possible.

As for the implementation timetable, the more straightforward measures which do not require primary legislation and can be implemented quickly are in some cases already underway. Making TPR “clearer, quicker and tougher” by building on existing processes is one such example. Where primary legislation will be required (in areas such as increasing TPR’s powers, creating an enforceable revised DB code of practice and developing commercial consolidation vehicles) consultation will be conducted during 2018 and into 2019. The White Paper confirms that any resultant new legislation is unlikely to emerge before 2019-20 “at the earliest”.

DWP publishes response to the consultation on Master Trust authorisation and supervision

In our update for December 2017, we reported on the DWP’s publication of draft regulations to be made under the Pension Schemes Act 2017, setting out further details about the new regime for regulating master trusts in the UK. The consultation ended on *January 12, 2018*, and the response to the consultation has now been published.

The Government’s approach relating to the authorisation and supervision of master trusts has not changed and the minor amendments in the response relate to technical points and increased clarification where necessary.

The key date remains *October 1, 2018*, after which a master trust will be 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.

One provision that has changed since the draft regulations were published is the level of the fee that a master trust will be required to pay when applying for authorisation. An existing scheme in operation before October 1, 2018, will have to pay a flat fee of £41,000 (down from a maximum of £67,000), while a new scheme established on or after that date will have to pay a flat fee of £23,000 (down from a maximum of £24,000). The DWP maintains that the higher fee for an already established master trust reflects its view that substantially more work will be required for TPR, compared with authorising a new arrangement.

The response confirms that the detail of the new regime will be provided in TPR's related new code of practice. This is to be published shortly and will be subject to a separate consultation.

Welcome simplification of the DC-to-DC bulk transfer without consent regime

On *February 26, 2018*, the Occupational Pension Schemes (Preservation of Benefits and Charges and Governance) (Amendment) Regulations 2018 (the Regulations) were laid before Parliament. The Regulations will permit DC-to-DC bulk transfers on a without consent basis if the receiving scheme is an authorised master trust or else if the trustees have consulted with a professional verified to be independent. The DWP also published its consultation response on the same day.

The Regulations will come into force on *April 6, 2018*, with the exception of the provision removing the actuarial certification bulk transfer option for DC-to-DC bulk transfers, which will come into force on *October 1, 2019*.

Background

On *October 26, 2017*, the DWP published a draft of the Regulations, (on which we reported in our November 2017 update), improving the process for DC-to-DC bulk transfers without consent, while maintaining protection for members. The draft Regulations set out amendments to regulation 12 of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 (the Preservation Regulations) that would remove the requirement

- To obtain actuarial certification that the transfer credits to be acquired for each member under the receiving scheme were "broadly no less favourable" than the rights to be transferred (the scheme quality condition) for pure DC-to-DC transfers.

- That the transferring and receiving schemes must be related (the scheme relationship condition) in the case of pure DC-to-DC transfers.

The new Regulations

The final version of the Regulations differs from the draft on which the DWP consulted last year in a number of respects

- *Independence requirement* – the draft Regulations provided that where the receiving scheme is not an authorised master trust, the trustees of the transferring scheme must have obtained the written advice of a suitably qualified professional who was independent of the receiving scheme. Many consultation respondents considered that the proposed independence requirement was too stringent and would limit significantly the ability of trustees to find someone sufficiently independent to advise.

  As a result, the independence requirement has been softened so that

  - The period of time trustees have to look at to establish the independence of an adviser is reduced from five years to one year.

  - The adviser must not have received payment, in the year leading up to the date of provision of the advice, for advisory, administration or investment services to the receiving scheme, service provider or employer (or a connected firm).

- *Bulk transfers between connected schemes* – there is now an exemption from the requirement to seek independent advice (beyond that applying to authorised master trusts) to include a situation where the following tests are met

  - The transferring scheme employer is a group undertaking in relation to the receiving scheme employer.

  - The members whose rights are to be transferred are current or former employees of an undertaking which is a group undertaking in relation to the transferring scheme employer or the receiving scheme employer.

- *Situations where the employer has the transfer power* – the Regulations have been amended to make it clear that where the employer, rather than the trustee, has the power to effect the transfer, the employer has responsibility to seek and consider the advice of an appropriate adviser, and confirm to the trustee that it has done so.

- *Removal of the actuarial certification bulk transfer option* – trustees of schemes that fall under the new regime will not be able to opt to continue to use the current actuarial certification route for bulk transfers. However, in order to give schemes 18 months to complete bulk transfers currently underway, this restriction will not be implemented until *October 1, 2019*. Transfers would need to be complete by *September 30, 2019* and schemes which had obtained an actuarial certificate but not completed the transfer by this date would need to begin the process under the new provisions.

- *Extension and maintenance of charge cap protection* – consultation respondents agreed that capped members should retain their protection if transferred to a scheme that is not being used for automatic enrolment. However, the Regulations have been amended to ensure that these members retain cap protection if subsequently switched between arrangements, without consent, in the new scheme.

- *Transfers of self-selectors* – in the consultation, concern was expressed that the current legislation might force trustees to move members who had actively chosen their arrangement (referred to as self-selectors) into a default arrangement against their wishes. The draft Regulations have been amended to allow trustees to transfer these self-selectors from a non-default arrangement to a new non-default arrangement without triggering the cap restrictions, if the member has in the past five years, expressed a choice as to where their contributions were allocated. (However, the DWP emphasises that this provision is not intended to discourage trustees from placing relevant members in a capped arrangement should they consider it to be in the members' best interests.) Members who made the choice of arrangement more than five years ago and who do not respond to any trustee attempts to make contact can be moved to the default fund.

Implementation and guidance

The Regulations will come into force on *April 6, 2018*, except for the provision removing the actuarial certification route for DC-to-DC bulk transfers, which will come into force on *October 1, 2019*.

The consultation response confirms that the DWP is working with stakeholders and the Pensions Regulator to produce "high-level guidance" for trustees "no later than the end of April 2018".

Comment

The driving force for this welcome simplification of the DC-to-DC bulk transfer process is scheme consolidation, with the principal beneficiaries likely to be authorised master trusts. Recent research from the Pensions Regulator (TPR) found that there are currently 2,180 DC schemes with 12 or more members, 80 per cent of which have fewer than 1,000 members. Smaller schemes often pay significantly more in charges, are less able to negotiate effectively with service providers and are less able to invest in certain asset classes.

The DWP's response acknowledges that the current transfer process is very burdensome since the test to be met for bulk transfers without consent (originally designed for DB schemes) can be difficult to apply in practice when used for DC schemes. The promised guidance will be essential in determining what TPR considers a proper process for the transfer of DC pots without consent and the 18 month delay in the removal of the certification route is useful for transfer already underway.

Employers have reported that the current requirements prevent them from consolidating their schemes. These Regulations will certainly simplify that process and are likely to result in the increased consolidation of small DC schemes.

TPR publishes latest compliance and enforcement bulletin

Of interest to all occupational schemes providing money purchase benefits is the publication by TPR of its latest compliance and enforcement bulletin, confirming that scheme governance failures prompted the issue of fines for six schemes in the last quarter of 2017.

In our February 2018 update, we highlighted TPR's publication of a quick guide relating to the Chair's annual statement, as non-compliance with this requirement remains one of the most frequent reasons for regulatory action. Occupational pension schemes providing money purchase benefits are required to produce an annual chair's statement within seven months of the end of each scheme year or face a mandatory penalty of between £500 and £2,000. Forty-nine mandatory penalty notices were issued for failing to produce a chair's statement between September and December 2017, with fines ranging from £500 to £2,000, the higher being for professional trustee companies.

Other points of interest in the bulletin include

- TPR used its powers in respect of automatic enrolment a total of 28,446 times in this period, the majority of these being compliance notices.
- Although the number of fixed penalty notices issued dropped compared to the previous quarter, the number of escalating penalty notices remained stable, at 1,440.
- Over £240,000 of fines from escalating penalty notices were unpaid, and were the subject of Court orders to compel payment, with only £30,000 of penalties for such notices being paid within the same period.

View the Bulletin.

TPR publishes statement on managing service providers

In the wake of recent attention on companies providing outsourced services to Government and industry, including pension schemes, TPR has issued a statement setting out its expectations of good practice by trustees when managing service providers.

The statement reminds trustees that where they appoint third party providers, such as scheme administrators, they remain accountable for the running of the scheme and must manage their commercial arrangement with the provider, ensuring that sufficient controls are in place.

The statement also covers risk management and business continuity planning. Trustees should implement arrangements to manage risks that would have a significant impact on the scheme, such as failure of a third party provider. This would include putting in place a business continuity plan setting out what actions would be taken if certain events occur that affect the running of the scheme and looking at their provider's business continuity arrangements. Trustees should work with providers to resolve any areas of concern identified.

View the statement.

Pensions Advisory Service dispute resolution function moves to Ombudsman's office

The Pensions Ombudsman (TPO) has announced the moving of The Pensions Advisory Service's (TPAS) dispute resolution function to TPO. The move includes the transfer of the TPAS dispute resolution team and volunteer network of over 350 advisers. The transfer will be completed by *April 1, 2018*, at which time TPO's office premises will move to Canary Wharf.

Currently, scheme members can approach both TPO and TPAS for help when dealing with a pension complaint. TPAS tends to focus on complaints before the pension scheme's internal dispute resolution procedure (IDRP) has been completed, while TPO typically deals with complaints that have already been through IDRP.

The transfer will simplify the process, whether pre- or post-IDRP, which will in future be dealt with in one place. The aim is to provide a smoother customer journey and improved complaint handling. TPAS will continue to focus on providing pension information and guidance, and will become an integral part of the new Single Financial Guidance Body which is to be introduced under the Financial Guidance and Claims Bill.

TPO and TPAS will update their signposting to the public and pensions industry to reflect the services provided by each organisation. Pension schemes and providers will be given information to enable them to make the necessary changes to their own member communications.

HMRC publishes Countdown Bulletin no. 32

Of interest to schemes formerly contracted-out on a DB basis is the most recent edition of the Countdown Bulletin, dealing with various administrative issues, including

- A reminder to scheme administrators that HMRC will not be accepting termination and transfer notices that do not comply with specific guidance as set out in its bulletins.
- An acknowledgment that schemes are still submitting notices despite contracting-out coming to an end in April 2016. HMRC points out that, with very limited exceptions, administrators no longer need to submit termination and transfer notices where the period of contracting-out ends or transfers are effected after *April 5, 2016*.
- Details of a new process that has been developed following advice from the DWP, which will allow administrators to claim a contributions equivalent premium or limited revaluation premium refund where a post April 5, 2016 transfer of membership or liability has taken place.

The 32nd bulletin highlights that it is receiving queries from administrators where members are recorded incorrectly on the scheme reconciliation service (SRS) output. HMRC lists a number of scenarios where issues may arise, and asks that administrators check for these before notifying them where inconsistencies occur.

View the Countdown Bulletin.

HMRC publishes pension schemes newsletter 96: further details on new Scottish income tax rates

On *March 6, 2018*, HMRC published the latest edition of its pension schemes newsletter. The newsletter contains further information on the pensions tax implications of the Scottish Budget 2017 and the proposed higher and additional rates of income tax for the tax year 2018/19.

The newsletter confirms

- Fixed rate tax charges will continue to apply at the current rates. For example, where a short service refund lump sum is paid, tax will continue to be due at the rate of 20 per cent on the first £20,000 and 50 per cent on amounts over £20,000.
- Scottish taxpayers will be liable to tax at the new Scottish income tax rates where marginal rate tax charges apply, so Scottish taxpayers will be liable to pay tax at the Scottish income tax rates (which may be higher or lower than the rate they currently pay).
- Where a lump sum death benefit (other than a trivial commutation lump sum death benefit) is paid to a Scottish taxpayer who is liable to income tax at their marginal rate, pension scheme administrators will continue to deduct income tax under PAYE in the same way as for pension flexibility payments.

View the Newsletter.

Financial Guidance and Claims Bill – Government commits to speeding up pension scam and cold-calling ban legislation

The Government's response to the House of Commons Work and Pensions Committee report entitled *Protecting pensions against scams: priorities for the Financial Guidance and Claims Bill* confirms its broad support for the Committee's recommendations for tackling pensions cold-calling. As a result, amendments to clause 4 of the Bill will be brought forward to accelerate the introduction of the ban, as well as regulations to clarifying its enforcement.

The cold-calling ban provisions were previously linked to the introduction of the new single financial advice body, and the Government amendments should allow faster implementation of the necessary regulations. While the effective date for the ban coming into force is not yet clear, it is thought that it could be as early as June 2018.

The Bill will progress to the House of Commons report stage on *March 12, 2018*.

Finance Act 2004 (Standard Lifetime Allowance) Regulations 2018 – standard lifetime allowance for 2018/19 confirmed

The Finance Act 2004 (Standard Lifetime Allowance) Regulations 2018 have been made increasing the standard lifetime allowance from £1 million to £1,030,000 with effect from *April 6, 2018*.

The regulations are required under section 218(2D) of the Finance Act 2004. This provision, inserted by the Finance Act 2016, provides for the standard lifetime allowance to increase for 2018/19 in accordance with the rise in the Consumer Prices Index (CPI) for the 12 months to the end of September 2017.

According to figures from the Office for National Statistics, the CPI 12-month rate for September 2017 was 3 per cent. For future tax years, the standard lifetime allowance will continue to rise in line with annual CPI increases, with the exact figure to be confirmed each year in regulations.

The Occupational Pension Scheme (Employer Debt and Miscellaneous Amendments) Regulations 2018 – employer debt: new regulations finalised to introduce deferred debt arrangements

On *February 26, 2018*, the Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2018 (the Regulations)were laid before Parliament. The Regulations amend the employer debt regime to introduce a new arrangement for dealing with employer debts, referred to as a "deferred debt arrangement" (DDA). A DDA will permit an employer in a multi-employer defined benefit (DB) to defer any payment of an employer debt arising when the employer ceases to employ active members. The DWP published its consultation response on the draft Regulations on the same date, and the response confirms a number of changes have been made to the original draft version of the Regulations.

The Regulations will come into force on *April 6, 2018*.

Qualifying conditions to enter into a DDA

As a result of the consultation, the DWP accepted that meeting the funding test, as originally proposed, was not an appropriate entry requirement for a DDA since the deferred employer will retain responsibility for scheme funding. The funding test requirement has now been removed. Under new Regulation 6F, the following conditions must now be met

- The trustee must consent in writing to the DDA.
- The scheme is not in an assessment period (or being wound up).
- The trustee must be satisfied that the deferred employer's covenant is not likely to weaken materially within the period of 12 months beginning with the date on which the trustees expect the DDA to take effect.

The DWP has retained the requirement for trustee consent if the employer chooses to trigger the employer debt. Some respondents had argued that trustee consent should not be required since an employer in a frozen scheme can trigger a debt by giving notice. However, the DWP considers that trustee consent is important since, unlike a frozen scheme, there will be other active members and so more volatility of funding.

The DWP also confirmed that DDAs should be available to employers who have already participated in other arrangements for managing their employer debt provided they satisfy the conditions for the DDA.

Circumstances in which a DDA will end

New regulation 6F(6) sets out the circumstances in which a DDA will end. A DDA will terminate on the first date on which one of the following events occurs

- The deferred employer employs a person who is an active member of the scheme.
- The deferred employer and the trustee agree to end the arrangement. An employment cessation event will be treated as having occurred, bringing the DDA to an end.
- A relevant event occurs in relation to the deferred employer (that is, they become insolvent or are treated as being insolvent).

- All employers in the scheme have experienced a relevant event or have become deferred employers.
- The scheme commences winding up.
- The deferred employer restructures unless.
  - The restructuring falls within either regulation 6ZB or 6ZC (setting out exemptions) of the Employer Debt Regulations.
  - Where the receiving employer is a deferred employer, the trustees or managers of the scheme are satisfied that the conditions in paragraph 6F(3) (relating to assessment periods not applying or being likely) are met.
- A freezing event occurs in relation to the scheme. An employer debt will not be triggered at this point but the deferred employer will become a former employer at the point of freezing.
- The trustees of the scheme serve notice on the deferred employer, stating that the DDA has come to an end on the grounds that they are reasonably satisfied that the deferred employer has.
  - Failed to comply materially with its duties under the Scheme Funding Regulations.
  - A scheme covenant which is likely to weaken materially in the next 12 months.
  - Failed to comply materially with its duties under regulation 6 of the Scheme Administration Regulations.

New regulation 6F(7) sets out whether an employment cessation event will be treated as occurring in each circumstance that a DDA ends, and the date of it.

Period of grace followed by DDA

The Regulations include amending provisions on how the provision for a DDA to follow on from a period of grace will work in practice. In particular

- An employer who does not employ an active scheme member or enter into a DDA by the last day of a period of grace will be treated as if the period of grace has not applied. This could result in an employer debt being due from the employer calculated at the time he ceased to employ an active member of the scheme.
- An employer in a period of grace arrangement must notify the trustees if it does not intend to employ an active member or enter into a DDA. In either of these circumstances, the employer will be treated as if the period of grace had not applied.

Notifiable events

Trustees must notify TPR of a DDA taking effect, or any event which terminates a DDA. Following comments made during the consultation, the Regulations now provide that notice must be given as soon as reasonably practicable after the trustees make the decision or become aware of the event.

Comment

This new option was welcomed by respondents to the consultation and will be helpful for certain employers in non-associated multi-employer schemes, such as those involving charities. It has been described by those in favour of its introduction as a logical way forward, as ceasing to employ an active member is an event which can occur due to matters outside the control of a participating employer.

However, it remains to be seen how frequently it will be used in practice as the requirement for trustee consent before a DDA is entered into, coupled with the ability of the trustee to terminate the DDA if it considers that the employer's covenant is likely to weaken materially in the following 12 months, may make DDAs an unattractive option. The result may be that the affected employer continues with a normal accrual of benefit liabilities which it cannot afford, in preference to entering an agreement which confers additional power on the scheme's trustee.

The Contracting-out (Transfer and Transfer Payment) (Amendment) Regulations 2018 – provisions finalised on bulk transfers without consent to schemes that were never contracted-out

On February 26, 2018, the DWP published its response to the consultation on draft amending regulations enabling bulk transfers of contracted-out rights to take place without member consent to schemes that have never been contracted out, provided certain conditions are met.

Following the consultation, a number of changes have been made to the draft Contracting-out (Transfer and Transfer Payment) (Amendment) Regulations 2018 (the Amending Regulations). In particular, the DWP has removed the requirement that a connected employer transfer payment of post 1997 contracted-out rights without consent must "not adversely affect the rights" of the transferring members. Instead, the Amending Regulations now require the receiving scheme to provide benefits similar to those which a formerly contracted-out scheme would have provided in line with the appropriate legislation as it had effect at the time.

The Amending Regulations were laid before Parliament on *February 26, 2018* and will come into force on *April 6, 2018*. They provide a welcome simplification so that bulk transfers involving contracted-out rights will no longer be prevented where the receiving scheme was established after the end of contracting-out.

New costs and charges disclosure requirements for defined contribution schemes: the Occupational Pension Schemes (Administration and Disclosure) (Amendment) Regulations 2018

Of interest to schemes providing DC benefits is the recent publication by the DWP of its response to the consultation on the Occupational Pension Schemes (Administration and Disclosure) (Amendment) Regulations 2018 (the Regulations), under which costs and charges information is to be made available to DC members.

The new requirements seek to improve transparency in workplace pensions and investment disclosure. They do not affect DB schemes where the only DC benefits are AVCs. The Regulations will amend the Occupational Pension Schemes (Scheme Administration)

Regulations 1996 and the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013.

Timing of the new requirements

Under the final Regulations laid before Parliament on *February 26, 2018* (and the accompanying statutory guidance), trustees and managers of schemes offering DC benefits will be responsible for publishing certain information on costs and charges on a website within seven months of their first scheme year end-dates falling on or after *April 6, 2018*, when the Regulations come into force.

This means that at some point after *November 6, 2018*, the majority of DC schemes will need to publish on websites more detailed information about charges incurred by members. The final schemes (with a scheme year end-date of April 5) will not be required to publish until *November 5, 2019*.

Compliance with the statutory guidance

The Regulations require occupational schemes providing DC benefits to

- Provide an illustrative example, as part of the Chair's statement, of the cumulative effect of costs and charges incurred by the member.
- Publish that information, and certain other parts of the Chair's statement, on a website for public consumption.

Trustees must have regard to the guidance on meeting these legislative requirements.

Members receiving an annual benefit statement must be provided with a web address and details for finding the costs and charges information. The timing for this has been altered after consultation, to ensure alignment between the date by which schemes have to start including information in benefit statements and the duty to provide the costs and charges information.

In addition, the Regulations include duties to disclose pooled fund investment information to members. After consultation, this will now come into force from the later date of *April 6, 2019*. Trustees will need to ensure the information is no more than six months out of date at any time, although members can request the information only once in a six month period. Again, the members' annual benefit statements must refer to how to obtain this information.

How should the information be provided?

The statutory guidance provides an example of how an illustration can be prepared in the form of a table using assumptions which are based on those used by the Financial Conduct Authority (FCA) in its Conduct of Business Sourcebook (COBS) as at *April 6, 2018*.

The information required to be used in the illustration includes such elements as

- One or more typical pot sizes to illustrate the long-term effect of charges.
- The effect of further contributions.

- Where the product is used for flexi-access drawdown, expected representative future withdrawal rates.
- Real-term contribution growth taking into account projected salary increases.
- Expected investment returns.
- The effect of charges and transaction costs based on a five-year average (or the period for which data are available).
- The cumulative effect of charges and transaction costs over time.

Optional information includes

- Historic performance data.
- Percentage of gross investment returns lost over time.
- Percentage of the pot lost to costs and charges.
- A breakdown of charges into investment and administration costs.

The FCA is preparing to consult on parallel disclosure rules for workplace personal pension schemes in the second quarter of 2018.

Comment

Although schemes will not have to provide this information until *November 5, 2018* (and possibly later, depending on their scheme end-date), trustees should not underestimate the work involved in complying with the new requirements. Preparing the new illustration information may well be time-consuming and should be considered as early as possible.

Auto-enrolment: new qualifying earnings bands published for 2018/19 tax year

The Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2018 has been made confirming the earnings trigger and qualifying earnings for the 2018/19 tax year.

The upper end of the qualifying earnings band will rise to £46,350 from 45,000 and the lower end will rise to £6,032 from £5,876 in line with the NIC upper and lower earnings limits. The earnings trigger remains fixed at £10,000.

The Order comes into force on *April 6, 2018*.

Registered Pension Schemes (Relief at Source) (Amendment) Regulations 2018 – HMRC publishes final version of amendment regulations

Regulations impacting schemes that reclaim tax relief using the relief at source method have been finalised. Relief at source operates where members of personal pension schemes have their contributions deducted from their net pay after tax has been deducted.

The contributions are paid to the pension provider or the scheme, which must reclaim the available relief at the basic rate from HMRC. To obtain full relief at his or her marginal rate, a higher-rate tax payer must then claim the balance of the tax relief through self-assessment. Relief at source also applies in occupational schemes which do not deduct pension contributions from employees' gross, pre-tax pay under a net pay arrangement.

HMRC has published the final form of the Registered Pension Schemes (Relief at Source) (Amendment) Regulations 2018, which are intended to reduce the time period for the filing of interim and annual claims for relief at source tax claims. The key changes include

- A reduction in the time period for the filing of interim and annual claims. The timescale for making both an annual and an interim tax relief claim will be reduced from six months to three months.
- The introduction of revised requirements for submitting an annual return of individual information. The return will become a statutory return rather than a response to an HMRC notice for information.
- Setting requirements for claiming excess relief in an interim claim and introducing an interest charge.

The regulations will have effect from *April 6, 2018* and, in relation to interim claims, for tax months ending on or after *April 5, 2018*.

High Court: summary judgment granted in statute-barred negligence case in relation to pension transfer

Summary

In *Davy v 01000654 Ltd* [2018], in a judgment handed down on *March 9, 2018*, the High Court has held that a member's claim against his financial adviser for negligence or breach of contract, or for alleged breaches of statutory duty, for losses allegedly arising from a switch of pensions, was statute-barred (brought out of time), and granted summary judgment.

The case is a useful example of how the Court will consider limitation issues in the context of professional negligence cases concerning pensions.

Legal background

Summary judgment is a procedure by which the Court may decide a claim or a particular issue without a trial. Under the Civil Procedure Rules (CPR), the Court may give summary judgment against a claimant or defendant on the whole of a claim, or on a particular issue, if the party has no real prospect of succeeding on or defending the claim and there is no other compelling reason why the case or issue should be disposed of at trial.

The Court has the power to strike out the parties' statements of case (or part of a statement of case), both under its case management powers and under its inherent jurisdiction.

Facts of the case

The claimant (C) brought proceedings against the defendant financial adviser (D) in relation to allegedly negligent advice on the transfer of his pension. D applied to strike out the claim or for summary judgment.

The advice leading to the transfer of the pension was given in 2001. In 2006, C again consulted D in relation to his pension. In July 2011, he took advice from another financial adviser. On July 17, 2014, the parties entered into a standstill agreement by which they agreed to suspend the running of the limitation period in relation to the claim, which was issued in January 2015.

In addition to his claim based on the 2001 advice, C also maintained that D had failed in 2006 to advise him about the reasonableness of the earlier advice, so that he had lost the opportunity to bring a claim in respect of it.

The Court issued a direction on limitation which D successfully appealed. This arose out of the fact that the D had been dissolved and needed to be restored to the register and whether the period between March 20, 2010, and July 1, 2014, was not to count for limitation purposes. Pending that appeal, the parties agreed to a stay of proceedings.

D took the view that the claim was barred by the Limitation Act 1980 (LA 1980) on the basis that C had known before July 2011 of his potential claim; therefore, he could not argue lack of knowledge of the facts relevant to the cause of action in order to start the alternative three-year limitation period running under section 14(A) LA 1980 (lack of requisite knowledge), nor could he make out a case of deliberate concealment under section 32 LA 1980 based on the further advice of 2006.

C maintained that he had not acquired section 14A knowledge until July 2011.

Decision

HHJ Russen QC, sitting as a judge of the High Court, dismissed the claim, holding that it was statute-barred. He refused to strike out the claim but granted summary judgment.

The judge concluded that there was no real prospect of the C overcoming a limitation defence by relying on the alternative three-year period under section 14A for lack of requisite knowledge or showing deliberate concealment by the defendant (D) under section 32.

C submitted that he did not acquire the knowledge that the pension scheme he had switched to was high risk until he received independent advice about his investment. However, there was evidence that he had received advice from D about this in 2006, which was sufficient to deprive C of the benefit of section 14A. C had also had concerns about loss earlier.

Regarding section 32, the case reinforces the fact that, if a defendant's retainer to provide investment advice is a continuing one, there is generally no obligation on the adviser to exercise continuing vigilance to discover any past mistakes and to put them right.

The judge was content to rule on the summary judgment application, rather than order a preliminary issue trial, so the case is also useful for confirming that cases involving issues over section 14A LA 1980 knowledge or section 32 LA 1980 concealment are not, as a matter of principle, outside the proper remit of the summary judgment process.

The judge refused D's applications for the claim to be struck out as disclosing no reasonable cause of action or as an abuse of process. He said that there was nothing within the particulars of claim which was repugnant or deficient regarding revealing a viable cause of action and C had not, by his delay in bringing the claim, been guilty of any misuse of the court process.

Comment

The case is a good illustration of how the Court will consider limitation issues in the context of professional negligence cases relating to pension claims.

The case is also useful for confirming that cases involving issues over section 14A LA 1980 knowledge or section 32 LA 1980 concealment are not, as a matter of principle, outside the proper remit of the summary judgment procedure. As here, it may be possible to decide them on paper and there may not be a need for a trial of a preliminary issue.

The case also demonstrates that while there may be some overlap, there is a difference in the Court's approach to applications for summary judgment and strike out.

Pensions Ombudsman: Mrs Y – transfer delays suffered where proposed pension provider suspended from QROPS (PO-16581)

The Deputy Pensions Ombudsman (DPO) has given her determination in a complaint by Mrs Y against MyCSP, the scheme administrator.

The DPO upheld a complaint where a member was unable to transfer her pension to an overseas scheme as, due to delays by the scheme administrator, the receiving scheme was no longer on the recognised overseas pension schemes (ROPS) list.

The member had started the transfer process in November 2014 and hoped to complete it before changes to the QROPS legislation took place on April 6, 2015. However, as a result of delays by the scheme administrator, the transfer was not ready to take place until June 2015, by which time the member's chosen overseas pension provider was no longer on the ROPS list and the transfer could not be made.

The DPO held that there had been delays and that, but for those delays, the transfer would have been completed while the receiving scheme was still a QROPS. The member should be put back in the position she would have been in had the maladministration not occurred. However, this was not possible in this case as a transfer to a provider who was no longer on the ROPS list would amount to an "intentional unauthorised payment" and would be subject to tax charges. Because of this, the law prevented the DPO from putting Mrs Y back in the position she should have been in and, as such, she has suffered a "wrong which cannot now be righted".

The DPO pointed out that, despite the failure to transfer, Mrs Y was unable to demonstrate a direct financial loss as she would still be able to receive benefits from the PCSPS, albeit not in the way that she wanted or expected to. She had however suffered a serious loss of expectation as a consequence of the maladministration. Mrs Y was a few years from her 60th birthday and, had the transfer gone ahead, she would have been able to access free tax benefits from the Australian pension scheme. This amount would have paid off her mortgage as a lump sum and allowed her to cease work at age 60. MyCSP's maladministration meant that Mrs Y could have to work for a further seven years to achieve this. This amounted to a serious loss of expectation.

The member had however suffered loss of expectation and the DPO considered that the distress and inconvenience caused was "unusually great". She directed the scheme administrator to increase its initial offer of £300 compensation to £2,000.

Comment

Cases concerning the blocking of transfers usually arise in the pension liberation context, where the PO and the courts have held that in certain circumstances, transfers cannot be legitimately blocked. However, there are circumstances where a scheme administrator is entitled to refuse a transfer and this case is an example of such a situation.

There have been a number of determinations over recent months from the PO showing a willingness to award increased sums for the compensation of non-financial loss.

A summary of further pensions issues in the pipeline

As a new addition to the update, we are providing a monthly chronology of pension changes expected in the near future in addition to those outlined above:

Steria (Pension Plan) Trustees Ltd v Sopra Steria Ltd and others: High Court claim seeking declaration regarding the requirement to obtain a section 37 certificate. The case was heard on May 22, 2017. Judgment is awaited.

Lifetime Allowance (LTA) – under the Finance Act 2004 (Standard Lifetime Allowance) Regulations 2018, the LTA was increased to £1,030,000 with effect from *April 6, 2018*. Future member communications should warn savers about the retroactive effect of this measure.

Auto-enrolment – cyclical re-enrolment now applies within a six month window related to the employer's staging date. e.g. employers with a July 1, 2015, staging date must complete the cyclical re-enrolment process between April 1, 2018, and September 30, 2018. Total minimum contributions are due to increase to five per cent (of which there is a minimum employer contribution of two per cent) from *April 6, 2018*.

Ban on member-borne commission – the deadline for service providers to send trustees written confirmation of compliance with the ban on member-borne commission for pre-6 April 2016 contracts where payment was made on or after October 1, 2017, is *May 1, 2018*. This applies where the scheme is used a "qualifying scheme" for auto-enrolment and some or all of the benefits are money purchase.

The General Data Protection Regulation comes into force on *May 25, 2018*. As data controllers, trustees will need to ensure that compliance is achieved by this date.

EMIR – new requirements to the exchange variation margin relating to derivatives applied from March 1, 2017. If an investment manager uses over the counter derivatives, schemes should check that arrangements are in place for trustees to comply with the new regime. A further EMIR exemption extension for pension scheme arrangements now applies to *August 16, 2018*. An additional 3 year clearing extension is proposed.

The Pension Schemes Bill 2017 received Royal Assent on April 27, 2017. The legislation is concerned principally with provisions relating to the authorisation of master trusts. The new regime for master trust regulation, upon which the Government's response to the consultation is awaited, is likely to be brought fully into force on *October 1, 2018*.

IORP II – the expected transposition date is *January 12, 2019*.

Brexit should be achieved by *March 29, 2019*. The UK will then leave the EU from the effective date of withdrawal agreement or, failing that, 2 years after giving Article 50 notice unless European Council and UK unanimously decide to extend period.

Global resources

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We employ 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, Africa and the Middle East.

People worldwide

>7000

Legal staff worldwide

>4000

Offices

58

Key industry strengths

- Financial institutions
- Energy
- Infrastructure, mining and commodities
- Transport
- Technology and innovation
- Life sciences and healthcare

Our office locations

Europe

Amsterdam
Athens
Brussels
Frankfurt
Hamburg
Istanbul
London
Luxembourg
Milan
Monaco
Moscow
Munich
Paris
Piraeus
Warsaw

United States

Austin
Dallas
Denver
Houston
Los Angeles
Minneapolis
New York
St Louis
San Antonio
San Francisco
Washington DC

Canada

Calgary
Montréal
Ottawa
Québec
Toronto
Vancouver

Latin America

Bogotá
Caracas
Mexico City
Rio de Janeiro
São Paulo

Asia Pacific

Bangkok
Beijing
Brisbane
Canberra
Hong Kong
Jakarta[1]
Melbourne
Port Moresby
(Papua New Guinea)
Perth
Shanghai
Singapore
Sydney
Tokyo

Africa

Bujumbura[3]
Cape Town
Casablanca
Dar es Salaam
Durban
Harare[3]
Johannesburg
Kampala[3]
Nairobi[3]

Middle East

Bahrain
Dubai
Riyadh[2]

1 TNB & Partners in association with Norton Rose Fulbright Australia
2 Mohammed Al-Ghamdi Law Firm in association with Norton Rose Fulbright US LLP
3 Alliances

Contacts

If you would like further information please contact:

London

Lesley Browning
Partner
Tel +44 20 7444 2448
lesley.browning@nortonrosefulbright.com

Peter Ford
Partner
Tel +44 20 7444 2711
peter.ford@nortonrosefulbright.com

Lesley Harrold
Senior knowledge lawyer
Tel +44 20 7444 5271
lesley.harrold@nortonrosefulbright.com

Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, the Middle East and Africa.

Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare. Through our global risk advisory group, we leverage our industry experience with our knowledge of legal, regulatory, compliance and governance issues to provide our clients with practical solutions to the legal and regulatory risks facing their businesses.

Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.