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NORTON ROSE FULBRIGHT

Essential pensions news

Updater

April 2019

Introduction

Essential Pensions News covers the latest pensions developments each month.

AG opinion: prohibition on levelling down under EU law applies even where domestic law permits retrospective reduction of pension rights – *Safeway Ltd v Newton and another*

In an Opinion delivered on *March 28, 2019*, the Advocate General (AG) recommended that the ECJ should reject the Safeway Pension Scheme's attempt at equalisation of its normal pension age (NPA). An estimated increase to the scheme's liabilities as a result of this opinion (if it is followed by the ECJ) is in excess of £100 million.

Background

The scheme had issued a member announcement, following the Barber judgment in 1990, that it would equalise NPAs by increasing the NPA for women to 65, and subsequently executed a deed effecting the change in May 1996.

The relevant events in this case occurred before April 1997, when section 67 of the Pensions Act 1995 made retrospective amendments impossible. The issue to be determined was whether the scheme was permitted to equalise by "levelling down" members' rights and increasing NPAs during the so-called "Barber window" between the 1990 judgment and the execution of the deed. The case was referred to the ECJ in October 2017, and the AG stated in his Opinion that, despite the amendment's validity under the scheme's rules, the scheme was not permitted to increase NPAs retrospectively, until the 1996 deed was executed.

High Court decision

At first instance, the High Court ruled that NPA had not been equalised for male and female members until the formal amending deed was executed on May 2, 1996. The Judge also held that, although the amending deed purported to have retrospective effect from December 1, 1991, shortly after an announcement to members had been issued, such retrospective amendments breached the equal treatment requirements of EU law (relying on the ECJ judgment in *Smith v Avdel Systems Ltd*).

Court of Appeal decision

On appeal, the Court of Appeal (CA) rejected Safeway's argument that the 1991 announcement to members had been effective to equalise NPAs. It upheld the High Court decision that the scheme's power of amendment required execution of a formal deed. However, the CA considered that the issue of whether retrospective amendment equalising NPAs was prohibited by the EU equal treatment principle raised a question of EU law that should be referred to the ECJ. The CA distinguished between defeasible rights (amendable retrospectively) and indefeasible rights (fixed), highlighting that a prohibition on levelling down NPAs retrospectively would appear to conflict with the EU law principle that the domestic law rights of the advantaged class should be treated as the benchmark. Before the execution of the deed of amendment on May 2, 1996, the women's NPA of 60 had been a defeasible right, as it could be amended retrospectively under the scheme rules, but to apply a total prohibition on levelling down would elevate both the women's and men's NPA of 60 to an indefeasible right during the *Barber* window.

The AG's opinion

The AG proposed that the question put before the ECJ should be reformulated and that the defeasible or indefeasible nature of the right of women to retire at 60 was immaterial.

He said that equal pay had a "foundational status" in EU law and its Le provided unequivocally that the pensionable age of men and women must be the same. In the AG's opinion, during the Barber window period, the prohibition under EU law on retrospective levelling down applied even where the rules of a pension scheme conferred a power, as a matter of domestic law, for a retrospective reduction of both men's and women's accrued pension rights.

As to how national courts should determine the date on which the Barber window closed, member states should ensure that an effective legal remedy for EU law rights should not be impossible in practice or excessively difficult to enforce.

Comment

Since the decision in *Harland v Wolff* in 2006, it has widely been accepted that EU law required that during the period between the Barber judgment and the date on which measures are effected equalising benefits (the "Barber window"), the retirement age of the disadvantaged sex had to be "levelled up" and could not be "levelled down", even where there was power under a scheme's rules to reduce benefits during that period, which had been validly exercised.

The AG's opinion is not legally binding on the ECJ and a date for the ECJ's judgment has not yet been set but it is expected at some point in 2019. If the ECJ decides that benefits cannot be levelled down retrospectively, even where a scheme's rules would have allowed this before section 67 was implemented, it could set an important precedent in the context of equal treatment more widely. Such a decision would mean that the Safeway Scheme's male and female members would have better rights than either enjoyed prior to the *Barber* decision, albeit that this is what the pensions industry has understood the effect of *Barber* to be.

Conversely, if the ECJ decides that levelling down benefits is possible, the funding position of the Safeway Pension Scheme will be improved by approximately £100 million. It is possible that other schemes could benefit too, although the number of schemes having similar rules is likely to be limited.

GMP equalisation guidance published by PRAG

The Pensions Research Accountants Group has published guidance available here for its members on GMP equalisation and the impact on pension scheme accounts.

- There are three main aspects to the financial impact on scheme funding of equalising GMPs The calculation of underpaid pensioner and dependant benefit arrears plus interest.
- The effect of higher pensioner and dependant benefits on future scheme costs.
- The effect of higher future benefit payments for active and deferred members.

For schemes with an accounting year-end date after *October 26, 2018* (the date the High Court judgment was handed down in the *Lloyds* case), the new guidance places an obligation on Trustees in relation to the calculation of underpaid pensioner and dependant benefit arrears (plus interest) only.

The main points are summarised below

- The arrears payments plus interest should be recognised as a liability in the pension scheme accounts as benefits paid and be included in current liabilities in the balance sheet where they “can be measured reliably”.
- Whether the arrears figure is material is a key consideration. If the amount is deemed to be immaterial, it need not be recognised in the accounts but a note should be included setting out the trustees’ future approach to GMP equalisation.
- Circumstances in which a figure is not included in the accounts because the trustees consider they cannot produce a reliable estimate are expected to be exceptional.
- Depending on the degree of estimation of the figure, the arrears may be treated as an “accrual” or a “provision”. A figure which is considered to be reasonably certain (and this is likely to be the norm) would be an accrual for accounting purposes.
- Any additional information on whether or not the liabilities allow for GMP equalisation should be disclosed within the “Report on Actuarial Liabilities”.

Comment

Trustees of affected schemes will wish to seek advice from their auditors and the scheme actuary as soon as possible. Where employers have already undertaken an assessment of the liability for accounting purposes, trustees should ask for the relevant information.

In addition, the scheme rules should be checked to establish whether there is a six-year limitation period applying to benefit arrears payments, as this could affect significantly whether the amount of underpayment is material or not.

Trustees should also take into account any guidance issued in future by HMRC's working group (as flagged in its Newsletter 108, see below) which is due to consider the pensions tax issues arising from the equalisation of GMPs for members who have one of the lifetime allowance protections.

PPF publishes strategy document outlining priorities for next three years

The PPF has published its strategy guide for the next three years, which sets out its five key priorities

Sustainable funding in volatile times
The intention is to maintain the current strategy. In smoothing schemes' transition into the PPF, industry contingency planning guidance will be published with the support of TPR. It will also encourage the appointment of experts from its trustee and pensions administration panels to complex or high-profile cases prior to insolvency.

Built for innovation
The PPF intends to become an "agile innovative business" and to continually improve its processes using new tools, services, and technologies. It will cultivate an agile project and performance culture.

Brilliant service for members and schemes
It will aim to improve its systems and efficiencies, reducing costs per member over the next three years. The use of technology will reduce the need for manual intervention.

The best of financial and public services culture
The focus on building a strong internal culture will continue.

Clear value for money
Investment management expenses are the PPF's most significant cost, representing over 60 per cent of its overall administration fees. It aims to ensure that the investment costs continue to demonstrate good value against the returns achieved.

From what is now a position of strength, the PPF states that it remains "robust and on track" to meet its long-term funding target to be 110 per cent funded by the time it reaches its funding horizon, currently assessed to be in 2030. Following a competitive tender, it has reappointed its former insolvency risk provider, Dun & Bradstreet and will undertake a review of its levy methodology. A consultation will follow on proposed changes that would apply for invoices issued from 2021/22.

View the strategy plan.

FCA publishes consultation to extend remit of IGCs

The FCA has published a consultation paper on rules to extend the remit of Independent Governance Committees (IGCs) to include two new duties

- To report on their company's environmental, social and governance (ESG) issues.
- For IGCs to oversee the value for money of investment pathway solutions for pension drawdown.

The paper also invites views on issues relating to the FCA's planned work with TPR on value for money in pensions.

The consultation closes on *July 15, 2019*.

View the consultation paper.

Comment

There are views that whilst the proposals to extend the remit of IGCs may appear to be a small extension of powers, they may represent a significant shift in how pensions and personal finances more widely are policed.

The ABI has voiced reservations on the need for the remit of IGCs to be extended to investment pathways and ESG considerations, and has questioned what benefits IGC oversight would provide, when other governance structures are already in place.

FCA clarifies its comments on misleading promotions of defined benefit to defined contribution transfers and PASA launches Pension Transfers Gold Standard

In our March 2019 update, we noted that the Financial Conduct Authority (FCA) had published a "Dear CEO" letter concerning managing the risks of DB to DC transfers. The FCA reported that it had identified the key drivers of harm and the letter set out its expectations of regulated firms when communicating with clients.

Since the letter was published, the FCA has clarified its advice for pension providers as to what is expected of them when handling DB transfer business. There was concern among providers that the FCA was expecting them to take on additional responsibility for transfer advice given by financial advisers. An FCA spokesperson has, however, confirmed that this was not the intended meaning of the letter, stating: "We do not expect pension providers to be responsible for the suitability of advice provided to consumers by advisers, but we do expect them to understand the underlying drivers to form an assessment on whether harms are being caused to consumers. This is in line with our existing rules and published guidance."

On *April 9, 2019*, the Pensions Administration Standards Association (PASA), an independent body dedicated to driving up standards in pensions administration, launched its new Pension Transfer Gold Standard.

This is a voluntary code of good practice for financial advisers with the aim of ensuring that members of DB schemes receive high quality transfer advice in relation to safeguarded benefits. The Gold Standard's Consumer Guide is due to be released shortly and PASA will actively encourage administrators to include it with all transfer quotations.

View more about the Pension Transfer Gold Standard here.

HMRC publishes Pension schemes newsletter no. 108

On *March 29, 2019*, HMRC published the latest edition of its Pension schemes newsletter.

Contents include

Relief at source
Administrators should use HMRC's secure data exchange service (SDES) from *April 6, 2019* for annual returns of scheme information. Where registration for SDES is not yet complete, this should be done as soon as possible, and the scheme's file transfer schedule for the annual return information should be provided. HMRC reminds schemes that changes will be made to the spreadsheet and text file specifications for the annual return of information for 2018 to 2019 onwards;

Guaranteed Minimum Pensions
A working group, chaired by HMRC and including various industry bodies, has been formed to consider the pensions tax issues arising from the equalisation of GMPs. The first meeting is due to take place in April 2019. A major concern to be addressed by the group is the effect on a saver whose pension is increased as a result of GMP equalisation and who consequently invalidates their fixed protection for pensions tax relief against reductions in the lifetime allowance.

Annual allowance calculator
HMRC's online calculator has been updated to include the 2019/20 tax year so that it is available for members of DC schemes who make their total contributions early in the tax year.

View the Newsletter.

Court challenge to PPF's *Hampshire* ruling implementation approach

As we reported in September 2018, the ECJ ruled in the Hampshire case that pension scheme members being paid compensation from the Pension Protection Fund (PPF) are entitled to an "individual minimum guarantee" of 50 per cent of the value of their entitlement to old-age benefits, rather than an average level of pension protection. In our January 2019 update, we noted that the PPF was first assessing the position of members subject to the long-service cap, after which it planned to deal with members subject to the standard compensation cap. Finally, the position of all remaining members was to be considered, including those yet to start drawing benefits.

In a further update, the PPF has now revealed that its approach is being challenged in the High Court and, according to a frequently asked questions document, the PPF intends to undertake a one-off calculation for affected members. This will assess the total actuarial value of the member's scheme benefits payable from their employer's insolvency date (using their original scheme benefit structure) and compare it against the total actuarial value of their PPF benefits payable from the same date. If the latter is less than 50 per cent of the former, the PPF will increase the member's PPF benefits until the 50 per cent threshold is met. No further adjustments will be made to reflect subsequent events. Interest will be payable on arrears at Bank of England base rate.

Comment

No further information is yet available about the court proceedings, or the exact details of the challenge. While the PPF says it considered whether to suspend its implementation work in light of the case, it has resolved to continue with its current approach for the time being, but to limit the size of arrears payments to reduce the prospect of overpayments having to be recovered from members if the court decide a different calculation approach should be adopted. The first phase of the process is due to be completed by *April 30, 2019*, and it will be kept under review pending further developments.

Trustees owe no fiduciary duty to employers relating to funding and investment strategy: *Keymed (Medical and Industrial Equipment) Ltd v Hillman and Another* [2019]

In a mammoth judgment running to 221 pages, the High Court has dismissed a claim by a company against two of its former directors in which the company alleged that the defendants, who were also trustees of its occupational pension scheme, had abused their position as directors and dishonestly breached their fiduciary duties. The company claimed that the directors had acted dishonestly and that they had conspired by creating and managing a separate executive scheme of which they were also trustees, in order to maximise their own pension entitlements contrary to the company's interests.

The executive scheme was to be fully funded on a buyout basis, thereby removing the risk that the defendants would, as high earners, become subject to the PPF compensation cap if the scheme were to be wound up. The company also argued the defendants ensured the main and executive schemes pursued unduly conservative funding and investment strategies in order to maximise the security of their benefits and the calculation of their transfer values after they left service.

Dismissing the claim, the Judge held that the defendants, as trustees of the schemes, had owed the company, as sponsoring employer, no fiduciary duty. They were entitled to take account of the employer's interests but only if those interests did not conflict with the trustees' primary duty to beneficiaries was respected. The Court also found no evidence of dishonesty on the part of the defendants and the decisions to establish the executive scheme and remove the relevant limits and restrictions had been honestly and properly made. The funding and investment strategies adopted by the schemes were entirely reasonable, and actively endorsed by the company at the time. The fact that the defendants had operated the same strategy for both schemes was inconsistent with the existence of a conspiracy.

Comment

The judge made clear that the interests of the scheme's members (and their survivors) have primacy when it comes to the trustees' fiduciary duties. While trustees may need to balance competing interests of the employer and scheme members, dividing the trustees' loyalty was undesirable as they should serve only one master and the Court would not go out of its way to create conflicts.

The case of Re *MNRPF* established that the trustees' duty is to act in the best interests of the beneficiaries and cannot be separated from the proper purpose of the trust itself. While trustees are entitled to take into account the employer's interests, these are subordinate to the interests of the beneficiaries.

The Court agreed with the trustees' funding and investment strategies which had been to minimise the risk of a shortfall. While noting that TPR expects trustees to use an integrated risk management approach, by balancing employer covenant, investment and funding risks, the Judge held that, more generally, trustees must exercise their powers for a proper purpose in accordance with the scheme's trust deed and rules.

There is no indication as yet whether an appeal is planned.

Pensions Ombudsman: no implied duty on employer and financial adviser to advise dying employee on implications of taking ill health benefits early (Mrs T – PO-19080)

On *February 20, 2019*, the Pensions Ombudsman (PO) published a determination dismissing a complaint on behalf of a deceased employee that the scheme's employer and its financial advisers failed to advise the dying employee of the implications of taking his pension benefits early, due to his ill health.

In relation to the employer, the PO held there was a difference between giving financial advice to employees, which is prohibited under the Financial Services and Markets Act 2002, and providing information to assist them. The employer had given the employee all the relevant information in the scheme booklet including how the level of life cover available would depend on the employee's status in the pension plan at the time of the his death and when to seek independent financial advice.

The PO considered two leading cases on an employer's duty to employees in similar situations *(University of Nottingham v Eyett* [1999] and *Scally v Southern Health and Social Services Board* [1992]). He noted that although in *Scally* the court decided that it was appropriate to imply a term that the employer would take steps to inform employees of their rights, the case was decided predominately on its facts. In *Scally* the employees did not know about their rights, whereas here the deceased employee had been able to inform himself by referring to the scheme booklet.

The PO held the financial advisers were required to give advice to employees only on request, as stated in the agreement between them and the employer. In this instance, the deceased employee did not once ask for advice or assistance.

Comment

There have been several cases where a scheme and its advisers can be placed in a difficult position when dealing with members in situations where a single decision can have a significant financial consequence for their pension scheme benefits. Here, there was a large difference between what was payable to the member's estate after he had made his decision, compared to what would have been paid if he had taken no decision at all.

The PO's decision, while sympathetic, relies very clearly on the case law on the issue of employers guiding or advising employees. Although here it would have benefitted the member if the employer (or its adviser) had taken an extra step to assist the member, it would have involved taking on a responsibility that no prudent employer would choose to adopt. It is not unusual for trustees of schemes to face questions from employees that could benefit from that "extra step" when decisions are being contemplated.

Our April 2019 briefing will look at some more examples of decisions which illustrate why it is important for scheme employers, trustees and advisers to ensure that any responses they give do not cross the line from providing information to giving advice which they are not authorised to provide.

QROPS regulations finalised on repaying the overseas transfer charge

On *April 3, 2019*, two sets of regulations were laid before Parliament that relate to the circumstances in which HMRC will repay the overseas transfer charge, and the mechanism that will apply for a repayment. The charge applies on a recognised transfer to a qualifying recognised overseas pension scheme (QROPS) requested on or after *March 9, 2017*, or on an onward transfer on or after April 6, 2017 from one QROPS to another within five years of the original transfer date, unless the transfer falls within certain exclusions.

If the overseas charge applies on a transfer, but the member's circumstances change within the period of five years after the transfer so that the charge would not now apply, the member can claim a repayment. Among other things, the new regulations provide for the conditions that must be met to make a claim for repayment; the information that an applicant must give; and how the repayment claims will be processed.

Both the Pension Schemes (Information Requirements – Qualifying Overseas Pension Schemes, Qualifying Recognised Overseas Pension Schemes and Corresponding Relief) (Amendment) Regulations 2019 and the Pension Schemes (Information Requirements – Repayment of Overseas Transfer Charge) Regulations 2019 come into force on *April 25, 2019*.

TPR's market report on master trusts

On *April 3, 2019*, the Pensions Regulator (TPR) published its latest monthly report on the master trust market, detailing how many master trust schemes have applied for authorisation, how many have decided to exit the market, and how many have yet to confirm their plans. The application window period for existing master trusts already operating before October 1, 2018 closed on *March 31, 2019* and the new figures reflect a flurry of last-minute activity.

The report indicates that as at March 31, 2019

- 30 master trust schemes have applied to TPR, of which three have so far been approved. In the previous month, only 13 applications had been received, one of which had been approved.
- Nine schemes have exited the market and in the previous month, this figure was eight.
- 34 schemes have notified TPR that a triggering event has occurred and that they will wind up and exit the market after securing members' benefits. This compares to 31 the previous month. Apparently one further scheme has told TPR it intends to exit the market but has yet to report a formal triggering event.

In certain circumstances, the trustees of a master trust scheme may apply to TPR for an extension of up to six weeks to the six-month application period for filing an authorisation application, and TPR says it has granted ten such extensions.

View TPR's report.

DWP sets out next steps for pensions dashboards

On *April 4, 2019*, the DWP published a response to its December 2018 feasibility report and consultation paper about pensions dashboards. The report envisaged an industry-led system of multiple dashboards, allowing consumers to access their pension information in a single place online.

Dashboards are due to be phased in over several years, with a non-commercial dashboard hosted by the single financial guidance body (now renamed as the Money and Pensions Service – MPS) established first, followed by commercial dashboards provided by industry. It will be a legal requirement for pension schemes to provide their data to dashboards.

Only firms that are already authorised by the FCA to undertake a regulated activity will be permitted to connect to the digital framework, although over the long term different regulatory requirements may be developed to help new market entrants.

Compulsory data provision by pension schemes will be introduced on a staged basis according to scheme size and most schemes will be expected to provide data via dashboards within a three to four year timeframe. In advance of compulsory data provision, the DWP hopes that large DC schemes will provide data via dashboards on a voluntary basis during 2019/20.

There was disagreement among respondents as to whether certain micro schemes should be exempted from compulsory data provision but the DWP will undertake further work before any exemptions are finalised. State pension information will be included on dashboards as soon as this is technically possible.

View the consultation response.

Comment

Most industry commentators are firmly in favour of the DPW's move to engage all pension savers with their investments and to put them in control of their own data. The pensions dashboards are seen as transformational for helping consumers in many ways across the lifetime savings industry and have been hailed as "the second most positive pension development in a generation, after auto-enrolment".

The Government's prioritisation of legislation to ensure pensions dashboards providing a comprehensive service, including the state pension, has been welcomed. However, given the grip of Brexit on Parliamentary time, it likely still to be some way off as there is no guarantee that the Pensions Bill needed compel schemes to provide data to pensions dashboards will see the light of day in 2019. Nevertheless, the fact the policy has attracted cross-party support suggests it is likely to become reality eventually – it is just unclear who will introduce the legislation or when.

British Airways settlement agreed with Airways Pensions Scheme Trustee

We have reported over the years on the long-running dispute between the trustee of the Airways Pensions Scheme and British Airways (BA). In a judgment handed down on July 5, 2018, the CA overturned the High Court decision and held (by a majority of two to one) that the trustees had acted outside of their powers by granting the 0.2 per cent discretionary increase. The CA held that trustees should manage and administer the scheme rather than redesigning the benefits. The trustee was then to make an appeal to the Supreme Court, which was due to be heard in July 2019.

A settlement, if approved by a court later this year, has been reached which will see the scheme gradually return to awarding increases to pensions in line with the Retail Prices Index (RPI). Backdated payments will be made to pensioners for the 2013 to 2019 period in the form of a lump sum of up to 4.6 per cent of pensions in payment in 2013, and adjusted for members whose payments began after that date. A further "catch-up" discretionary increase of up to 1.7 per cent will be paid for pensions in payment on March 31, 2019, and another 0.7 per cent will be added from April 8, 2019 to account for some of the gap between the latest Pension Increase Review Order (which applied when the Scheme was a public-sector scheme) and RPI.

Payments will be adjusted depending on when pensions or GMPs came into effect, and when the member left active service. Deferred members will receive similar increases. Depending on meeting the terms of an undisclosed affordability test BA and the trustees have also agreed an intention to award an increase of 75 per cent of the gap between CPI and RPI in 2020, and then to move fully to RPI for 2021.

Comment

One of the principal catalysts behind the settlement was to "gain some certainty", and the agreement was aided by the Scheme's movements to de-risk through removing a requirement to invest in equities and through last year's £4.4 billion buy-in.

The focus of all concerned is on implementing the settlement and improving security of benefits for members, with the trustee expecting to be fully insured with all members eligible to draw their full benefits from 2028 – although this is not fixed. The trustee is also exploring options to provide a way for members to opt-out of the increases if this would cause them to

breach enhanced or fixed tax protections, and will it encourage members to let the scheme know if this may affect them.

BA has set aside around £40 million to pay for the discretionary increases and the settlement is expected to receive court approval during the summer.

Pensions issues in the pipeline

Below is a summary of pension changes expected in the near future in addition to those outlined above. Changes since the last update are in *italic*:

Key dates in 2019:

May 22/June 30/October 31 – the UK withdraws from the EU, although it is (currently) unclear exactly what form Brexit will take.

April 6 – increases to auto-enrolment contributions.

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

GMP Equalisation – *slow progress but DWP conversion guidance is expected out "before Easter" and HMRC has now formed a working group.*

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 due in Summer 2019 *although its timing remains uncertain due to Brexit issues. It is expected to include provisions covering the Pensions Dashboard, TPR powers, the revised Funding Regime, DB Consolidators and the Money and Pensions Service.*

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

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