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

NORTON ROSE FULBRIGHT

Essential pensions news

Updater

January 2019

Introduction

Happy New Year to all our readers! *Essential Pensions News* covers the latest pensions developments each month.

PPPF issues further update about implementing ECJ Hampshire ruling

In our September 2018 update, we reported that the ECJ had ruled in the Hampshire case that pension scheme members being paid compensation from the Pension Protection Fund 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.

Having set out its preliminary plans in October 2018, the PPF has now published further details about how it plans to implement the ECJ ruling. The PPF is first assessing the position of members subject to the long-service cap, after which it will deal with members subject to the standard compensation cap. Finally, the position of all remaining members will be considered, including those yet to start drawing benefits.

The process is complicated by the fact the PPF does not hold full service records for members receiving compensation as there is no statutory requirement for it to do so. The information is being collated from various sources to recreate members' original scheme benefits, and the PPF hopes to start making any additional payments that are due early in the new year. This phase should be completed by the end of April 2019. The next phase, involving members affected by the standard cap, is likely to be more complex, but the PPF hopes to conclude this work in the summer of 2019.

Generally, the PPF will attempt to obtain member information from scheme administrators, and will write to individuals only if absolutely necessary. A further update will be published later in the year about the PPF's plans for addressing the position of remaining members.

View the PPF update.

Master trusts: Pensions Regulator updates decision-making procedure

The Pensions Regulator has made some minor changes to the decision-making procedure it uses when assessing master trust authorisation.

The main change from the original version of its procedure document published in August 2018 is that TPR's authorisation team will now send a full preliminary recommendation letter to an applicant only where it has recommended to the decision-maker delegated to act on behalf of TPR's Determinations Panel that a master trust should not be authorised. If the authorisation team has recommended authorisation, the applicant will be notified about this, but will not receive the full preliminary recommendation letter. If the authorisation team has recommended that a master trust be authorised, but the decision-maker disagrees, the latter will send the preliminary recommendation letter to the master trust and confirm the date of an oral hearing (or decision meeting in the case of a new master trust) to the master trust and authorisation team.

View the decision-making procedure document here.

GMP equalisation: new industry group formed to help develop best practice

On *January 10, 2019*, TPR issued a press release announcing the formation of a new pensions industry group to assist schemes following the High Court's landmark ruling in the Lloyds Bank case on the equalisation of guaranteed minimum pensions. The Court's ruling set out several possible methods for equalisation, leaving schemes with a range of choices.

The aim of the group is to help develop and promote best practice on issues arising from the ruling, from how to address missing data to dealing with transfer requests and rectifying underpayments.

The Pensions Administration Standards Association is bringing together representatives from across the pensions industry, including individuals from the administration, legal, advisory, actuarial, data and trustee sectors.

Promoting best practice guidance on an industry-wide basis is likely to be a valuable initiative. GMP equalisation projects are expected to be complex and it is recognised as important that advisers, administrators, trustees and employers work collaboratively to ensure cost-effective delivery and clarity for the scheme members affected. Establishing best practice should help the industry to work through the issues as efficiently as possible while minimising disruption to scheme business.

DWP consults on new early dispute resolution function for Pensions Ombudsman

The DWP is consulting on changes to the Pensions Ombudsman's jurisdiction to include a new early resolution function allowing it to resolve disputes before they proceed to formal determination. This follows the transfer of The Pensions Advisory Service's informal dispute resolution function to TPO in April 2018.

The DWP also proposes widening the jurisdiction of TPO by allowing employers who choose a group personal pension arrangement for their employees to bring a complaint or refer a dispute to TPO. Currently an employer may not bring a complaint against a provider or administrator on its own behalf.

The consultation closed on *January 18, 2019*.

View the consultation.

HMRC publishes scheme guidance on providing GMPs

On *December 19, 2018*, HMRC published three guides for pensions schemes that provide GMPs to their members. The guides provide details on

- Providing a pension for a scheme member – this explains the provision of a pension, a lump sum and the inclusion of inflation proofing (where applicable). Further detail is also provided on the payment of benefits on a member's death, as well as paying a pension to a member's widow, widower or surviving civil partner (including when such benefits are protected).

- How to calculate a scheme member's GMP – this details how to calculate a weekly GMP, the use of revaluation of earnings factors in the calculation, and GMP calculation at GMP payable age. Examples are also included to assist schemes in applying the guidance.

- How to transfer a scheme member's contracted-out pension rights – the third guide includes details of the types of schemes GMP and post-1997 COSR rights can be transferred to, the member's right to a transfer, and the revaluation of GMPs on a transfer.

Our client briefings from October and December 2018 provide details on the Lloyds Bank judgment and GMP equalisation issues.

HMRC publishes Count down Bulletin no 40

On *December 19, 2018*, HMRC published the latest issue of its bulletin for schemes formerly contracted-out on a final salary basis.

The contents of the bulletin include

- A Scheme Financial Reconciliation update – in bulletin no. 39 HMRC confirmed which schemes were in scope for Financial Reconciliation and how schemes could request surplus or deficit information. The latest scan of scheme financials will provide the position as at December 13, 2018 and the update provides detail about the implications for schemes which do not request their financial position information.

- Contributions Equivalent Premiums guidance after April 5, 2016 – HMRC is due to publish guidance on the ongoing administration of contracted-out pension rights soon. The bulletin provides detail on the criteria applying to CEPs after April 5, 2016.

- Further queries in relation to the Scheme Reconciliation Service.

View the Bulletin.

Single Financial Guidance Body goes live – Financial Guidance and Claims Act 2018 (Commencement No. 5) Regulations 2018

The Financial Guidance and Claims Act 2018 (Commencement No. 5) Regulations 2018 were made on December 10, 2018 and bring into force provisions of Part 1 of the Financial Guidance and Claims Act 2018 with effect from January 1, 2019. The Regulations bring into force provisions of the Act giving the Government's Single Financial Guidance Body (SFGB) its delivery functions. The SFGB consolidates the services offered by the Money Advice Service, TPAS and Pension Wise.

On its official website, the SFGB sets out five core functions

- Pensions guidance – providing information on workplace and personal pensions

- Money guidance – enhancing people's understanding and knowledge of financial matters and day-to-day money management skills

- Debt advice

- Consumer protection – the SFGB is to work with Government and the Financial Conduct Authority in protecting consumers

- Strategy – working with the financial services industry, devolved authorities and the public and voluntary sectors to develop a national strategy to improve people's financial capability, help them manage debt and provide financial education for children and young people.

As 2019 progresses, the aim is to seek a new name for the SFGB and to develop a new outreach strategy. This will include an integrated service offer and enhanced partnership working with the wider industry, employers and key stakeholders.

Pensions cold-calling banned – the Privacy and Electronic Communications (Amendment) (No. 2) Regulations 2018

Following an initial consultation in December 2016, the publication of draft regulations and subsequent amendments following consultation in July 2018, the law prohibiting direct marketing (cold-calling) in relation to occupational and personal pension schemes came into force on *January 9, 2019*.

The Privacy and Electronic Communications (Amendment) (No. 2) Regulations 2018 prohibit pensions cold calling except where the caller is a trustee (or manager) of a pension scheme, or a firm authorised by the FCA, and either

- The recipient has consented to receiving calls from the organisation making the call.
- The recipient has an existing client relationship with the organisation and would expect to receive such calls.

The cold-calling ban will be enforced by the Information Commissioner's Office whose powers include issuing a fine of up to £500,000. Regulations which came into force on December 17, 2018 allow the ICO to impose such a fine for breaches of the Regulations on unsolicited direct marketing on officers of a body corporate.

The ICO is due to issue guidance on the pensions cold-calling ban shortly.

Court of Appeal finds transitional provisions in pension schemes were age discriminatory: McCloud and Sargeant

In our update of February 2018, we reported on two cases in which separate employment tribunals (ET) had considered potentially age discriminatory pension scheme provisions. Both ET cases were appealed, with the ET making an order to consolidate the cases in the Employment Appeal Tribunal (EAT).

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

This decision means that respondents in similar claims will need to consider presenting evidence to support the legitimacy of their asserted aims.

The Court has also ruled that the material factor defence in occupational pension scheme equal pay claims is the same as in non-pensions cases, despite the different wording in section 69 of the Equality Act 2010.

Comment

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

This is a significant decision for the parties. From the Government's perspective, the amounts involved are likely to be considerable and there could be a wider impact in relation to other public sector pension schemes with similar transitional provisions.

The Court of Appeal office has confirmed that permission to appeal was not granted but it is unclear whether the Government intends to apply directly to the Supreme Court for such permission.

Supreme Court rules advantageous treatment of an individual cannot be unfavourable, even though it could have been more advantageous: *Williams v The Trustees of Swansea University Pension & Assurance Scheme and another* [2018]

Background

Mr Williams was employed by Swansea University from June 12, 2000, until he retired for ill-health reasons at the age of 38. He suffers from Tourette's syndrome and other conditions satisfying the definition of "disability" under section 6 of the Equality Act 2010 (the 2010 Act). He had been an active member of the university's pension scheme (the Scheme) throughout his employment.

He was employed by the university for 13 years, for the first 10 on a full-time basis and then, for the final three, he worked between 17.5 and 26 hours per week when he was fit to do so. The reduction in working hours arose from his disabilities. When he retired he was working half his full-time hours (17.5 hours a week).

Under the Scheme's ill-health early retirement provisions, Mr Williams was entitled to a lump sum and annuity, calculated on the basis of his actual salary at relevant times, whether full or part-time. The amount of this part of the pension was not in dispute. He was also entitled to an enhancement, calculated on the basis of his actual salary at the date of retirement. This element was the point of dispute.

The law

Section 15(1) of the 2010 Act provides that

A person (A) discriminates against a disabled person (B) if –

a. A treats B unfavourably because of something arising in consequence of B's disability, and

b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

The claim

Mr Williams claimed that the calculation of the enhancement constituted discrimination within this section, as it was based upon his final part-time salary, rather than his full-time salary. He said this was unfavourable treatment because of something arising in consequence of his disabilities, namely his inability to work full-time. The Employment Tribunal agreed with Mr Williams, but this was overturned by the Employment Appeal Tribunal and the Court of Appeal. The central issue for the Supreme Court was the meaning of the expression "treats ... unfavourably".

Judgment

he Supreme Court unanimously dismissed the appeal. The SC held that in most cases, including this one, little is likely to be gained by seeking to draw distinctions between the word "unfavourably" in section 15 of the 2010 Act and analogous concepts such as "disadvantage" or "detriment" found in other provisions of the Act, or between an objective and a "subjective/objective" approach.

The SC first identified the relevant treatment to which section 15 of the 2010 Act is to be applied. In this case it was the award of a pension. There was nothing intrinsically unfavourable or disadvantageous about that. The appellant's argument depended on an artificial separation between the method of calculation and the award to which it gave rise. The only basis on which Mr Williams was entitled to any award at this time was by reason of his disabilities. Had he been able to work full-time, the consequence would have been, not an enhanced entitlement, but no immediate right to a pension at all. In those circumstances the award was not in any sense "unfavourable" and could not be regarded as such.

Comment

The SC's decision confirms that, generally, advantageous treatment of an individual cannot be unfavourable, even though it could have been more advantageous.

It is worth noting that the SC considers that "unfavourable" is broadly equivalent with "detriment" and "disadvantage". The concept of detriment under the Equality Act 2010 involves consideration of whether a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. On the facts of this case, the Court took the view that a reasonable worker would not consider themselves disadvantaged in having received an enhanced pension on retiring early on the grounds of disability.

Pension developments 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 bold and italics:

Item	Key dates
The UK withdraws from the EU, although it is unclear exactly what form Brexit will take.	March 29, 2019
Master Trust authorisation application deadline.	March 31, 2019
scheme return and PPF deadline.	March 31, 2019
GMP reconciliation deadline for HMRC queries.	March 31, 2019
increases to auto-enrolment contributions.	April 6, 2019
new SIP requirements in force relating to environmental, social and governance (ESG) factors.	October 1, 2019

DB consolidation and superfunds
Consultation awaited.

Pensions dashboard
The Government has confirmed "tremendous progress" is being made.

Pensions Regulator's powers
Government response to the consultation is expected in the first quarter of 2019.

New Pensions Bill
is due in Summer 2019 covering "multiple areas of pensions law", including DB consolidation and CDCs.

Clarification of trustees' fiduciary duties in relation to longer term investment risks
The DWP has published its full response to the 2017 Law Commission report, Pension funds and social investment. The FCA intends to consult in the first quarter of 2019 on a single package of amended rules reflecting the Government's suggested changes.

EMIR
New requirements to the exchange variation margin relating to derivatives applied from March 1, 2017. A further EMIR temporary exemption extension for pension scheme arrangements applied to August 16, 2018, and has now expired. In the absence of a further temporary exemption, ESMA expects national competence authorities not to prioritise their supervisory actions towards entities that are expected to be exempted again relatively shortly.

The DC scheme Chair's annual governance statement
This must be completed within 7 months of the end of the scheme year. For example, schemes with a March 31 year end should have submitted the statement by October 31, 2018. TPR issued trustee guidance on the statement in November 2017 and the guidance was updated in June 2018 and further in September 2018.

IORP II
The expected transposition date is January 12, 2019. The DWP is shortly expected to provide more detail on how it intends to implement the Directive. 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.

New regulations
The Occupational Pension Schemes (Administration and Disclosure) (Amendment) Regulations 2018 came into force April 6, 2018, setting out new requirements to improve transparency on DC benefit costs and charges to members. They do not apply to DB schemes providing only DC AVCs. Members must be provided with access to information via a website with seven months of the scheme's year-end date – meaning the earliest date was November 6, 2018, for schemes with year-end April 6, 2018.

VAT
HMRC's existing practice on VAT and pension schemes is to continue indefinitely. Employers should consider taking steps to preserve (or enhance) their pensions-related VAT recovery.

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 were increased to 5 per cent (of which minimum employer contribution of two per cent) from April 6, 2018. Total minimum contributions will increase to eight per cent (of which minimum employer contribution of three per cent) from April 6, 2019.

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, the Middle East and Africa.

People worldwide

>7000

Legal staff worldwide

>4000

Offices

57

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
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.