NORTON ROSE FULBRIGHT

Essential UK Pensions News

April 2020

Introduction

Essential UK Pensions News covers the latest pensions developments each month. This month, our update covers:

- The developments which have taken place as a matter of urgency in response to the coronavirus crisis
- Other pensions news since our last update in March 2020

COVID-19 developments

We have produced two COVID-related briefings:

COVID-19 issues for pension scheme trustees and

TPR guidance on suspending deficit repair contributions.

Summary of delays and deferrals

The following pension developments have been delayed due to the current crisis:

- The Pensions Regulator's defined benefit (DB) funding statement, due in March, is now due to be issued "after Easter"
- DB Funding Code of Practice consultation response deadline extended to **September 2, 2020**
- Regulator offers concessions on regulatory actions for non-compliance for three months until June 2020
- Government withdraws proposal to increase general pension scheme levy
- The FCA has extended all open consultation periods to **October 1, 2020**
- IR35 is deferred one year to **April 6, 2021** – this is the proposed system under which the responsibility will shift from a self-employed individual to a private sector company to determine the tax status of the contractor
- Progress on the Pension Schemes Bill 2019/21 seems unlikely until late April at the earliest

Further details are included below where required.

Coronavirus Act 2020: Pensions implications

The Coronavirus Act 2020 received Royal Assent on **March 25, 2020.** It amends legislation so that UK public bodies have additional tools and powers to respond to the COVID-19 pandemic. The legislation will be time-limited for two years.

In relation to pensions, the Government intends to amend NHS Pensions to allow individuals who have recently retired from the NHS to return to work, and retired staff who have already returned to work to increase their commitments, without having their pension benefits suspended. The Act contains provisions suspending the rule that currently prevents some NHS staff who return to work after retirement from working more than 16 hours per week, along with rules on abatements and drawdown of NHS pensions that apply to certain retirees who return to work.

The Coronavirus Job Retention Scheme

Also provided for under the Act is the Coronavirus Job Retention Scheme (CJRS). HMRC's website confirms that the CJRS is a temporary scheme open to all UK employers for at least three months starting from **March 1, 2020**. It is designed to support employers whose operations have been severely affected by coronavirus.

Employers will be able to use a portal to claim for the lower of 80 per cent of furloughed employees' (employees on a leave of absence) usual monthly wage costs, up to £2,500 a month, plus the associated employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that wage. Employers can use this scheme anytime during this period. The Government's guidance makes clear that furloughed staff salaries are pensionable. Employers can reclaim the costs of pension contributions made, but only to the extent of minimum automatic enrolment contributions, which would be 3 per cent of Qualifying

Earnings (currently, gross earnings from employment between £6,240 and £50,000). For employers who pay more generous employer contributions into pensions, the additional amounts in excess of the minimums set out above are not reclaimable.

The scheme is open to all UK employers that had already created and started a PAYE payroll scheme by **February 28, 2020**. However, the online service for claiming will not be available until the end of April 2020.

Pensions Regulator issues extensive COVID guidance

On March 20, 2020, the Regulator published guidance ranging over several topics under the heading Coronavirus: what you need to consider, and further updated this guidance on **April 9, 2020**.

Statements include those relating to the following:

DB sponsoring employers in corporate distress – this sets out questions trustees should ask the employer before considering how to deal with the possible deferment of DRCs. Further guidance has since been provided (see below).

An update for trustees, employers and administrators - trustees of both defined benefit (DB) and defined contribution (DC) schemes, employers and administrators should focus their activities on benefits being paid; minimising scams; continued employer contributions; and encouraging savers to make good decisions. The Regulator recognises that some administrative breaches of the law may occur and it seeks to maintain a proportionate and fair approach to any action it may take.

In its more detailed guidance, issued on **March 27, 2020**, and summarised below, the Regulator recognises that flexibility may well be needed in these exceptional times:

Trustee guidance on Scheme funding, investment and transfer values - recognising the significant challenges for DB scheme trustees and employers in the current environment, the guidance includes several rewgulatory easements. The Regulator states that while it cannot waive trustees' statutory obligations, it will not take any regulatory action in relation to failures to adhere to the law.

The easements in question are:

- **Valuations** - the Regulator will allow schemes completing triennial valuations to delay finalisation for the valuation and associated documents such as the recovery plan beyond the 15-month statutory deadline. The Regulator does not intend to use its powers to fine trustees for late submission of these documents for the next three months.
- **Suspending DRCs** - the Regulator will take no action regarding failure to pay deficit-repair contributions (DRCs) for the next three months. Noting that many employers are likely to request the suspension or reduction of DRCs, the Regulator says it expects trustees to consider such requests with the benefit of full information regarding affordability and the employer's covenant prospects. In the absence of clear "covenant visibility" in the short to medium term, the Regulator expects trustees to offer only short-term concessions of up to three months until more reliable covenant visibility is available. Moreover, trustees should have regard to steps taken by other creditors when agreeing any concessions.
- **Transfer values** - the Regulator will take no action in the next three months regarding breach of the statutory disclosure requirements if trustees decide to suspend cash equivalent transfer values (CETVs). According to the Regulator, the Pensions Ombudsman will take its guidance, and the impact of COVID-19 generally, into account when determining whether trustees acted reasonably in their treatment of CETV requests.

The Regulator says it will review these regulatory easements as matters progress.

Trustee guidance on DC investment - noting that trustees face difficult decisions across a range of investment-related areas, the Regulator advises that trustees should undertake reviews of several matters, including:

- The degree of their scheme's exposure to certain counterparties and the diversification and extent of any concentrations of risk, whether in specific investments or sectors.
- Any previously agreed investment and risk management decisions due to be implemented in the future. They should ensure these "*remain appropriate, efficient and do not introduce risks or crystallise losses*".
- Their current investment governance and risk arrangements. This should include ensuring trustee boards and sub-committees can continue to function (for example, in relation to quorum requirements) in the event of trustee incapacity or absence.

While the guidance does not set out any specific regulatory easements, it notes that some schemes may struggle to meet statutory deadlines or comply with statutory requirements. In these circumstances, the Regulator says it will take a *"pragmatic approach*", and where possible use its discretion in relation to whether to take action regarding specific breaches.

Employer guidance on DB Scheme Funding - this much shorter guidance explains the Regulator's pragmatic approach where trustees are being asked to agree to a previously unforeseen arrangement (such as DRC reductions or suspensions, or additional debt being secured over employer assets) provided that:

- The need for this can be justified.
- A plan is made for deferred scheme payments to be caught up (e.g. beyond the shorter term).
- A plan is agreed for mitigating any detriment caused to the scheme.
- The scheme is being treated fairly compared with other stakeholders. In particular, it expects payments to shareholders (as well as other forms of value leaving the employer) to have ceased.

It strongly recommends that employers document their position regarding the treatment of their schemes, particularly as this may assist in any future engagement with the Regulator.

The Annual Funding Statement, which is due to be published after Easter 2020, will also provide messages relevant to all DB schemes, but particularly schemes with valuation dates between September 22, 2019, and September 21, 2020 (Tranche 15, or T15 reviews), as well as schemes undergoing significant changes that require a review of their funding, investment and risk management strategies.

Warning for pensions savers amid growing pension scams – the pandemic may have created the "perfect conditions" for pension fraudsters to operate and pension savers to should be on their guard amid times of economic and employment uncertainty.

Action Fraud has reported a quadrupling of the number of scams in March 2020, with many frauds focused on providing early pension access for those under the age of 55. This could result in savers suffering a 55 per cent unauthorised payment charge from HMRC.

Trustees should be aware of the spike in cybercrime attacks and new ways in which cybercriminals have taken advantage of the growing demand for information. The risk has been compounded by organisations needing to set up remote working in a timeframe which sometimes does not always allow effective cyber security arrangements to be put in place.

On **April 1, 2020**, the Regulator and the FCA, with the support of the Money and Pensions Service, issued a joint warning for pensions savers amid the ongoing pandemic that "*fraudsters will exploit the coronavirus to prey on anxiety and fear of savers and investors*".

The Regulator, has urged savers "*not to transfer their pensions into another arrangement now*", adding that members should "take the time" to consider their options. Meanwhile, TPR, the FCA and the MaPS have advised that members should access the Pensions Advisory Service and ScamSmart websites for guidance on how to protect themselves against pension scams.

The Pension Protection Fund

PPF publishes measures to respond to impact of COVID-19

The Pension Protection Fund (PPF) has published a new webpage which it plans to keep updated with information for members, schemes and insolvency practitioners relating to the current COVID-19 situation.

PPF guidance has been published, emphasising compensation payments will continue to be made during the crisis.

PPF confirms methodology for insolvency risk mechanism from 2021/22 and plans COVID-19 monitoring

The PPF has published its policy statement on insolvency scoring from 2021/22, after consulting on a revised system for calculating the likelihood of employer insolvency as part of its new partnership with Dun & Bradstreet (D&B).

Consultation respondents were largely supportive of its insolvency scoring proposals, while also being positive about other new services for levy payers that were launched in parallel with the consultation (including a new portal to view insolvency risk scores, a new levy section on the PPF website and other new communications channels).

The policy statement confirms the methodology used in live scoring will be "*broadly as consulted on*" and the statement sets out its detailed analysis on the points raised.

The PPF will use feedback received to help improve its services, with enhanced portal functionality. The PPF also confirms that the insolvency risk scores calculated by D&B will go live from the end of April 2020, for use in 2021/22 levy invoices.

Finally, in the statement's foreword, David Taylor (Executive Director and General Counsel to the PPF) noted the impact of the COVID-19 pandemic. He confirmed the PPF was not planning to publish its final rules for the 2021/22 levy year until December 2020. The PPF will "*monitor developments carefully and consider what, if any, changes to our rules are necessary in view of these exceptional circumstances*".

PPF publishes Business Plan 2020/21

The PPF has published its Business Plan 2020/21, which outlines how it will continue to protect its members in a volatile market whilst setting new standards.

PPF Chief Executive Oliver Morley said: "*The work to make sure we have a sustainable and appropriate funding strategy is on track…..The extent of the impact [of COVID-19] is, of course, unknown at this stage. We have chosen to leave our objectives as they stand but* we *accept that there may be challenges to achieving our objectives within the next 12 months*."

DB Funding Code consultation deadline extended

In our March 2020 Stop Press, we reported in detail on the first of two planned consultation papers on DB scheme funding from the Regulator. This first consultation focuses on its new regulatory dual approach for valuations and the eight principles underlying the new framework offering alternative "fast track" or "bespoke" routes to schemes for compliance.

The consultation response deadline was originally **June 2, 2020**, but this has now been extended to **September 2, 2020**. The second consultation, which was due to be published in the Autumn 2020, may also now be delayed.

Pensions Climate Risk Industry Group draft guidance: consultation deadline extended

On **April 1, 2020**, the DWP announced it had extended the closing date for responses to the consultation on draft non-statutory guidance from the Pensions Climate Risk Industry Group. The draft guidance is intended to help trustees of DB and defined contribution (DC) schemes in their implementation of the recommendations of the Task Force on Climate-Related Financial Disclosures on integrating, managing and reporting on climate change risks. The consultation, which was originally due to close on May 7, 2020, will now close on **July 2, 2020**.

DWP confirms planned increases in 2020/21 pension scheme general levy now postponed

On **March 4, 2020**, the DWP published a response to its October 2019 consultation on proposed increases to the general levy on pension schemes. The changes were due to be implemented under the Occupational and Personal Pension Schemes (General Levy) (Amendment) Regulations 2020. These regulations were laid before Parliament on **March 4, 2020**, and were due to come into force on **April 1, 2020**, but have now been revoked. The DWP has confirmed that the issue will be revisited when "business as usual" is resumed, whenever that may be.

HMRC publications

GMP equalisation newsletter

HMRC has finally produced some guidance on the tax treatment of changes to benefits to give effect to equalisation for the effect of unequal GMPs. The guidance leaves a lot of questions still unanswered, for example on trivial commutation and serious ill-health lump sums, and over how GMP conversion might be viewed.

However it has put to bed a number of concerns in relation to the lifetime allowance (LTA):

- Adjustments to benefits will be treated as pre-6 April 2006 accrual, so not affecting the LTA
- Fixed protection will not be lost unless there are benefit increases above those solely for GMP equalisation
- Members with primary protection or individual protection should inform HMRC of the increase to their previously notified benefit value
- In the event that GMP equalisation tips the member into a category where LTA protection would have been available, HMRC will consider late notifications, although the qualifying criteria differ by type of protection.

HMRC expects calculations of the amount of LTA used on past benefit crystallisation events (BCEs) to be updated where GMP equalisation increases what would have been the individual's starting pension, and where that results in the entitlement exceeding the LTA, the charge paid. This raises a practical question around how much support trustees will need to give members trying to do this exercise.

On the annual allowance front, HMRC has confirmed that:

- Members who became deferred before April 6, 2006, do not have to do an annual allowance test on any GMP equalisation increase.
- Any deferred member benefiting from the deferred member carve-out (i.e. no annual allowance charge as long as revaluation satisfies various requirements) will continue to be exempt on the grounds that the change to benefits is solely attributable to statutory equalisation requirements.
- There is no need to unpick past years' annual allowance calculations.

See the **February 20, 2020**, HMRC guidance here.

HMRC has promised more guidance, on the treatment of lump sum and death benefit payments, "as soon as possible", but it seems clear they are some way away from a resolution to the tax implications for schemes choosing to use the conversion route to deliver GMP equalisation.

HMRC Pension schemes newsletter 118: Temporary changes to pension processes for administrators introduced as a result of COVID-19

On **March 26, 2020**, HMRC published edition 118 of its pension schemes newsletter. The latest edition sets out a range of temporary changes to pension processes as a result of the COVID-19 pandemic, which is causing problems for pension scheme administrators.

These changes include a process for applying to HMRC to cancel penalties and interest charged on the late submission of accounting for tax returns or late notification of transfers to qualifying recognised overseas pension schemes (QROPS) as a result of administrative challenges caused by COVID-19. The temporary changes will apply for the next three months, after which HMRC will review the position and provide an update in its June 2020 newsletter.

The newsletter also references the changes announced in the Spring 2020 Budget although HMRC notes that it has not yet updated its online Annual Allowance calculator to take account of the tapered allowance changes. If trustees have issued member communications with links to the calculator, members should be warned that it is subject to change.

HMRC also confirms that the call for evidence on the net pay issue, announced in the Budget, will be published in Spring 2020.

Countdown Bulletin no. 52

On April 1, 2020, HMRC published the latest issue of its Countdown Bulletin for formerly contracted-out DB schemes. It states that it has needed to extend the publication of its planned timeline for the issue of final data cuts, which will now be published by the end of April 2020.

EMIR: ESMA launches consultation on clearing solutions for pension schemes

On **April 2, 2020**, the European Securities and Markets Authority (ESMA) launched a public consultation on a range of issues regarding potential central clearing solutions for Pension Scheme Arrangements (PSAs) under the European Market Infrastructure Regulation (EMIR). The consultation closes on **June 15, 2020**.

The consultation paper sets out the issues PSAs face in clearing their contracts, studies the rationale for the use of derivatives by PSAs and explores the different solutions already envisaged to facilitate PSAs to centrally clear their over-the-counter trades.

It aims to gather views and data on potential central clearing solutions for PSAs, and more specifically on solutions to facilitate PSAs discharging their variation margin requirements. ESMA seeks detailed feedback on:

The structure of PSAs' portfolios and on the potential reduction of portfolios' investment returns from increasing their cash holdings.

The solutions still being explored, such as relying on the ancillary services of collateral transformation of clearing members, a market-based repo solution or the access to alternative emergency liquidity arrangements.

Next steps
Following the public consultation, ESMA will consider all comments received before the deadline, and expects to publish a second report and to submit it to the European Commission by the end of the year.

GMP equalisation: PASA publishes guidance on timing for GMP rectification and equalisation exercises

The GMP Equalisation Working Group of the Pensions Administration Standards Association has published a guidance note, *When to Rectify*, considering when to make corrections needed as a result of GMP reconciliation, where a scheme is now also required to equalise benefits for the effect of GMPs after the *Lloyds Banking Group* case.

This guidance focuses on the question of timing for GMP rectification and equalisation exercises. PASA notes that while, in the past, trustees may have decided to defer GMP rectification once GMP reconciliation was completed, to be done in conjunction with GMP equalisation, this may not always be appropriate now.

More detail on the options and factors to take into account is available in our April 2020 briefing note.

DWP announces earnings auto-enrolment trigger and qualifying earnings band for 2020/21

The DWP has announced the outcome of its annual review of the auto-enrolment earnings trigger and qualifying earnings band.

For the 2020/21 tax year, the following limits will apply:

- The earnings trigger will remain fixed at £10,000.
- The lower end of the qualifying earnings band will rise from £6,136 to £6,240.
- The upper end of the qualifying earnings band will remain £50,000.

The changes to the qualifying earnings band will maintain the band's alignment with the lower and upper earnings limited for paying National Insurance contributions.

The DWP confirms that the Government intends to consult on removing the lower earnings limit "in the mid-2020s" following its 2017 review of automatic enrolment.

Auto-enrolment: Alternative quality requirements for DB schemes and seafarers and offshore workers

Seafarers and offshore workers became subject to the auto-enrolment requirements if they were "ordinarily working" within the UK, provided they met the other necessary conditions applying to eligible jobholders.

Provisions in secondary legislation extended the scope of the auto-enrolment reforms to seafarers and offshore workers involved in oil or gas extraction. In the case of offshore workers, the statutory instrument in question will cease to have effect automatically on July 1, 2020 under "sunset" provisions.

The Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2020 come into force on June 30, 2020 and amend current regulations to which these "sunset provisions" apply. This means automatic enrolment duties under the Pensions Act 2008 continue to apply to employers in those industries.

Finance Bill 2019-21: pension provisions

The Finance Bill 2019-21 was introduced to the House of Commons and given its first reading on March 17, 2020.

In relation to occupational pension schemes, the Bill will implement the changes to the operation of the annual allowance announced by the Chancellor of the Exchequer in his Spring 2020 Budget (see above).

The provisions implementing these changes will amend the Finance Act 2004 to:

- Reduce the minimum tapered allowance from £10,000 to £4,000 and simplify the formula used to calculate the reduced annual allowance.
- Amend the definition of a "high-income individual" so that the tapering of the annual allowance will apply only to individuals whose adjusted income for the tax year is greater than £240,000 (previously £150,000) and whose threshold income for that year is greater than £200,000 (previously £110,000).

These amendments have effect from the 2020-21 tax year and subsequent tax years.

Comment
There were relatively few pensions provisions in this year's Budget but the Chancellor's announcements since then to address the coronavirus emergency are hugely significant.

There are concerns that the reduced minimum tapered annual allowance (and the existing money purchase annual allowance) will not be sufficient for workers to replenish their pension savings in the wake of the current crisis.

VAT exempt treatment of DC pension funds - the Value Added Tax (Finance) Order 2020

The Value Added Tax (Finance) Order 2020 provides for the VAT fund management exemption to apply to "qualifying pension funds" (essentially DC schemes), and removes the requirement for certain funds to invest wholly or mainly in securities for the exemption to apply. The order came into force on April 1, 2020.

A qualifying pension fund is a fund meeting the following conditions:

- It is solely funded, whether directly or indirectly, by the members.
- The members bear the investment risk.
- The fund contains the pooled contributions of more than one member.
- The risk borne by the pension members is spread over a range of investments.
- The fund is established in the United Kingdom or in an EU member state.

In the years following the 2014 decision of the CJEU in the ATP case, HMRC gave businesses the option either to exempt fund management services in accordance with EU law, or to apply UK VAT legislation.

In January 2019, the Government decided to align UK law with EU law in the Value Added Tax (Finance) (EU Exit) Order 2019. In June 2019, faced with uncertainty around the date of the UK's exit and in order to give the industry more time to prepare, the Government revoked that order, confirming that its intention was to introduce the same changes in a new order, but with a certain commencement date of **April 1, 2020**.

This means that supplies of fund management services to DC occupational pension schemes are exempt from VAT from **April 1, 2020**.

Comment
At first glance this seems to be good news for DC schemes, as it confirms that they are not charged VAT (at least on fund management costs). However it does create some problems. Any suppliers of fund management services which had previously followed the UK approach are now prevented from offsetting input tax against their charges to pension schemes, so their costs go up, and that cost will be passed on to pension schemes. Where employers had previously been able to "use" the VAT on supplies to the scheme against their own input tax, that ability has shrunk. So overall, the cost to employers may have risen, at least where there was previously some offsetting taking place.

Supreme Court holds employer not vicariously liable for employee's data protection breach: *Wm Morrison Supermarkets plc v Various Claimants* [2020]

In *Wm Morrison Supermarkets plc v Various Claimants* [2020], the Supreme Court has overturned judgments of the High Court and Court of Appeal in deciding that a supermarket was not vicariously liable for unauthorised breaches of the Data Protection Act 1998 committed by a malicious employee.

The Supreme Court held that Morrisons was not vicariously liable for the actions of an employee who, without authorisation and in a deliberate attempt to harm his employer, uploaded payroll data to the internet using personal equipment at home.

In reaching its decision, the Supreme Court found that the circumstances in which the employee had committed the wrongful disclosure of payroll data were not so closely connected with acts which he was authorised to do that they could fairly and properly be regarded as having been done by him while acting in the course of his employment.

Although this was not relevant in the Morrisons case, the Supreme Court also found that, under the Data Protection Act 1998 (which was in force at the time), vicarious liability did apply to breaches of the obligations it imposed, as well as to breaches arising at common law and equity, committed by an employee who is a data controller acting in the course of their employment.

Comment
This decision will be welcomed by employers. It will assure them that that they will not always be liable for data breaches committed by rogue employees. Here, the employer was completely unaware of the grudge held against the supermarket by its employee. The employee also took extreme care to cover up what he had done and even attempted to frame another employee for his actions..

Although this case was decided under the previous data protection regime, the DPA 1998 and the GDPR are based on broadly similar principles and the new legislation will not prevent vicarious liability actions in data privacy proceedings commenced under the current regime. Compliance failures under the GDPR and DPA 2018 regime are more onerous than previously. Data controllers run the risk of exposure to huge revenue-based fines and data subject compensation claims for breaches, in cases where they fail to safeguard data to statutory standards and neglect to have governance in place to curb the malicious acts of rogue employees.

Court of Appeal dismisses member's appeal against unauthorised member payment - *Clark v Revenue and Customs Commissioners* [2020]

Background

The most common form of so-called "pension liberation" involves the member of a registered pension scheme being offered the opportunity to get access to their pension fund outside of the legal and tax restrictions that apply to such schemes. Many pension liberation schemes are set up ostensibly as occupational pension schemes registered with HMRC and, at first sight, do not involve any illegality. However, they often breach HMRC tax rules regarding unauthorised payments or loans, resulting in adverse tax consequences for the member.

If a registered pension scheme makes an "unauthorised member payment" (as defined in section 160(2) of the FA 2004), an unauthorised payments charge of 40 per cent arises, in addition to an unauthorised payment surcharge of 15 per cent.

Facts

Mr Clark initiated a series of transfers, following advice he received, commencing with a transfer from his SIPP to a new occupational pension scheme, of which Laversham Marketing Ltd (LML) was the principal employer and Mr Clark its only member. Funds representing a "scheme surplus" were then transferred from the scheme to LML and onwards to a company incorporated in the British Virgin Islands, from which Mr Clark subsequently received loans to make property investments.

In 2014, HMRC issued a discovery assessment on the basis that Mr Clark was liable for an unauthorised payment charge and surcharge. Mr Clark appealed against this assessment.

Decision

Following Mr Clark's lack of success in both the First Tier Tribunal and the Upper Tribunal, the Court of Appeal also dismissed his appeal. The Court held that the evidence as a whole pointed strongly towards the conclusion that the transfer from the SIPP to the pension scheme was an unauthorised member payment under the legislation. The word "payment" within the phrase "unauthorised member payment" included a transfer of money from one pension scheme to another in circumstances where it later transpired that the trusts of the recipient scheme were void for uncertainty.

Further, there was nothing in the provisions of the of the Finance Act 2004 to show that they only operated in respect of payments which transferred beneficial ownership.

In reaching its decision on the question of whether a "payment" was made, the Court looked at the practical, business reality of the transaction, including any composite transaction of which the payment formed part. If the intended purpose and effect of the transactions was that money leaves the scheme and is placed at the free disposal of the member, the mere fact that the money may be subject to an equitable obligation to restore it to the scheme will not prevent it from being a "payment" in the ordinary sense of that word. To conclude otherwise (the Court found) would deprive the charge to tax of effect in many of the most egregious cases where it is most needed.

It was relevant that Mr Clark had used the money as he wished and had full control, choosing to invest in property that would otherwise have been prohibited under a SIPP.

Comment

This decision may increase HMRC's focus on similar schemes in the future. It serves as a warning that the courts will be unforgiving where they consider that pension schemes are being used as part of elaborate tax avoidance schemes. As the decision considers the meaning of "payment" in the legislation in depth, it could have a wider impact in cases regarding other types of unauthorised payments.

The difficult position that some transferring schemes find themselves in is highlighted here. Although the trusts of the receiving pension scheme were later found to be void for uncertainty, the Court noted that at the time of the transfer, the transferring scheme presumably thought it was merely giving effect to a standard request by the member to transfer his pension assets to another registered pension scheme of which he was a sole member.

High Court rules that provision in Police Pension Scheme excluding post-retirement widows from spouses' pension is lawful - *Carter v Chief Constable of Essex* [2020]

On **January 21, 2020**, the High Court handed down its decision in *Carter v Chief Constable of Essex* [2020], with the Judge rejecting a complaint by a retired member and his wife that a rule excluding widows from entitlement to a widow's pension if they were not married to the member before the member retired as a police officer was unlawful.

The member, who was 95 years old, had remarried in 1981 after retiring from the Police Pension Scheme in 1977. Under the rules of the scheme, no widow's pension would be payable to his wife if she survived him, because she was not married to the member before he retired as a police officer. The claimants sought to rely on section 3 of the Human Rights Act 1988 and argued that the relevant rule unlawfully discriminated against the member's wife as a post-retirement widow.

Decision

The Court held the member's wife was not entitled to rely on section 3 of the Human Rights Act 1998 (which came into force on 2 October 2000). This was because the claim sought to challenge the effect of legislation that extinguished the right to a widow's pension many years before the passage of the Act. The same conclusion applied in relation to EU law since the claimants were seeking to give retrospective effect to the Framework Directive and the Employment Equality (Age) Regulations 2006 in order to challenge a situation that was permanently fixed long before such provisions came into force.

Comment

It is easy to sympathise with Mrs Carter who, despite being married to the member for 38 years, was not going to be entitled to a spouse's pension. Nevertheless, the Court's analysis of the issue demonstrates just how far pensions policy has developed since Mr Carter joined the Scheme in the post-war period. As the judge noted, until the 1970s, the Government's prevailing view appears to have been that the employer's obligation was to provide only for dependants acquired before or during the course of the member's service. This policy changed in relation to the Scheme in 1978, but that was too late for the member in this case.

It is unclear how many private sector pensions may have similar spouse benefit provisions but trustees of schemes established many years ago may wish to check this point.

Tax tribunal finds it "inherently improbable" member did not submit enhanced protection application by deadline: *Hayes v Revenue and Customs Commissioners* [2020]

The Finance Act 2004 (FA 2004) specifies a maximum amount of saving that an individual may make in a registered pension scheme without incurring a tax charge. This is known as the standard lifetime allowance (LTA). Although it was originally much higher, for the 2020/21 tax year, the standard LTA is set at £1,073,100. As the LTA has been reduced over the years, savers have been able to apply for various protections to preserve the LTA that originally applied to them.

In this case, following financial advice, Mr Hayes arranged for a completed application seeking enhanced and primary protection from the LTA charge, to be sent to HMRC by his assistant on July 20, 2006. The closing date for notifications was April 5, 2009. He kept a copy of the signed form for his personal records.

On his retirement, Mr Hayes discovered HMRC had no record of his application and sent them a copy of the form he claimed to have sent. HMRC stated his notification was out of time and could not be accepted, and he appealed to the tribunal. The Regulations require HMRC to consider a late notification if the appellant had a reasonable excuse for not giving the notification by the deadline.

Allowing the appeal, the tribunal found that it was "inherently improbable" that the appellant did not send his notification to HMRC on July 20, 2006. It noted that "in hindsight" the appellant should have followed up receipt of the certification from HMRC, However, as Mr Hayes had argued, the notification did not require HMRC to exercise a judgment that needed to be confirmed and therefore there was arguably less reason for him to have been on notice to look for a reply. He was an honest and credible witness and there was no reason to doubt him. He had done as much as he could to protect his pension but unfortunately at the "last hurdle" had simply failed to check that HMRC had received his notification. Viewed objectively on the facts, he had a reasonable excuse for the "late notification" that subsequently had to be given.

Comment

The tribunal reached a sensible decision here. In this case, the member's careful record keeping stood him in good stead and allowed him to avoid a considerable LTA charge.

Age discrimination: Government sets out progress on action following *McCloud and Sargeant* cases

On **March 25, 2020**, HM Treasury issued a written statement regarding the steps the Government is taking to address the unlawful age discrimination identified by the Court of Appeal in the *McCloud and Sargeant* cases. The Court held that transitional provisions in the judges' and firefighters' pension schemes were directly age discriminatory.

Following technical discussions with members and employer representatives on its high-level proposals for removing the discrimination, the Government plans to consult on detailed proposals later this year.

According to the written statement, the Government's proposals would allow affected members a choice as to whether they accrued service in the legacy or the reformed scheme for periods of relevant service, depending on which is better for them. However, the written statement notes that if an individual's pension circumstances change as a result, the Government may need to consider whether previous tax years back to 2015-16 should be reopened in relation to their pension.

Comment

These proposals will mean that millions of public sector workers, including retired members, will need to make complex calculations to work out which scheme would benefit them the most. There is a chance that retrospective changes to pensions could affect tax calculations going back several years. If members need financial advice, it is unclear how this would be funded.

Box Clever: ITV given deadline to put in place financial support for scheme following financial support direction

The Pensions Regulator has given ITV plc a six-month deadline in which to put in place financial support for the Box Clever pension scheme.

In February 2020, the Supreme Court refused ITV's application for permission to appeal against the Court of Appeal's judgment, which upheld the Upper Tribunal's decision to issue financial support directions to ITV and related entities in respect of the Box Clever pension scheme.

The form of financial support is not specified in financial support directions. The Regulator states that ITV and four related entities must now provide a "credible" proposal on how they will support the scheme. The Regulator will then decide whether the financial support plan is reasonable in the circumstances.

The Box Clever pension scheme has around 2,800 members and a deficit of approximately £115 million.

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2 Mohammed Al-Ghamdi Law Firm in association with Norton Rose Fulbright US LLP
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Contacts

Lesley Browning
Partner
Tel +44 20 7444 2448/+44 77 1030 3311
lesley.browning@nortonrosefulbright.com

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

Shane O'Reilly
Partner
Tel +44 20 7444 3895
shane.o'reilly@nortonrosefulbright.com

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

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