Norton Rose Fulbright

Essential UK Pensions News

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Introduction

Essential UK Pensions News covers the latest pensions developments each month.

Pension Schemes Bill completes Committee stage

On November 5, 2020, the Pension Schemes Bill completed its Committee stage in the House of Commons. There was debate on a number of topics, including collective money purchase schemes, the new criminal sanctions and the pensions dashboard. Notably, the amendment which was intended to protect professional advisers from criminal liability for carrying out their role (by virtue of a negligence test in relation to the new criminal sanctions) was rejected.

The Bill had its report stage and its third reading in the House of Commons on November 16, 2020 and was reported with amendments (although only four were put to a vote and these were defeated.) These included amendments and new clauses concerning pension guidance, pension transfers and scams, defined benefit funding and climate-change risk. A date for the House of Lords to consider these four amendments has not yet been set.

It is expected that the Bill will receive Royal Assent before the end of 2020.

Further judgment handed down in the case of Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank plc

The High Court has handed down a subsequent judgment in the case of *Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank plc* concerning GMP equalisation issues relating to the extent trustees are obliged to revisit past transfers out of the pension scheme.

Summary

Individual transfers

The court ruled that for individual statutory transfers, the transferring scheme remains liable for any shortfall on the transfer payment due to GMP inequality. Transferor schemes cannot rely on statutory provisions, scheme rules or any agreement or discharge from the member if they failed to include in the transfer value any necessary uplift for GMP inequalities. The receiving scheme will not be liable to equalise in respect of statutory transfers in.

Former members are able to seek redress from the transferring scheme trustees requiring payment of any shortfall and such a claim will not be time barred by the scheme rules or by the Limitation Act 1980. The transferring scheme is under a duty to make a top-up payment to the receiving scheme (even where the new scheme does not hold GMP liabilities).

For non-statutory individual transfers, the transferring scheme is discharged (and will not be liable in respect of any GMP inequality) unless the actual transfer was in breach of the preservation of benefit requirements under the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 or the scheme rules. Members can apply to the court to set aside the transfer if the trustee committed a breach when exercising the transfer power under the scheme rules.

Bulk transfers

Where there has been a bulk transfer into a pension scheme, the receiving scheme will be liable for GMP equalisation (and the transferring scheme will not retain any liability for any shortfall as a result of GMP inequality). Members will need to seek redress from the receiving scheme to ensure their benefits are adjusted as required in relation to any GMP inequalities.

Comment

The long awaited judgment is of material significance to DB schemes who are in the process of dealing with equalisation issues. Most schemes will not have made an allowance for GMP inequality when calculating and paying transfer values to members prior to the October 2018 judgment (due to the uncertainty around whether this was actually required). This poses practical problems such as how scheme trustees track statutory transfers back through the last 30 years to determine whether top up payments are required. It is likely that this will be a time consuming and costly task but the judge has left it open for trustees to take a view on the specific action required, considering the relevant rights and obligations identified, the remedies available and the absence of a time bar.

The judgment also raises the question of whether the treatment of defective transfers (in particular, the lack of a time bar applying to claims) goes beyond corrections required for GMP inequality.

Update on RPI reform

On November 25, 2020, the result of the joint consultation by HM Treasury and the UK Statistics Authority (UKSA) on the timing of the reform to the Retail Prices Index (RPI) was published.

In September 2019, it was announced that UKSA intended to change the way RPI is calculated by using the methods and data sources of CPIH, which is a variation of the Consumer Prices Index that takes account of owner occupier's housing costs. CPIH gives a lower measure of inflation than RPI (approximately 1% over the last 10 years). The consultation proposed making the change as early as 2025 but it required Chancellor consent if it was to be implemented before 2030, due to the impact on the holders of index-linked gilts.

The response explains that the Chancellor has withheld his consent in order to minimise that impact. Consequently, the change proposed by UKSA can legally be made in February 2030, after the date of the maturity of the final specific index-linked gilt that year. There will be no compensation offered to holders of index-linked gilts.

Comment

RPI reform will have a significant impact on defined benefit schemes and savers, particularly where they provide pension increases linked to RPI. It is also likely to have material implications on the scheme's funding position and investment strategy. Employers will also need to consider any consequences for corporate accounting. The extent of the impact will vary from scheme to scheme but it is expected to be most acute where schemes have high levels of inflation hedging and provide pension increases linked to CPI. Members who have RPI-linked pension increases can expect to receive lower increases to their pensions from 2030.

DWP publishes response to consultation on simplifying benefit statements

Summary

The Department for Work and Pensions (DWP) has published its response to its October 2019 consultation paper and will consult later this year on a mandatory approach which would require defined contribution (DC) schemes used for auto-enrolment to produce simpler annual benefit statements. While the focus will initially be on DC schemes used for auto-enrolment, this may be extended in the future to bring other schemes within the scope of the requirements.

Background

The DWP stated that the consultation confirmed that *"the direction of travel amongst schemes is broadly towards providing shorter and simpler statements"* but that the approach remains "piecemeal" and "inconsistent" and some of the revised statements produced by providers are, in the government's view, still too long.

DWP has therefore decided to consult later in 2020 about introducing requirements for DC schemes used for auto-enrolment to produce simpler statement templates. The starting point for this simplified statement will be the two-page template developed by the Pensions and Lifetime Savings Association, in consultation with the industry, during 2017/2018.

Pensions Regulator (TPR) publishes further guidance on transfers to defined benefit (DB) superfunds

Following its guidance published in June 2020, TPR has published further guidance on transfers to DB superfunds. The guidance applies to trustees and sponsoring employers considering transacting with a DB superfund model and other similar models. It sets out TPR's approach to regulating transfers to superfunds and the approach TPR expects trustees and employers to take when considering whether to transact. TPR will also shortly publish a list of the DB superfunds which it has assessed to assist trustees considering a transfer.

The guidance states that TPR considers a transfer to a superfund to be a new category of clearance Type A event and that it expects ceding employers to apply for clearance in advance of the transfer. The guidance states that it expects sponsoring employers and trustees to work closely together to compile the evidence in support of the application, including evidence that the "gateway principles" have been considered and that any detriment has been adequately mitigated. Where clearance is given for a transfer to proceed, TPR expects that it should normally take place within three months of the clearance being granted.

Old British Steel Scheme expected to exit assessment at the end of 2021

The PPF has confirmed that the trustee of the Old British Steel Scheme has secured a buy-in deal, which will mean that the benefits received by the 30,000 members will be the same or higher than the level of PPF compensation which they currently receive. The buy-in, worth £2 billion, is with Pension Insurance Corporation and the Old British Steel Scheme is expected to exit the PPF assessment process at the end of 2021.

Government extends CJRS

On November 5, 2020, the government announced that it was extending the Coronavirus Job Retention Scheme (CJRS) until March 31, 2021 and postponing the new Job Support Scheme, which had been due to come into effect from November 1, 2020. A fifth Treasury direction dated November 12, 2020 (covering the period of the extension of the CJRS until January 31, 2020) has also been published, providing that employers are unable to claim under the CJRS where an employee is working their notice period. It also sets out the applicable deadlines for employers making claims (or extending existing claims) from November 2020 to January 2021. A further direction will be published in due course to cover February and March 2021.

Employers can claim 80 per cent of employees' wages (with a cap of £2,500 per month) but must pay national insurance contributions and employer pension contributions in respect of employees' furlough pay.

The government has confirmed it will review the scheme in January 2021 to decide if economic circumstances are improving such that employers can contribute more.

New Code of Practice for sole corporate trustees

The Association of Professional Pension Trustees (APPT) has published a Code of Practice for Professional Corporate Sole Trustees (PCSTs) which will take effect from January 1, 2021.

The Code of Practice is voluntary and applies to firms acting as a PCST of an occupational pension scheme in the UK. It is not intended to apply to master trusts or "captive" corporate trustees which have been set up for the sole purpose of running one or more pension schemes associated with a single employer or group of employers.

The new Code of Practice sets out good practice for how PCST firms should operate and covers the following areas:

1. Appointment
2. Working with the sponsoring employer
3. Decision making
4. Diversity and inclusion
5. Appointment and review of advisers and service providers
6. Assurance reporting

Please see our latest briefing for further details on the Code.

HMRC moves up priority order in relation to corporate insolvency

Following changes introduced by the Finance Act 2020, on December 1, 2020, changes to the insolvency priority order mean that HMRC will have increased priority in relation to certain taxes and will be paid after those holding fixed charges but before those holding floating charges and unsecured creditors.

In relation to pension schemes, this means that in an insolvency scenario, the recovery of any section 75 debt by trustees is pushed slightly further down the priority order, as is recovery by the PPF, although the significance of this change will vary depending on the circumstances of individual insolvencies.

TPR guidance for trustees where sponsor is in financial distress

On November 12, 2020, TPR published guidance for trustees of DB schemes on protecting their schemes from financial distress of their sponsoring employer.

The guidance stresses that trustees are the "first line of defence" for pension schemes and savers and emphasises the importance of trustees acting quickly when it is clear that the employer is in financial distress, in order to protect the interests of members.

The key points from the guidance are as follows:

- Trustees should adopt an integrated risk management (IRM) approach to their scheme, which should include workable contingency plans and appropriate triggers. These procedures should be reviewed regularly to ensure they remain suitable and trustees should not wait for formal confirmation of a downgraded covenant before taking mitigating action. This approach will highlight to trustees at an early stage where the employer is experiencing difficulties, enabling trustees to act sooner and better protect members.
- Trustees should engage regularly with the sponsoring employer and other creditors (where relevant) to help identify and manage key risks early on.
- If trustees do not have robust procedures in place to protect the scheme, other stakeholders, such as lenders, are likely to be in a better position in terms of extracting value from the sponsor, which may negatively impact the scheme.

- Trustees should be alert to the possibilities of pensions scams or unusual transfer activity and should have procedures in place to communicate with members where the sponsor and scheme are facing uncertainties.
- If trustees think that their sponsor is facing the prospect of insolvency, they should refer to the Pension Protection Fund (PPF)'s contingency planning guidance.

Commenting on the new guidance, TPR's Director of Supervision, Mike Birch, stated as follows:

"When sponsoring employers experience financial distress or make business disposals it can cause significant risks to DB schemes and we know that sadly, in the current climate, some employers are struggling. The current environment is also leading to an increased level of corporate transactions, some of which are completed in response to distress.

Trustees are the first line of defence for savers. The faster they act, the more options and greater time they'll have to protect members' retirements. Trustees should know the signs of distress, and preparations can be made before these signs appear."

Comment

This guidance is in response to the ongoing financial implications of the COVID-19 pandemic and is a reminder to trustees that the quicker they act in situations where employers are experiencing financial distress, the better the outcomes are likely to be for their schemes and members. Where trustees are concerned about a sponsor insolvency event, we recommend that advice is sought from pensions and restructuring experts to ensure that the scheme's position is adequately protected and that it is being treated fairly in comparison with other stakeholders. Our webinar provides further information on the new corporate insolvency and restructuring legislation (which will be particularly relevant where employers are experiencing financial distress) and a discussion in relation to the impact on pension schemes.

TPR launches pledge to combat pension scams

On November 10, 2020, TPR, supported by the Pension Scams Industry Group (PSIG), launched a pledge for the pensions industry to join in combating pension scams.

In order to self-certify that they meet the pledge, pension providers, trustees and administrators are asked to commit to:

- Regularly warn members about pension scams.
- Encourage members asking for cash drawdown to get impartial guidance from The Pensions Advisory Service.
- Get to know the warning signs of a scam and best practice for transfers by
  - Completing the scams module in the Trustee Toolkit and encouraging all relevant staff and trustees to do so.
  - Studying and using the resources on the Financial Conduct Authority ScamSmart website, TPR's scams information and the PSIG code.
  - Considering becoming a member of the Pension Scams Industry Forum by contacting PSIG.
- Take appropriate due diligence measures by carrying out checks on pension transfers and documenting pension transfer procedures.
- Clearly warn members if they insist on high-risk transfers being paid.
- Report concerns about a scam to the authorities and communicate this to the member in question.

Commenting on the new pledge, Minister for Pensions and Financial Inclusion, Guy Opperman stated that *"This initiative will also give these industry leaders a chance to step up ahead of the legislative protections outlined in the [Pensions Schemes] Bill".*

Comment

Although the pledge is not a legal requirement, it is a helpful reminder of the steps trustees can take to help avoid their members falling victim to a pension scam. Given the rise of scamming generally and the regulatory scrutiny attached to the issue of pensions transfers, the pledge gives those trustees who are following a robust diligence process a platform to show they are thinking seriously about these issues, and doing what they can to protect their members.

TPR confirms increase in unpaid automatic enrolment contributions

TPR's compliance and enforcement bulletin dated November 19, 2020, highlighted that there has been an increase in employers failing to pay pension contributions in accordance with automatic enrolment requirements. TPR has responded by increasing the number of unpaid contribution notices and compliance notices issued by 191.4% and 17% respectively, compared to last quarter. The bulletin reminds employers of their responsibilities under automatic enrolment legislation and demonstrates a commitment to holding employers to account for their pension duties.

Mel Charles, Director of automatic enrolment at TPR, said: *"Employers may have seen their business change because of COVID-19, but their pension duties have not."*

The bulletin also demonstrates TPR's use of other enforcement powers and reveals that it secured its first confiscation order under the Proceeds of Crime Act (POCA) 2002 in September (in respect of a fraud of more than £250,000 committed against a charity's pension scheme whereby the offender was required to pay back the money or face further jail time.)

A further confiscation order was secured in October

Pensions liberation schemes and the Fraud Compensation Fund

The Fraud Compensation Fund (the "FCF") is funded by a levy paid by occupational pension schemes which has historically been relatively minor (approximately 25p per member) and is called upon where a scheme loses out financially due to dishonesty, the scheme employer becomes insolvent or is unlikely to continue as a going concern and the scheme cannot be saved.

The Pension Protection Fund, which runs the FCF, has taken a test case to the High Court to determine whether pension liberation schemes are eligible for FCF compensation. Prior to this, it was not clear whether these schemes were eligible to make such claims as the legislation governing the FCF wasn't designed with this type of scam in mind.

The test case has confirmed that, in principle, pension liberation schemes may qualify for FCF compensation and provides guidance to trustees making such claims.

Comment

The potential claims from pension liberation schemes are estimated to exceed £350m which has caused some concern in the industry that this will result in a significant increased cost for levy payers (i.e. occupational pension schemes) at a time where schemes and sponsors are experiencing financial uncertainty and instability.

Mr S (PO-22018) – no maladministration where member failed to update trustees about his address

Summary

The Pensions Ombudsman has held that there was no maladministration on the part of trustees where they sent correspondence to the member's known address, although the member was actually abroad at the time and was also residing at a different address.

Background

Mr S was a member of the British Steel Pension Scheme (BSPS) and began receiving his benefits in 2016. In connection with the restructuring of Tata Steel (UK) Limited, BSPS members were offered the choice between transferring to a new scheme (New BSPS) or remaining in the BSPS, which was expected to enter the PPF.

In order to communicate this choice to members, the trustees instructed a tracing firm to cross-check the addresses held by the trustees in respect of members. In the case of Mr S, the tracing firm connected him with an address in Scunthorpe which matched the address held by the trustees.

Between October and December 2017, the trustees sent three letters to this address in Scunthorpe setting out the choice Mr S had. The deadline for responding was 12 December 2017.

In March 2018, Mr S received his first pension payment since moving to the PPF, which was a reduced amount. Mr S sought an explanation for this reduction and when the situation was explained, he asked to transfer to the New BSPS. He said that he had not received any of the correspondence about the choice to transfer to the New BSPS. He was no longer living at the Scunthorpe address, although he did own the property. He currently lived in Skegness but he had not updated his address with the trustees because he had found that the postal service in his new location was unreliable. He had also been abroad between early November 2017 and March 2018.

The trustees' IDRP did not uphold Mr S's complaint and Mr S complained to the Pensions Ombudsman.

Pensions Ombudsman's determination

The Pensions Ombudsman did not uphold Mr S's complaint. It was held that it was Mr S's responsibility to keep the trustees updated about his address and about any long-term travel plans, especially as he was receiving his pension benefits and relying on these for income. The trustees had acted appropriately in instructing a tracing firm and in the case of Mr S, it was appropriate for them to use the Scunthorpe address as this was the address found by the tracing firm and matched the address on the trustees' records.

The determination can be viewed here.

Mr Y (PO-28558): - failure to meet service level agreement resulted in missed CETV deadline

Mr Y was a deferred member of a final salary pension scheme. On September 5, 2018, his independent financial adviser applied online on his behalf to transfer his pension and he was provided with a CETV of £2,830,891 (which was guaranteed until September 15, 2018.)

Under the service level agreement, the receiving scheme's administrators were required to send Mr Y's discharge forms to the transferring scheme's administrators within 5 working days. However, the forms were not received until after the guarantee deadline had expired. Mr Y's CETV had to be recalculated as a result and the revised figure was £62,694 lower than the original quote.

The receiving scheme's administrators accepted responsibility for missing the deadline, asking Mr Y to complete the transfer as soon as possible so it could undertake an actuarial calculation to assess whether he had been disadvantaged by the delay. They also agreed to compensate Mr Y for distress and inconvenience. Mr Y refused to transfer without receiving information about the compensation he would receive, which the administrators would not provide until the transfer had completed. Mr Y transferred his pension to another provider.

Mr Y asked the administrators who had caused the delay for the following compensation:

- 8% interest on a tax-free pension commencement lump sum of £100,000, which he should have received in September 2018 but was now only available in November 2019.
- Compensation in respect of his inability to use his 2018-19 tax allowances plus 8% interest on the monthly withdrawals not taken.
- A sum of £5,000 in respect of an additional transfer charge imposed by his IFA for the transfer.

An attempt was made to settle the dispute but Mr Y rejected the offer and made a complaint to the Ombudsman.

Pension Ombudsman Determination

The Ombudsman partly upheld Mr Y's complaint finding that the failure to meet the service level agreement for returning completed discharge forms (resulting in the original CETV deadline being missed) amounted to negligent maladministration. As such, Mr Y was entitled to be returned to the position he would have been in had the maladministration not occurred (to the extent that the loss had been reasonably foreseeable). However, some of the loss (including the additional financial adviser cost) was not reasonably foreseeable and so not recoverable. Mr Y was also under a duty to mitigate his loss if possible.

The determination can be viewed here.

Pensions issues in the pipeline

January 31, 2020 – The UK withdrew from the EU and the transition period will last until December 31, 2020.

New Pension Schemes Bill – The new Pension Schemes Bill includes provisions covering the Pensions Dashboard, the Pension Regulator's powers, and the revised Funding Regime. The Bill completed the committee stage in the House of Commons on November 5, 2020 and had its report stage and its third reading in the House of Commons on November 16, 2020. A date for the House of Lords to consider suggested amendments has not yet been set

December 16, 2020 – closing date for comments on TPR's provisional corporate strategy.

January 6, 2021 – deadline for submitting compliance statement in relation to objective setting for investment consultants under the CMA Order.

October 1, 2021 – New requirements apply for trustees to publish information on a publicly available, free website relating to voting and capital structure of investment companies under the Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019 following the transposition into UK law of the revised Shareholder Rights Directive (SDR II).

October 1, 2021 – New requirements for trustees of DB schemes to publish an implementation statement online under amendments to the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013. For "relevant schemes" (broadly, money purchase schemes with 100 or more members), the requirement to publish an implementation statement online applies as soon as the accounts have been signed after 1 October 2020 (but in any event no later than 1 October 2021).

Revised Funding Regime – A revised Code of Practice is expected by the end of 2021, after the Pension Schemes Bill 2019/21 becomes law.

Contacts

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

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

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

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