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# Essential UK pensions news

## Updater

May 2019

## Introduction

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

### Pensions Regulator: 2019-2022 corporate plan highlights "new regulatory initiatives" to improve member outcomes

On May 16, 2019, the Pensions Regulator (TPR) published its corporate plan for the period 2019 to 2022, in which it sets out its commitment to improving "the participation, accountability, protection and confidence in occupational pension schemes".

The plan confirms TPR's intentions for this three year period, including new regulatory initiatives aimed at increasing its engagement with schemes. Future communications will be produced aimed at clarifying trustees' duties and TPR's expectations. The plan also confirms the following initiatives with the Financial Conduct Authority (FCA)

- The launch of a joint review of the "consumer pensions journey", examining how the information disclosed by schemes and providers interacts with the guidance and advice services available to savers.
- Closer work with the FCA and the Money and Pensions Service (MAPS) on informing members of the risks involved in DB to DC transfers and the available options.

TPR states that its supervision and regulation of corporate matters that affect schemes and the employer covenant will increase, and to this end it will be contacting over 1,000 schemes this year to monitor the treatment of members in comparison to issues such as shareholder dividend payments, the length of recovery plans and efficient record-keeping. The corporate plan confirms that "action will be taken where standards are not met".

Other principal points of interest are

- A consolidation plan for DC schemes that have difficulties meeting the standards expected.
- An increase in the number of schemes under supervision (currently 20) using its new dedicated supervision team.
- Confirmation of further engagement with stakeholders and other regulators to ensure the revised DB code of practice is "based on expert input" and "provides practical guidance on long-term funding".
- The focus of phase two of the 21st Century Trustee programme on the constitution of trustee boards and the impact of industry-developed competency standards and accreditation for professional trustees.

View the Corporate Plan.

## Pensions Regulator: DWP tailored review proposes new rule-making ability for TPR

On May 16, 2019, the Department for Work and Pensions published a periodic, government-conducted review which examines the continuing need, efficiency and good governance of TPR. This tailored review was conducted between August and November 2018 and led by Jamey Johnson, the former Chief Officer for Pension Wise (which is now part of the Money and Pensions Service).

One of the review's principal conclusions is that TPR's current form remains the most appropriate for its functions, and rejects the idea of merger with the FCA. As the two bodies regulate markets with different fundamental purposes, the review concludes that it makes sense to continue regulating them separately. Similarly, the review rejects the idea of merger with the PPF and Pensions Ombudsman to form a single larger pensions body, which it says would not be feasible or produce meaningful benefits.

The review makes 16 specific recommendations, which relate to TPR's form and functions, operational and organisational effectiveness, governance, relationship with the DWP, and preparations for Brexit. The DWP's most significant recommendation is that consideration should be given to extending TPR's powers to enable it to make its own rules in specific circumstances. Since changes to how TPR conducts its regulatory functions currently require changes to primary legislation, the review suggests that giving TPR its own rule-making ability could enable it to be a stronger and more proactive regulator. Such a reform would also put TPR on a similar footing to the FCA in terms of accessible powers. The review notes that, if this change were made, rules promulgated by TPR would need to be subject to both ministerial oversight and industry input.

On Brexit, the review suggests TPR could be doing more to support schemes in preparing for possible risks arising from the UK's departure from the EU, and that TPR should actually take steps to enhance schemes' preparedness for future uncertainty.

View the Tailored Review.

## Comment

The recommendations that TPR should strengthen its information sharing capabilities and be "proactively monitoring" its joint strategy with the FCA are to ensure it can better achieve its stated goal of becoming "clearer, quicker and tougher". A further key recommendation included adding a board member with digital transformation experience.

However, the headline-grabbing proposal is the DWP's suggestion that TPR could benefit from its own rule-making ability. The review proposes that TPR could then be able to respond more quickly to risks and changes in the pensions sector since, frequently "the regulations themselves cannot change at the same pace as the digital world".

Some of TPR's data requirements from schemes are specified in legislation, which means departmental and parliamentary time and cooperation is required to change them. The review states that a new rule-making ability would aid TPR's strength as a regulator and potentially resolve public confusion over the extent of TPR's powers. It suggests that the main benefits of this would be increased effectiveness, as TPR would be better able to respond to emerging risks. However, granting TPR rule-making powers would represent a dramatic change, and precise parameters would be needed. In addition, such a change could lead to a perception of a reduction in TPR's government accountability and uncertainty for employers and trustees.

The review states that extending TPR's powers would put the organisation on a similar footing to the FCA. In 2018, TPR was heavily criticised by two Parliamentary committees over its work on Carillion, with the group of MPs saying TPR made "hollow threats" and "failed in all its objectives". We will be monitoring developments closely in the wake of the review.

## Pensions Regulator confirms consultation on a DB funding framework "this summer"

In a recent blog post, TPR has confirmed further details of its approach to changes to its defined benefit (DB) funding guidance, as outlined in the DWP's White Paper "Protecting Defined Benefit Pension Schemes".

TPR states that further clarity is needed regarding how schemes calculate their technical provisions and set an appropriate recovery plan, to prevent "a minority of schemes and employers abusing the flexibilities in the system".

The White Paper recommended that TPR should include in a revised DB scheme funding code a description of how the statutory funding objective should be set in the context of a "long-term objective". The blog states that this long-term objective will be "at the heart" of the revised code of practice.

In the blog, TPR outlines the following consultation issues on DB funding which will be addressed "this summer":

- A clearer DB funding framework, including what it sees as a suitable long-term objective. For closed schemes, this will include ideas on how they should seek progressive reduction of their reliance on the employer covenant and reach a position of low dependency by the time they are "significantly mature".

- For open schemes, the consultation will address how to meet the long-term objective without unduly increasing the cost of future benefit accruals and risking additional scheme closures.

- And finally, proposals for clearer guidelines on acceptable lengths of recovery plans for different covenant strengths and on how this could work in practice, including whether stronger employers should be required to fund technical provisions deficits in a shorter period.

The second consultation on the draft funding code will take place "next year" once TPR has "more clarity on the intended primary and secondary legislative package".

View the blog.

## *BIC UK Ltd v Burgess* [2019] – employer appeal successful: retrospective amendment re-wrote history to an impermissible extent

The Court of Appeal (CA) has unanimously overturned a decision of the High Court handed down in April 2018 that a retrospective amendment to the deed and rules of the BIC UK Pension Scheme (the Scheme) had been made effectively to introduce pension increases.

The High Court had ruled that whilst the relevant deed of amendment had involved "an element of re-writing history" it did "not involve doing so impermissibly". The CA disagreed and said that " ... the past cannot be rewound and replaced with a different version of history in reality ... In that important and literal sense, history cannot be re-written." See our May 2018 update for details of the case.

However, additional parts of the High Court judgment were not in issue in this appeal. These included

- The judge's decision that a statutory limitation period does not apply to the remedy of equitable recoupment.

- That the Pensions Ombudsman (PO) is not a competent court for the purposes of section 91 of the Pensions Act 1995, which covers set-off and inalienability of pension benefits.

### Background

The trustees had resolved in 1991 to introduce increases of the RPI or 5 per cent, whichever was lower (that is, LPI 5 per cent) but the relevant deed of amendment was not executed until 1993. A disagreement arose around the issue of retrospectivity, and whether or not the increases had been validly awarded.

The trustee resolution had been recorded in minutes of a meeting held on February 18, 1991. In May 1993, a new deed and rules was executed and was expressed to be effective from August 6, 1990. The power of amendment gave the trustees power to make amendments by deed executed by the principal employer and the trustees or "by resolution (in writing) of the trustees in the case of the rules only."

BIC UK Ltd claimed that the minutes neither amounted to a trustee decision to increase future pension payments, nor did they evidence its consent as the employer. The trustees claimed that the minutes reflected their decisions both to increase pension payments on a discretionary basis in line with inflation since the commencement of their payment and to increase future benefits for pensioners and other members by LPI 5 per cent.

## The appeal decision

The CA expressed some doubt as to whether certain of the Scheme powers relied on could have validated the introduction of the increases at all. The CA stated that the trustees' 1991 minutes did no more than record a resolution on future policy, leaving the implementation of that policy to "be carried out as soon as possible". The minutes did not purport to effect an immediate alteration of the Scheme rules, and if that had been the intention, the text of the necessary amendments would have been set out in a written document signed by all three of the trustees. In addition, formal reference would have been made in the amending document to BIC's consent.

### Comment

The case highlights that the proper and formal process set out in a trust deed and rules must be followed in order to made valid amendments to pension benefits.

As the amendment to the BIC UK Scheme rules has been found to be invalid by the CA, the increases awarded by that change will now need to be recouped from members via the adjustment of future payments, to the tune of approximately £5 million in wrongly paid benefits. This process will not be limited by a statutory limitation period.

When the High Court judgment was reported in 2018, most of the headlines in the legal press emphasised the element of the decision holding that the six-year limitation period does not apply to claims for equitable recoupment. The decision does not overrule that of the High Court in Webber, on which we reported in our November 2016 update, and which ruled that the recovery of overpayments was subject to the limitation period of six years. This means there are two High Court decisions taking different views on the same issue and schemes should consider the treatment of overpayments on a case by case basis.

On the point of its competency as a court for section 91 purposes, the PO published a fact sheet in April 2019 setting out its view that it considers the High Court judge's comments on the issue as obiter and thus not forming part of his decision as a whole. Section 91 provides that where there is a dispute regarding an amount to be repaid, set-off cannot be exercised unless the obligation to repay has become enforceable under an order of a 'competent court' or in consequence of an award of an arbitrator.

## GMP equalisation: DWP publishes GMP conversion guidance

On April 18, 2019, the DWP published its long-awaited guidance for pension scheme trustees on GMP conversion, following the October 2018 High Court decision in the Lloyds case.

The method dealt with in the guidance, which was one of several lawful methods considered by the Court, was that labelled "method D2". It envisages a one-off equalisation calculation followed by conversion.

The highlights of the guidance are

- A more detailed explanation of method D2 and a ten-stage process is set out in section 4.

- The DWP flags that method D2 only addresses GMP inequalities from the conversion date. Trustees will still need to adopt a suitable equalisation method to address past inequalities, and pay arrears. The guidance notes that one possibility is to determine arrears at the conversion date by applying method C2 (providing the better of male or female comparator pensions each year, subject to accumulated offsetting), but it warns that complex additional issues are likely to arise, including as to limitation.

- A statement relating to pensions tax issues that are being explored by HMRC, in relation to which further guidance is expected.

- A question and answer section.

### Comment
It may be worthwhile waiting to start the equalisation process, as although we have the guidance, there are a more than a few difficulties with the current version of the conversion legislation. The DWP is looking at some changes which may make the whole process a little easier.

One good example of where change is needed is over employer consent. Employer consent is needed – but as defined, that is probably the employer that employed the individual while they were building up their GMP, which may even have been in another scheme. If that entity cannot be identified, has left the group or has been wound up, does that mean no employer consent is needed, or that GMP conversion is impossible? Would the consent of the companies currently sponsoring the scheme be good enough? Could the Pensions Regulator give an appropriate clearance, or does the DWP need to step in? This issue will not affect schemes where all relevant employers are still going.

We are also waiting for answers from HMRC to all the tax problems inherent in suddenly increasing benefits decades after they were accrued. The continuing risk on tax issues may dissuade trustees and employers from initiating their conversion exercises quite yet, but planning can certainly start now.

For more detail, please see our April 2019 briefing.

## HMRC newsletter 109: pension flexibility registration statistics and master trust closure support

On April 30, 2019, HMRC published the latest edition of its regular pension schemes newsletter. The key points of interest are

- Between January 1, 2019 and March 31, 2019, HMRC repaid £31,101,989 in tax repayment claims for pension flexibility payments, slightly up from last quarter (£30,242,426).

- For 2018 to 2019 HMRC received 1,925 applications to register new pension schemes (a 23 per cent reduction on applications received in 2017 to 2018), of which 81 per cent of schemes were registered and 11 per cent refused (with decisions pending on the remainder).

- On the overseas transfer charge, a reminder that two sets of regulations have been laid before Parliament relating to the circumstances in which HMRC will repay the overseas transfer charge, and the mechanism that will apply for a repayment. These came into force on April 26.

- The window for existing master trusts to apply for authorisation closed on March 31. HMRC will now work with TPR to support master trusts that are closing, to ensure savers are protected while their savings are transferred to another scheme.

View the Newsletter.

## *Estate of Mrs N* (PO – 19673, March 2019): employer should have set terminally ill member's retirement and approval of benefit to same date

The Deputy Pensions Ombudsman (DPO) has upheld the complaint of Mr N, the widower of a member who died one day before her retirement date. The member's ill-health early retirement had been approved, and her retirement date was set for later in the month. She died in service and as a consequence her widower's benefits were reduced. The DPO held the employer had jeopardised the member's benefits unnecessarily by not setting the retirement and approval dates for the same day, for which there was no justification. Retrospective amendment was not possible under the scheme rules. The DPO directed the employer to pay any difference to the widower, plus interest and any tax liability incurred.

### Comment

There are clear administrative difficulties where employers and trustees learn of a member's terminal ill-health, and where decisions (and the timing of decisions) can have a significant impact on the resultant level of benefits.

The Ombudsman's determinations, while often sympathetic to the member, must follow both statute and case law where members have sought financial advice which employers cannot give. Although it would often benefit a member if the employer takes an extra step to provide assistance, that may involve taking on a responsibility that no prudent employer would choose to adopt. Trustees may also face questions from employees that could benefit from that "extra step" and it is important to ensure that any responses do not cross the line from providing information to giving unauthorised advice. In broad terms, employers are not obliged to advise members about options relating to their pension rights, or highlight potentially detrimental member decisions, or inform members of how best to exercise their choices under a scheme's rules. The only requirement is to make sufficient information available to the member, and there is no automatically enhanced duty when a member is terminally ill.

Employers should be aware that the Ombudsman has often found maladministration where employers have failed to follow good practice. Trustees and employers should be on high alert when they learn of a member's terminal illness and ensure related benefits queries are dealt with quickly.

It is simple human kindness to exercise some understanding that members' thoughts will not be fully focussed on the finer details of their pension benefits when they have received a terminal diagnosis. It must be best practice for trustees and employers to reiterate in simple terms the scheme rules that apply and, where possible, set an ill-health retirement date as early as possible. Where there is a discretionary notice period, employers may wish to consider waiving it altogether. Employers should always seek to provide members with full details of a scheme's benefit structure, ensure the information is clear, and ultimately suggest that members seek independent advice before making important financial decisions.

For an in-depth analysis of a range of similar Ombudsman decisions, please see our May 2019 briefing.

## Delay to Queen's Speech and Pensions Bill

The State Opening of Parliament was scheduled for May 15, 2019, but due to Brexit the Government is delaying the Queen's Speech on its new legislative programme, which was due to include the next Pensions Bill. It is likely this will not now be published before the summer recess.

## Bridging pensions: Equality Act (Age Exceptions for Pension Schemes) (Amendment) Order 2019

The Equality Act (Age Exceptions for Pension Schemes) (Amendment) Order 2019 makes a technical change to former regulations that will permit occupational pension schemes paying bridging pensions to continue to do so without breaching equality requirements, as the State pension age increases.

The Order came into force on May 15, 2019.

### Key dates in 2019:

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 – *DWP conversion guidance has now been published and is outlined above.*

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 now unlikely before the Autumn 2019, *as the Queen's Speech has been postponed. It is expected to include provisions covering the Pensions Dashboard, TPR powers, the revised Funding Regime, DB Consolidators and the Money and Pensions Service.*

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