SLAUGHTER AND MAY

# Pensions Bulletin

19 December 2018 / Issue 17

Legal and regulatory developments in pensions

## In this issue


### New law

Pensions Dashboards: DWP Consultation ...more

Auto-enrolment – earnings trigger and qualifying earnings bands ...more

### Cases

High Court supplementary GMP equalisation hearing ...more

Pensions Ombudsman considers himself a 'competent court' ...more

Taxpayer appeal allowed where fixed protection certificate revoked due to pension payments ...more

### Points in practice

Regulator's tougher funding approach in practice: intervention in relation to Southern Water ...more

### The Watch List


Back issues

More about our pensions and employment practice

Details of our work in the pensions and employment field

For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or Bridget Murphy

# New law

## I. Pensions Dashboards: DWP Consultation

### *A. Overview*

1. Trustees have another reason to ensure that their data is as accurate as possible. The Government has announced (in a DWP consultation paper) that industry-led dashboards will be introduced "when Parliamentary time allows". A pensions dashboard allows people to access all their pensions information (i.e. State and private pensions) in a single place, online.

2. Trustees will be able to participate voluntarily once the first dashboards are up and running (this is expected to be late 2019). Once legislation is passed, however, pension schemes will be compelled to provide dashboards with data. Some schemes (such as SSAS and executive pension plans) may be exempted from the requirements.

3. The Government expects the majority of schemes to be 'on-boarded', in phases, during the 3-to-4 years following the introduction of the first dashboards.

4. The consultation (which closes on 28th January, 2019) anticipates several commercial dashboards. There would also be a non-commercial version, hosted by the Single Financial Guidance Body ("**SFGB**") and introduced from 2019/20.

5. The Government anticipates that the cost of establishing and running dashboards should be met by the pensions industry but that there may be an opportunity to use existing industry levies for this.

### *B. Structure and data issues*

1. The consultation anticipates that the dashboards will be made up of:

   1.1 a user interface, to verify the individual's identity, and

   1.2 a search engine, which would find an individual's pension schemes, to be known as a Pension Finder Service ("**PFS**").

2. Once the individual gives their consent, the PFS would use information gathered during the identity verification process to send requests to pension schemes to access and retrieve their data.

3. The details and values of a pension would not pass through the PFS. Neither the PFS nor the user interface would store any data.

4. Access to the data would be available only to the user, unless consent is specifically delegated (for example, to the user's IFA). According to the DWP, such delegated consents should be time sensitive and revocable by the user, without the co-operation of the delegate.

## II. Auto-enrolment - earnings trigger and qualifying earnings bands

1. Employers are subject to auto-enrolment duties in respect of certain individuals who meet a range of conditions. One of those conditions is that the individual earns an amount above the earnings trigger. Contributions are then based on qualifying earnings between the lower limit and the upper limit of the qualifying earnings band.

2. In its review (December, 2018) of the auto-enrolment 2019/20 earnings trigger, and the lower and upper earnings limits for that year, the DWP has concluded that:

   2.1 the earnings trigger is to remain at £10,000

   2.2 the lower earnings limit of the qualifying earnings band should be set at £6,136

2.3 the upper earnings limit of the qualifying earnings band should be £50,000

# Cases

## III. High Court supplementary GMP equalisation hearing

1. A brief judgment has been handed down by the High Court to clarify one aspect of its recent ruling that schemes must address any inequalities brought about by unequal GMPs earned by service on or after 17th May, 1990 (please see Pensions Bulletin 18/15 to read about the main judgment).

2. The focus of the supplementary judgment is equalisation Method D2, which involves a one-off actuarial equivalence test followed by a statutory conversion exercise to convert GMPs to normal scheme benefits.

3. The judge has clarified that it will not be necessary to first equalise benefits (in accordance with the method approved in the main judgment, known as Method C2) before proceeding with the conversion exercise.

4. Instead, it should be for the actuary, rather than the court, to determine the D2 calculation. This means that the actuary should be allowed to determine the higher of the actuarial equivalents of the unequalised female and the unequalised male pensions.

**Comment (1):** This supplementary judgment adds a gloss to discussions that will already be taking place between schemes and their advisers about which route to take when dealing with GMP equalisation.

**Comment (2):** In its current consultation on DB consolidators, the DWP says it hopes to provide schemes with guidance on how to equalise, and that it is working with HMRC on what changes to tax legislation may be needed for those "*potentially negatively affected by GMP conversion*". The consultation also notes that the DWP is "*confident of finalising in the near future*" its work on simplifying the GMP conversion process, including "*minor changes*" to legislation.

*Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank PLC and Others - 6th December, 2018*

## IV. Pensions Ombudsman considers himself a 'competent court'

### *A. Overview*

1. Trustees wishing to set-off amounts owed to their scheme against future pension payments may wish to note a recent Pensions Ombudsman decision about whether a County Court order would be required first.

2. Legislation[1] allows schemes to set-off amounts in dispute (in this case, the recoupment of overpayments) against a person's current or future pension, but only if the money owed by the person becomes enforceable by order of a 'competent court' .

3. The Pensions Ombudsman considers his decisions to be those of a 'competent court'. The Ombudsman's view stands in contrast, however, to comments made by the High Court in *Burgess v BIC UK Ltd* (which is due to be heard on appeal on 5th February, 2019).

### *B. Facts*

1. The complainant retired before State pension age. On reaching State pension age, the GMP element of his pension should have been split from the excess to ensure that each increased at the correct rate, but this did not happen and the entire pension continued to increase at the full scheme rate, resulting in overpayments over a number of years.

2. The complainant opposed the Trustee's plan to recoup the

[1] Section 91(6) of the Pensions Act 1995

overpayment by making deductions from future pension payments. He argued that he had changed his position by purchasing a property for his daughter and would not have done this had he known his correct pension entitlement was lower than the pension he had been receiving.

### C. *Decision*

1. The Ombudsman dismissed the complaint, remaining unconvinced that the complainant would not have purchased the property but for the overpayment, which only equated to around £380 per annum. He could not, therefore, rely on change of position as a defence to the overpayment being recouped.

2. The Ombudsman departed from the decision in *Burgess v BIC* regarding the status of his decisions in the context of the set-off legislation. In *Burgess v BIC* the judge commented that the Ombudsman was not a "competent court" for those purposes, and therefore a trustee would need to go to the County Court to enforce the Ombudsman's determination.

3. The Ombudsman cited a number of authorities to support his view that he does meet the "competent court" definition, pointing out that he had not been a party to the proceedings in *Burgess* and the court did not have the benefit of hearing full arguments on that issue.

*Dr E (PO-16856) - 25 October 2018*

## V. Taxpayer appeal allowed where fixed protection certificate revoked due to pension payments

In a judgment that will be unwelcome to HMRC, a taxpayer has successfully appealed against HMRC's decision to revoke his fixed protection certificate. HMRC decided to revoke the certificate because payments continued to be made to a number of pension schemes. The Tribunal accepted the taxpayer's challenge on the basis that the payments were made mistakenly. The decision turns on its facts, however.

### A. *Facts*

1. The taxpayer applied for a fixed protection certificate in 2012. He and his wife were the shareholders of a company of which he was the sole director. There were four pension schemes relating to him: a company scheme receiving annual contributions, depending on available funds; two insured arrangements with regular contributions paid by standing order; and one scheme receiving national insurance rebates.

2. The taxpayer said that he understood that the annual contributions to the company scheme had to stop, but was confused by the fact that payments of rent could still be made into the company scheme, so genuinely believed there was no problem with the standing orders to the insured arrangements continuing.

### B. *Decision*

1. The First-tier Tribunal (Tax Chamber) accepted the taxpayer's argument that he made a mistake when making the additional payments. On the basis that the remedy of rescission would have been available if he had gone to the High Court, the Tribunal decided that the pension payments could be set aside and treated as though they had not been made.

2. It was clear (from *Pitt v Holt*) that a voluntary disposition, such as additional contributions to a pension scheme, may be set aside on grounds of mistake where:

   2.1 but for the mistake, the contribution would not have been made, and

   2.2 the circumstances and consequences of the mistake are sufficiently serious.

3. Here, the taxpayer's mistake was not just a question of ignorance, but was borne of a genuine, conscious belief that it would be acceptable to continue making the standing order

payments to the insured schemes. The mistake was sufficiently serious in that it could result in a considerable potential lifetime allowance charge tax bill in the region of £50,000.

**Comment (1):** HMRC will not welcome this decision, thought to be the first appeal against the revocation of a fixed protection certificate. However, it is questionable whether it will result in a flood of applications from members who have inadvertently made contributions and lost protections. HMRC may take some comfort in that the facts of this case were relatively unusual, with the ongoing payments of rent causing particular confusion to the taxpayer.

**Comment (2):** It appears that HMRC followed the line taken in its genuine errors guidance (at PTM146000): if an error has been made by someone other than the taxpayer (eg, a bank not acting on an instruction to stop contributions), HMRC will accept that the contributions can be returned and treated as not made. HMRC does not set out the legal analysis behind that guidance, and tries to apply it narrowly (as seen in this case), but, logically, is likely to stem from a mistake analysis. This case demonstrates that those principles potentially have wider application than the guidance would suggest, although it might take an appeal to the FTT by the taxpayer to achieve a result with HMRC.

*Hymanson v Revenue and Customs Commissioner*

# Points in practice

## VI. Regulator's tougher funding approach in practice: intervention in relation to Southern Water

1. Trustees and employers of DB schemes may be interested in the Pensions Regulator's recent intervention in the funding arrangements of the Southern Water Pension Scheme, detailed in its Section 89 Report. The Regulator paid particular attention to the length of the recovery plan and the employer's dividend declaration in the context of reduced deficit repair contributions ('**DRCs**') and an increased scheme deficit.

2. The sponsoring employer decided to declare dividends of £210 million from 2015 to 2020, whilst halving DRCs from £20 million to £10 million over a similar period, despite an increase in the scheme's deficit to £252 million.

3. The scheme had a 15 year recovery plan. The employer considered its covenant to be "very strong". The Regulator's covenant advice put it at "tending to strong". The Regulator's scheme funding statistics show that the average recovery plan length for a "strong" employer is 5.9 years, while that for a "tending to strong" employer is 7.2 years. The Regulator says it is likely to have concerns where recovery plans for such employers are longer than this.

4. In this case the Regulator concluded that a shorter recovery period was appropriate and issued a warning notice in respect of its statutory[2] powers to impose a replacement recovery plan and schedule of contributions.

5. In the event, the trustee and employer reached agreement on the 2016 valuation, including:

   5.1 a strengthening of the technical provisions assumptions,

   5.2 a "significant" increase in (almost doubling) the DRCs, resulting in a shortened (11 year) recovery plan,

   5.3 additional contributions to cover the post-valuation increase in the deficit, and

   5.4 the introduction of a dividend sharing mechanism (whereby if external dividends in excess of an

[2] Section 231, Pensions Act 2004

agreed threshold are paid, DRCs are accelerated).

6. The Section 89 report says "*Where we see employers paying out substantial dividends, we do not expect to see long RPs [recovery plans]. … Trustees under pressure to agree RPs which they do not believe are appropriate should come and talk to us and not agree to a potentially non-compliant valuation.*"

**Comment:** The Regulator's preoccupation with dividends is now well established. Its 2018 Annual Funding Statement says that affordable contributions should be considered in the light of distributions to shareholders. Trustees are expected to assess the impact of dividends on the employer covenant and to establish whether the scheme is being treated fairly. In its 2017 Funding Statement, the Regulator promised to open an investigation if dividends exceeded DRCs and the recovery plan was not 'relatively short'. To read more about the 2018 and 2017 Funding Statements, please see Pensions Bulletin 18/06 and Pensions Bulletin 17/10.

# Watch List

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out (or has recently run out), with links to more detailed information. New or changed items are in **bold**.

| No. | Topic | Deadline | Further information/action |
|---|---|---|---|
| 1. | Put in place register of persons with significant control ("PSC") for trustee company where trustee is a corporate | 6th April, 2016 and ongoing requirement | Pensions Bulletin 16/03 |
| 2. | Ban on member-borne commissions in DC schemes used for auto-enrolment | 5th July, 2016 at the latest and ongoing requirement | Trustees must notify "service providers" if the scheme is being used as a "qualifying scheme" for auto-enrolment purposes and some or all of the benefits are money purchase. Pensions Bulletin 16/04. |
| 3. | Cyclical re-enrolment | Within 6 month window by reference to third anniversary of employer's staging date | For example employers with a 1st July, 2015 staging date must complete cyclical re-enrolment process between 1st April, 2018 and 30th September, 2018.<br>Publication available to clients on request from usual pensions contact. |
| 4. | Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6th April, 2015, has dropped from £10,000 to £4,000 under Finance (No.2) Act 2017 | Retroactive effect from 6th April, 2017 | Member communications should include a warning note about this, highlighting the retroactive effect. |
| 5. | GMP equalisation | | |
| 5.1 | Part 8 action brought by female staff, trustee and Lloyds Trade Union | 15th May, 2017 | We will continue to monitor developments in this litigation, which has implications for all schemes with GMPs accrued in the period 17th May, 1990 to 5th April, 1997. |
| | | Judgment published | 26th October, 2018 Pensions Bulletin 18/15 |
| | | **Clarificatory judgment published** | **See item III above** |
| 5.2 | Government response to consultation on GMP equalisation published | 13th March, 2017 | Pensions Bulletin 17/7 |
| 6. | HMRC's existing practice on VAT and pension schemes to continue indefinitely | | Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover.<br>Pensions Bulletin 17/18 |
| 7. | DC bulk transfers without member consent: introduction of easements | 6th April, 2018 | Pensions Bulletin 17/18<br>Pensions Bulletin 18/05<br>Pensions Bulletin 18/08 |
| 8. | Bulk transfers of contracted-out rights without consent: introduction of easements | 6th April, 2018 | Pensions Bulletin 18/01<br>Pensions Bulletin 18/05 |
| 9. | Deferred debt arrangements become available | 6th April, 2018 | Pensions Bulletin 18/05 |
| 10. | Disclosure of costs, charges and investments - | Mostly in force 6th April, 2018 | Pensions Bulletin 18/05 |

| No. | Topic | Deadline | Further information/action |
|---|---|---|---|
| | | | |
| | new requirements | | |
| | Chair's statement and website must publish costs and charges information | Within 7 months of scheme year end falling on or after 6th April, 2018 - so earliest compliance deadline is 5th November, 2018 | |
| 11. | Auto-enrolment total minimum DC contributions increase to 5% (of which minimum employer contribution of 2%) | 6th April, 2018 to 5th April, 2019 | |
| 12. | CJEU decides PPF compensation must equal at least 50% of each recipient's benefit (*Hampshire - Case C-17/17*) | 6th September, 2018 | Pensions Bulletin 18/13 |
| 13. | Data protection: New Regulation: EU General Data Protection Regulation in force | 25th May, 2018 | Pensions Bulletin 16/05<br>Employment Bulletin 16/15<br>As data controllers, trustees need to ensure that compliance with the EU General Data Protection Regulation is achieved.<br>A compliance checklist for trustees is available to clients from their usual Slaughter and May contact. |
| 14. | Existing EMIR exemption extension for pension scheme arrangements ends | 16th August, 2018 | Pensions Bulletin 17/01<br>Pensions Bulletin 18/12 |
| | EU Parliament confirms further extension of pensions exemption, with further extensions possible | 12th June, 2018 | Pensions Bulletin 18/10 |
| 15. | Master trusts new authorisation and supervision regime starts | 1st October, 2018 | Pensions Bulletin 18/12<br>Pensions Bulletin 18/13<br>(note: SI later re-issued as SI 2018/1030) |
| 16. | IORP II transposition deadline | 12th January, 2019 | Pensions Bulletin 16/11 |
| 17. | Brexit | By 29th March, 2019, unless extended | UK leaves EU from effective date of withdrawal agreement or, failing that, 2 years after giving Article 50 notice unless:<br>(a) European Council and UK unanimously decide to extend period, or<br>(b) UK withdraws, if able to do so, its Article 50 notice before 29th March, 2019. |
| 18. | Auto-enrolment total minimum DC contributions will increase to 8% (of which minimum employer contribution of 3%) | 6th April, 2019 onwards | |
| 19. | Trustees must ensure Statement of Investment Principles meets new requirements on ESG and stewardship | Most requirements to be met by 1st October, 2019 | Pensions Bulletin 18/13 |
| 20. | **Pensions Regulator consultation on draft DB Funding Code of Practice expected** | **Autumn 2019** | |

If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact Jonathan Fenn or your usual Slaughter and May adviser.

© Slaughter and May 2018

This material is for general information only and is not intended to provide legal advice. 556499089