

Pensions monthly update – keeping you on track

March/April 2013

Pension briefing

HIGHLIGHTS

Hogan Lovells pension group is delighted to send you our news Alerter for April, setting out developments over the last two months.

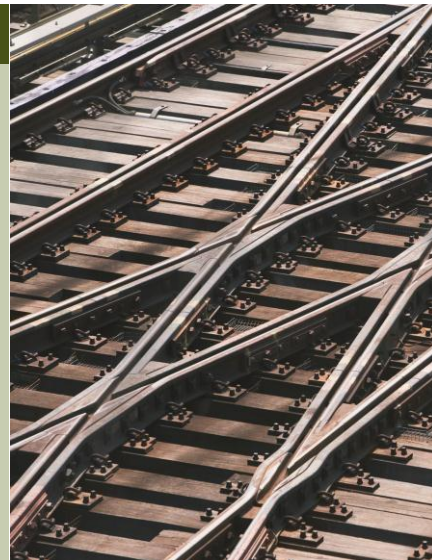
Our Pension Planner gives a comprehensive overview of legal developments in the previous 12 months and expected future changes. For the latest issue, please click on the link in the email Alerter.

DATE FOR YOUR DIARY

15 May 2013 – making good decisions

An interactive workshop for trustees looking at how to deal with the challenges of making good decisions in the everyday running of a pension scheme – including ill health retirement, overpayments and underpayments, dealing with conflicts, the exercise of trustees' discretion, and recording decisions. For an invitation, please click on the link in the email Alerter.

For our programme of pension seminars from March to September 2013, please click on the link in the email Alerter.



SINGLE TIER PENSION AND ABOLITION OF DB CONTRACTING-OUT

Steve Webb, the Pensions Minister, has announced that the launch of the single tier state pension will be brought forward to 2016. Contracting-out on the defined benefit basis will cease at the same time.

AUTO-ENROLMENT – WELCOME NEWS Fixed or enhanced protection

Power will be included in the forthcoming Pensions Bill to disapply the auto-enrolment requirements in relation to prescribed categories of workers. Potential categories include:

- workers with fixed or enhanced protection;
- active members of money purchase schemes who have given notice of retirement; and
- workers who give notice to leave employment during a deferral period.

Simplification – draft regulations

The DWP is consulting on draft regulations, intended to address some technical difficulties that have arisen with auto-enrolment so far. Proposed changes include:

Extension of joining window

The one month period within which an employer must achieve active membership for a jobholder and issue enrolment information will be extended to six weeks.

Alternative method of defining "pay reference period"

An alternative method for defining a "pay reference period" for the purposes of assessing an employer's auto-enrolment duties will be available. Under the proposed new method:

- The length of a pay reference period will be the same as the period by reference to which the worker is paid their regular pay.

- The pay reference period will start on the first day of the tax week or month in which the earnings fall to be paid, even where the period worked took place before the start of that tax week or month.
- The earnings payable in the pay reference period will be used to assess whether there are qualifying earnings.

The new option will not be compulsory and will run alongside the existing provisions.

Annual reconciliation of contributions not needed

The revised definition of pay reference period above will be used for assessing scheme quality, as well as for determining jobholder status. A scheme which receives contributions at or above the minimum level in each pay reference period will satisfy the quality requirements, without the need to carry out annual reconciliations in respect of workers whose earnings have fluctuated during the year.

Extended contribution payment deadline to apply for all joiners

The deadline for paying new joiners' contributions to the scheme will be the end of two months after the month in which the auto-enrolment date (or re-enrolment date or enrolment date) falls. This will apply to all new joiners, including entitled workers and those joining under a contractual arrangement.

Auto-enrolment not required where member recently opted out

The auto-enrolment duties will not apply in relation to any jobholder who voluntarily ceased active membership of a qualifying scheme in the 12 months before the duty to auto-enrol would otherwise arise.

TUPE transfers: alignment with auto-enrolment requirements

Draft regulations have been issued to align the requirements on a receiving employer following a TUPE transfer with the auto-enrolment requirements. As amended, a receiving employer who offers transferred employees a money purchase scheme must either:

- match the level of contributions paid by the transferring employer immediately prior to the transfer; or
- match the level of contributions paid by the employee, to a maximum of 6%.

Without the amendment, a receiving employer could be required to pay 6% contributions in respect of an employee whose previous employer (the transferor) had auto-enrolled him into an occupational scheme and, under the auto-enrolment transitional provisions, had paid only 1% contributions.

FROM THE TAXMAN Budget 2013

The Budget confirmed that:

- the annual allowance will be reduced to £40,000, from £50,000, for the tax year 2014/15 onwards;
- the lifetime allowance will be reduced to £1.25m, from £1.5m, for the tax year 2014/15 onwards;
- transitional protection, "fixed protection 2014" will be available to individuals with lifetime pension savings up to £1.5m. "Personalised protection" for high value pension pots is also proposed (please see below);
- individuals with A-day primary or enhanced protection, but who do not have lump sum protection, will retain a right to a lump sum of up to 25% of £1.5m;
- the capped drawdown limit will be increased to 120%, from 100%, of the value of an equivalent annuity.

Lifetime allowance – new personalised protection

Pension Newsletter 56 sets out some features of the proposed personalised protection regime:

- Personalised protection would be available for individuals with pension rights at 5 April 2014 exceeding £1.25m and who do not already have one of the existing protections from the lifetime allowance (LTA).
- Individuals with personalised protection would have a LTA of the greater of the value of their pension rights on 5 April 2014 (up to a maximum of £1.5m) and the standard LTA (£1.25m). The personalised LTA would remain at this level unless it falls below the standard LTA, in which case the individual's LTA would revert to the standard LTA.
- Continued accrual would be allowed without jeopardising personalised protection, but benefits over the personalised LTA would be subject to the LTA charge.

Annual allowance – delay to adjustments dealing with transfers

HMRC has announced that it will delay the implementation of draft regulations setting out how to adjust an individual's closing balance for annual allowance purposes after a transfer, following concerns raised in the consultation.

Pensions Regulator: statutory objective

It was announced alongside the Budget that the Pensions Regulator will be given a new objective to support scheme funding arrangements that are compatible with sustainable growth for the sponsoring employer and fully consistent with the scheme funding legislation in the Pensions Act 2004.

DISCLOSURE REQUIREMENTS – NEW REGULATIONS

The DWP is consulting on long-anticipated draft regulations which will:

- combine the disclosure requirements for occupational schemes and personal pension schemes in a single set of regulations and revoke the current (separate) regulations;
- require DC schemes that use "lifestyling" to determine some investment choices to give certain information to members as part of the basic scheme information and at the time their funds are subjected to lifestyling;
- give DB schemes flexibility to use the most appropriate retirement date when preparing benefit statements;
- more closely harmonise projections in statutory money purchase illustrations (SMPIs) with those provided to members of personal pension schemes at the point of sale and give schemes greater flexibility to tailor SMPIs to the needs of their members;
- change the time requirements for a member's first SMPI to take account of auto-enrolment.

The DWP has also asked for views on a move to a principles based approach to disclosure, under which schemes would be required to give members sufficient information to allow them to understand the benefits to which they will be entitled and any other relevant information which would enable them to make decisions in their best interests.

DC ISSUES

Financial Services Authority: thematic review on annuities

The FSA has announced a thematic review into annuities. The first phase will consider the level of detriment consumers suffer from not shopping around and whether there are particular groups of customers where this detriment is more likely to occur. The second phase will consider whether firms' processes for providing annuities facilitate or inhibit shopping around.

The review will be taken forward by the Financial Conduct Authority (FCA) following its formation in April 2013.

Decumulation: code of conduct

The Association of British Insurers has launched a code of conduct on retirement choices, intended to ensure that customers approaching retirement are provided with clear, timely information about their options, including combining small pots, shopping around, providing for dependants and taking account of lifestyle or medical conditions.

FROM THE COURTS

Claim for repayment of VAT on management services rejected

The Court of Justice of the European Union (CJEU) has rejected a claim that a common investment fund (the "CIF") in which assets of several defined benefit schemes were pooled should be exempt from VAT on management fees.

European law requires Member States to exempt from VAT the "management of special investment funds as defined by Member States". The CJEU held that an investment fund in which assets of defined benefit pension schemes are pooled is not a special investment fund, nor was it sufficiently comparable with special investment funds so as to be in competition with them. (*Wheels Common Investment Fund Trustees Limited, NAPF and others v HMRC*)

Statutory construction; meaning of "no less advantageous"

The High Court has refused to give a declaration that the rules of the Industry-Wide Coal Staff Superannuation Scheme (IWCS) should be read so as to incorporate a provision requiring uprating of pension increases to be prorated in the first year of payment, where a pension has been in payment for less than 12 months before uprating is first applied.

In particular, the words "no less advantageous" could not be construed as meaning that benefits under the new scheme (IWCS) must be "the same as but not better than" benefits under the previous, nationalised, coal staff pension scheme. (*Industry-Wide Coal Staff Superannuation Scheme Co-ordinator Limited v Industry-Wide Coal Staff Superannuation Scheme Trustees Limited and another*)

Exclusion of fee paid judges from pension scheme was unlawful discrimination against part-timers

The Supreme Court was asked to consider whether the exclusion of part-time, fee paid recorders (judges) from judicial pension arrangements available to salaried full-time or part-time judges was objectively justifiable. Rejecting various arguments put by the Ministry of Justice, the Court considered the following:

- Giving a greater reward to those who are thought to need it most (here, full-time judges who cannot earn money from private practice or other work in addition to being a judge) might be a legitimate aim but the unequal treatment should be justified by precise, concrete factors and on the basis of objective and transparent criteria. This was not the case here.
- Giving a greater reward to those who make a greater contribution to the justice system might be legitimate but the Ministry had failed to demonstrate that fee paid part-timers, as a class, made a lesser contribution than full-timers, as a class.
- Recruiting a high-quality judiciary was undoubtedly a legitimate aim but it applied to part-time judges as much as to full-timers. It had also not been shown that denying a pension to the part-timers had a significant effect upon the recruitment of full-timers.
- The Ministry had accepted that cost alone could not justify discrimination but argued that "cost plus" other factors may do so. The fundamental principles of equal treatment could not depend upon how much money happened to be available in the public coffers or upon how the State chooses to allocate the funds available between its various responsibilities. Such an argument would not be available to a private employer and should not be available to the State in its capacity as an employer. (*O'Brien v Ministry of Justice*)

FROM THE PENSIONS OMBUDSMAN Ombudsman could hear pension aspects of employment-related dispute

The Pensions Ombudsman has held that he had jurisdiction to hear the pension aspects of a complaint that the member's employer had delayed informing the scheme administrator of the member's retirement on redundancy, despite there being other, employment-related, matters in dispute. The Ombudsman's jurisdiction did not include employment disputes, although these other matters helped the Ombudsman understand the circumstances surrounding the pension complaint.

In relation to disclosure of compromise agreements subject to confidentiality clauses, the Ombudsman pointed out that he had power under the Pension Schemes Act 1993 to require disclosure and considered that disclosure of the documents fell within the exception in the clauses banning disclosure "save as required by law".

The Ombudsman also considered that clauses in the compromise agreement requiring the member to withdraw any complaint to an ombudsman applied only to matters in dispute before, or at the time of, the termination of employment and not to matters arising from the parties' conduct after the agreements had been signed.

The Ombudsman concluded that pension benefits payable "on redundancy" could not sensibly be construed as meaning that they would be paid on the next working day. However, the employer had not acted with due speed in notifying NHS Pensions of the member's retirement – had it done so, the wait for her retirement lump sum might have been shortened by up to 10 days. £150 compensation was awarded in respect of non-financial injustice. (*Ashwell*)

£1,000 compensation for failing to engage with member's complaint

The Deputy Pensions Ombudsman has criticised trustees for failing to respond to the member's complaints, failing to engage with TPAS and refusing to initiate the scheme's internal dispute resolution procedure. Although the complaint was only partially upheld, the trustees were directed to pay £1,000 to the member for the distress and inconvenience caused by the trustees' poor communication and their delay in responding to the Ombudsman's office. (*Frankham*)

Ill health: decision maker failed to obtain sufficient information

The Deputy Pensions Ombudsman has directed that the member's application for ill health early retirement be reconsidered. Although it was for the employer to determine what weight to attach to the evidence before it, it could not accept the IRMP's opinion blindly. In this case, the employer did not have sufficient information before it to determine what weight to give to the independent doctor's report. (*Hassell-Roberts*)

Ill health: untried treatments – further clarification needed

The Pensions Ombudsman has upheld the complaint of a member that the employer had not properly considered the member's request for an ill health early retirement pension. The independent medical adviser considered that the member could benefit from untried treatment and therefore refused to certify that the member would not be able to return to work before normal retirement date. However, the medical adviser had not specified what treatments should be tried, nor was there evidence that he had before him any information regarding which treatments had been tried, or

had been considered and deemed unsuitable.
(*Winterbotham*)

Member unable to trace preserved benefits

In a case the Pensions Ombudsman described as "very unsatisfactory", the complainant's deferred benefits had been transferred several times without his knowledge as part of corporate restructurings and transactions and had subsequently proved untraceable. There was no evidence to indicate he had ever been a member of the scheme about which the complaint was made and the Ombudsman found that there had been no maladministration by its trustees or their custodian. There might have been maladministration in respect of one of the previous schemes but the entities concerned had not been named as respondents in the complaint and, in many cases, had ceased to exist.
(*Waterton*)

OTHER DEVELOPMENTS

Pension liberation

The Pensions Regulator has issued an action pack and elearning module for trustees, highlighting the serious consequences for members and trustees (including liability for unauthorised payments charges and scheme sanction charges) of involvement with pension liberation scams. The Regulator considers some warning signs trustees may look out for in relation to transfers out and recommends further information that may be sought.

New inflation indices

The Office for National Statistics has launched two new inflation indices: CPIH (which includes owner-occupiers' housing costs); and RPIJ (similar to RPI but calculated using methodology consistent with international standards). CPIH and RPIJ are currently "experimental indices" and are being assessed for National Statistic status.

RPI will still be issued but it is no longer designated as a National Statistic, meaning that it will cease to be used for official statistics.

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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Financial transaction tax

The European Commission has adopted a proposal for a directive to implement a financial transaction tax of 0.1% on equity and fixed income transactions and 0.01% on derivatives transactions. It is not proposed to exempt pension funds. The directive will only be adopted by 11 participating Member States. However, the tax may apply where parties to a transaction are outside the 11 participating States but where the issuer of the financial instrument is resident or incorporated in one of the 11 States.

Pension Protection Fund: deficit reduction contributions

The Pension Protection Fund has issued FAQs relating to various aspects of deficit reduction contributions. A point to note is that a special contribution for the trustees to invest in a special purpose vehicle (SPV) (such as entering into a Scottish limited partnership with the employer) can qualify as a deficit reduction contribution provided that various conditions are met, including that the contribution is irrevocable and is capable of being assessed as a quantifiable cash contribution. A contribution subject to repayment if not used for a specified purpose will not be considered irrevocable.

Contracting-out: amending contracted-out schemes

Following consultation, final regulations have been issued to:

- clarify the current restrictions on amending contracted-out (and formerly contracted-out) schemes. Following concerns raised in consultation, the amending regulations have been altered to protect a survivor's right to a pension at least as generous as that which would have been payable in respect of the member's contracted-out rights (section 9(2B) rights) prior to the amendment;
- allow bulk transfers without consent to be made between schemes with the same sponsoring employer even where one scheme no longer has any active members;
- allow bulk transfers without consent from a contracted-out scheme to former contracted-out schemes.