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What's Happening in Pensions

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- **GMP indexation judicial review case:** The High Court has rejected BT's application for judicial review of the government's decision that public service pension schemes will provide top-up GMP indexation for members retiring since the state pension was reformed in April 2016. That decision has a knock-on effect on BT's scheme.
- **Pensions Ombudsman:** The government and the Pensions Ombudsman have consulted on how to implement proposals in relation to the Ombudsman's jurisdiction, including in relation to the informal resolution of disputes.
- **Brexit regulations:** The government has corrected an issue with draft "no deal" regulations on pension scheme investment but other draft regulations could have significant implications as regards the ability of a scheme with a statutory employer located exclusively in an EU member state (post-Brexit) to enter the PPF. They could also prevent such an employer's insolvency from triggering a PPF standard form guarantee.
- **Pensions dashboards:** The government has published a feasibility study, including a consultation, on facilitating pensions dashboards.
- **PPF insolvency guidance:** The PPF has published new and updated versions of its guidance for insolvency practitioners.
- **Pensions cold-calling:** Regulations prohibit cold-calling in relation to occupational and personal pension schemes from 9 January 2019.

Pension protection levy

The PPF **has published** the pension protection levy determination, appendices and guidance for the 2019/20 levy year.

The rules are largely unchanged from the consultation proposals (see **WHiP Issue 73**), which themselves proposed few changes from last year's rules.

By far the most significant change this year is, as previously announced, that contingent asset agreements of Type A (guarantees) and Type B (security over cash, UK real estate or securities) that (in either case) include a fixed sum liability cap must be in the new PPF standard form in order to be recognised for a levy reduction. See our briefing note **Does your PPF guarantee include a fixed sum liability cap? If so the clock is ticking**.

There will be no mitigation for accounting adjustments made by companies to reflect GMP equalisation costs that result in a less favourable insolvency risk score.

There is a new requirement for advisers producing a guarantor strength report to include a statement confirming their independence.

The online filing deadline is midnight on Sunday 31 March. The deadline for submitting hard copy documentation, usually the last working day of March, is 5pm on Monday 1 April.

GMP equalisation

Supplementary judgment

The High Court has issued **a supplementary judgment** in the *Lloyds Banking Group* GMP equalisation case (see our alert **GMP equalisation: court ruling**). In this, the judge clears up confusion caused by part of his original judgment concerning the use of GMP conversion to equalise.

The uncertainty was as to whether Method D2 (ie, equalisation with GMP conversion) first requires equalisation to be performed under one of the other permissible methods. The supplementary judgment makes it clear that it does not. Rather, one can take the actuarial values of a member's benefits and those of his or her comparator, level up the value and then apply it to provide reshaped benefits, removing the GMPs, by way of GMP conversion. This only applies to the equalisation of future payments of pension, not to the equalisation of pension payments already made.

Industry working group

The Pensions Regulator **has announced** that a new industry group has been formed to consider issues for pension schemes following the High Court's ruling in the *Lloyds Banking Group* case.

The group will help develop and promote best practice on issues arising from the ruling, from how to address missing data through to dealing with transfer requests and rectifying underpayments. It will comprise representatives from across the industry, including from the administration, legal, advisory, actuarial, data and trustee sectors. The group will be chaired by Geraldine Brassett of the Pensions Administration Standards Association.

CPI and RPI

The Court of Appeal **has upheld** the decision of the High Court (see **WHiP Issue 69**) that BT cannot switch from RPI to CPI as the basis for pension increases in one section of the BT Pension Scheme.

The BT Pension Scheme's revaluation index switched automatically from RPI to CPI in 2010 (for all sections of the scheme) when the method for calculating public sector scheme increases was changed (see **WHiP Issue 20**). This also happened for increases to pensions in payment ("indexation") in sections A and B of the scheme, but not section C. Section C is for members who joined the scheme between 1 April 1986 and 31 March 2001 (when it was closed to new members). Up to approximately 80,000 members are reportedly affected.

Section C's indexation rule requires increases in line with RPI unless that index "ceases to be published or becomes inappropriate". It formerly allowed RPI to be replaced if it has been "so amended as to invalidate it as a continuous basis". The questions for the court were (very broadly) whether RPI has become inappropriate/invalidated or not; who is to decide that; on what basis; and whether, because the relevant rules were re-adopted in April 2016, changes to RPI that happened before then cannot be taken into consideration.

The Court of Appeal upheld the High Court's decision to the effect that the switch to CPI could not be made. It found as follows:

- The question whether RPI has become inappropriate is an objective question, ultimately to be decided by the courts. There were no grounds for interpreting the rules as including the power for BT to make the determination or for implying such a power.

- Matters which occurred before the rules were re-adopted in April 2016 can be taken into account in deciding whether or not RPI has become inappropriate. The reference in the April 2016 deed of amendment to the rules being "replaced" by the rules set out in that deed was no more than a convenient way of setting out the rules in their new and partially amended form. In other words, restating the scheme rules when amending them did not "reset" their effect.

- BT argued that matters occurring before May 2002, when the indexation rule was introduced, could be taken into account in deciding whether RPI had become inappropriate, if BT and the trustees were previously unaware of them. The Court decided, however, that "becomes inappropriate" is clearly forward-looking and that the actual knowledge of the parties as to events before May 2002 is irrelevant.

- The High Court judge was entitled to decide that specific changes to the RPI formula (such as the 2010 clothing change, the 2013 freeze, the introduction and subsequent abandonment of RPIJ, and the de-designation of RPI as a national statistic) were not such as to have caused RPI to have become inappropriate, either individually or cumulatively. The judge was also entitled to decide that they were not such as to permit BT to form the view that RPI has been "so amended as to invalidate it as a continuous basis".

Age discrimination

Both the judges and the firefighters have been successful in the Court of Appeal in their respective age discrimination claims against the government (*Lord Chancellor and Secretary of State for Justice v McCloud* and *Sargeant v London Fire and Emergency Planning Authority*). There is a **single judgment** covering both cases.

The claims were brought by younger scheme members who claimed that they were discriminated against by transitional provisions introduced when future service pension benefits were generally reduced under the recent public sector pension reforms. These were included in order to protect (among others) judges and firefighters who were closer to retirement and who therefore (the government argued) were less able to make other financial arrangements. Members within ten years of retirement age were broadly allowed to continue on the original benefit terms under the old scheme and there were tapering provisions protecting those who were between 10 and 14 years from retirement.

The government accepted that there was direct age discrimination but argued justification in that it was pursuing a legitimate aim. The Court of Appeal dismissed that argument. It held that the government had to be accorded some margin of discretion in relation to legitimate aims and the means of pursuing them but that it was for the tribunal to determine the appropriate margin in each particular case. Actual evidence is required in order to substantiate the legitimacy of aims: it is not sufficient to categorise the decision as a moral one incapable of evidential substantiation.

As regards the present cases:

- In the judges' case, the tribunal had been entitled to conclude that the desire to protect older judges was irrational, given that they were less affected than younger judges (because accrued benefits were fully preserved), and that the government had failed to show that providing the protections was a proportionate means of achieving a legitimate aim. As to the government's attempt to justify the protections on grounds of consistency across the public sector, the Court of Appeal said that the position of judge is very different to that of other public sector workers.

- In the firefighters' case, having found that the government's aims were social policy aims, the tribunal had proceeded to treat them as legitimate without assessing them as such. The Court of Appeal decided that the government's assertions and generalisations did not amount to evidence of legitimacy.

Equal pay and indirect race discrimination claims were also successfully made out (with one caveat in the firefighters' case) but were of no real practical significance given the success of the age discrimination claims.

The Court of Appeal refused the government permission to appeal but the government can ask the Supreme Court directly.

Inadvertent master trusts

The Pensions Regulator **has issued** a one page **step-by-step guide** for DC schemes to check whether or not they are a master trust. The Regulator notes: "If your scheme is defined as a master trust and you haven't applied for authorisation (or received authorisation to operate), you will be operating illegally after 31 March 2019 and will have to stop operating and wind-up. We may also serve you with a penalty.".

See **WHiP Issue 72** regarding the risk of a group scheme inadvertently falling within the "master trust" definition.

Bridging pensions

The government **is consulting** on draft amending regulations to exempt schemes that pay bridging pensions (or that have similar arrangements) from the age discrimination legislation if the bridging pension ends (or the scheme pension is otherwise reduced) at any age between 60 and the member's state pension age.

At present the reduction must occur between age 60 and 65 in order to fall within the exemption. With state pension ages now rising above age 65, the exemption needed to be extended. The government proposes that it be extended so that the bridging pension can end at any time between the member reaching age 60 and reaching his or her state pension age.

It does not seem to be proposed that the regulations have backdated effect. The government asks how many members are likely to be affected within the next 6 and 12 months as a result of any delay in introducing the changes. It also asks how many members in total are likely to be affected if the changes are not made.

The consultation closes on 30 January 2019.

See our September 2013 briefing note **Bridging pensions – state pension age issues** for background to this and other issues.

Disability discrimination

The Supreme Court **has dismissed** an individual's claim that his ill health early retirement pension should have been based on his full salary, rather than the reduced salary he was being paid at the time of retirement as a result of working shorter hours due to his illness.

In *Williams v The Trustees of Swansea University Pension and Assurance Scheme and another*, Mr Williams retired due to disability at the age of 38. He qualified for an ill health early retirement pension under the scheme rules but this was based on his reduced salary, the reduction being due to his employer allowing him to work fewer hours as an adjustment to accommodate his disability. He argued that the pension should have been calculated on the basis of the full-time salary he had previously been receiving and that there was otherwise disability discrimination against him.

The Supreme Court decided that when considering whether there is unfavourable treatment for the purposes of the disability discrimination provisions of the Equality Act 2010, one has to consider what the treatment is and ask if it is disadvantageous or detrimental to the individual. Here, the treatment was the award of an enhanced pension, albeit based on the reduced salary. The Supreme Court held that there was nothing intrinsically unfavourable about awarding someone an enhanced pension. Mr Williams' appeal was therefore dismissed.

Investment consultancy and fiduciary management

The Competition and Markets Authority (CMA) **has published** its final report on the investment consultancy and fiduciary management markets. See **WHiP Issue 72** for background.

The CMA found competition problems within both the investment consultancy and – to a greater degree – the fiduciary management markets. Its final conclusions included the following:

- Some pension scheme trustees will choose their existing investment consultant to be their fiduciary manager even if a better deal may be available elsewhere, with only a third of pension scheme trustees asking fiduciary managers to compete for their business through a tender. Investment consultants are also able to steer customers towards their own service.

- Many pension scheme trustees do not have sufficient information on the fees or quality of investment consultancy and fiduciary management to be able to judge if they are getting a good deal from their existing provider.

The CMA will now require a number of changes to these markets to deal with its concerns, including:

- Pension scheme trustees who wish to delegate investment decisions for more than 20% of their scheme assets to a fiduciary manager must run a competitive tender with at least three firms. Trustees who have appointed a fiduciary manager without a tender must put the service out to tender within five years.

- Fiduciary management firms must provide potential clients with clear information on their fees and use a standard approach to show how they have performed for other clients, so that pension trustees have the information they need to compare different providers.

- The CMA recommends that the Pensions Regulator produces new guidance to help trustees with these services.

- The CMA also recommends that the government broadens the regulatory scope of both the FCA and Pensions Regulator, to ensure greater oversight of this sector in the future.

The CMA will next consult on a draft order, with implementation expected to begin later in 2019.

DB consolidation

Government consultation

The government **has published** a consultation on proposals for the authorisation and regulation of DB consolidator schemes, which it calls "superfunds". These are schemes to which transfers of all of a DB scheme's assets and liabilities can be made, as an alternative to buying out benefits with an insurer. This follows proposals originally outlined in the government's DB White Paper, published in March 2018 (see **WHiP Issue 70**).

Superfunds will be authorised and supervised by the Pensions Regulator. Authorisation will be given if a superfund demonstrates that it has a viable business model, is financially sustainable, is well governed (including satisfying a fit and proper person test) and has a high probability of being able to pay benefits as they fall due.

The ability for a DB scheme to transfer its assets and liabilities to a superfund will be restricted. The government proposes that there will be a "gateway" such that schemes will not be permitted to transfer if they are able to buy out benefits at the time of entry or if there is a reasonable prospect of that being the case in the "foreseeable future" (perhaps up to five years). Employers may also need to contribute significant additional funds.

The consultation closes on 1 February 2019.

Pensions Regulator guidance

There is nothing to stop superfunds from operating before the authorisation regime is in place. With that in mind, the Pensions Regulator has issued:

- **guidance** setting out its expectations of superfunds that intend to operate before the authorisation regime is in place;
- **guidance** for trustees considering transferring to a superfund, which says that the decision must be in the best interests of members, to further the purpose of paying the accrued scheme benefits; and
- **guidance** for employers, which says that they should seek "Type A event" anti-avoidance clearance for any proposed transfer to a superfund even if they consider that any detriment is mitigated (which it should be).

Automatic enrolment thresholds

The government **has announced** the automatic enrolment earnings trigger and qualifying earnings band figures for 2019/20, as follows:

- The automatic enrolment earnings trigger will remain at £10,000 pa.
- The lower end of the qualifying earnings band increases from £6,032 to £6,136 pa.
- The upper end of the qualifying earnings band increases from £46,350 to £50,000 pa.

The earnings band figures continue to accord with the National Insurance lower and upper earnings limits

The new figures apply from 6 April 2019, at which time the minimum required contributions also increase. See our briefing note **Automatic enrolment: minimum DC contribution rates**.

GMP indexation judicial review case

The High Court **has rejected** BT's application for judicial review of the government's decision that public service pension schemes will provide top-up GMP indexation for members retiring since 6 April 2016 (when the state pension was reformed). The decision has a knock-on effect on the rules of the BT Pension Scheme.

This additional indexation of the GMP is being provided by public service schemes, at least until April 2021, as a substitute for a lost state pension increase for individuals who reach state pension age (SPA) after 5 April 2016.

The increases that schemes are required to apply to an individual's GMP are less generous than those that would have applied to their State Earnings Related Pension Scheme (SERPS) pension (which, very broadly, the GMP otherwise mirrors) if the individual were not contracted-out. Contracted-out members who reach SPA before 6 April 2016 generally receive top-up increases from SERPS to make up the difference. Those who reach SPA after 5 April 2016, however, miss out on that top-up because they are not entitled to any pension under the old state pension system and no credit is given for the top-up increases when calculating their single tier state pension under the new system.

The government's decision in relation to the Principal Civil Service Pension Scheme (PCSPS) has a knock on effect (with an estimated £120 million cost) for Section B the BT Pension Scheme, which is required by its rules to mirror PCSPS increases.

Other schemes, particularly those with a public sector background, may have the same issue, depending on how their increase rules are drafted.

Pensions Ombudsman

The government and the Pensions Ombudsman (TPO) **have consulted** on how to implement proposals to:

- allow TPO to operate a binding early resolution service (without a determination) and to mediate and resolve disputes (including before an IDRP decision) (NB it is not clear how this differs from what TPO is already doing or if this is to formalise that practice);
- allow employers who choose a group personal pension to complain to TPO about the provider; and
- make changes to provisions on signposting people to TPO.

Primary legislation is required in order to make the proposed changes, so this may take some time.

Brexit regulations

Investment regulations

The government has published a **revised draft** of The Occupational and Personal Pension Schemes (Amendment etc.) (EU Exit) Regulations 2018. These regulations are to amend pensions legislation so that it continues to work in the event of the UK leaving the EU (perhaps after a transitional period) without a withdrawal agreement, ie, "no deal".

The revised draft corrects an error in the original draft which would have amended the requirement in the 2005 Investment Regulations for UK occupational pension schemes to invest predominantly in "regulated markets", so that they would have had to invest predominantly in "UK regulated markets". The revised drafting reinstates the current legal position but with language that refers less to EU legislation than at present.

Insolvency regulations

We have identified potential issues arising from another set of "no deal" Brexit regulations, the draft Insolvency (Amendment) (EU Exit) Regulations 2018. These would (among other things) amend:

- the PPF entry rules concerning when an insolvency qualifies a scheme for PPF entry; and

- statutory provisions concerning the reimbursement of unpaid employer contributions on an employer's insolvency.

The proposed changes both relate to insolvency proceedings in an EU member state after a "no deal" Brexit. The background is that the government does not wish, for many purposes, to recognise the EU Insolvency Regulation as regards insolvency proceedings taking place in the EU, when EU member states will not recognise UK insolvency proceedings.

The proposed change to the PPF entry rules could have significant implications as regards the ability of a scheme with a statutory employer located exclusively in an EU member state (post-Brexit) to enter the PPF (for example, the situation that occurred for the Olympic Airlines scheme, in respect of which amending legislation was introduced). It could also prevent such an employer's insolvency from triggering a PPF standard form guarantee.

We doubt that these consequences were intended and are raising our concerns through our representation on industry bodies' legislative committees.

Pensions dashboards

The government **has published** a feasibility study, including a consultation, on facilitating pensions dashboards. These will allow individuals to access their pension information from multiple sources, including the state pension, in a single place online. The government may compel schemes to contribute information.

It is envisaged that the dashboards will be set up by commercial organisations but the first one will be set up by the new Single Financial Guidance Body (SFGB). The SFGB will convene a "delivery group" to implement the proposals.

The consultation closes on 28 January 2019.

PPF insolvency guidance

The PPF **has published** new and updated versions of its guidance for insolvency practitioners.

There are now the following guidance notes:

- **General guidance for insolvency professionals**
- **Guidance Note 1 – Our legal standing and approach to the governance of insolvency proceedings**
- **Guidance Note 2 – Insolvency practitioner remuneration**
- **Guidance Note 3– Pre-packaged administrations**
- **Guidance Note 4 – Potential legal actions contemplated by insolvency practitioners**
- **Guidance Note 5 – Company voluntary arrangements**
- **Guidance Note 6 – How PPF drift arises and should be addressed**
- **Guidance Note 7 – Appointment of independent trustees**

New Guidance Note 8 – Situations involving new or successor schemes - will follow shortly.

Pensions cold-calling

The Privacy and Electronic Communications (Amendment) (No. 2) Regulations 2018 prohibit cold-calling in relation to occupational and personal pension schemes from 9 January 2019.

Broadly, the amending regulations ban "direct marketing" in relation to occupational and personal pension schemes unless the caller is an FCA authorised person or is the trustee or manager of an occupational or personal pension scheme and either:

- the line called is that of an individual who has previously notified the caller that they consent to such calls being made by the caller on that line; or
- the recipient of the call has an existing client relationship with the caller and the relationship is such that the recipient might reasonably envisage receiving unsolicited calls for direct marketing in relation to pension schemes and the recipient has been given a simple means of refusing the use of their details for direct marketing purposes.

An earlier **consultation response** noted that the use of text and email for these purposes is already restricted by the regulations.

The ban will be enforced by the Information Commissioner's Office (ICO). HM Treasury has acknowledged that the ICO will only be able to enforce against firms within the UK's jurisdiction (unless the calls are made on behalf of a UK company). The consultation response noted that the ICO has arrangements in place with international regulators to enable enforcement action in circumstances where companies operating wholly abroad make calls into the UK that would be unlawful if made in the UK.

In-person introducers (where lead generators meet prospective clients in person and introduce them to financial advisors, sometimes referred to as "factory gating") are not within the scope of the ban. However, the consultation response noted that the government is in discussion with the FCA to keep this under review.

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If you wish to discuss any points arising from this note, please speak to your usual contact in the Travers Smith Pensions team or to one of the Pensions partners: Susie Daykin, Daniel Gerring, David James, Dan Naylor and Paul Stannard.

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