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Green Paper and consultation on Defined Benefit ("DB") schemes published

The Department for Work and Pensions (DWP) has published the keenly awaited Green Paper looking at the security and sustainability of DB schemes. A consultation has been launched seeking views on this.

The backdrop to the Green Paper is those recent high profile cases involving DB schemes, such as the collapse of BHS, which the Government recognize have raised concerns regarding how the system for DB schemes currently operates. It also follows on from the recent report of the Work and Pensions Committee into DB pensions, as well as an informal consultation by the DWP with various stakeholders which took place in the summer of 2016.

The Green Paper is wide-ranging, and includes a number of suggestions for how the system could potentially be changed in the following areas:

- Funding and Investment;
- Employer Contributions and Affordability;
- Member Protection/corporate activity; and
- Consolidation of schemes.

If implemented, a number of the suggestions would have a significant impact on how the system currently operates. **The Government's main conclusion, though, is that there is not a significant structural problem with the regulatory and legislative framework.** This, together with statements elsewhere in the Green Paper in each of the specific areas noted above, indicates that the Government is not currently minded to introduce root and branch reform of the current system.

The DWP is seeking the views of a wide range of people and organizations with an interest in private sector DB pension schemes. Baker McKenzie will be preparing a response. The consultation runs until 14 May 2017. The link to the consultation can be viewed [here](#).

Auto-enrolment legislation updated for Fixed Protection 2016 and Individual Protection 2016

Currently, employers do not have an obligation to auto-enrol employees with certain HMRC protections related to the reduction in the lifetime allowance (e.g. fixed/enhanced protection). However, the auto-enrolment legislation has not yet been updated to include the most recent HMRC protections: fixed protection 2016 and individual protection 2016.

Regulations to address this issue, which will mean that there is no obligation to auto-enrol employees where these two newer protections apply will come into force on 6 March 2017. The regulation can be viewed by clicking [here](#).

Fines imposed for failure to complete Chair's statements

The Pensions Regulator has the power to fine trustees between £500 and £2,000 for a failure to complete a chair's statement. **The Regulator has issued a report on its decision to fine two trustees in respect of their failure to complete Chair's statements.**

In one of the cases the trustee was a professional trustee (MC Trustees Ltd) of a Master Trust, and the Regulator comments that, as it expects professional trustees to meet a higher standard of care, it has imposed the maximum £2,000 fine in that case.

The Regulator's Section 89 report can be viewed [here](#).

Pensions Regulator blog on use of enforcement powers

The latest blog on the Pensions Regulator website warns trustees that, as well as exercising its powers in headline grabbing high profile cases (which suggests *BHS*, although it is not specifically named in the blog), it is also looking to exercise less well known powers too where there is a failure to meet basic legal requirements.

The thrust of the blog is that trustees should ensure they complete basic tasks, as the Regulator views them as often a symptom of more serious failings: issuing a fine for a failure to complete a scheme return is given as an example.

The blog by Nicola Parish (Executive Director of Frontline Regulation) can be viewed [here](#).

Payment of IFA fees from pension plan

As reported in our December Update, the Government announced in Budget 2016 that it would consult on members being able to use part of their DC pension savings to pay for retirement advice from an IFA, so that IFA fees are not a barrier to members seeking IFA advice. This is particularly relevant for DC members given the new flexibilities and options available to them.

Further detail is now available on the terms of which such payments can be made, following draft regulations being introduced. Particular points to note on how the payments will operate are:

- the payment must not exceed £500;
- up to three payments can be made in respect of each member, although the payments cannot occur in the same tax year; and
- the payment is made direct from the pension plan to the IFA for retirement financial advice.

Trustees and employers should be aware that there is no obligation on plans to offer these payments to members, and the plan rules may require amendment in order for these payments to be made. It is anticipated that the regulations will come into force for 6 April 2017. The draft regulations can be viewed by clicking [here](#).

GMP revaluation - lapse of statutory power on 6 April 2017

In our February and March 2016 updates we highlighted an issue arising for schemes with active members relating to GMP revaluation. In essence, depending on the wording of a scheme's rules, schemes may lose the option to use their preferred GMP revaluation method if the scheme rules are not amended to ensure that the trigger point for determining the relevant method is the cessation of pensionable service rather than contracted-out employment. It is possible to amend scheme rules retrospectively under a statutory resolution power to fix this issue. **However, that power lapses on 6 April 2017 and so schemes which need to take action using the statutory power should do so before that date.**

Data Protection - all change

Kate Atkinson and Lauren Awoyinka have produced the attached summary and action plan about the upcoming changes to the data protection regime in the UK. The summary can be viewed [here](#).

Comments from our Pensions Disputes Group

Transitional provisions in judges' pension schemes found age discriminatory

A recent Employment Tribunal decision has found transitional protection for older members of the Judicial Pension Scheme (JPS) to be age discriminatory.

The Government changed the pension arrangements for judges so that lower benefits were provided, along with reductions in pensions being provided to other public sector employees (such as the fire service, police, and NHS). However, the Government protected judges above a certain age so that they would not be affected by the changes, and introduced a period of tapered protection for another group who were close to retirement age.

The tribunal found that this direct age discrimination could not be objectively justified. This was because the Government could not provide a satisfactory rationale to the tribunal for protecting the older judges, as the tribunal concluded that the effect of its actions was to protect those who were least likely to be affected by the changes (as the older judges were most likely to have built up the largest pensions under the existing plan).

The case is relevant to those who are changing the benefits provided to employees (for example, employers ceasing defined benefit accrual) and considering how to structure transitional provisions provided to employees on such changes.

It is expected that the Government will appeal the decision, and in doing so may revisit the question of the rationale put forward for its actions.

A copy of the tribunal's decision can be viewed [here](#).

Court confirms ability to compromise pension benefits

The Court of Appeal has confirmed previous decisions that it is possible to compromise pension disputes without infringing section 91 of the Pensions Act 1995 (which prevents pension rights being assigned, commuted or surrendered).

In the *Gleeds Retirement Benefits Scheme* the Court accepted the previous decisions which found that section 91 protects *actual* pension rights or entitlement, and that it does not protect *disputed* pension rights.

The Court of Appeal affirmed the previous Court of Appeal decision on this point in *IMG* (a case in which Baker McKenzie was involved). **The decision is important for enabling employers and trustees to agree settlements outside of Court and thereby avoid the need for a potentially costly Court hearing.**

Court requires a pension to be paid to unmarried partner even where the requirement for completion of a nomination form had not been met

There has been a recent Supreme Court decision (Brewster) concerning a member of the Local Government Pension Scheme (LGPS) in Northern Ireland. The member had failed to complete a nomination form in respect of his unmarried partner (Ms Brewster), which was a condition of paying an unmarried partner's pension on death. On the member's death the LGPS declined to pay a pension to Ms Brewster because no nomination form had been completed.

The Court held that the requirement for the nomination form (a condition which did not apply to spouses or civil partners) was unlawful as it breached Ms Brewster's rights under the European Convention on Human Rights (ECHR). The case is unusual in this regard since claims for discrimination are usually brought under the Equality Act 2010. Marital status is not a protected characteristic under the Equality Act and so it appears Ms Brewster had to rely on the broader protections under the ECHR.

The Human Rights Act 1998 incorporates the ECHR into UK domestic legislation. Amongst other requirements, the Act makes it unlawful for "public bodies" to act in a way which is incompatible with the ECHR and requires the Courts to interpret legislation, as far as possible, in way which is compatible with the ECHR.

It should be noted that the decision related to a public body (the administering authority of the relevant LGPS fund) and to scheme rules that were set down in legislation. It is not readily apparent that a similar claim directly against a private sector pension scheme would be possible under the law as it currently stands.

In addition, the case also related to a narrow issue (the requirement for a nomination form in respect of a survivor's pension) which is not generally relevant in the private sector context (one exception are plans that are set up to be broadly comparable to the Government schemes). **However, since there is currently no UK legislative requirement for unmarried partners to receive the same treatment as civil partners or spouses in respect of pension rights, the decision does leave open the possibility that there could be a challenge on this wider point in the future.**

A copy of the judgment can be viewed [here](#).

Court of Session in Scotland applies presumption of regularity to equalisation case

In the case of *Barber v Guardian Royal Exchange* [1990] it was held that it was unlawful to discriminate between men and women by providing pension benefits on the basis of different normal retirement ages. Pension schemes subsequently took steps to equalise retirement ages between men and women, and much case law has arisen as to whether schemes have been properly amended in accordance with their amendment powers to effectively close the "Barber window" and provide benefits based on the same normal retirement age for men and women.

The Court of Session in Scotland (which is the equivalent of the High Court in England and Wales) has held as a preliminary issue in proceedings issued by the trustees and employer against its former advisers, in relation to four pension schemes that, despite the absence of a formal board resolution or memorandum amending the schemes, sufficient material had been produced to enable the presumption of regularity to be applied. Therefore, the schemes had been amended in accordance with their amendment powers. It was also noted that if a transaction was challenged on ground of improper procedure a long time after it was carried out, this would call into question any subsequent dealings, which would be an intolerable position.

While a Scottish case, this is a sensible and helpful decision and worth considering in discussions regarding equalisation, which was usually implemented many years ago and accepted as effective by the parties concerned.

The decision can be viewed by clicking [here](#).

Contact us

If you wish to discuss any of these issues further, please contact your usual Baker McKenzie lawyer.

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