UK Pensions Update

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High Court rules on the equalisation of GMPs in the Lloyds Banking case

The important and much-anticipated judgment in the case of *Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank plc* was handed down on 26 October. As widely expected, the Court found, after two weeks of highly technical argument and explanation, and consistent with the Government's view, that benefits must be equalised between men and women for the effect of Guaranteed Minimum Pensions (GMP) for service after 17 May 1990.

Mr Justice Morgan found that the payment of GMPs on an unequal basis is contrary to the basic principle, established in the *Barber* case, that men and women should receive equal pay for equal work. This is despite the fact that GMPs are inherently linked to the State Retirement Pension, which does not have to be provided on an equalised basis. The judge also established some parameters for the method of equalisation but did not prescribe a single method for addressing the unequal effect of GMP provision.

Additional aspects of the case included the ruling that members who have received unequal pensions in the past as a result of their GMPs will be entitled to arrears in respect of any shortfall, together with the application of interest at a rate of 1% above base rate. The question of whether trustees will have to investigate transfers out has been delayed and will be considered at a future hearing.

It is not yet clear whether any of the parties involved in the case are seeking to appeal the decision.

Robert West, an expert witness in the case, will be discussing this case in further detail at our Breakfast Briefing, which is taking place on 6 November at our London office. Please email Karis.Berthier@Bakermckenzie.com if you would like to attend. Chantal Thompson has also provided commentary on this case in the press, which can be viewed here: The Times, The New York Times, Daily Mail, Thompson Reuters, Business Standards.

Budget 2018 relatively uneventful for pensions

The 2018 budget, announced on 29 October, proved relatively quiet on the pensions front, with no significant new announcements being made. The Chancellor did, however, confirm the position in relation to a number of previously announced policy initiatives, including:

- **Charge cap** - the Government has announced that the Department for Work and Pensions ("DWP") will consult in 2019 on the function of the charge cap to ensure that it does not unduly restrict the use of performance fees within default arrangements.
- **Ban on cold calling** - the Government confirmed it will issue a response to its consultation on implementing the ban on cold calling. This has since been published – we comment further in the item on the Financial Claims and Guidance Act below.
- **Pension Dashboards** - the Government has confirmed that the DWP will consult later this year on the detailed design for pension dashboards - the consultation refers to there being more than one of these. The Budget provides extra funding of £5 million in 2019-20 to help deliver the pensions dashboards. Consistent with previous statements from the Government, the intention is that implementation of the project will be industry led, although Philip Hammond has stated the DWP "*will work closely with the pensions industry and financial technology firms*".
- **Pension fund investment in patient capital** - the Government has outlined a number of steps it will be taking with a view to unlocking £20 billion of finance for innovative, high growth firms, including removing barriers to (DC) pension investment in patient capital.
- **Lifetime allowance** - the lifetime allowance for pension savings will increase in line with CPI for 2019-2020, rising to £1,055,000.

PPF levy consultation for 2019/2020

The levy estimate for 2019/20 will be set at £550 million.

This is the mid-year of the third Pension Protection Fund ("PPF") Levy triennium and therefore, to maintain stability in the calculation of the PPF Levy, the consultation only proposes minor changes to the third triennium parameters set last year. The consultation notes that substantive policy changes will be considered for the fourth triennium which commences in the Levy year 2021/22.

The PPF notes in the consultation that the insolvency risk model is working well, and there are no immediate concerns to address. There is some commentary on the potential impact on the PPF of the Government's proposals for the consolidation of DB schemes, and the PPF proposes to base the Levy for commercial consolidators on the methodology it has established for schemes without a sponsoring employer.

The consultation also comments on the recertification of contingent assets. ***Trustees and employers with a type A contingent asset (parent company guarantee) with a fixed cap must re-execute the contingent asset on the new standard form agreements and re-certify them by 31 March 2019 (5pm on 29 March 2019 for hard copy documents) if they are to be recognised in the Levy.***

Pensions Regulator publishes master trust supervision and enforcement policy and consultation response

Following the introduction of the master trust regulatory regime on 1 October 2018, the Pensions Regulator (the "Regulator") has finalised and published its policy on the supervision and enforcement of master trusts, together with its response to the consultation on the policy.

The policy sets out the Regulator's supervision and enforcement approach for authorised master trusts, and provides detail about its principles for supervision and the supervisory process itself, as well as background as to how it may exercise its powers in the case of breaches of the regime. The policy also addresses the withdrawal of authorisation from master trusts and the possible involvement of the Regulator's Determinations Panel. The Regulator views the policy as forming part of its "*significantly more proactive*" approach to both master trusts and other occupational pension schemes.

The final policy can be found here and the consultation response can be found here.

Pensions Regulator requires trustees of a master trust to pay £5,000 for failing to invest savings promptly

The Regulator has issued a civil penalty to a group of trustees of the Salvus Master Trust requiring them to pay £5,000 for failing to invest contributions promptly (which was the maximum amount that it could have imposed by law in the circumstances).

The Regulator explained in its regulatory intervention report that the relevant trustees had not invested contributions received between 2014 and 2017, which was an issue that had affected over 9,000 members and £1.4 million of contributions. The error occurred due to a problem relating to the scheme's manual process for allocating contributions, which was viewed by the Regulator as a failure to comply with the trustees' obligations under relevant legislation governing the administration of pension schemes. In its report, the Regulator highlighted that it expects trustees of all DC schemes to comply with the requirement to process core financial transactions promptly and accurately; however, it also noted that it had decided that it would be unreasonable to penalise a trustee who had joined the trustee board in October 2016 and so had had little time to take any action before reporting the breach to the Regulator in January 2017.

A copy of the Regulator's report can be found here.

Pensions Regulator publishes report on its recent intervention in an offshoring case

The Regulator has issued a section 89 report confirming how it intervened in a recent case involving the replacement of a scheme's sponsoring employer with a non-UK entity. The report, which is the first to be published in this type of case since the Regulator set out its new "*clearer, quicker, tougher*" approach, suggests that any agreement to re-apportion liabilities to a sponsoring employer outside the UK (an event which requires notification to the Regulator) is likely to give rise to further investigation and, potentially, the threat of enforcement action, even where there are no immediate concerns regarding the overall funding position of the scheme following the restructuring.

The transfer of a sponsoring employer out of the UK or the replacement of a sponsoring employer with an entity outside the UK have been listed in the material detriment code of practice for some time as examples of scenarios which could lead the Regulator to consider that the material detriment test has been met - one of the threshold requirements for the Regulator to exercise its power to issue a contribution notice. There have, though, been relatively few examples of the Regulator relying on this in recent years in order to take enforcement action and applications for clearance for reapportioning pension liabilities under a flexible apportionment arrangement in such cases have been relatively rare. This report, whilst not binding on the Regulator in terms of how it acts in future cases, is further evidence of the Regulator taking a more proactive and interventionist regulatory approach and threatening to issue a contribution notice in order to secure additional mitigation for the scheme (in return for confirming that it will not issue a contribution notice). In this particular case, clearance was applied for and granted, but only after an additional package of measures was put in place, including an additional financial guarantee and the scheme moving back to the UK.

The approach taken will be of interest to employers with UK DB schemes who are considering restructuring their operations, particularly where the restructuring results in the sponsoring employer transferring overseas or a UK sponsoring employer being replaced with a non-UK entity, for example as part of any Brexit related restructuring.

The potential for "accidental" master trusts

As we have reported previously, existing master trusts have until 1 April 2019 to apply for authorisation from the Regulator (i.e. 6 months from 1 October, when the new regulatory regime was introduced). It has become apparent that some pension schemes containing non-connected employers could "accidentally" become subject to the new regime, and may need to take action if they do not want to become subject to it after 1 April 2019.

Broadly, a master trust is defined as a multi-employer money purchase occupational pension scheme that is used by non-connected employers. DB schemes which only provide additional voluntary contributions on a money purchase basis are exempt from the scope of the master trust regime.

We have become aware that several pension schemes may inadvertently become subject to the new master trust requirements from 1 April 2019 as a result of having participating employers which are not connected entities under the relevant statutory tests (often because they are not in the same corporate group). However, please be aware that the new regime will not apply in cases where a scheme used to have a non-connected employer participating, but no longer does (or will not have such an employer participating as at 1 April 2019).

If you have any questions in relation to the impact of the new master trust regime, please get in touch with your usual contact at Baker McKenzie for further information.

Financial Claims and Guidance Act 2018 - provision creating the new single advice body now in force

The provision in the Financial Claims and Guidance Act 2018 (the "Act") creating a single financial guidance body came into force on 1 October 2018. The new body, which is currently being referred to as the Single Financial Guidance Body, brings together the Pensions Advisory Service (TPAS), Pension Wise and the Money Advice Service. The new body will be responsible for co-ordinating advice on pension guidance, as well as on debt and money guidance. Although the new body has now been legally established, it is not expected to launch until January 2019 and a new name is to be sought for it "as 2019 progresses". ***Trustees should check that their scheme administrator is monitoring the position with a view to updating literature to refer to the new body, including at retirement communications, in due course.***

Trustees should also be aware of a new requirement in the Act,which will, in due course, require them to check that members and survivors have received guidance, or opted out of receiving guidance, before accessing DC pension pots. Currently, trustees are required to signpost to guidance before members access DC pension pots, but not to check whether or not this has been received. There was a lot of debate in Parliament about how much compulsion there should be for members to seek guidance. The final provision, which is yet to be brought into force, falls short of an absolute requirement for members to seek guidance before gaining access to a DC pension pot, but is a step up from the current requirements. The hope is that this will increase the take up of pension guidance by members. A similar requirement is expected to be introduced for personal and stakeholder schemes.

Finally, trustees should note that, although the provision in the Act requiring the Secretary of State to implement a ban on direct marketing in relation to pensions is now in force (the pensions cold calling ban), the necessary secondary legislation implementing the ban has not yet been brought into force. The cold calling ban is aimed at addressing concerns over pension scams. The Government recently confirmed (as part of its response to the consultation on implementing the ban, which it published on 29 October 2018 following the Budget) that it expects the secondary legislation to be brought into force in the Autumn, although no precise date has been given. The Government has said that it will be taking steps in the run up to the ban coming into force in order to raise general awareness of the ban.

IORP II: New regulations published

Two sets of regulations have been published that will transpose requirements from the IORP II Directive into UK law. Both sets of regulations come into force on 13 January 2019. The restricted scope of the regulations reflects the DWPs 'light touch' approach to implementing IORP II.

The Occupational Pension Schemes (Governance) (Amendment) Regulations 2018 amend Section 249A of the Pensions Act 2004. One of the key changes being introduced is that, instead of "internal controls", trustees will be required to put in place an "effective system of governance including internal controls", which must be proportionate to the size, nature, scale and complexity of the activities of the pension scheme. The Regulator will consult on new guidance to replace the existing Code of Practice No 9 to address the more detailed requirements of IORP II. It should be noted that DC Master Trusts are exempt from the new requirements, as they are subject to their own authorisation and supervision requirements. The regulations can be viewed here.

The Occupational Pension Schemes (Cross-border Activities) (Amendment) Regulations 2018 amend the Pensions Act 2004 and the Occupational Pension Schemes (Cross-border Activities) Regulations 2005. Two key features of the new regulations are minor changes to the system that governs the authorisation of UK pension schemes engaged in cross-border activities and amendments to the provisions relating to cross-border transfers to include a requirement for member consent. The regulations can be viewed here.

DWP publishes new draft EU exit regulations

The DWP has published the draft Occupational and Personal Pension Schemes (Amendment etc.) (EU Exit) Regulations 2018, together with an explanatory memorandum. The stated aim of the regulations is to make minor and technical changes to UK pensions legislation to ensure retained EU law continues to operate effectively, and to address other deficiencies arising from the withdrawal of the UK from the EU. The explanatory memorandum accompanying the draft regulations explains that the changes are being made as part of the Government's wider planning in the event the UK leaves the EU without a withdrawal agreement in place.

The draft regulations are due to come into force on "exit day" (which is 11pm on 29 March 2019), in accordance with the European Union (Withdrawal) Act 2018, and can be viewed here, together with the explanatory memorandum here. If there is a transitional period, it is possible that implementation of the regulations will be postponed.

Contact us

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

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