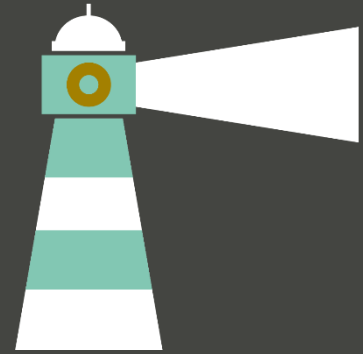


What's Happening in Pensions



Issue 79 - December 2019

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New government agenda: We summarise here the pensions promises in the Conservatives' manifesto, including reintroduction of the Pension Schemes Bill.

Pension protection levy: The PPF has issued its final determination and accompanying appendices and guidance for the 2020/21 pension protection levy and contingent asset rules. Economic conditions mean that many schemes' levies are expected to increase.

Adequacy of pension protection: On 19 December, the European Court is expected to give its judgment in *Bauer*, a German case concerning the level of pension protection required by the EU insolvency directive. The decision could have significant implications in the UK for the PPF, future levies and the DB scheme funding regime.

Investment consultants and fiduciary management: The Pensions Regulator has finalised guidance to help trustees with investment governance tasks, including choosing an investment governance model, setting objectives for investment consultants and tendering for fiduciary management and investment consultancy services.

Opposite sex civil partnerships: Regulations now allow opposite sex couples in England and Wales to apply to enter into a civil partnership, as an alternative to marriage. They also recognise equivalent overseas-registered relationships.

Rectification of drafting errors: In two recent cases, the High Court has granted rectification of errors in scheme pension increase rules where there was no positive evidence of a continuing common intention between the employer and trustees about what the rules should have said. In both cases, the judges concluded that the parties had not addressed their minds to the provisions in question at the time of the relevant rule amendments but that there was sufficient other evidence indicating what the rules were intended to say.

Pension scam transfer was maladministration: A recent Pensions Ombudsman case concerning a pension scam serves as a reminder that a member does not have a statutory right to a cash equivalent transfer value to an occupational pension scheme if they are not in receipt of earnings from any employment. There was also some reassurance for schemes that miss transfer deadlines because of ongoing due diligence.

Lost SERPS GMP increases: The Parliamentary and Health Services Ombudsman has determined that the government was not "open and accountable" about the loss of a state pension top-up to GMP increases for individuals who qualify for the new single tier state pension. There was, however, no order of compensation.

Incentive exercises: The Incentives Exercises Monitoring Board is ending its work and standing aside from the Code of Good Practice on Incentive Exercises. The Pensions Regulator will be responsible for future guidance.

New government agenda

The new Conservative government made the following pension promises in its [manifesto](#):

- It will reintroduce the Pension Schemes Bill. The Bill (see [WHIP Issue 78](#)) includes provisions on:

- DB scheme funding and investment strategy;
 - new grounds and non-compliance penalties for contribution notices;
 - new criminal offences for putting benefits at risk;
 - new notifiable events and harsher penalties;
 - transfer scam protections;
 - facilitating pensions dashboards; and
 - PPF compensation for transfer credits.
- It will "address the 'taper problem' in doctors' pensions" via an "urgent review" in the first 30 days. This relates to the tapering of the annual allowance for higher earners that has led senior NHS clinicians to reduce their working hours or decline additional shifts.
 - It will conduct a comprehensive review to look at how to fix the issue whereby members of schemes operating "net pay" tax relief (generally occupational pension schemes, including some master trusts) who do not pay income tax because they earn less than the personal allowance do not benefit from tax relief, whereas members of schemes operating "relief at source" (generally personal pensions) benefit from a "tax relief" HMRC contribution regardless of their income. This affects low earners, predominantly women. (The language of the promise suggests that any resolution might only benefit those earning above the automatic enrolment earnings trigger of £10,000 pa.)
 - It will "unlock long-term capital in pension funds to invest in and commercialise our scientific discoveries".
 - State pensions will continue to be increased annually by the "triple lock" (ie, the highest of the increase in average earnings, the CPI price inflation increase and 2.5%).
 - The lower earnings limit (LEL), above which National Insurance Contributions are payable, will be increased from the current £6,136 pa to £9,500 pa for 2020/21. (Note: In recent years, the LEL has also been the lower earnings threshold for automatic enrolment 'qualifying earnings'. If the alignment is maintained, pension contributions could be reduced. The increase could also impact low earners' qualification for the state pension: the state pension now requires a minimum of ten years' paid or credited NICs and 35 years for a full entitlement. The manifesto does not comment on these issues.)
 - The UK will leave the European Union in January 2020. There will be a transitional period until 31 December 2020 to agree the future relationship. The government says it will not extend that period, which leaves open the possibility of a "no deal" Brexit at the end of 2020. This could have an impact on employer covenant and the value of scheme assets and liabilities.

Pension protection levy

The Pension Protection Fund [has issued](#) its final determination and accompanying appendices and guidance for the 2020/21 pension protection levy and contingent asset rules.

This is the third year of a triennium, meaning that major changes were not proposed (see [WHIP Issue 78](#) for the consultation). There are no significant differences compared with 2019/20 but:

- the "Type A" (guarantees) contingent assets guidance includes changes to the requirements for the content, though not the overall approach, of guarantor strength reports (NB there is a slightly less prescriptive approach in the final guidance);
- there is an express prohibition on a service company (ie, broadly a company constituted to provide services to scheme employers and which derives its income from such activities) being a guarantor; and
- there is a new information note for actuaries on calculating any interim allowance for GMP equalisation liabilities when preparing a section 179 (PPF liabilities) valuation (with a few clarifying changes to the consultation draft).

In response to concerns raised about accounting allowances for GMP equalisation costs disproportionately affecting levies where the allowance causes the company to report a pre-tax loss rather than a profit, the PPF will permit affected companies to request an adjustment to their insolvency risk calculation.

The PPF summarises the changes of note in its [Policy Statement](#).

The confirmed 2020/21 overall levy estimate is around 8% higher than the expected total levy collection for 2019/20 (which itself is 15% higher than the PPF had originally estimated). There is no adjustment in respect of any increase in the PPF's compensation liabilities arising from the *Hampshire* case (see [WHiP Issue 72](#)), concerning the PPF compensation cap, or from the possibility of an adverse finding in the *Bauer* case (see below), concerning the provision of less than full protection.

In the consultation paper, the PPF said that the anticipated levy collection increase is due to declines in gilt yields resulting in larger deficits and the increased likelihood of employer insolvencies. It said that individual scheme levies will only change where their own underfunding or insolvency risk has changed. Employers and guarantors should therefore check for changes in their insolvency scores and consider whether to seek to mitigate any anticipated levy increase for their scheme.

Adequacy of pension protection

On 19 December, the European Court is expected to give its judgment in *Pensions-Sicherungs-Verein VVaG v Bauer*, a German case concerning the level of pension protection required by the EU insolvency directive.

Previous European Court judgments (notably *Hampshire* – see above) have indicated that 50% protection for each individual is sufficient but the Advocate General in the *Bauer* case recommended that the European Court reconsider the adequacy of this level of protection. The PPF provides less than full protection in a number of respects. Accordingly, depending on the outcome and the extent to which the judgment can be applied in the UK context, this case might have a significant impact for the PPF, future levies and the DB scheme funding regime.

Investment consultants and fiduciary management

The Pensions Regulator has finalised [guidance](#) to help trustees with investment governance tasks. The four pieces of guidance cover:

- choosing an investment governance model (including fiduciary management and investment consultancy);
- tendering or re-tendering for fiduciary management services;
- tendering or re-tendering for investment consultancy services; and
- setting objectives for investment consultants.

These guidance notes relate in part to compliance with requirements of a Competition and Markets Authority order that took effect from 10 December 2019. Under these, trustees are now required to have set objectives for investment consultants and to run competitive tendering exercises in respect of fiduciary management services: see our briefing note [Investment consultancy and fiduciary management: a dose of CMA medicine](#).

There is also a [consultation response](#) (see [WHiP Issue 77](#) for the consultation). The guidance will be updated when DWP regulations supersede the CMA order (see [WHiP Issue 77](#)).

Opposite sex civil partnerships

[The Civil Partnership \(Opposite-sex Couples\) Regulations 2019](#) allow opposite sex couples in England and Wales (with Scotland or Northern Ireland to follow) to apply to enter into a civil partnership, as an alternative to marriage. Applications could be made from 2 December 2019 and the first of those civil partnerships can be entered into from 31 December 2019.

Generally, the existing law on civil partnerships now applies in respect of opposite sex civil partners in the same way it does for same sex civil partners. This means:

- Schemes have to provide survivors' benefits to opposite sex civil partners in the same way that they do to same sex civil partners. As the terminology is the same, scheme rules may not need to be amended in order to reflect this if previous civil partner amendments were made in gender-neutral language.

- Overseas opposite sex partnerships that are equivalent to a civil partnership but are not marriage are since 2 December recognised in law as civil partnerships in England and Wales.
- As the law currently stands, female survivors of a male civil partner are entitled to the widower's GMP, rather than the more generous widow's GMP. This puts them in the same position as a female survivor of a female civil partner, but makes them worse off than a widow of a male spouse. This seems contrary to the government's stated intention and so could change.

Opposite sex couples are not, however, able to convert a civil partnership into a marriage in the way that same sex couples can. This may change, depending on the outcome of a consultation on the matter (see [WHiP Issue 76](#)).

Rectification of drafting errors

In two recent cases, the High Court has granted rectification of errors in scheme pension increase rules where there was no positive evidence of a continuing common intention between the employer and trustees about what the rules should have said. In both cases, the judges concluded that the parties had not addressed their minds to the provisions in question at the time of the relevant rule amendments but that there was sufficient other evidence indicating what the rules were intended to say.

The court can make a rectification order amending provisions of (among other things) a pension scheme trust deed and rules where it is satisfied that there is evidence demonstrating that the terms do not reflect the intentions of the parties. Rectification has retrospective effect. The High Court can now allow applications for summary judgment in rectification cases based on written evidence: this avoids having a trial and so reduces the cost of a court application.

Earlier this year, the Court of Appeal decision in *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd*, a case concerning rectification of a commercial contract, clarified the test to be applied in rectification cases. Two recent High Court decisions in pension cases, both concerning pension increase rules that were more generous than intended, have followed that judgment and granted rectification of the scheme rules.

The courts now accept that in cases (including most pensions cases) of a continuing common intention, there need not be any evidence of communication between the parties about the subject matter of the provision for which rectification is sought. This is often the case where no attention is paid to the provision in question at the time rule amendments are made because it is not intended to change that particular provision.

There does, however, need to be other evidence of a continuing common intention about how, in a pensions case, the scheme is to be administered:

- In one of these cases, *Blatchford Limited v Brian Stephen Blatchford and others*, replacement drafting resulted in the granting of 5% minimum increases instead of RPI up to 5%. There was no reason for granting such increases and no change had been implemented in practice.
- In the other case, *Colart International Holdings Ltd v Colart Pension Trustees Ltd and another*, a drafting error meant that more generous increases were unintentionally granted to GMPs when introducing a DC section. The judge was able to conclude that improving benefits was contrary to the commercial intent of the amendments. It was also the case that the higher increases had not been communicated or paid.

Pension scam transfer was maladministration

A recent [Pensions Ombudsman case](#) concerning a pension scam serves as a reminder that a member does not have a statutory right to a cash equivalent transfer value to an occupational pension scheme if they are not in receipt of earnings from any employment. In this case, this was not appreciated by the scheme administrator and a transfer was made to a scam scheme without – the Ombudsman found – proper due diligence and communication with the member.

The case concerned the Local Government Pension Scheme. Mrs H, aged 59, who had worked for the Hampshire County Council housing department and lives in Portsmouth, was cold-called by Pensions Matters Associates Limited. Via them, she requested a transfer value statement for her DB benefits. This was provided, together with a copy of the Pensions Regulator's "scorpion" scam warning leaflet. She applied for a transfer to a recently established DC occupational pension scheme of a steel stockholding company based in Warrington, declaring that she had read the leaflet. Some concerns

were noted by the Council but the transfer of £26,234 proceeded. Mrs H took a pension commencement lump sum but appeared to have lost the rest of her benefits.

Responding to Mrs H's internal dispute resolution procedure complaint, the Council said that it had no choice but to make the transfer, as she had a statutory right to take it. In fact, Mrs H was living on state benefits and had no current earnings from any employment. Following the High Court decision in *Hughes v Royal London Mutual Insurance Society Limited (2016)* (see [WHiP Issue 56](#)), this means that she had no statutory right to acquire transfer credits in an occupational pension scheme.

The Council therefore had a discretion whether or not to allow the transfer, which it had not understood. The Ombudsman determined that the Council should have made enquiries of Mrs H before deciding whether to make the transfer but failed to do so. It was maladministration to have failed to recognise the correct legal position and, as a consequence, conduct further due diligence. In particular, it should have contacted Mrs H by phone or email to explain its concerns. Had it done so, the Ombudsman considered it more likely than not that she would have withdrawn the transfer request.

The Council was ordered to reinstate net benefits in the scheme and pay Mrs H £500 for significant distress and inconvenience.

Concerning schemes missing transfer deadlines when undertaking thorough due diligence, the Ombudsman said: "Although that could amount to a valid maladministration complaint for undue delay, the overriding consideration for a scheme trustee or administrator must be to evaluate the transfer application carefully in order that a valid statutory transfer right is complied with and an invalid transfer application is legitimately withheld".

Lost SERPS GMP increases

The following is based on press reports: the source decision has not been published but has been seen by some journalists.

The Parliamentary and Health Services Ombudsman has determined that the government was not "open and accountable" about the loss of a state pension top-up to GMP increases for individuals who qualify for the new single tier state pension. There was, however, no order of compensation.

Between 1978 and 1997, GMPs accrued for individuals who were contracted out on a salary-related basis of the State Earnings Related Pension Scheme (SERPS, which was the additional state pension at that time). SERPS pension increases are more generous than for GMPs but GMPs are effectively deducted from SERPS pensions and SERPS (ie, the state) pays any excess. This gives individuals who receive a SERPS pension the benefit of full price inflation protected increases. The 2016 state pension reforms mean that individuals reaching their state pension age after 5 April 2016 do not receive a SERPS pension. No account was taken of these SERPS excess payments when converting accrued state pension entitlement into the single tier state pension. This means that these individuals lose the SERPS top-up payments that are payable to those who reached state pension age before 6 April 2016. The complaint in this case concerned the communication, or otherwise, of the loss of this benefit.

The Ombudsman decided that the government's Department for Work and Pensions (DWP) had failed to follow its own service standards, customer charter and communications strategy: "The DWP failed to fully acknowledge and explain negative impacts of pension reforms to those with large periods of contracting out, due to reach state pension age shortly after April 2016". The DWP has been ordered to report back to the Ombudsman within three months on how it will ensure that people can find out if they were affected.

About 50,000 people are reportedly affected, though many are unaware. Affected public sector workers are already being compensated by the government: this helps the government to satisfy GMP equalisation obligations (see [WHiP Issue 69](#)).

Some schemes' member literature referred to these SERPS top-ups to scheme pension increases being payable. Those that still do are no longer accurate for members reaching their state pension age after 5 April 2016. For more on this, see our briefing note [State pension reform and the end of contracting-out](#).

Incentive exercises

The [Incentives Exercises Monitoring Board](#) is ending its work and standing aside from the Code of Good Practice on Incentive Exercises.

This code outlines good practice as regards enhanced transfer value offers and benefit modification exercises such as pension increase exchanges (see [WHiP Issue 34](#)).

Users are from now on directed to Pensions Regulator [guidance](#). This guidance refers to the Code which, together with its accompanying "boundary examples", has been added to the Pensions Regulator's website. It will not, however, be updated.

FOR FURTHER INFORMATION, PLEASE CONTACT



Daniel Gerring
Head of Pensions
daniel.gerring@traverssmith.com
+44 (0)20 7295 3341



Susie Daykin
Partner
susie.daykin@traverssmith.com
+44 (0)20 7295 3247



David James
Partner
david.james@traverssmith.com
+44 (0)20 7295 3087



Andy Lewis
Partner
andrew.lewis@traverssmith.com
+44 (0)20 7295 3444



Dan Naylor
Partner
dan.naylor@traverssmith.com
+44 (0)20 7295 3454



Paul Stannard
Partner
paul.stannard@traverssmith.com
+44 (0)20 7295 3270