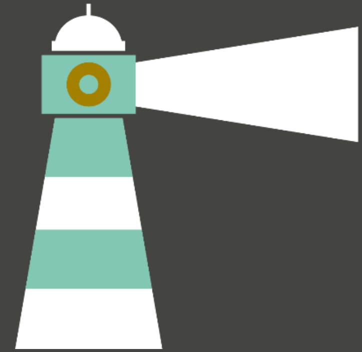
BRIEFING



What's Happening in Pensions

Issue 83 – August 2020

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Corporate Insolvency and Governance Act 2020: This Act took effect on 26 June 2020. It makes radical changes to UK insolvency legislation. Among other things, it allows a qualifying company to instigate a moratorium, giving it breathing space from many creditors' claims, and allows the proposal (perhaps during a moratorium) of a restructuring plan which can bind non-consenting creditors.

PPF compensation cap: In *Hughes v Pension Protection Fund*, the High Court held that the PPF compensation cap discriminates on grounds of age contrary to EU law and must be disapplied. The Court also ruled on the effect of the *Hampshire* decision concerning minimum PPF compensation.

Pension Schemes Bill: The Bill has completed its passage through the House of Lords and will commence its substantial House of Commons stages after Parliament resumes in September. We note here points of interest from the final House of Lords stages.

GMP equalisation - HMRC guidance: HMRC's latest GMP equalisation newsletter notes its position on the effect (or otherwise) of making GMP equalisation top-up payments on the authorised payment status of various types of previously paid lump sum benefits and the authorised payment status and tax treatment of the lump sum GMP equalisation top-up payments themselves.

GMP equalisation - industry group guidance: The GMP Equalisation Working Group has published its third and fourth guidance notes, addressing data issues and early stage member communications.

Pension age equalisation and retrospective amendment: The Court of Appeal has ruled in the latest instalment of the *Safeway Limited v Newton* retrospective amendment equalisation case. The scheme is now able to proceed on the basis that pension ages were retrospectively raised but only from a date much later than Safeway had intended.

Widowers' pensions and GMPs: A written statement to Parliament indicates that the government has accepted that its steps to equalise public sector schemes fully for same sex spouses and same sex civil partners creates unlawful sexual orientation discrimination against many widowers from a heterosexual marriage or civil partnership.

Finance Act 2020: The Act includes provisions on the changes to the tapered annual allowance, HMRC's elevated creditor status in a corporate insolvency, and an exemption from unauthorised payment charges for members who have retired early with a protected pension age and returned to work to help employers to deal with consequences of the COVID-19 pandemic.

Tax relief: The government has published a call for evidence on the issue for low earners whose pension schemes (generally occupational pension schemes) obtain tax relief using the 'net pay' rather than 'relief at source' system. Separately, the Public Accounts Committee of the House of Commons has called on HMRC to conduct a review on the impact of tax relief, highlighting pension tax reliefs in particular.

"Kickstart" scheme for young people: The Chancellor announced this scheme to help young people into work. The support for employers includes limited help with minimum automatic enrolment contributions.

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Pensions Ombudsman: The Pensions Ombudsman's latest corporate plan confirms that it plans to launch a new online customer portal. It also says that the Ombudsman will not, at least for now, replace the recently departed Deputy Pensions Ombudsman. This is partly due to a significant decrease in cases requiring a formal determination.

Data protection case: The European Court has ruled that the EU-US "privacy shield", like the EEA-US "safe harbour" regime, cannot be relied on under GDPR for the transfer of data to the US but that, subject to due diligence, this may not be an issue in practice because standard contractual clauses broadly work as intended.

Pension protection levy: The PPF is offering to waive interest charges on late payment of PPF levies in some circumstances related to the COVID-19 pandemic where these are paid within 90, rather than the usual 28, days.

DC charges and scheme consolidation: The government has issued a call for evidence and survey on the scope and level of the 0.75% DC automatic enrolment scheme default fund charge cap and on standardised cost disclosure.

Pensions Regulator COVID-19 guidance: The Pensions Regulator has updated its COVID-19 guidance for DC schemes on the implications of redirecting contributions that were being invested in gated funds.

Rectification and RPI/CPI: In *Univar UK Ltd v Smith and others*, the High Court granted rectification of scheme rules regarding inflation-linked pension increases where a consolidation had unintentionally 'hard-wired' RPI into the increase rule.

Automatic enrolment – seafarers and offshore workers: Two statutory instruments continue to apply automatic enrolment requirements in respect of seafarers and offshore workers. They would otherwise have ceased to apply at the end of June 2020.

Corporate Insolvency and Governance Act 2020

The Corporate Insolvency and Governance Act 2020 took effect on 26 June 2020. It makes radical changes to UK insolvency legislation. Among other things, the Act allows a qualifying company to instigate a moratorium, giving it breathing space from many creditors' claims, and allows the proposal (perhaps during a moratorium) of a restructuring plan which can bind non-consenting creditors. Though introduced in light of the COVID-19 crisis, these changes are permanent.

Neither a moratorium nor a restructuring plan is listed as an insolvency event under the Pensions Acts 1995 and 2004, so no section 75 employer debt or PPF assessment period is triggered (though this can be changed by government order). Security enforcement clauses under commercial contracts such as bank loans are, however, likely to be triggered but this will depend upon the drafting of the relevant contract.

The Act also contains a new limit on the operation of clauses in commercial contracts that would otherwise allow for the contract to be terminated if the counterparty goes into an insolvency process. This applies to a broad range of agreements, although there are a number of exclusions.

There are also provisions on presenting winding-up petitions and suspension of wrongful trading penalties. There is, however, still a Pensions Act 2004 notifiable event, requiring a report to the Pensions Regulator, where the employer is advised that it is trading wrongfully or where a director or former director knows that there is no reasonable prospect that the company will avoid going into insolvent liquidation.

For more detail, see our Finance department's briefing note on the Act.

Government amendments were passed in the House of Lords addressing the main pensions-related concerns (see WHiP Issue 80) but there are still potential issues for schemes, including as regards the employer covenant and the scheme's creditor status in a later employer insolvency.

Moratoriums

A moratorium is generally instigated by a company by filing papers at court. This is without the need for a hearing but the courts can be involved later (for example for a second time extension). It is overseen by one or more insolvency practitioners ("monitors") but the directors generally continue to run the company. The directors must believe that that the company is, or is likely to become, unable to pay its debts and the proposed monitor(s) must believe that the moratorium is likely to result in the company being rescued (it should be noted that, for a transitional period, the

monitor may disregard the adverse effect of COVID-19 in making this assessment). A moratorium initially lasts for 20 days but can be extended. Creditors, including pension scheme trustees, are entitled to information from the monitor(s) and can challenge decisions in court. Monitors must consent to any granting of security and to some property disposals.

During a moratorium, creditors (except as noted below) cannot issue statutory demands, petition for winding-up or (with limited exceptions) enforce security. The company has a payment holiday for its debts but there are exceptions where rights can be enforced, including:

- There is a broad exception for liabilities arising under certain financial services arrangements, including bank and (potentially) intra-group loans. The exemption of bank etc. debt is designed to avoid lenders refusing to provide debt funding to businesses that they thought could become distressed – the concern was that if the moratorium locked down the requirement to make payments to those lenders, they would refuse credit (or greatly increase the cost of lending) to whole sectors of the UK economy.
- There is also an exception for wages and salary payments, which are defined to include payments to an occupational pension scheme under a contract of employment. It may be (though this is not clear) that DB pension scheme contributions, including deficit repair contributions, are not paid under a contract of employment and so payment cannot be enforced during a moratorium. Similar logic would apply to section 75 debts and moral hazard liabilities. Oddly, while rights to DC occupational pension scheme contributions can be enforced, rights to personal pension contributions are not expressly included and might not be capable of enforcement.

These excepted debts, even where unsecured, have "super-priority" over most unsecured debts and over floating charges in an insolvency triggered within 12 weeks after a moratorium ends. But following Bill amendments, lenders and other financial services creditors will not now be able to gain super-priority for future unsecured debt instalments in a subsequent insolvency by accelerating them (where terms permit) during a moratorium. This change would not, however, seem to affect debt acceleration (including on-demand debts being demanded) before a moratorium begins.

If company money continues to be used to service the excepted debts during a moratorium but DB pension contributions are not paid, the priority creditors will benefit and the scheme will miss out on scarce company funds (especially if the moratorium fails to help rescue the company and it enters insolvency). Non-payment of DB contributions may, of course, have consequences under the scheme rules.

Following a Bill amendment, the Pensions Regulator and PPF will (where applicable) be entitled to information about the commencement, extension and ending of a moratorium and any change of monitor(s). The PPF will be able to challenge the actions of monitors or directors in the same way that trustees can. Under later regulations, the PPF also has the right to be involved in place of the trustees (though they must be consulted) in matters such as consent about an end date and creditor decisions about challenges.

Restructuring plans

This new procedure, involving a court application and creditor voting, can be used to compromise debts. It is similar to a scheme of arrangement but all creditors can be bound, even if their allocated class votes against the plan, through the use of a "cross-class cram down" provision. Where this is applied, however, the court must be satisfied that a number of tests are met, including that no member of the dissenting class(es) would be any worse off under the restructuring plan than they would be in the event of the likely alternative if the plan is not approved (which may well be administration or liquidation).

The intention here is to fill the gap between company voluntary arrangements (CVAs) (which cannot bind preferential or secured creditors and are "insolvency events") and schemes of arrangement (which lack a cross-class cram down mechanism and are not "insolvency events"). Some practitioners have suggested that it may be possible to use a restructuring plan to compromise a scheme's potential section 75 employer debt claim in certain circumstances, but this is not entirely clear. Depending upon the particular facts, a restructuring plan may be able to treat a pension scheme and its debt more aggressively than would have been realistically achievable under a CVA or a scheme of arrangement.

Following a Bill amendment, the Pensions Regulator and PPF must (where applicable) be given the information on restructuring plan proposals that is given to creditors. Later regulations (see above) also give the PPF the right to be involved, for example in attending creditor meetings (alongside the trustees) and voting on proposals (in place of the trustees, though they must be consulted).

PPF compensation cap

In *Hughes v Pension Protection Fund*, the High Court held that the PPF compensation cap discriminates on grounds of age contrary to EU law and must be disapplied. This was based on the EU human rights charter applying to EU member state governments when legislating to implement EU law (in this case, the EU insolvency directive). The Court also ruled on the effect of the *Hampshire* decision concerning minimum PPF compensation. The knock-on effects, if any, on pension schemes are not yet clear.

The case was brought by a number of Monarch and BMI airlines pilots, including two surviving spouses, plus Mr Hampshire (the same one from the 2018 case on minimum PPF compensation) and a Heath Lambert scheme member (Mr Hughes). It was a judicial review application concerning the method adopted by the PPF to calculate compensation following the *Hampshire* decision. The claimants argued that the PPF compensation cap (currently £41,461 pa at age 65) is age discriminatory because it only applies to those under normal pension age when a scheme enters PPF assessment, and that the PPF has been in breach of EU law. The government joined the case to defend the legislation.

The judge (Lewis J) held as follows:

- The PPF compensation cap constitutes unlawful discrimination on grounds of age contrary to EU law and must be disapplied. This is because (very broadly) the EU human rights charter requires that there be no discrimination on any of various grounds without objective justification when implementing EU legislation and there was not objective justification for the government introducing an age-based cap. The government's aims were legitimate (ie, moral hazard: the highest earners of an employer will try to keep their scheme out of the PPF; and employer levy cost concerns) but the measures taken were not appropriate and necessary. This was because of the very small numbers affected and the significant impact on them.

  Note that this decision gives rise to a further question: whether the PPF's 10% benefit reduction for members below normal pension age might be similarly unlawful. This issue was not argued but comments by the judge indicate that a distinction might be made.

- In the *Hampshire* decision (see WHiP Issue 72), the European Court had held that each affected employee or former employee muse receive at least 50% of the value of their accrued pension entitlement. The judge in *Hughes* has now ruled that the PPF is not required to assess whether the compensation payable in each pension year is equivalent to 50% of the pension benefits that would have been payable under the relevant pension scheme in that year. Instead, the overall compensation payable during retirement (or the lifetime of a survivor) must equal at least 50% of the amount of the benefits that the member (or the survivor) would have received under the scheme. The precise mechanism by which the PPF achieves that is a matter for it.
- The six year limitation period in the Limitation Act 1980 applies to restrict claims for arrears of compensation resulting from underpayments due to the application of the compensation cap.
- During the assessment period, trustees must ensure that benefits paid do not exceed the compensation that would be payable by the PPF including any sums due by reason of this judgment.

The PPF and government are considering the judgment and there might be an appeal.

Pension Schemes Bill

The Pension Schemes Bill has completed its passage through the House of Lords and will commence its substantial House of Commons stages after Parliament resumes in September. The following are the points of most interest from the final House of Lords stages.

- **Pensions Regulator powers and criminal offences**: Opposition amendments were tabled to restrict the new criminal offences and financial penalties to parties associated with or connected to the scheme employer. These were withdrawn after a short debate but with the stated intention that they will be raised again.

  Earl Howe, for the government, told peers that the Pensions Regulator has said that it will consult on specific guidance on prosecution of these offences and expects to publish that before the commencement of these provisions. He said that the government is concerned about creating loopholes if it narrows these provisions.

- **DB scheme funding**: A non-government amendment was passed relating to the new DB funding framework. The amendment is intended to help fully open DB schemes stay open by making sure that they can invest in riskier assets than a closed scheme, with the Pensions Regulator required to exercise powers accordingly. This is likely to be overturned in the Commons.
- **Climate risk**: The climate risk provisions inserted by an earlier government amendment (see WHiP Issue 80) have been expanded by accepted government amendments. The previous amendment gives the government power to impose requirements on trustees with a view to securing that there is effective governance of the scheme with respect to the effects of climate change, and to publish information. The new amendments allow regulations to require that the trustees explicitly consider climate change goals, including the 2015 Paris Agreement temperature goal.

  Regulations may require trustees to take into account the different ways in which the climate might change and the steps that might be taken because of those changes. Trustees may be required to publish information relating to the assessments they make by reference to the Paris Agreement goal or other climate change goals. This includes publication of the contribution of schemes' assets to climate change as a way of measuring the extent of alignment.
- **Transfers:** Accepted government amendments allow future regulations to restrict the right to a cash equivalent in prescribed circumstances to cases where the member has obtained information or guidance from a prescribed source and proves to the trustees that they have complied or do not have to do so. The Bill already permitted regulations to impose restrictions based on employment or place of residence.
- **Pension dashboards**: Two non-government amendments were passed. These may be overturned in the Commons but would prohibit dashboards (ie, those of commercial operators) from allowing financial transactions and would ban commercial alternatives to the Money and Pensions Service dashboard from being offered for a year from commencement.

  Independently, the Pensions Dashboards Programme has issued a call for input on the development of data standards with which pension schemes and providers will in due course have to comply.
- **Collective DC**: A non-government amendment was passed. Unless overturned in the Commons, this would require collective money purchase schemes to report on the extent to which they are operating in a manner fair to all members.

  Separately, draft clauses and accompanying notes published for the Finance Bill 2021 include detailed amendments to the Finance Act 2004 that will enable collective money purchase schemes to operate as registered pension schemes. Comments are requested by 15 September 2020.

GMP equalisation - HMRC guidance

HMRC's latest GMP equalisation newsletter notes its position on:

- the effect (or otherwise) of making GMP equalisation top-up payments on the authorised payment status of various types of previously paid lump sum benefits; and
- the authorised payment status and tax treatment of the lump sum GMP equalisation top-up payments themselves.

As expected, GMP conversion is not covered: HMRC notes that more detailed work needs to be done.

Key points are as follows. Note that only the courts can conclusively determine what the legislation provides.

The effect of making GMP equalisation top-up payments on the original lump sum benefit payment

Requirement to extinguish rights: For many authorised lump sum payments, there is a requirement to extinguish the member's (or dependant's) rights to benefits under the scheme or arrangement. These are: serious ill health lump sums, trivial commutation lump sums, small (a.k.a. *de minimis*) lump sums, winding-up lump sums, trivial commutation lump sum death benefits, and winding-up lump sum death benefits.

GMP equalisation may result in the individual having additional benefit in the scheme that was not commuted and extinguished when the original lump sum was paid. HMRC helpfully says:

> "The reference to extinguishing the member's (or dependant's) entitlement to benefits is to all the benefits or rights that could reasonably have been known about at the time of the payment. The lump sum will not stop being an authorised payment purely because, due to GMP equalisation, further entitlement is later identified that the scheme administrator could not reasonably have known about at the time of the lump sum payment."

Payment limits: Some authorised lump sum payments are limited by amount. These are: small (a.k.a. de minimis) lump sums, winding-up lump sums, trivial commutation lump sum death benefits and winding-up lump sum death benefits.

A GMP equalisation uplift may mean that the individual's true benefit value exceeded the relevant limit. For these, HMRC again helpfully says:

> "As long as the previous lump sum payment was not more than the relevant payment limit, that lump sum will not stop being an authorised payment purely because, due to GMP equalisation, further entitlement is later identified."

For trivial commutation lump sums, the limit is based on the value of the member's pension rights under all registered pension schemes on a nominated date. Here, HMRC takes a different position and says:

> "It may be that as a result of equalising GMP rights the value of the member's rights on the nominated date is found to be more than the relevant limit. If this is the case the original lump sum payment cannot be a trivial commutation lump sum. Unless the lump sum can meet the payment conditions for another type of authorised payment, for example a small lump sum, the payment will be unauthorised." (As to this, see immediately below.)

The authorised payment status and tax treatment of lump sum top-up payments

Making further lump sum payments: HMRC says that top-up payments to previous lump sums must satisfy the payment conditions in force at the time the top-up payment is made:

> "This may mean that a top-up lump sum payment cannot be an authorised payment, or it is another form of authorised payment. For example, a top-up payment to a trivial commutation lump sum originally paid in 2015 cannot be a trivial commutation lump sum but it may be payable as a 'small lump sum' if the relevant payment conditions are met."

It adds that taxable authorised top-up lump sums are subject to income tax in the tax year in which the top-up is paid, not the tax year of the original lump sum payment.

HMRC notes that some lump sum payments can only be authorised if paid to the member, so it is not possible for top-up lump sums in relation to the following lump sum benefits to be authorised payments if they are paid following the member's death:

- pension commencement lump sum;
- serious ill health lump sum;
- trivial commutation lump sum;
- winding-up lump sum.

Pension commencement lump sums (PCLSs): HMRC notes the strict time limits for authorised PCLS payments. Where (uncommonly) it is possible to pay a GMP equalisation top-up within that time frame, this is an authorised payment but the BCE 6 lifetime allowance calculation will need to be revisited and a revised BCE lifetime allowance statement given to the member.

Serious ill health lump sums: HMRC notes that these payments only have to extinguish entitlement under an arrangement, not the scheme. It seems to be saying that any top-up can be in a newly created arrangement for the member, which trustees may then be able to deal with separately.

Trivial/small pension commutation lump sums: HMRC notes that due to the rules on trivial commutation, "if any registered pension scheme has paid a trivial commutation lump sum to a member and the first such payment was more than 12 months ago no further payment of a trivial commutation lump sum to that member is possible".

It adds, however, that "Scheme administrators may consider using [the small pension commutation option] to pay a further lump sum to extinguish the members rights where:

- further benefits have been identified as payable to a member

- the value of their total rights under the scheme is not more than £10,000".

Here there is no requirement to pay to the member, so payments can be made after the member's death, and there is no time limit.

Defined benefits lump sum death benefits: Payment of a further lump sum death benefit will be taxable regardless of the age of the member when they died, if the further payment is made more than two years after the date the scheme administrator first knew, or could reasonably have been expected to have known, of the member's death.

Trivial commutation lump sum death benefit: There is no time limit for paying this type of lump sum. Where there is a GMP equalisation uplift to a dependant's scheme pension, trustees may therefore consider commuting that pension within the payment terms for this type of lump sum.

GMP equalisation - industry group guidance

The GMP Equalisation Working Group chaired by PASA has published its third and fourth guidance notes. These address data issues and early stage member communications.

The third guidance note covers the key data aspects of GMP equalisation. It identifies five key areas in respect of member data:

- Data required and Data availability: Trustees will need to consider what data is readily available, what could be available at some additional expense and effort, and what is unlikely ever to be available. They need to consider the impact of the missing data and weigh up the costs of obtaining it against the impact and risk of not doing so.
- Member groupings: Trustees could decide to deal with data issues for groups of members where there is a material impact sooner. Alternatively, they may decide it is most cost-effective to obtain all data at once.
- Adviser input: Trustees will need to consult relevant advisers on the data required, the impact of making assumptions or approximations and availability of resources. Decisions need to be taken about the process of data cleansing.
- Consistency and efficiency: Trustees should consider the potential need for GMP equalisation decisions in relation to data to be consistent with other similar decisions. As part of this they should also consider how the data requirements may dovetail with data needs for any other forthcoming projects.
- Calculation options: There are different options for calculating the post-16 May 1990 GMP and non-GMP elements for the opposite sex and the option chosen will depend on the data available, the benefit structure and the profile of the affected members.

The fourth guidance note covers communications to members in the early planning stages of GMP equalisation. There are sections on broad principles, possible questions and answers, a checklist of communications that may need to be reviewed, and ways of avoiding potentially confusing jargon.

Pension age equalisation and retrospective amendment

The Court of Appeal has ruled in the latest instalment of the *Safeway Limited v Newton* case concerning a retrospective amendment to equalise pension ages. The scheme is now able to proceed on the basis that pension ages were retrospectively raised but only from a date much later than Safeway had intended.

Facts

In September 1991, following the European Court's 1990 *Barber* decision, Safeway issued an announcement saying that pension ages would, going forward, be equalised at 65 for men and women. Before that, they were 60 for women and 65 for men. The change was confirmed by another announcement on 1 December 1991 but the scheme rules were not amended until a deed was executed on 2 May 1996.

The scheme's amendment power required amendments to be made by supplemental deed but allowed amendments to take effect "from a date specified in the Supplemental Deed which may be the date of such Deed or the date of any prior written announcement to Members of the alteration or addition or a date occurring at any reasonable time previous or

subsequent to the date of such Deed so as to give the amendment or addition retrospective or future effect as the case may be".

All of the relevant events took place before section 67 Pensions Act 1995 (which would otherwise prevent adverse retrospective amendments without consent) was in force.

Earlier case law

In October 2017, the Court of Appeal agreed with the High Court that the Safeway scheme rule amendments were not made until the deed was executed in May 1996. It added, however, that it is "undoubted" that accrued benefits can be retrospectively reduced with an appropriate amendment power unless EU equality laws prohibit such action. (As noted above, this is now subject to section 67.)

The European Court had concluded in *Smith v Avdel Systems Limited (1994)* that "Article 119 of the Treaty precludes an occupational scheme … from retrospectively raising the retirement age for women in relation to periods of service completed between 17 May 1990 and the date of entry into force of the measures by which equality is achieved in the scheme in question". Its judgment did not, however, refer to the scheme's amendment power and the Court of Appeal concluded that there was doubt about whether the European Court took into account the possibility of a scheme having a retrospective amendment power. (It later became apparent that the Avdel scheme rules did not permit retrospective amendments.)

The Court of Appeal therefore held that EU law as it applies in the case of scheme rules permitting retrospective amendments is not clear. In other words, the Court of Appeal was not sure what the European Court would say, if it were to consider all the arguments, in a case where there is a clear retrospective power of amendment. Would it really say that the advantaged class – women – have their benefits for the *Barber* "window period" upgraded from:

- defeasible (ie, subject to reduction or removal by a retrospective amendment power); to
- indefeasible (ie, incapable of being reduced or removed) rights?

The Court of Appeal therefore referred to the European Court the question whether the *Avdel* decision established a principle which would turn defeasible rights into indefeasible rights.

The European Court reframed the question and ruled as follows:

> "Article 119 of the EC Treaty (now, after amendment, Article 141 EC) must be interpreted as precluding, in the absence of an objective justification, a pension scheme from adopting, in order to end discrimination contrary to that provision resulting from the fixing of a normal pension age differentiated by gender, a measure which equalises, with retroactive effect, the normal pension age of members of that scheme to that of the persons within the previously disadvantaged category, in respect of the period between the announcement of that measure and its adoption, even where such a measure is authorised under national law and under the Trust Deed governing that pension scheme."

The new Court of Appeal decision

Following the European Court ruling, Safeway had to reduce its ambitions. It argued that section 62 Pensions Act 1995 (now in the Equality Act 2010), which wrote an overriding equal treatment rule into schemes from 1 January 1996, had equalised pension ages at 60 from that date. Accordingly, Safeway argued, only domestic law questions of retrospective amendment arose, not EU law questions of equalisation.

The Court of Appeal ruled that the Pensions Act 1995 closed the Safeway scheme's '*Barber* window' on 1 January 1996 for the purposes of UK law, equalising pension ages under the Safeway scheme at 60 (including, as required by EU law, for *Barber* window service from 17 May 1990 to 31 December 1995).

The parties agreed that, once pension ages are equal – here at age 60, European law is not concerned with a subsequent amendment retrospectively increasing pension ages for both men and women. This meant that the scope to amend pension ages for benefits accrued on and after 1 January 1996 was purely a question of what was permitted by domestic law.

This, in turn, allowed the parties to proceed on the basis that the May 1996 deed of amendment had lawfully retrospectively amended the scheme back to 1 January 1996. Consequently, from 1 January 1996, pension ages were age 65 for both men and women. For the period from 17 May 1990 (the date of the *Barber* judgment) to 31 December 1995 (the day before the Pensions Act 1995 equalisation took effect), however, EU law requires the 'levelling up' of benefits and so a pension age of 60 applied to men as well as women.

Implications

Though very interesting, the decision is of limited wider application. This is because:

- it only helps schemes that have retrospective amendment powers; and
- they would have had to use the power to raise pension ages on a date between 1 January 1996 (when the Pensions Act 1995 equalisation provision took effect) and 6 April 1997 (when section 67 of the same Act came into force).

In other cases, financial arguments may also be possible. The European Court had earlier said:

> "… it is possible that measures seeking to end discrimination contrary to EU law may, exceptionally, be adopted with retroactive effect provided that, in addition to respecting the legitimate expectations of the persons concerned, those measures are in fact warranted by an overriding reason in the public interest. In particular, according to settled case-law, the risk of seriously undermining the financial balance of the pension scheme concerned may constitute such an overriding reason in the public interest …"

Widowers' pensions and GMPs

A written statement to Parliament indicates that the government has accepted that its steps to equalise public sector schemes fully for same sex spouses and same sex civil partners creates unlawful sexual orientation discrimination against many widowers from a heterosexual marriage or civil partnership. Note, however, that the government's view of the law is not definitive.

This relates to male opposite sex spouses/civil partners not having any entitlement to survivors' pensions in respect of pre-April 1988 service. Entitlement to such pensions was granted to same sex spouses/civil partners in the equalisation measures adopted after the *Walker v Innospec Limited* case (see our briefing note **Supreme Court rules in favour of full equality for same sex spouses and civil partners**), hence the sexual orientation discrimination arguments. This issue also affects some private sector schemes. As there are widows' but not widowers' GMPs payable in respect of pre-April 1988 service, there are also separate potential GMP equalisation implications.

Finance Act 2020

The Finance Act 2020 is now on the statute book. The pensions content is as follows. HMRC's Pensions Tax Manual has been updated.

- **Tapered annual allowance:** The Act includes provisions raising the tapered annual allowance trigger income levels from 6 April 2020 and reducing the annual allowance to as little as £4,000 for the very highest earners, as follows. The increased thresholds were intended to ease NHS senior clinician staffing issues but are applicable to all, including members of private sector registered pension schemes.
  - The 'adjusted income' level will be £240,000 rather than the current £150,000. Adjusted income is, for the vast majority of taxpayers, their income from all sources (before deducting any pension contributions they make) plus the value of their employer-funded pension input. Individuals with income above this level have a reduced annual allowance.
  - The 'threshold income' level will be £200,000 rather than £110,000. Threshold income is, very broadly, taxable income from all sources less employee pension contributions (but with anti-avoidance measures) and without adding employer-funded pension input. Individuals who have income below this level do not have to consider whether their adjusted income is over the above threshold.
  - The full taper, with a reduced annual allowance of £4,000 rather than the current £10,000, will apply to those with adjusted income over £312,000 (rather than the current £210,000). It will taper down from £10,000 to £4,000 for those with incomes between £300,000 and £312,000.
- **HMRC creditor status:** The elevation of HMRC to preferential creditor status in a company insolvency will commence on 1 December 2020. This might be relevant to covenant advice.

- **Protected pension ages:** Members who have retired early with a protected pension age and returned to work, with the only or main reason being to help the employer to respond to the public health, social, economic or other effects of coronavirus, will not be hit by authorised payment charges. This exemption takes effect from 1 March 2020 and applies until 1 November 2020 (though this period can be extended). It is not restricted to the public sector.

Tax relief

'Net pay' consultation

The government has published a call for evidence (closing on 13 October 2020) on the issue for low earners whose pension schemes (generally occupational pension schemes) obtain tax relief using the 'net pay' rather than 'relief at source' system.

- Relief at source: This is the system generally used for contributions to personal pensions, including group personal pension plans and also some master trusts. The employer passes on employee contributions to a pension provider after having deducted income tax under PAYE on the employee's full pay (including the part contributed). The pension provider claims basic rate (currently 20%) tax relief from HMRC and adds it to the employee's pension pot. The employee has to claim any higher (40%) or additional (45%) rate relief via self-assessment.
- Net pay: This is the system generally used for contributions to occupational pension schemes including some, but not all, master trusts. The employee contribution is deducted from the employee's wages before applying PAYE income tax to them. That part of the wages is thereby never subjected to income tax, so the individual automatically benefits immediately from tax relief at their marginal rate and no claims to HMRC are needed.

An issue for low earners in 'net pay' schemes arises because HMRC pays the 20% tax relief payment to pension providers for "relief at source" scheme members even if they do not pay income tax (ie, because they earn less than the personal allowance – £12,500 for the current tax year). They therefore benefit from a tax relief payment even though they have not paid the tax. Workers who earn less than the personal allowance are therefore better off in a "relief at source" scheme than a "net pay" scheme.

The government estimates that there are about 1.5 million people affected by this issue. More women than men are low earners, so they are disproportionately affected.

The government says that it has not yet found a proportionate and straightforward solution. It moots four options but says that they all have drawbacks and introduce unwelcome complexities. It therefore seeks views on how any of the proposals (though the fourth is very much its preferred option) could be adapted so as to meet the government's principles for reform (simplicity, deliverability, proportionality). It also welcomes any other proposals.

Very broadly, the four options are:

- paying a bonus to affected members of 'net pay' schemes;
- a standalone charge for members of 'relief at source' schemes who do not pay income tax;
- requiring employers to provide two schemes, with contributions switching in pay periods depending on whether the member is earning above or below the personal allowance;
- obliging all DC schemes to operate 'relief at source'.

The government is also interested in suggestions for improvement of the 'relief at source' system, including evidence of any significant burdens compared to the 'net pay' system.

We also note that many employers operate salary sacrifice for member contributions. Where this is done, there is no employee tax relief but issues arise anyway. 'Relief at source' scheme members who make contributions by salary sacrifice miss out on an HMRC payment because the contribution is an employer contribution, not an employee contribution. For taxpayers there is no issue here but non-taxpayers who make contributions via salary sacrifice miss out on an HMRC top-up despite being in a 'relief at source' scheme. This is not mentioned in the call for evidence.

Tax relief review proposed

The Public Accounts Committee of the House of Commons has called on HMRC to conduct a review on the impact of tax relief. It highlights pension tax reliefs in particular. The Committee is concerned that "the Government has not made

any assessment of whether that huge cost [£38 billion for 2018/19] actually encourages saving for retirement or reduces dependence on state retirement benefits, or whether it just enables those already saving comfortably to save more".

"Kickstart" scheme for young people

The Chancellor announced this scheme to help young people into work. It involves funding for six month work placements for those aged 16 to 24 who are on universal credit and at high risk of long-term unemployment. It is due to operate until the end of 2021.

The support includes 100% of the relevant National Minimum Wage for 25 hours a week plus the associated employer NICs and employer minimum automatic enrolment contributions. Note that the pension contributions will be small or in some cases nil because there is no requirement to enrol workers under age 22 (though there is an opt-in right from age 16) and qualifying earnings start at £6,240 pa.

Pensions Ombudsman

The Pensions Ombudsman's latest corporate plan confirms that it plans to launch a new online customer portal later in 2020 for individuals to make applications and enquires, including supporting documentation. In the future, respondents (such as trustees and employers) will be able to submit through the portal and all parties will be able to track the progress of investigations.

It also says that the Ombudsman will not, at least for now, replace the recently departed Deputy Pensions Ombudsman. Part of the reason for this is that, as noted in the Ombudsman's annual report and accounts for 2019/20, 95% of complaints were resolved without a formal determination being issued (compared to 80% in 2018/19). The Ombudsman's Legal Director has authority to make determinations where the Ombudsman himself cannot.

Data protection case

The European Court has issued its judgment in a long-running case brought by Max Schrems against Facebook Ireland. It ruled that the EU-US "Privacy Shield", like the EEA-US "Safe Harbor" regime, cannot be relied upon to transfer personal data to the US in a way which is compatible with the requirements of the General Data Protection Regulation 2016 (GDPR) for restricted data transfers. It also, however, held that standard contractual clauses are still a valid mechanism for restricted data transfers, though there are some important caveats to their use. This case is relevant to pension schemes where member or other personal data is made available to employer group companies, service providers or other third parties in the US (including even if it is just hosted on a US server) or any other country which is not subject to an adequacy decision of the European Commission.

Mr Schrems objected to the transfer by Facebook of his personal data from the EEA to the US, following revelations made by Edward Snowden about access by US surveillance authorities to personal data. The initial case resulted in the downfall of the US "Safe Harbor" regime, which had been put in place as a mechanism for allowing personal data to be transferred from the EEA to the US in a way which complied with EU data protection laws requiring destination countries outside the EEA to keep the data safe and to the same standards as set out in the EEA. This new decision of the European Court examined the ongoing validity of two important mechanisms, approved by the European Commission, for transferring personal data in accordance with the GDPR outside the EEA in such a way as to maintain the safety of that data in the destination country. These were:

- the Privacy Shield, which was put in place to replace the US "Safe Harbor" regime, and which supposedly addressed the privacy concerns with "Safe Harbor" so that EEA-based businesses could continue to transfer personal data to their US counterparts which had signed up and complied with the new regime; and
- standard contractual clauses, which are a set of European Commission approved clauses which data exporters and importers sign up to, obliging them to keep personal data exported outside the EEA safe. There are two sets of clauses – clauses for use between data controllers, and clauses for use in respect of transfers from data controllers to

data processors. The European Court examined the latter set of clauses, but its reasoning could also be applied to controller to controller clauses.

Key points from the new judgment are that:

- the Privacy Shield is no better than the "Safe Harbor" regime for protecting EU personal data and has been invalidated. I can therefore no longer be relied upon as a valid mechanism for transferring personal data to the US. This leaves a lacuna, but for the fact that:
- standard contractual clauses are still valid for transfers of personal data to countries outside the EEA which have not been whitelisted by the EU as having adequate data protection regimes for keeping EU personal data safe. The Court highlighted, however, the importance of several provisions in the contractual clauses, including that data exporters and importers are required to carry out due diligence, not only into their own technical and organisational measures for transferring and storing the data safely, but also into the wider data protection regime of the country in which the data importer is located. (Whilst these provisions already exist in contracts using standard contractual clauses, to date some parties have not been particularly adept at enforcing them.) This point, together with the Court's reasons for finding that the Privacy Shield was inadequate for protecting the security of EU personal data from US surveillance authorities, means that whilst standard contractual clauses are likely to be the most viable alternative mechanism for transferring personal data to the US, they must be used with caution.

The Information Commissioner's Office (ICO) has issued a statement on the decision that also refers readers to FAQs issued by the European Data Protection Board (EDPB), whilst noting that further work on guidance is underway. The ICO says: "In the meantime you should take stock of the international transfers you make and react promptly as guidance and advice becomes available."

The impact of Brexit on future UK to US data transfer requirements remains to be seen.

For more detail, see our Commercial, IP & Technology department's briefing note.

Pension protection levy

The PPF is offering to waive interest charges on late payment of PPF levies in some circumstances related to the COVID-19 pandemic where these are paid within 90, rather than the usual 28, days. Schemes applying for this concession need to explain how they have been affected by the pandemic. Payment plans still remain available.

DC charges and scheme consolidation

The government has issued a call for evidence and survey on the scope and level of the 0.75% DC automatic enrolment scheme default fund charge cap (or equivalent combination charge) and on standardised cost disclosure. It closes on 20 August 2020.

The government also indicates that it will be consulting on regulations to encourage smaller schemes to consider consolidation where this would offer better value to their members.

Pensions Regulator COVID-19 guidance

The Pensions Regulator has updated its COVID-19 guidance for DC schemes on the implications of redirecting contributions that were being invested in gated funds. It has added the following section:

> "**Redirecting contributions back into the original fund**
>
> If you choose to redirect contributions back into the original fund when it reopens, the pre-existing expression of choice could still apply. This will depend on the individual circumstances, including the precise terms of the consent given, and of any correspondence with members after the fund was gated.
>
> The pre-existing expression of choice will probably still apply where members have either:

- consented to the redirection of the contributions on a temporary basis, until the original fund ceases to be gated
- been informed by the trustees that their contributions are being diverted into a default fund but that this will be corrected as soon as the original fund reopens

It is less likely that the pre-existing expression of choice would still apply where members have formally consented to the redirection of their contributions on an ongoing basis.

If, having taken legal advice, you determine that the pre-existing expression of choice no longer applies, and contributions are directed back to the original fund without obtaining a new expression of choice from the member, that original fund would fall within the definition of a 'default arrangement'."

Rectification and RPI/CPI

In *Univar UK Ltd v Smith and others*, the High Court granted rectification of the Univar Company Pension Scheme rules regarding inflation-linked pension increases where a consolidation had unintentionally 'hard-wired' RPI into the increase rule.

When the Univar scheme rules were consolidated in 2008, an apparent drafting error amended a reference to pension increases being linked to statutory requirements so that the rule instead referred to RPI. That resulted in no change at the time but when the statute was amended with effect from 2011 to refer to CPI rather than RPI, the amended scheme rules required RPI increases to continue to be applied.

The judge (Trower J) ruled, after considering documentation and hearing witnesses, that neither the employer nor the trustees intended this 'hard-wiring' of RPI in the rules. The advisers who prepared the consolidation admitted the mistake and documents they prepared at the time for the clients about the changes did not refer to this change. There was therefore, considered subjectively, a common intention as to what the rules should have said.

Accordingly, the judge was able to order that the rules be rectified to reinstate the original text, linking increases to the statutory requirements. This results in the scheme applying CPI, rather than RPI, to calculate pension increases from (as well as before) 2011.

Automatic enrolment – seafarers and offshore workers

Two statutory instruments (SI 2020/630 and SI 2020/634) have been laid that will continue to apply automatic enrolment requirements in respect of seafarers and offshore workers. They would otherwise have ceased to apply at the end of June 2020.

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