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TRUSTEE QUARTERLY UPDATE

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TRUSTEE QUARTERLY UPDATE – 1 SEPTEMBER 2017

Supreme Court rules same sex partners entitled to equal survivor pension benefits for all service

In a landmark ruling in the case of Walker v Innospec, the Supreme Court has held that surviving civil partners and spouses in same sex marriages must be provided with pension death benefits on the same basis as would apply to a marriage between a man and a woman. For more detail, see our e-bulletin.

IBM Court of Appeal ruling on Employer's power to make pension changes

In the case of IBM v Dalgleish, the Court of Appeal ruling has given important guidance on what limits apply to the way an employer can exercise its powers under a pension scheme. Overruling the High Court's decision that the members' "reasonable expectations" meant that IBM could not implement pensions changes that were not essential, the Court of Appeal held that a court should only interfere in an exercise of an employer's powers if it has acted in a way in which no reasonable employer would have acted. For more detail, see our e-bulletin.

Court of Appeal gives key judgment in salary capping case of Bradbury v BBC

In its judgment in Bradbury v BBC, the Court of Appeal has rejected a member's challenge to an exercise in which the BBC sought to cap the extent to which future salary increases would be pensionable. Mr Bradbury had challenged the BBC's actions on various grounds, arguing that (a) it was not entitled to determine that part of his salary would not count as basic salary and therefore not be pensionable; (b) the BBC's actions breached section 91 of the Pensions Act 1995 which provides that pension rights cannot generally be surrendered; and (c) that the BBC had breached its implied "duty of trust and confidence" as an employer.

Pensionable salary in the Scheme rules was defined by reference to "Basic Salary", which was in turn defined as "the amount determined by the BBC as being an Employee's basic salary or wages…" The Court held that this allowed the BBC to determine how much of a pay rise would count as Basic Salary and therefore be pensionable. Key to the Court's ruling on this point was that the BBC was not obliged to offer Mr Bradbury any pay rise at all. Therefore if it did offer a pay rise, it was entitled on offer it on the basis that it would not form part of Basic Salary for pension purposes. However, the BBC would not have been allowed to retrospectively exclude an amount from Basic Salary if it had previously counted that amount as Basic Salary.

The Court held the cap did not breach the anti-surrender provisions of section 91 of the Pensions Act 1995. It held that section 91 protects **accrued** rights and does not apply where a person may acquire a future right to a pension as a result of a future salary increase.

The Court held the BBC did not breach its duty of trust and confidence. The BBC's conduct had to be assessed against the background that it was faced with a multi-billion pound Scheme deficit and the BBC, the trustees and the unions had all agreed that something had to be done. Without reform to the Scheme, the BBC would have needed to make pension contributions that equated to about 10% of TV licence fees (rather than 3.5% previously). That would have damaged its ability to maintain the quality and range of its services.

Comment

This judgment illustrates that it is in principle possible for an employer to limit the extent to which future salary increases will be pensionable. However, two key elements to the outcome in this case were (a) the drafting of the pensionable salary definition; and (b) the fact that the member had no legal right to any pay rise. Had either of these things been different, the BBC might not have been able to carry out its salary capping exercise in the way that it did.

Supreme Court gives key ruling on pension sharing on divorce under Scots law

In the Scottish case of McDonald v Newton, the Supreme Court has clarified how to calculate what part of a member's rights are subject to pension sharing under Scots divorce law. Under Scots law (unlike English law) it is generally only property acquired during a marriage ("matrimonial property") which falls to be shared between the parties on divorce. Scottish legislation provides a formula for apportioning pension rights to determine what proportion of a party's pension rights are matrimonial property. The key question the Supreme Court had to decide was whether the cash equivalent of a member's rights falls to be apportioned by reference to the period during which the member was married and an active member of the scheme or whether any period of membership (active or not) counted. The Supreme Court held that "membership" for this purpose means any period of membership, active or not.

Court of Appeal holds calculating ill-health pension on part-time salary not disability discrimination

In the case of Williams v The Trustees of Swansea University Pension & Assurance Scheme, the Court of Appeal found that the Scheme had not discriminated against a disabled member by providing an ill-health pension calculated on the basis of the member's part-time salary immediately before retirement where the member had originally worked full-time, but had switched to part-time hours because his medical condition prevented him from working full-time.

The member in question had worked full-time for Swansea University for 10 years then switched to working part-time for three years due to his medical condition. His condition then rendered him incapable of working and he took ill-health early retirement. The Scheme rules provided for pensions to be enhanced where early retirement was due to ill-health, but the enhanced pension was calculated based on salary at actual retirement, so in the member's case was based on his part-time salary. The member argued that the enhanced pension should instead have been based on his full-time salary. He argued that calculating his pension based on his part-time salary was disability discrimination, as an individual who worked full-time and took early retirement due to a medical condition with a sudden onset would be entitled to a higher pension than a member whose progressive medical condition resulted in him first reducing his hours then taking early retirement.

The legal test which the Court of Appeal was required to consider was whether the member had been treated unfavourably as a consequence of something arising from his disability. The Court held that the member's enhanced pension equated to advantageous treatment which was not "unfavourable" just because it could have been more advantageous had his disability arisen more suddenly. It therefore held that the basis for calculating the pension did not constitute disability discrimination.

It has been reported that the member plans to appeal to the Supreme Court.

Legislation

New Money Laundering Regulations: implications for pension schemes not clear

New money laundering regulations which came into force on 26 June 2017 impose new duties on trustees. The regulations were not drafted with pension schemes in mind, and some key questions about how they apply to pension schemes have not yet been resolved.

The regulations contain new requirements for trusts to keep registers of information about the trust. If the trust is liable to income tax, capital gains tax, inheritance tax, stamp duty land tax, stamp duty reserve tax or Scottish land and buildings transaction tax it must pass the information to HMRC by 31 January 2018. In particular, trusts need to hold details of each beneficiary's National Insurance number or unique taxpayer reference (UTR) with additional record-keeping requirements applying to beneficiaries who have neither of these. There is also a requirement to provide details of trust assets valued as at the date that information is first provided to HMRC.

Many pensions professionals have queried how the requirements apply in a pension scheme context and whether HMRC really does want or need to be provided with such detailed information. Representatives from the pensions industry are seeking clarification from HMRC as to how the regulations are intended to apply to pension schemes. Trustees need to consider whether to take steps now in order to achieve compliance or whether to wait in the hope of receiving further guidance from HMRC regarding its expectations of scheme trustees.

The regulations also include a requirement for a person who acts as a trustee by way of business to be registered with HMRC. This requirement was also contained in previous money laundering regulations. Although neither set of regulations contains an exemption for pension schemes, HMRC appears to be continuing its existing policy, published in its guidance, of not requiring trustees of occupational pension schemes to register on the grounds that HMRC considers them "low risk".

Regulations ban early exit charges and extend ban on member-borne commission

New regulations are due to make changes restricting the charges that can be levied on members' money purchase benefits (including AVCs). The regulations prohibit or restrict "early exit charges" applied to members taking benefits before the scheme's normal pension age and extend an existing ban on member-borne commission for schemes used for auto-enrolment. Trustees can be fined by the Pensions Regulator if they allow charges to be imposed in breach of the regulations.

For members who join a scheme from 1 October 2017 onwards, trustees must not allow early exit charges to be imposed. For existing members, early exit charges cannot be increased after 1 October 2017, and in any event must not exceed 1% of the value of the benefits. Broadly, an "early exit charge" is an administration charge applied to a member who takes or transfers his benefits before normal pension age under the scheme if that charge is higher than would have applied at normal pension age.

The administrators of the scheme are required to write to the trustees by the end of October to confirm that they are complying with the restrictions, so trustees should diarise to make sure they receive this confirmation, and may wish to liaise with the administrators before then to make sure that this is on their radar.

For schemes used by an employer to satisfy its auto-enrolment obligations, the Government banned the use of new contracts allowing member-borne commission from 6 April 2016. "Member-borne commission" refers to using a member's pension pot to pay someone who advises the members or employer. From 1 April 2018 the ban is being extended to cover earlier contracts. There are detailed rules governing which payments and which members are caught by the extended ban, and what information the trustees and administrators are required to give each other. If a scheme currently makes any form of member-borne commission payment, it will be necessary to consider the rules in more detail to work out whether the payments will still be permitted after April 2018.

Pensions Regulator

Pensions Regulator publishes consultation response on professional trustee description and monetary penalties policy

The Pensions Regulator has published its response to its consultation on its policy for imposing monetary penalties under pensions legislation and the definition of "professional trustee" which the Regulator will apply for the purposes of deciding when a trustee should be held to higher standards by reason of being a professional trustee. The Regulator's key test for determining whether a trustee should be classed as a professional trustee is whether the person is acting in the course of the business of being a trustee.

Ombudsman upholds Trustees' refusal to provide more than one binding transfer value quote per year

In his determination in Mr Y (PO-16391) the Deputy Pensions Ombudsman has held that Trustees were within their rights to decline to provide a member with more than one binding transfer value quotation in a 12 month period. Legislation governing a member's statutory right to a transfer value provides that a member who has applied for one guaranteed transfer value quotation is not entitled to another until 12 months have elapsed since the previous application. In the case of Mr Y, the member had obtained one binding transfer value quotation then discovered through the Scheme's online portal that his guaranteed transfer value would have been considerably higher had he applied one month later. However the online portal made clear that the second transfer value was given for illustrative purposes only and did not confer any benefit rights. The Ombudsman held that the Trustees were entitled to decline the member's request for a second transfer value quotation notwithstanding that the member was willing to pay for it.

Complaint upheld where scheme refused to transfer bankrupt member's fund

In his determination in the case of Mr N (PO-10832) the Ombudsman has ordered the provider of a personal pension scheme to pay compensation to a member after it refused to action the member's transfer request for a year because the member's trustee in bankruptcy had requested that no transfer was made. The failure to make the transfer meant that the member's fund was held in cash for much longer than the member had intended and so missed out on investment returns. The member's trustee in bankruptcy had accepted that the member's fund did not form part of his estate for bankruptcy purposes, but had asked the scheme provider not to make the transfer while it investigated whether the member had made excessive contributions.

Comment

The facts of this case are unusual. The scheme provider had argued it had reason to be cautious because it was on notice that the member was a convicted fraudster who had previously submitted fraudulent transfer requests. The Ombudsman's determination says that the case has a "long and complex background" but does not set this out. Nevertheless, the determination illustrates that scheme trustees should not delay actioning a transfer value request made by a bankrupt member simply because the member's trustee in bankruptcy asks them to.

Pensions Ombudsman upholds complaint where transfer made to scheme that was no longer a QROPS

In his determination in the case of Mrs N (PO-9935) the Pensions Ombudsman has ordered a scheme to compensate a member for the tax charges incurred in consequence of a transfer to an overseas scheme being an unauthorised payment. A transfer to an overseas scheme will be an unauthorised payment and incur penal tax charges unless the receiving scheme is a "qualifying recognised overseas pension scheme" (QROPS). In Mrs N's case, the receiving scheme had been on HMRC's QROPS list, but had already been removed before the transfer request was made. The transferring scheme had a policy that it would not make overseas transfers to schemes that were not on the QROPS list. The transferring scheme's administrators had checked the QROPS list before making the transfer, but had apparently mistaken a scheme with a similar name for the receiving scheme and gone ahead with the transfer.

Comment

This case underlines the importance of making proper checks before making a transfer to an overseas scheme. Since the events giving rise to this case, HMRC has changed the name of its list to the "ROPS" (Recognised Overseas Pension Schemes) list. Even where a scheme appears on the list, it may not necessarily be a **qualifying** recognised overseas pension scheme, so schemes need to make sure they make appropriate checks.

Member not required to re-pay overpayments where she had been assured benefits were correct

In the case of Mrs S (PO-10270) the Ombudsman has ruled that a member is not required to re-pay overpaid benefits where, following a substantial previous overpayment which the member had re-paid under a repayment plan, the member had sought and been given an assurance from the administrator of the NHS Injury Benefit Scheme (NHSIBS) that a change to her state benefits would not affect her benefits from the NHSIBS.

Subject to any limitation period defence, a scheme which overpays benefits is normally entitled to require the member to re-pay the benefits. However, a member may have a defence if he can show that he has so changed his position that it would be "inequitable" to require him to re-pay. In this case, the member was able to show that she had spent any income received and taken out a loan for a car in reliance on her benefits having been correctly calculated. The Ombudsman held that the member had a valid "change of position" defence. However, he held that the specific assurance given by the scheme to the member in this case also meant that the member had an additional defence of "estoppel by representation". This defence applies where a person has reasonably relied to his detriment on an unambiguous representation.

Comment

This case illustrates that, although a scheme will normally be entitled to re-claim overpaid benefits provided it is not outside any limitation period, each case must be looked at on its facts, and there are circumstances where a member will have a valid defence to an overpayment claim.

Ombudsman upholds complaint where Trustees treated review of ill-health pension as new decision

In her determination in the case of Mr N (PO-11695), the Deputy Pensions Ombudsman has upheld a complaint where the Trustees discontinued an ill-health pension. The scheme rules gave the Trustees the right to suspend or vary an ill-health pension without specifying any particular test. Six years after granting the original ill-health pension, the Trustees obtained new medical evidence about the member's state of health. There was no evidence that his health had improved since the pension was originally granted or that new treatments had become available. However, the Trustees discontinued the pension on the grounds that the medical evidence did not indicate that the member's incapacity was likely, on the balance of probabilities to be permanent and there were potential treatment options which remained to be considered.

The Ombudsman held that once the decision has been made that the member met the eligibility criteria for an incapacity pension, that decision should stand unless and until there was a change in the member’s circumstances. The power under the rules to vary or suspend an ill-health pension should not be seen as an opportunity for the Trustees to change their minds or interfere with previous decisions. She ordered the Trustees to re-visit their decision to discontinue the pension.

Comment

This determination shows that trustees reviewing an existing ill-health pension in payment should not treat the review as if they were making a new decision whether to grant an ill-health pension. Once an ill-health pension has been granted, it will not normally be appropriate to suspend or vary it unless the Trustees have evidence that there has been a change in circumstances such as an improvement in the member's health or new treatments becoming available that were not available when the ill-health pension was originally granted.

Miscellaneous

Consultation response on pension scams: changes to transfer rights proposed

On 21 August 2017 the Government published its response to its consultation on pension scams. The Government intends to limit the statutory right to a transfer value to transfers to personal pension schemes, authorised master trusts, certain overseas schemes and schemes where members can provide evidence of an "employment link" with the receiving scheme.

Details of the "employment link" test have yet to be worked out. The Government intends to align the transfer rules changes with the roll out of the master trust authorisation regime in late 2018/2019.

Transfers in other "legitimate" circumstances will still be allowed on a discretionary basis, and the Government may introduce a power for schemes to amend their rules if they do not currently allow transfers where there is no statutory right. The Government is considering introducing new legal requirements regarding the need for schemes to make due diligence checks before making a transfer.

Other measures announced in the consultation response are a ban on making cold calls in relation to pensions, which will be introduced "when Parliamentary time allows" and a requirement for a scheme to have a non-dormant sponsoring employer unless HMRC exercises its discretion to allow a dormant sponsoring employer.

Government to publish White Paper on DB pensions later this year

The Government has announced that it plans to publish a White Paper later this year on the regulatory regime for defined benefit pension schemes.

Changes to state pension age

The Government has announced that it plans to accelerate the increase in state pension age from 67 to 68, although it will not actually pass the legislation to effect the change until a further review, due in 2023, has been carried out. Existing legislation provides that state pension age will be 68 for those born after 5 April 1978. The planned changes will affect those born from 6 April 1970 to 5 April 1978.

Reduction in money purchase annual allowance to go ahead for current tax year

In our last Update we reported that the provisions to reduce the money purchase annual allowance from £10,000 to £4,000 and to provide an income tax exemption for up to £500 worth of employer-arranged pensions advice had been dropped from the Finance Act 2017 in order to pass the Act before the General Election. The Government has since confirmed that it plans to pass legislation to give effect to these measures which will have effect from the start of the current tax year.

Lifetime allowance to increase in line with CPI inflation from April 2018

The Government has confirmed that the lifetime allowance will increase in line with CPI inflation from April 2018.

TPAS, Pension Wise and Money Advice Service to merge

In a response to its consultation, the Government has confirmed its intention to merge TPAS, Pension Wise and the Money Advice Service to form a single financial guidance body. It has since been reported in the pensions press that there are plans to bring TPAS's dispute resolution function within the remit of the Pensions Ombudsman.

Consultation response re valuing benefits with GARs for purposes of the advice requirement

The Government has published its response to its consultation on how benefits with guaranteed annuity rates should be valued for the purpose of assessing whether the value of the benefit exceeds £30,000 and the member is therefore required to take financial advice before transferring the benefit. The Government intends to simplify the requirements by providing that in future the value for assessing whether the advice requirement is triggered will be calculated by reference to the transfer value to which the member would be entitled (making the assumption that the member has a statutory right to transfer). The changes are due to take effect from 6 April 2018.

Pension surplus – changes to IFRIC 14 accounting standard

In our March 2017 Update we reported on the International Accounting Standards Board's proposals to make changes to IFRIC 14 and IAS 19, the accounting standards which address the circumstances in which a pension scheme surplus can be recognised in a company's accounts. At that time the final form amendments were expected to be issued in the second quarter of 2017. It is now expected that the final form amendments will be made in the first half of 2018, although they are still expected to apply to annual reporting periods beginning on or after 1 January 2019, with earlier application permitted.

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