ALLEN & OVERY

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Pensions: what's new this week

Welcome to your weekly update from the Allen & Overy Pensions team, bringing you up to speed on all the latest legal and regulatory developments in the world of occupational pensions.

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Brexit: TPR statement, 'no deal' regulations

The Pensions Regulator (TPR) does not expect the UK's withdrawal from the EU to have a significant effect on trustees' immediate ability to continue to administer their scheme effectively, according to a new statement. However, TPR reminds trustees to:

- take various Brexit-related steps, as per previous guidance. This includes 'no deal' planning and, for DB scheme trustees, discussing with sponsors how Brexit may affect the employer covenant. For more information, see WNTW, 9 April 2018 and WNTW, 18 July 2016;
- familiarise themselves with issues relating to the payment of occupational pensions in the event of a 'no deal', in order to maintain the continuity of payment of benefits. TPR expects trustees to consider government guidance (see WNTW, 21 December 2018) and to communicate with the scheme administrator (and members) where appropriate; and
- consider the implications for cross-border schemes (where applicable). In particular, currently authorised and approved schemes should be considering 'no deal' contingency plans. Trustees considering applying for authorisation are advised, where possible, to wait until there is more certainty before applying.

In other Brexit-related news, Parliament has approved the draft 'no deal' pensions regulations tabled by the government last month (see WNTW, 10 December 2018). The regulations have not yet been published but, once made, they will come into force on 'exit day' (29 March 2019), unless the government subsequently takes steps to prevent this.

For news on other Brexit-related developments, visit www.allenovery.com/Brexit.

TPR: quick guide to measuring data

TPR has published a new quick guide to measuring data for trustees. The guide contains an explanation of common data (basic data used to identify members) and scheme-specific (conditional) data, as well as a brief explanation of how to measure data and calculate a data score. The data score calculation examples underline that the test is whether each member has fully present and accurate common or scheme-specific data with the score being the percentage of the membership reaching this standard.

Measuring data is a key part of scheme record-keeping, and TPR expects trustees to review their data at least once a year – additional reviews may be expected if there has been a significant event (such as a change in administrator or administration system). TPR's quick guide to improving scheme data is designed to assist schemes where issues are identified.

Scheme returns for DB/hybrid schemes

TPR has published an example of the DB/hybrid scheme return to be submitted from January 2019.

The accompanying checklist outlines changes to this year's return, including:

- Hybrid schemes will be asked for information about whether the scheme is invested in with-profits, including whether any penalties are applied on surrender. If this is not currently known, TPR expects trustees to take steps to obtain this information for the next scheme return (to assist in checking compliance with future disclosure requirements).
- Hybrid schemes will be asked for information about whether the scheme complies with the rules on early exit charges (see WNTW, 31 July 2017).
- Schemes with contingent assets will be asked additional questions, in line with changes to Pension Protection Fund (PPF) requirements.
- Schemes will be asked for membership details as at the scheme year-end falling between 1 April 2017 and 31 March 2018, and for details about transfers-out in the past 12 months.

The checklist also provides information about submitting updated deficit reduction contribution certificates on Exchange.

Restructurings: TPR joint protocol, BSPS review

TPR has published an independent review into the communication and support given to members of the British Steel Pension Scheme (BSPS) during its restructuring exercise, and a new joint protocol between TPR, the Financial Conduct Authority (FCA) and the Single Financial Guidance Body (in connection with The Pensions Advisory Service (TPAS)).

The BSPS restructuring has received a high level of public attention – most recently, as a result of concerns that a high percentage of members who had opted to transfer out had not received suitable financial advice. For more information, see WNTW, 12 February 2018, our DB White Paper eAlert, 20 March 2018 and WNTW, 10 December 2018.

The **joint protocol** is intended to facilitate early intervention by TPR, the FCA and TPAS in assisting pension scheme trustees with providing information to members who are considering transferring out of their DB pension scheme. Although the process specifically covers situations where TPR has agreed a scheme restructuring, a similar approach is intended in wider situations where developments in relation to scheme sponsors may prompt transfer value requests (for example, if there is concern that the scheme may enter the PPF).

The protocol sets out arrangements for information-sharing and meetings between the three organisations (and the PPF) and processes for communicating with trustees. Template letters are included in the protocol; in appropriate cases TPR may require trustees to send these to members (with appropriate amendments as agreed by the three bodies in an expedited process under the protocol) alongside trustees' own communications. The template letter to trustees includes a list of information that should be included in communications to members who have requested a transfer quote, including an explanation of the risks of transferring out; information about the requirement to obtain financial advice; and information about the risk of pension scams. It also suggests that, in this type of situation, trustees should undertake additional monitoring and recording of transfer activity – specific information will be required from trustees on a monthly basis. As a package, this represents a more organised and interventionist approach to supporting schemes and members through a restructuring or similar situation triggered by concerns about or issues with the scheme sponsor.

The **independent review** contains numerous recommendations including:

- to consider whether legislation could simplify member choices in the event of a restructuring (such as allowing a partial default into a new scheme or setting requirements for a new scheme to provide better benefits than the PPF);
- to consider whether there should be a new power for TPR to consider the preparedness of a scheme to handle the member consultation in the event of a regulated apportionment arrangement, and if necessary to delay or stop it;
- to consider whether duties for trustees of DB schemes should more explicitly cover a duty to communicate effectively with members; and
- that TPR should provide additional support and guidance for trustees, and should consider directing guidance at 'what good looks like' rather than the legal minimum for compliance.

Determining incapacity: USS v Scragg

The High Court has allowed an appeal against a decision by the Pensions Ombudsman (TPO) that, on a proper interpretation of the rules of the Universities Superannuation Scheme (USS), the trustee was not bound by the employer's conclusion that the member suffered from incapacity: *Universities Superannuation Scheme Limited v Scragg*.

The USS rules stated that a member qualified for an early pension on incapacity where certain conditions were met: these included that '[i]n the employer's opinion the member is suffering from incapacity' and '[t]he trustee company determines that the member is suffering from total incapacity or partial incapacity'. The rules provided that the trustee was to make its decision 'on the balance of probabilities, having regard to a medical opinion'.

The dispute arose because Mr Scragg's employer considered that Mr S was incapacitated and applied for an ill health pension on his behalf. However, the trustee's medical panel considered that Mr S did not meet the test for incapacity. Mr S argued that, as his employer had found that he was incapacitated, the trustee was limited to deciding whether he was partially or totally incapacitated, but not whether he was incapacitated at all. TPO found in favour of Mr S (which was consistent with a 2015 TPO decision in relation to an earlier version of the scheme rules). The trustee appealed.

Mrs Justice Rose disagreed with TPO's interpretation of the rules. The rules both entitled and required the trustee to determine for itself, with regard to medical opinion, whether the member was suffering total or partial incapacity, which included whether the member was suffering any incapacity at all. For practical reasons and in order to balance the interests of the employer (which might support an incapacity application in the interests of good relations with an employee) against the interests of the body of funders of the scheme, the trustee's interpretation was the correct one. The member had also argued that the current version of the rules had been adopted after the earlier PO

decision, and that if the trustee disagreed with TPO's interpretation of the rules, it would have clarified the wording in the new version of the rules. This was rejected; Mrs Justice Rose commented:

> *'[i]n my judgment that is the kind of interpretative tool which the Supreme Court has disapproved… members of the pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established. This should lead the court construing the scheme rules to concentrate on the words used and attach less weight to the background factual matrix than might be appropriate in commercial contracts'.*

Court of Appeal: JV parties liable for pension deficit

The Court of Appeal has unanimously dismissed an appeal against a High Court decision that companies participating in a joint operating arrangement (JOA) were liable to pay a share of the deficit recovery charge (DRC) incurred by the operator in relation to its employees' membership of a DB scheme: *Spirit Energy Resources Ltd v Marathon Oil LLC*. To read about the High Court decision, see WNTW, 19 March 2018.

Under the JOA, the operator (Marathon Oil) had submitted draft operating programmes and budgets to an Operating Committee made up of representatives from participant companies. Marathon Oil had hired employees to work on the operation (which included membership of a DB scheme) and the operation was approved by the Operating Committee; however, a substantial pension deficit subsequently arose. Marathon Oil argued that it was entitled under the JOA to require the participant companies to pay their share of the DRC; the appellant participant companies argued that they were not liable under the JOA for future liabilities which were not foreseen or contemplated when the Operating Committee approved and authorised the programme and budget.

The Court of Appeal held that the normal and ordinary meaning of the JOA meant that the participants were liable for the DRC. Amongst other reasons, the JOA stated that all costs and expenses of all operations shall be borne by the participants (which included the DRC), and there was no carve-out for costs and expenses that were unknown or unknowable when the head of cost was first approved and authorised.

Pension scams: new Insolvency Service materials

A new press release from the Insolvency Service warns pension scheme members about pension 'misuse' – this phrase is used to cover both scam activity (such as pressure to access pension savings and invest in unregulated schemes) and pension trustees not carrying out their duties properly (in connection with the receiving schemes). Since 2015, the Insolvency Service has applied to the courts to wind up 24 companies that have carried out a form of pension misuse. The Insolvency Service's 'Protect your pension' website contains guidance and information for members, as well as case studies of some of the Service's actions in relation to pension misuse.

Annual GMP uprating order

The government has laid before Parliament a draft of the annual uprating order for guaranteed minimum pensions (GMPs). Once approved by Parliament, it would come into force on 6 April 2019.

According to the draft order, the rate at which the GMP element of an individual's occupational pension entitlement accrued in tax years 1988/89 to 1996/97 must be increased would be 2.4%.

Latest HMRC guidance

HMRC has published a short article on GMP conversion and GMP equalisation. It is largely factual and does not contain any information about potential easements to tax rules in connection with GMP equalisation.

HMRC has also published issue 41 of its Countdown bulletin for administrators dealing with reconciliation processes after the end of DB contracting-out. The bulletin notes that the deadline for scheme financial reconciliation requests is 28 February 2019, and that it is being extended to schemes with a live file in scheme cessation. It also includes a reminder about contribution equivalent premiums, and a note that scheme reconciliation service (SRS) automated responses asking for queries to be resubmitted should be ignored. This is because the deadline for submitting clerical and automated SRS queries has passed.

Seminar: a stronger Pensions Regulator: new risks for UK corporates?

The government intends to strengthen TPR and make changes to scheme funding rules. Partner Neil Bowden and Counsel Jessica Kerslake will discuss the proposed changes, their implications for corporates and M&A activity, and expected timing at our free lunchtime client seminar on Wednesday 6 February 2019. Click here for more information, and to register to attend.

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