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.

Equalisation: CJEU limits retrospective amendment | Latest HMRC newsletter | TPR publishes no-deal Brexit guidance | Government updates investment duties factsheet

Equalisation: CJEU limits retrospective amendment

Retirement ages can only be retrospectively 'levelled down' where this is objectively justified, even if the scheme rules apparently permit a retrospective change, the Court of Justice of the European Union (CJEU) has ruled: *Safeway v Newton*.

Following the *Barber* decision in 1990 (and later cases), pension schemes were required to equalise pension ages for men and women. Effectively, pension schemes had to level up benefits in respect of service from 17 May 1990 for men to the level enjoyed by women (for example, age 60 instead of 65) until the scheme rules were amended to achieve equalisation – this intervening period is known as the '*Barber* window'. 'Levelling down' is the practice of lowering the retirement age for men to that of women during the *Barber* window, but then equalising at a higher age for both men and women.

Safeway had argued that the scheme's Normal Pension Age (NPA) had been equalised at 65 for men and women in December 1991, based on notices to members (a formal deed of amendment was executed in 1996). Both the High Court and the Court of Appeal concluded that the scheme's amendment power could only be exercised by deed and not by announcement (although the deed could have retrospective effect), meaning that the amendment to the rules did not occur until May 1996. This led to the issue of whether a retrospective increase to the NPA by the 1996 deed was prohibited by European law where there was a power to do so under domestic law. The Court of Appeal referred this issue to the CJEU. To read about the earlier decisions see WNTW, 7 March 2016 (High Court) and WNTW, 9 October 2017 (Court of Appeal).

The CJEU has now ruled that, in the absence of objective justification, European law prevents a pension scheme from retrospectively equalising the NPA at the higher pension age, even where this is permitted by domestic law and the scheme rules. The CJEU commented that the evidence before it did not demonstrate an overriding reason in the public interest which could provide objective justification; however, it left this issue for the Court of Appeal to 'verify'. In the CJEU's view, 'the risk of seriously undermining the financial balance of the pension scheme' may amount to an overriding reason in the public interest.

The Court of Appeal will now consider whether any objective justification exists – its guidance may clarify the availability of an objective justification argument in these circumstances in practice. It

should also consider the issue of whether the 'equal treatment rule' in section 62 of the Pensions Act 1995 had the effect of closing the *Barber* window in January 1996, as it had deferred this point until after the CJEU decision.

For some time, there has been a general view that retrospective levelling down was not permitted (based on the decision in *Harland v Wolff*) – the Court of Appeal had introduced some doubt by ruling that it was not clear whether scheme rules might effectively provide an exception to this in some circumstances. However, subject to the potential 'objective justification' argument, the CJEU has now ruled out retrospective levelling down. This means that the decision is most likely to be of interest to schemes that initially equalised on an informal basis, such as schemes with an 'amendment by announcement' power. Whether or not an announcement was effective to amend the scheme prospectively will depend on the rule in question – in this case, the courts were clear that the announcements did not constitute a formal amendment of the scheme. Trustees of schemes in a similar position, and where there has been no subsequent review of whether the scheme was properly equalised, may wish to take advice.

Latest HMRC newsletter

HMRC's latest Countdown bulletin (no. 49) includes information for administrators dealing with reconciliation processes after the end of DB contracting-out. The latest edition contains information on the services and support that HMRC will provide following the end of the Scheme Reconciliation Service (SRS), including the following:

- Schemes that engaged in SRS will receive a final data cut later this year (which may include additional member liabilities), but will not be able to query the information with HMRC.
- HMRC will only amend Scheme Contracted Out Numbers (SCONs) in limited circumstances. HMRC notes that it will not share the SCON with customers or their agents unless it is part of a subject access request under data protection rules.
- All GMP queries should be made via the GMP checker at a 'life event' (for example, reaching GMP payable age). HMRC will amend records if the GMP information held is incorrect. For other queries, schemes will be asked to explain how the query falls within the (limited) service provided by HMRC.
- There is no longer an opportunity to pay Contributions Equivalent Premiums (CEPs) for members, and HMRC will not accept queries where a scheme believes it has paid a CEP but this is not recorded on HMRC's records.

Schemes are reaching the end of the data reconciliation process with HMRC, and the latest newsletter indicates that HMRC intends to take a firm line on the finality of its records, and will only continue to provide a very limited service to schemes. Schemes that disagree with data involving significant financial liabilities should seek advice.

TPR publishes no-deal Brexit guidance

The Pensions Regulator (TPR) has published high-level no-deal Brexit guidance for existing UK-based cross-border schemes and UK employers contributing to EEA-based pension schemes.

Trustees of, or employers contributing to, cross-border schemes are likely to have taken legal advice on their specific circumstances and contingency plans already, but TPR asks trustees and employers to contact it if there is an urgent business need to set up a new cross-border arrangement or if they have not been contacted by TPR or another EEA regulator about an existing arrangement in relation to Brexit.

Government updates investment duties factsheet

The government has updated its factsheet on the implementation of the revised Shareholder Rights Directive (SRDII) in respect of pension schemes. The government has updated section 4 ('What trustees need to do') to refer to 'relevant schemes' and 'other schemes' (previously it referred to DC and DB schemes), and to include additional detail – for example, the factsheet now refers to default arrangements. You can read more about the requirements in our briefing 'ESG, stewardship and transparency in pension scheme investing'.

Trustees should also ensure that there is a plan in place to comply with the 10 December deadline for the new requirement to set objectives for investment consultants (for more details, see WNTW, 17 June 2019).

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