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22 July 2019

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.

Negligent misstatement but no *Scally* breach: *Corsham* | TPR update on governance, code of practice review | ICO consults on draft data sharing code | New GMP equalisation guidance | TPR and TPO annual reports published | Limitations in overseas opinion on PPF guarantee ineffective in UK: *Caribonum* | Government statement on *McCloud* litigation | Refusal of pension to unmarried partner was discriminatory: *Langford*

Negligent misstatement but no *Scally* breach: *Corsham*

The High Court has resisted extending the scope of the *Scally* duty for employers to provide information in some circumstances: *Corsham*. The case concerned an appeal by former police officers against a determination of the Pensions Ombudsman (TPO); the individuals complained about adverse tax consequences as a result of being employed in a civilian role post-retirement – the complaints were against Chief Constables (with whom they had a quasi-employment relationship before retirement) and police authorities (the post-retirement employers, and also the (sub-)scheme administrators for the purposes of the Finance Act 2004). Mr Justice Morgan agreed with the former officers that TPO had not made all the necessary findings of fact, did not appreciate that the police authority was the scheme administrator, and did not deal with the allegations of negligent misstatement.

Morgan J concluded that, in relation to the Avon and Somerset appellants, the police authorities were liable for negligent misstatement. The appellants had been sent letters referring to 'tax-free lump sums' even though the police authority had actual knowledge of the retirement dates and re-employment offers – under tax rules, a break of at least one month was required. It should have realised that the individuals would lose their protected pension age and that the payments would be unauthorised. The police authority had a responsibility not to make statements which it should have understood were highly misleading and which did foreseeably mislead those complainants.

However, the appellants were not successful in their argument that the Chief Constables had breached a duty of care in tort analogous to the '*Scally* duty'. The judge rejected this argument – the issue in this case was not a failure to provide information about rights arising under the quasi-employment relationship, but about tax consequences external to that relationship. Morgan J considered that it 'would be a major and unjustified extension' of the decision in *Scally* to hold that there was a duty to advise, inform or warn the appellants of the tax consequences. In addition, the Chief Constables were not responsible for the administration of the pension schemes, and the new employment was with the police authorities (not the Chief Constables).

A blog post discussing this decision will be available shortly.

TPR update on governance, code of practice review

To meet the requirements of the IORP II Directive, the government introduced changes to pension scheme governance requirements, including new matters to be covered in a code of practice by the Pensions Regulator (TPR) – to read more about the regulations, see WNTW, 29 October 2018.

TPR has now issued a statement on its approach to implementing these requirements. It is reviewing its current codes of practice and expects to combine the content of its current codes to form a single, shorter code. It plans to develop the new code in phases, and will first focus on reviewing the internal controls and DC codes, with a consultation expected later this year. The statement suggests that trustees will need to demonstrate that they have an effective system of governance within 12 months of the publication of the updated code, although this is a tighter timescale than is provided in regulations for trustees to carry out their first own-risk assessment.

ICO consults on draft data sharing code

The Information Commissioner's Office (ICO) is consulting on a draft code of practice on data sharing between data controllers. It includes guidance on good practice in routine data sharing as well as one-off situations, for example where there is a merger or acquisition or other restructure. The consultation closes on 9 September 2019.

New GMP equalisation guidance

An industry working group has published a 'Call to action' for trustees and sponsors on GMP equalisation, which includes a key actions list. The guidance comments on issues relating to GMP rectification, data, and current scheme transactions (such as transfers). The group expects to publish 'good practice' guidance later this year on data, tax, impacted transactions, methodologies, and reconciliation/rectification projects. HMRC has recently announced that updated guidance on tax issues is unlikely to be published before the autumn.

TPR and TPO annual reports published

TPR and TPO have published their annual reports for 2018-2019.

TPR's annual report contains statistics on its performance over the year including data on its enforcement activity – for example, there was a 32% increase in its use of frontline (non-auto-enrolment) powers. However, TPR engaged in less proactive casework than the previous year (88% of the level in 2017-2018). This is explained as being due to the introduction of TPR's 'new' supervision approach (including 1:1 supervision), and the reallocation of resources.

TPO's annual report includes statistics about the types of complaints being investigated by TPO, and the extent to which complaints are resolved informally. Almost 90% of complaints are concluded without a determination by the Ombudsman (this includes the resolution of 2,165 'early resolution' cases). The most common type of complaint was in relation to transfers.

Limitations in overseas opinion on PPF guarantee ineffective in UK: *Caribonum*

The High Court has dismissed an appeal against an order for summary judgment in favour of a pension scheme trustee: *Caribonum Pension Trustee v Pelikan Hardcopy Production*.

The trustee had brought a claim under a guarantee given by Pelikan Hardcopy Production (PHP), a company registered in Switzerland. There were no material differences between the deed and the PPF standard-form Type A contingent asset guarantee. The deed was stated to be legally binding, valid and enforceable subject to the reservations – this included reservations or qualifications of law contained in a legal opinion. A Swiss legal opinion annexed to the deed stated that: 'The enforcement of a guarantee, indemnity or other obligation of [PHP] for and with respect to any obligation of its shareholder or any of its affiliates … is limited to the freely disposable shareholder equity of [PHP]…'. The guarantee was governed by English law and the High Court previously ruled in favour of the trustee that the legal opinion could not reduce PHP's liability under its primary guaranteed obligations (for more information, see WNTW, 17 September 2018).

PHP argued that it was a term of the guarantee that its obligation to make any payment could not survive or arise once it ceased to have any freely disposable shareholder reserves but Judge Pelling QC has dismissed this argument, agreeing with the earlier ruling that the clause was a representation and not a contractual term, and did not limit liability under the guarantee.

Government statement on *McCloud* litigation

Recently we reported that the Supreme Court had refused permission to appeal in the long-running *McCloud* and *Sargeant* cases (see WNTW, 1 July 2019). The Court of Appeal had ruled that transitional scheme closure arrangements in relation to the Judicial Pension Scheme and the Firefighters' Pension Scheme were unlawfully discriminatory.

The government has now confirmed that it intends to remedy the difference in treatment across public service schemes. The above litigation will return to the Employment Tribunal to determine the remedy; the government will also engage with employer and member representatives to inform its proposals to the Tribunal and in respect of the other public service pension schemes.

The statement also notes that the government remains committed to ensuring that the cost of public service pensions are affordable for taxpayers and sustainable for the long term, suggesting that the government could seek to make further changes to the schemes in future.

Refusal of pension to unmarried partner was discriminatory: *Langford*

The Court of Appeal has held that a provision in a public service pension scheme excluding an unmarried partner from receiving a survivor pension (because she and her estranged husband were not divorced) was unlawfully discriminatory: *Langford v Secretary of State for Defence*.

Mrs Langford had previously brought a case about the refusal to pay her a pension under the Armed Forces Pension Scheme (see WNTW, 7 April 2015). In the present case, she argued that the failure to pay her benefits under another scheme for dependants of armed forces personnel was unlawfully discriminatory (being contrary to the European Convention on Human Rights). One of the grounds of appeal was that the Upper Tribunal had not correctly applied the 2017 Supreme Court decision of *Brewster* (see this blog post for a discussion of that decision). Mrs Langford did not qualify as a surviving adult dependant because she was not divorced from her estranged husband; she and the deceased member had lived together for 15 years.

The Court of Appeal concluded that the discrimination was unlawful in the case of Mrs Langford. However, it did not rule out the possibility that, in other cases (including in relation to other public service schemes), a similar rule could be justified and proportionate.

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