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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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Government consults on collective DC schemes

The government is consulting on proposals to introduce collective DC schemes (CDC schemes). CDC schemes pool and invest contributions, with a view to delivering better member outcomes than individual DC arrangements. The intention is to create a new legal framework for CDC schemes, rather than using the existing framework for defined ambition schemes – the legislation would be introduced as soon as parliamentary time allows. The impetus comes from proposals for the Royal Mail pension arrangements; the proposed framework would support that suggested model but could be modified if and when wider interest in pooled pension schemes develops.

Under the proposals, contributions would be invested in a collective fund, meaning members do not need to make choices about investments or conversion into a retirement income stream. CDC benefits could be classified as a specific type or sub-set of money purchase benefit. CDC schemes would not be 'accumulation only', like traditional DC arrangements: they would also provide income in retirement. The scheme would provide details of a target (estimated) level of benefits: the levels of current and prospective pensions may be adjusted to match the value of the assets. The government proposes the adjustment should be set out in scheme rules rather than being a discretionary decision for trustees, and recognises the significant member communication challenges involved.

Existing benefits would be unaffected – the plan is for new CDC schemes (or new segregated CDC sections of existing schemes) to be established for future accrual. The employer would not be liable for guaranteeing benefits, and CDC schemes would not be eligible for the Pension Protection Fund (PPF). CDC schemes would need to be pre-authorised by the Pensions Regulator (TPR) based on similar criteria listed to those used for master trusts, but potentially with additional requirements in areas including member communications and arrangements for investments, funding and adjustments to benefits. Changes would be required to other legislation to cater for this new type of scheme – for example, the interaction with auto-enrolment, revaluation of deferred benefits, protection of subsisting rights, and transfer provisions would need to be considered.

The consultation closes on 16 January 2019.

HMRC: SRS deadline extended

HMRC has published issue 38 of its Countdown bulletin for administrators dealing with reconciliation processes following the end of DB contracting-out. The bulletin contains important updates including an announcement that the deadline for Scheme Reconciliation Service (SRS) data requests has been extended: these can now be submitted until 31 January 2019. HMRC will confirm the cut-off date for scheme cessation queries in a future bulletin (the current deadline is 31 December 2018).

The bulletin includes details of three 'Stalemate Scenarios' where HMRC and a scheme have not agreed the issue of liability under the reconciliation process to date. HMRC will accept queries on these scenarios until 31 December 2018 and will conduct further investigations – note that if a case remains at stalemate then HMRC's view is that schemes should then accept HMRC records. HMRC will investigate these queries until March 2019 but recognises that it is possible that not all members will be reconciled before the SRS ends: these cases would then be dealt with on an individual basis.

The bulletin also includes further information on financial reconciliation processes (relating to unpaid Contribution Equivalent Premiums).

RPI/CPI switch not permitted: *Barnardo's*

The Supreme Court has unanimously upheld a decision by the Court of Appeal that the trustees of the Barnardo's pension scheme do not have a discretionary power to switch to CPI: *Barnardo's v Buckinghamshire*. This is because, under the scheme rules, RPI must first have been replaced as an index. In recent years, there have been multiple cases about whether the trustees of private sector occupational schemes may change the index used for revaluation and pension increases, following the government's decision to switch from using RPI to CPI.

The decision reiterates that the ability to make an RPI/CPI switch depends on the precise wording of the scheme rules. The Supreme Court had granted permission to appeal on the understanding that the decision might affect many other pension schemes with similar wording, but the judgment states that it is not clear whether that is the case.

The court did not go on to consider the point of wider relevance from the Court of Appeal's decision: namely, its *obiter* view that, in line with previous High Court decisions, an RPI/CPI switch is not a detrimental modification for the purposes of the Pensions Act 1995 (see WNTW, 7 November 2016). Schemes that have already made the switch will be relieved that the Supreme Court did not overturn this view. A further decision by the Court of Appeal on an RPI/CPI switch is expected in relation to the BT Pension Scheme (see WNTW, 29 January 2018).

CJEU: full part-time service counts towards pension

The Court of Justice of the European Union (CJEU) has ruled that the Directive on part-time workers requires that periods of service before the deadline for transposing the Directive must be taken into account when calculating the amount of a part-time worker's pension: *O'Brien*. This applies to workers whose service took place both before and after that deadline (for the UK, 7 April 2000) – the court stated that this situation could be distinguished from those who had retired before the deadline.

Mr O'Brien acted as a part-time judge between 1978 and his retirement in 2005. In long-running litigation about his entitlement to a judicial pension, in July 2017 the Supreme Court referred to the CJEU a question about the periods of service to be taken into account in calculating the amount of his pension (see WNTW, 17 July 2017). The Ministry of Justice has recently estimated its potential liability, in respect of Mr O'Brien and others, as being up to GBP750m. We will report more fully on the implications once the litigation concludes.

Finance (No. 3) Bill published

Following the recent Budget (see WNTW, 5 November 2018), the government has laid the Finance Bill before Parliament. The Bill includes a provision amending the income tax exemption in section 307 of the Income Tax (Earnings and Pensions) Act 2003 in relation to provision by an employer for retirement or death benefits – this includes excepted group life policies.

Currently, the definition of 'retirement or death benefit' means that the employer contributions or paid premiums only fall within the exemption if the beneficiary is the employee or a member of the employee's family or household. Clause 11 of the Bill amends this definition so that the beneficiary may be any individual or a charity – the government announced this measure in the Autumn Budget 2017, and the change would take effect from 6 April 2019. The policy paper is available here.

PPF update

The PPF has released an update on its implementation of the *Hampshire* decision. The CJEU recently ruled that a Directive requires that each employee must receive old age benefits equivalent to at least 50% of the value of his or her accrued entitlement (see WNTW, 10 September 2018).

The document contains a high-level explanation of the PPF's proposed approach, with two worked examples. The PPF is approaching implementation on a phased basis, starting by contacting pensioners whose compensation is capped – it will write to others who may be affected in due course. The PPF also states that it is working with government to ensure that its approach is likely to be consistent with the future legislative framework.

Master trust update

TPR's latest figures on the master trust market show there has been one application for authorisation since the new authorisation and supervision regime began on 1 October. As expected, the number of schemes exiting the market has also increased, with three schemes having wound up and a further 33 in the process of exiting the market. Further schemes are expected to exit before 31 March 2019.

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