HYMANS ROBERTSON

Current issues

January 2020

Articles this month:

Polished-up Pension Schemes Bill Promised

Although the Queen's Speech, on 19 December 2019, did not mention it, background briefing notes confirm the new Government's intention to revive the Pension Schemes Bill that was lost, pre-election, with the dissolution of Parliament.[1] Pensions Minister Guy Opperman subsequently said that the Bill had been '*refined*', and that he hoped to reintroduce it to Parliament '*very early in the new year.*'[2]

The Bill will pave the way for collective money purchase schemes, bolster and boost the Pensions Regulator's powers, lay the foundations for 'pensions dashboards', revise the defined benefit (DB) funding regime, and allow for restriction of statutory transfer rights. For more information about the original contents of the Bill, please read our Sixty Second Summary.[3]

Higher PPF compensation for some—but 100% protection not universal

The European Court of Justice (ECJ) has ruled that institutions such as the UK's Pension Protection Fund (PPF) are not required to fully compensate pension members of underfunded pension schemes whose employers become insolvent.[4] It is possible, however, that the PPF will have to increase the level of protection it provides to those in relative poverty.

PPF compensation limits

The PPF rules may restrict scheme members' benefits in several ways. Those under normal pension age at the time of their employer's insolvency are subject to a compensation cap and have their compensation trimmed back to 90 per cent. Compensation attributable to pre-6 April 1997 service does not increase whilst in payment, and increases are otherwise in line with rises in the Consumer Prices Index (CPI), capped at 2.5 per cent.

[1] *Queen's Speech December 2019* (transcript) <www.gov.uk/government/speeches/queens-speech-december-2019>; *Queen's Speech December 2019: background briefing notes* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf>.
[2] <twitter.com/dwppressoffice/status/1207632985778016256>.
[3] *The Pension Schemes Bill* (October 2019) <www.hymans.co.uk/media/uploads/1910_pension_schemes_bill_60SNS.pdf>.
[4] *Pensions-Sicherungs-Verein VVaG v Günther Bauer* Case C-168/18.

Article 8 of the EU Insolvency Directive obliges member states to take the necessary measures to protect employees' occupational pension rights.[5] The ECJ has explored the implications of the obligation in a series of recent judgments, culminating in the *Hampshire* ruling in September 2018, which said that scheme members must receive at least half of their accrued entitlements. The PPF is in the process of adjusting its compensation payments to comply with that ruling (we note for the sake of completeness that aspects of its implementation are the subjects of a separate legal challenge). There were hints in some of the judgments that that might not be the end of the story.

Facts

The current case did not concern the PPF itself, but rather an insolvency insurance institution covering employees of German and Luxembourger companies. The action was raised by a pensioner who had lost 13.8 per cent of his monthly pension (7.4 per cent of his total entitlement—the scheme in question also provided a Christmas bonus) because his former employer went bust. A German court asked the ECJ whether a reduction in accrued benefits could still be manifestly disproportionate if the former employee is receiving at least half of his scheme entitlement.

The ECJ Advocate General, assigned to help the judges with his opinion on the case, argued that member states should fully guarantee employees' accrued rights.[6]

Judgment

The ECJ, recalling that members states have '*considerable latitude in determining both the means and level of protection*', said that Article 8 '*cannot therefore be interpreted as requiring a full guarantee*'. Accrued entitlements can be reduced, in pursuit of legitimate social and economic objectives, so long as '*the principle of proportionality*' is duly considered.

It noted that the purpose of the Directive was to protect former employees and their families from threats to their livelihoods. That led it to deduce that a benefit reduction must be regarded as manifestly disproportionate if resulted in a former employee living below the at-risk-of-poverty threshold determined by Eurostat for the member state concerned.

The Court also confirmed that the obligation in Article 8 is capable of having direct effect, so that it could be enforced against institutions, such as the German insolvency insurance provider (or the PPF), that can be treated as comparable to the State.

Eurostat's at-risk-of-poverty threshold for a country is a relative measure: in broad terms it is 60 per cent of the median disposable income (including social security benefits). The provision figure for a single person in the UK in 2018 is a little under €12,600, or around £10,800.[7]

The PPF and Government are considering the implications of the judgment.[8] The test concocted by the ECJ would pose some administrative challenges for the PPF—not the least of which is how it would gather information about people's disposable incomes and apply a threshold that will presumably cease to be calculated for the UK after Brexit.

---

[5] Directive 2008/94/EC '*on the Protection of Employees in the Event of the Insolvency of Their Employer*'.
[6] *Current Issues* October 2018 <www.hymans.co.uk/media/uploads/1810_Current_Issues.pdf>.
[7] <appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_li01&lang=en>.
[8] <www.ppf.co.uk/news/ecj-judgment-psv-v-bauer>.

PPF: 2020/21 levy details & 2021/22 insolvency risk methodology

The Pension Protection Fund (PPF) has finalized the details of the 2020/21 levies on defined benefit (DB) schemes.[9] It is also soliciting feedback on changes that it proposes to make to its insolvency risk methodology from 2021/22, and on the services accessible via a new online portal.[10]

The 2020/21 levies

The PPF confirms that rules governing the 2020/21 levies are in line with its consultation proposals.[11] As 2020/21 is the last year of the current levy 'triennium', a period during which the PPF prioritizes stability, there are no serious changes from the approach and parameters that were used for 2019/20. However, the levy estimate for 2020/21 is £620m, around 8 per cent more than the £575m target for the current year. The increase is a result of lower expected scheme funding levels and increased insolvency risks.

The 2020/21 levies take no account of the possible financial implications of the *Bauer* judgment, which had not been handed down at the time of the PPF's announcement.[12] There was little room for change in any event, due to the statutory constraints upon the magnitude of the levy increases that can made from one year to the next.

The PPF's policy statement on the 2020/21 levy says that, in the '*very small*' number of cases where the costs of equalizing for guaranteed minimum pension (GMP) differences move employers from profit to loss, it might produce movements of up to two levy bands. The PPF has decided to allow employers to request an adjustment, provided that all of the following conditions apply:

- a specific amount, solely attributable to a GMP-equalization adjustment, can be identified in accounts used to calculate one or more Monthly Scores;
- allowing the adjustment would result in the company being viewed as reporting a pre-tax profit rather than a loss; and
- allowing the adjustment would bring about a change in the Mean Score, to a Levy Band with a lower Levy Rate.

Adjustment requests should be made within 28 days of the publication of Mean Scores (which will probably happen in early July-2020). The PPF will produce a form that can be used for the purpose.

Insolvency risk from 2021/22

The consultation exercise is connected to the switch from Experian to Dun and Bradstreet (D&B) as its insolvency risk service provider. The PPF intends to begin using D&B insolvency risk scores in April 2020; the first invoices to be affected by the change will be issued in the autumn of 2021.

The PPF says that only limited changes have been made, as the existing methodology is working efficiently. Its calculations indicate that levies will remain the same for a third of all schemes, and that almost a half will experience a levy reduction. A fifth will have to shoulder increases: in seven per cent of cases those increases exceed fifty per cent.

The consultation period runs from 19 December 2019 to 11 February 2020. Consultation exercises on other aspects of the levy methodology will be held during 2020.

---

[9] <ppf.co.uk/levy-payers/levy-2020-21>.

[10] <www.ppf.co.uk/levy-payers/help-shape-our-rules>.

[11] See *Current Issues* November 2019 <www.hymans.co.uk/media/uploads/Current_Issues_-_November_2019.pdf>.

[12] See the article *Higher PPF compensation for some—but 100% protection not universal* in this edition of *Current Issues*.

The Pensions Regulator: compliance & enforcement update

The Pensions Regulator has made a plea for transparency and early engagement during corporate transactions.[13] Its latest *Compliance & Enforcement Quarterly Bulletin* (covering the period from July to September 2019) includes a feature on the work carried out in this area by its rapid-response and event-engagement teams.[14] It has also issued a press release about the latest prosecution for avoidance of auto-enrolment duties and providing false information.[15]

PASA master trust transition guidance

The Pensions Administration Standards Association (PASA) has published practical guidance for trustees and administrators to help them protect members when moving members to and from defined contribution (DC) master trusts.[16]

The guidance focuses on the two most likely master-trust transition scenarios:

- 'Continuity Option One' (when trustees of a master trust are required by legislation to transfer members to another scheme and wind up because authorization has been refused or removed), which is referred to in the guidance as a '*regulated transition*'; and
- transfers from single-employer DC schemes to master trusts, referred to as a '*non-regulated transitions*'.

Stop-gap AA taper fixes for the NHS

United Kingdom authorities have announced short-term solutions to the problem that the annual allowance taper is causing within the National Health Service. Whereas the Scottish Government has opted for immediate pay enhancements in lieu of pension provision, the response in England is a promise to offset deductions to retirement pensions.[17]

Taper tantrums

The taper affects 'high-income individuals', being anyone whose 'threshold income' for a tax year exceeds £110,000 and whose 'adjusted income' for the year exceeds £150,000. Threshold income is broadly speaking net taxable income, whilst adjusted income adds the value of any pensions accrual during the year. For every £2 of adjusted income in excess of £150,000, the taper reduces the person's annual allowance by £1, subject to a minimum annual allowance of £10,000 (so the maximum reduction to the allowance is suffered by those with adjusted incomes of £210,000 or more).

The NHS is reliant on senior clinicians taking on extra work. When they do so, it can raise their incomes into the ranges affected by the taper, resulting in substantial tax charges. To add insult to injury, the extra work is itself often non-pensionable. There is evidence of medics turning down additional work in order to reduce their exposure to annual allowance charges, with deleterious implications for patient care.

Regional variations

The Scottish Government will temporarily give NHS staff at risk of annual allowance charges the option of receiving additional pay, equivalent to their employers' contributions, in lieu of pension accrual. To benefit, those who are

---

[13] <www.thepensionsregulator.gov.uk/en/media-hub/press-releases/trustees-urged-engage-early-and-be-transparent>.

[14] <www.thepensionsregulator.gov.uk/en/document-library/enforcement-activity/enforcement-bulletins/compliance-and-enforcement-quarterly-bulletin-july-to-september-2019>.

[15] <www.thepensionsregulator.gov.uk/en/media-hub/press-releases/recruitment-agency-ordered-to-pay-10890-for-misleading-tpr-and-avoiding-workplace-pension-duties>.

[16] <www.pasa-uk.com/wp-content/uploads/2019/11/PASA-Master-Trust-Transition-Guidance-VFinal.pdf>.

[17] *Changes to protect NHS staff* <www.gov.scot/news/changes-to-protect-nhs-staff>; *Pensions tax annual allowance* <www.england.nhs.uk/pensions>.

likely to breach the annual allowance in 2019/20 will need to opt out of further pension accrual. An amount equivalent to the employer contributions that are thereby saved will be added to their (taxable) pay.

The Department of Health and Social Care has given the necessary directions to NHS England to allow employers to commit to making payments to senior clinicians when they retire.[18] This will apply to people who use the 'scheme pays' option to meet annual allowance charges due because of NHS Pension Scheme accrual (excluding additional voluntary contributions) in 2019/20. The scheme administrator will pay the member's charge and arrange a consequential reduction to his or her retirement pension. The clinician's employer will make a binding commitment to fully compensate the member for the scheme pays deduction, outside of the NHSPS. The Secretary of State for Health and Social Care speculated that the plan could in some circumstances constitute tax avoidance, which would ordinarily be contrary to established policy on *Managing Public Money*.[19] He nevertheless directed NHS England to proceed with the proposal on the basis that it serves the wider public interest, whilst instructing it to minimize the risk. He has also offered reassurances that the resulting commitments will be honoured even if employers have ceased to exist by the time of clinicians' retirement.[20]

For so long as the taper continues to exist, such measures are the equivalent of papering over cracks in a wall. The Conservative and Unionist Party manifesto promised a review within thirty days of re-election. Although the malady is most acutely felt in the NHS, it is surely pandemic.

Deadline for part-timer discrimination claims

The UK's Supreme Court has ruled that the three-month limit for employment-tribunal pensions-discrimination claims made by part-timers runs from the date of retirement (rather than, or as an alternative to, the point of leaving service).[21]

The case is about part-time judges, and there are references to the special characteristics of judicial appointments, but the basic principle seems to be extensible to other lines of work. It is expected to be costly for the Government because it means that more judges with periods of part-time, fee-paid appointment will have time to submit claims.

New Government, fresh Budget

The next Budget will be on 11 March 2020.[22]

[18] *Senior clinicians' pensions: letters between DHSC and NHS England* <www.gov.uk/government/publications/senior-clinicians-pensions-letters-between-dhsc-and-nhs-england>.

[19] <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742188/Managing_Public_Money__MPM__2018.pdf>.

[20] *Statement from the Secretary of State on the Clinician Pension Tax Scheme* <www.gov.uk/government/publications/statement-from-the-secretary-of-state-on-the-clinician-pension-tax-scheme/statement-from-the-secretary-of-state-on-the-clinician-pension-tax-scheme>.

[21] *Miller and others (Appellants) v Ministry of Justice (Respondent) [2019] UKSC 60* <www.supremecourt.uk/cases/docs/uksc-2015-0246-judgment.pdf>.

[22] <www.gov.uk/government/news/chancellor-launches-budget-process-to-usher-in-decade-of-renewal>.

And Finally…

AF was somewhat concerned to learn that the State Opening of Parliament on 19 December 2019 would take place with '*reduced ceremonial elements*' due to the '*unique circumstances of the general election and the proximity to Christmas*'.[23] However, only the most rabid devotees of Parliamentary pomp and circumstance would have been disappointed: fears that Her Majesty would turn up in her head scarf and green wellies proved to be groundless, there were plenty of dead stoats and comedy hair-pieces in evidence amongst their Lordships, and there was still a bloke in fancy dress brandishing a stick. Prince Charlie looked just as bonnie without the usual array of military decorations, although he may have felt a little exposed without—as far as we could tell—any edged weapons close to hand.

We had wondered whether the Queen would just say 'I refer you to my statement of 14 October' then drop the mic and walk out, but that proved not to be the case either. We do think, however, that someone in Government is at risk of spending time in the Tower for making the monarch utter phrases like *'Gigabit-capable broadband*'…

[23] <www.parliament.uk/business/news/2019/december/state-opening-of-parliament-december-2019>.