

# Current issues

March 2021

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## Guidance on tax consequences of GMP equalization

The Guaranteed Minimum Pension Equalization Working Group has published a *Guidance Note on Tax Issues*.<sup>1</sup> It seeks to acquaint trustees and others with the potential taxation-related consequences of adjusting benefits to compensate for inequalities arising from GMP differences, and to suggest possible practical solutions.

### The Guaranteed Minimum Pension Equalization Working Group

The Working Group comprises representatives from the pensions industry and was formed under the auspices of the Pensions Administration Standards Association (PASA). It has previously produced guidance on methodology, rectification timing, data and member communications.<sup>2</sup>

### Tax consequences

The latest guidance discusses Her Majesty's Revenue and Customs' two public announcements<sup>3</sup> about the tax consequences of GMP equalization, explores possible deeper ramifications, and offers some practical suggestions. It covers the annual- and lifetime-allowance implications of equalization, as well as issues concerning the payment of arrears and other authorized lump sums. One appendix deals with the different forms of lifetime-allowance transitional protection; others provide templates for communicating with members affected by the re-quantification of past benefit crystallization events, and those who may need to supply HMRC with a break-down of their arrears payments to obtain the correct tax treatment.

The guidance does not discuss issues associated with the equalization of past transfers. Nor does it spend much time on the tax consequences of converting GMP into ordinary scheme benefits. Both subjects are to be discussed in future guidance notes, as are implementation-stage communications and issues related to 'anti-franking'.<sup>4</sup>

The guidance is a valuable primer on the numerous tax issues that trustees and their advisers may confront when equalizing for GMP differences, and its communications templates will be welcomed. Readers will be left in no doubt about the intricate snarl that they may have to untangle; there seems little prospect of further HMRC assistance with this Gordian

<sup>1</sup> <[www.pasa-uk.com/wp-content/uploads/2021/02/Final-Draft-GMPEWG-Tax-Guidance-12-Feb-2021.pdf](http://www.pasa-uk.com/wp-content/uploads/2021/02/Final-Draft-GMPEWG-Tax-Guidance-12-Feb-2021.pdf)>.

<sup>2</sup> Its publications are available here: <[www.pasa-uk.com/guidance/gmp-equalisation](http://www.pasa-uk.com/guidance/gmp-equalisation)>.

<sup>3</sup> <[www.gov.uk/government/publications/guaranteed-minimum-pension-gmp-equalisation-newsletter-july-2020](http://www.gov.uk/government/publications/guaranteed-minimum-pension-gmp-equalisation-newsletter-july-2020)>;

<[www.gov.uk/government/publications/guaranteed-minimum-pension-gmp-equalisation-newsletter-february-2020](http://www.gov.uk/government/publications/guaranteed-minimum-pension-gmp-equalisation-newsletter-february-2020)>.

<sup>4</sup> *Working Group Update* (January 2021) <[www.pasa-uk.com/gmp-equalisation-working-group-update-january-2021](http://www.pasa-uk.com/gmp-equalisation-working-group-update-january-2021)>.



knot. The domino-toppling effects of equalization may even touch schemes that have never provided GMPs, as the proportion of a member's lifetime allowance used up by past benefit-crystallization events is retrospectively altered by the equalization efforts of those that did.

## Delay to regulations on oversight of investment consultants & fiduciary managers

Regulations to replace the Competition and Markets Authority's *Investment Consultancy and Fiduciary Management Market Investigation Order 2019* have been postponed until 'the first half of 2022'.<sup>5</sup> Until then, trustees, consultants and fiduciary managers will have to continue to comply with the Order.

The CMA Order, which requires trustees to put fiduciary management services out to tender and set objectives for their investment consultants, continues to have legal effect until equivalent provisions are brought into force.<sup>6</sup> Trustees and investment consultants had to submit their first compliance statements to the CMA by 7 January 2021 at the latest. Thereafter, compliance reporting is an annual task.

The Department for Work and Pensions (DWP) intends to replicate the substance of the Order within existing pensions law. In 2019, it circulated draft regulations that would have seen the supervisory responsibility pass from the CMA to the Pensions Regulator, which would have gathered compliance information via its scheme returns. The webpage for the consultation exercise was updated on 26 February 2021 to indicate that announcement of the outcome and publication of the final legislation have been pushed back: they are now expected in the first half of 2022.

As a result of the delay it seems likely that market participants will need to submit at least one more round of compliance statements to the CMA. Trustees should pencil it into their to-do lists.

## Recent judgments & determinations

Recent rulings by the courts and Pensions Ombudsman have included an employment-law case with pensions implications, a slight twist to the fall-out from the 2014/15 public-service scheme reforms, a determination on the extent of trustees' obligations to disclose meeting minutes, and some reassuring news for companies involved in transfers of insurance business.

### Uber BV and others v Aslam and others [2021] UKSC 5

The UK's Supreme Court confirmed that private-hire vehicle drivers booked through a company's smart-phone app were 'workers' for employment-law purposes. In doing so it rejected the idea that the written contract should be the starting point for such determinations, and instead based its decision on the degree of control that the company exercised over its drivers. The Court said that the business model for which the company argued, under which the drivers contracted directly with passengers whilst it acted solely as an agent, was 'not one that is legally available.'

The ruling will be of considerable interest to other organizations and persons operating within the so-called 'gig economy'. There may be pensions repercussions: the category of 'jobholders' who are eligible for automatic enrolment is a sub-set of a business's 'workers', and uses a definition similar to that in employment law.

### London Fire Commissioner v Sargeant UKEAT/0137/17

The Employment Appeal Tribunal added an interesting coda to the jurisprudence around the ill-fated transitional provisions made during recent reforms to the public-service pension schemes. The EAT said that fire and rescue authorities could not rely on an Equality Act 2010 exemption, for those following requirements in an enactment, as a defence to claims of unlawful age-based discrimination. The exemption did not apply because the Act also subjugates the provisions of an occupational pension scheme to an over-riding non-discrimination rule, and gives the trustees or managers power to make any alterations necessary to give effect to that rule.

<sup>5</sup> <[www.gov.uk/government/consultations/trustee-oversight-of-investment-consultants-and-fiduciary-managers](https://www.gov.uk/government/consultations/trustee-oversight-of-investment-consultants-and-fiduciary-managers)>.

<sup>6</sup> There is also provision for its revocation or variation, and for it to lapse after ten years.

This point could arise in future claims alleging discriminatory effects of provisions contained in public-sector schemes. It suggests that scheme managers' obligations in such cases are not restricted to application of the scheme rules as set out in legislation. The practical implications are unclear.

### **Mr N (PO-29382)**

The Pensions Ombudsman rejected complaints about a trustee board's decision to follow the Government's lead in switching from the Retail Prices Index to the Consumer Prices Index as the appropriate measure of the 'cost of living', and whether they had properly accounted for transferred-in additional voluntary contributions, because they were made too late. The Ombudsman declined to exercise his discretion to determine the late complaints on the grounds that they would have exceeded the relevant Limitation Act 1980 deadlines had they been brought before a court. The Ombudsman also rejected a complaint about the trustees' failure to provide the member with the minutes of a meeting in which they supposedly discussed how they would exercise their discretion over the interpretation of 'cost of living'. He said that the minutes of such a discussion did not 'supplement or alter' the trust deed or scheme rules, and so were out of the scope of the statutory disclosure of information requirements.

The Ombudsman's decision on the disclosure issue is particularly notable, given that previous determinations have tended to view failure to accede to requests for trustee minutes as maladministration. It is also a rare example of the Ombudsman disagreeing with his Adjudicator's opinion.

### **In the Matter of the Prudential Assurance Company Limited and Rothesay Life Plc [2020] EWCA Civ 1626**

The Court of Appeal said that a High Court judge made errors in his approach to an exercise of discretion that led him to refuse to sanction a proposed transfer of insurance business involving 370,000 annuity policies. It said that he ought not to have concluded that there was a material disparity in the support available to each of the insurers from their wider organizations, or that such a disparity was a material factor; that he gave insufficient weight to the independent expert's conclusion that there was only a remote risk of the transferee insurer needing such external support, and to the Prudential Regulatory Authority's lack of objection to the transfer; and that he ought not to have accorded any weight to policyholders' objections that they had chosen their annuity provider on the basis of its age and reputation, and had reasonably assumed that it would always be the one paying their annuities. The decision on whether to sanction the business transfer will be made by a different High Court judge.

The High Court decision put the cat among the pigeons with its suggestion that insurance transfers could be blocked so effectively by policyholders' expectations about the continuation of the status quo. The Court of Appeal's removal of said metaphorical feline will have been a relief to the insurers concerned and to others that are considering business transfers.

### **The Board of the Pension Protection Fund v Dalriada Trustees Limited [2020] EWHC 2960 (Ch)**

A High Court judge clarified the principles that will determine whether and by how much the Fraud Compensation Fund is able to compensate members of scam 'occupational pension schemes' set up as vehicles for transfers. The judgment was welcomed by the Pension Protection Fund, which operates the FCF, and had collaborated with a professional independent trustee company to obtain the Court's interpretation of several aspects of the legislation.<sup>7</sup> The PPF has received numerous applications, with hundreds of millions of pounds at stake.

In broad terms, the FCF was set up to compensate occupational pension schemes that have insolvent employers and that have suffered a reduction in assets attributable to a crime. The clearest example is where someone connected with the ailing sponsor of a genuine scheme has misappropriated its funds. It was unclear whether it could apply when the scheme itself was set up as part of the ruse to defraud members.

Some of the issues that the judge was asked to consider were rather abstruse, but others may prove to have wider application. He preferred broad interpretations of who counts as a scheme employer, what might constitute an employer's pension liabilities under the scheme, and the sorts of 'loss' that could be attributed to an offence.

<sup>7</sup> <[www.ppf.co.uk/news/fraud-compensation-fund-eligibility-criteria-confirmed](http://www.ppf.co.uk/news/fraud-compensation-fund-eligibility-criteria-confirmed)>.

## ONS pensions surveys

The Office for National Statistics has published data from the last Occupational Pension Schemes Survey (OPSS) that it will produce, and statistics from the quarterly Financial Survey of Pension Schemes (FSPS) that has largely replaced it.

The final OPSS provides information on membership, contribution-rate and benefits from 2019.<sup>8</sup> The ONS decided to discontinue the annual publication to minimize duplication of effort.<sup>9</sup>

Data from the FSPS has been used to compile Funded Occupational Schemes in the UK: October 2019 to June 2020, which provides statistics on membership, income and expenditure, transactions, assets and liabilities.<sup>10</sup> It shows dips in normal contributions to all types of schemes in Quarter 2 of 2020, which may be explainable as the effects of furloughing. There is no obvious evidence of widespread deferral of deficit reduction contributions to private sector defined benefit schemes in that quarter, though the ONS acknowledges that the Survey cannot paint the full picture as it does not record information on what employers had planned to pay before the pandemic struck.

## 2020 survey of trust-based DC schemes

The Pensions Regulator has published the results of a 2020 survey of trust-based defined contribution (DC) schemes.<sup>11</sup> It was carried out between January and March 2020, based on interviews with those involved in the management of 216 DC schemes (16 of which were master trusts).

The survey set out to investigate the extent to which the Regulator's 'key governance requirements' were being met. It looked, in particular, at the requirements to assess the value for members from charges and transaction costs, and to ensure that the default investment strategy is suitably designed. It found that 14 per cent of schemes were meeting the former requirement (unchanged from 2019) and that 39 per cent met the latter (compared to 28 per cent in 2019).

Trustees of DC schemes with more than 100 members, and all of those used for auto-enrolment, were asked if they had considered climate change in their investment strategies. Forty-three per cent confirmed that they had. Of the schemes whose trustees had not considered climate change, 19 per cent planned to review it, and 21 per cent considered that climate change was not relevant to their scheme. A press release accompanying the survey concludes that '*Too few trustees and managers of defined contribution (DC) schemes are paying proper attention to [the] risks and opportunities*'.<sup>12</sup> The Regulator plans to announce in the spring its strategy for helping trustees to meet climate-change challenges.

## HMRC newsletters

Her Majesty's Revenue and Customs (HMRC) has published *Pension Schemes Newsletter 127*.<sup>13</sup> This edition has some information on the practitioner registration and authorization features of the Managing Pension Schemes online service, which are due to become available in March 2021. The newsletter also contains information on member residency-status reports for administrators of relief-at-source schemes, and confirmation that a post-Brexit tweak has been made so that transfers to schemes in Gibraltar continue to be free from the overseas transfer charge. Lastly, there are some extracts from the latest quarterly pensions-flexibility statistics.

<sup>8</sup> <[www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/pensionssavingsandinvestments/datasets/occupationalpensionschemessurvey](http://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/pensionssavingsandinvestments/datasets/occupationalpensionschemessurvey)>.

<sup>9</sup> <[consultations.ons.gov.uk/business-indicators-bop/opss-consultation/](http://consultations.ons.gov.uk/business-indicators-bop/opss-consultation/)>.

<sup>10</sup> <[www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/fundedoccupationalpensionschemesintheuk/october2019tojune2020](http://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/fundedoccupationalpensionschemesintheuk/october2019tojune2020)>.

<sup>11</sup> <[www.thepensionsregulator.gov.uk/-/media/thepensionsregulator/files/import/pdf/dc-research-summary-report-2020.ashx](http://www.thepensionsregulator.gov.uk/-/media/thepensionsregulator/files/import/pdf/dc-research-summary-report-2020.ashx)>.

<sup>12</sup> <[www.thepensionsregulator.gov.uk/en/media-hub/press-releases/2021-press-releases/dc-market-must-pay-more-attention-to-climate-change-survey-shows](http://www.thepensionsregulator.gov.uk/en/media-hub/press-releases/2021-press-releases/dc-market-must-pay-more-attention-to-climate-change-survey-shows)>.

<sup>13</sup> <[www.gov.uk/government/publications/pension-schemes-newsletter-127-february-2021/pension-schemes-newsletter-127-february-2021](http://www.gov.uk/government/publications/pension-schemes-newsletter-127-february-2021/pension-schemes-newsletter-127-february-2021)>.

## And Finally...

Readers from the public-sector wing of our pensions coterie will no doubt be aware that QE2's Treasury recently announced the outcome of consultation about solutions to the ill-advised 'McCloud' discrimination in the public-service schemes.<sup>14</sup> It has decided to go ahead with plans to offer affected members a choice between their old final salary and the new career-average-revalued-earnings benefits for service up to 31 March 2022.

AF thinks the Government squandered a golden opportunity by opting for a medium as *passé* as a webpage update. Imagine for a moment that the announcement had been made via a TikTok video of Rishi Sunak lip-syncing—with or without platinum-blond wig—to the 1989 Transvision Vamp hit:

*You don't have to say that you love me*

*And you don't have to say any prayers*

*No you don't have to say that you love me*

*Baby it's alri-ight*

*Cause honey there's no CARE [until 1 April 2022 unless it's more advantageous given your salary and service history]*

Admittedly, the last line of the chorus doesn't scan quite so well as it did in the original...

<sup>14</sup> <[www.gov.uk/government/consultations/public-service-pension-schemes-consultation-changes-to-the-transitional-arrangements-to-the-2015-schemes](https://www.gov.uk/government/consultations/public-service-pension-schemes-consultation-changes-to-the-transitional-arrangements-to-the-2015-schemes)>.