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Current issues

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Articles this month:

Regulator pushes for ESG compliance
Criminal prosecutions policy
Regulator holds fire on Carillion
The 'actual or prospective right' to a protected pension age
FCA seeks data on iffy transfers
Public sector news
HMRC newsletters: February 2023

Regulator pushes for ESG compliance

The Pensions Regulator has (as expected) begun a campaign highlighting the environmental, social and governance (ESG) obligations of pension scheme trustees.

Responsibilities: OMG it's ESG

The Government has introduced several new ESG-related requirements in the last few years. Trustees of schemes with 100 or more members must set out their policies about financially material considerations (including ESG and, specifically, climate change) in their statements of investment principles (SIPs). They must produce implementation statements about how they have followed those policies. They must make those SIPs and implementation statements freely available online.[1] Trustees of schemes with £1 billion or more in assets must also prepare—and make public—annual climate-change governance reports, covering disclosures recommended by the Taskforce for Climate-related Financial Disclosures (TCFD).

Regulator's plans

In the spring, trustees will receive emails telling them that the Regulator is monitoring compliance with the ESG and climate-related requirements; the Regulator will also make a statement on trustees' TCFD reports. Later, in the summer, it will review a sample of SIPs and implementation statements, and will publish the results to identify examples of good practice.

The Regulator notes that, in the returns submitted by defined contribution schemes in 2022, '*a number*' did not supply the web addresses at which their disclosures are available (it does not say how high the incidence of non-compliance was). They can expect to be contacted about the omission.

This regulatory initiative—one of several mentioned in the Regulator's Corporate Plan 2022 to 2024—underlines how seriously the Regulator is taking the business of climate-change governance, and ESG more broadly.

[1] Trustees of schemes that provide money purchase benefits are (unless those benefits are entirely attributable to additional voluntary contributions) required to cover ESG policies in the SIPs for their default investment arrangements, and publish them online as part of their annual governance (Chairs') statements. There is no '100-member' exemption from this requirement.

Criminal prosecutions policy

The Department for Work and Pensions (DWP) and the Pensions Regulator have published a Memorandum of Understanding about the prosecution, in England and Wales, of the criminal offences introduced by the *Pension Schemes Act 2021*.[2]

The Regulator, rather than the Secretary of State for Work and Pensions, will initiate most prosecutions. The DWP will not generally pursue someone that the Regulator has decided not to prosecute. It may do so in exceptional circumstances, for example if the Regulator is unable to act. In such cases, the DWP will consider the Regulator's policy and guidance. The two organisations will also liaise and share information, subject to legal and confidentiality constraints.

It is good to have more clarity on how prosecutions are likely to be initiated, and that the potential decision-makers are working together to avoid duplication of effort and ensure consistency of approach.

Regulator holds fire on Carillion

The Pensions Regulator has published a regulatory intervention report explaining why it has no basis for enforcement action in relation to the insolvency of the Carillion Group. An investigation found that neither Carillion's public misstatement of its financial performance (and the resultant payment of dividends), nor the Group's disposals of assets and business prior to its insolvency gave the Regulator cause to exercise its anti-avoidance or criminal prosecution powers.

The Group entered into compulsory liquidation in January 2018. Its collapse was the result of unsustainable debt, and a massive reduction in the estimated value of important long-term construction contracts. It sponsored thirteen defined benefit pension schemes.

The contract losses were so great that the Group was arguably facing insolvency by the end of 2016. Even if it had retained the dividends it paid in 2015 and 2016, there was no guarantee that the Group would have made additional payments to the schemes, considering its debt. Carillion continued to pay deficit reduction contributions until just three months before its liquidation, so the DB schemes were not detrimentally affected during that period. Had the Group admitted the dire state of its finances earlier, its collapse would in all likelihood have happened sooner, and the schemes would have been around £76m poorer for it. The Group used the disposal proceeds for essential liquidity, enabling it to continue to support the schemes.

So, there was no evidence that Carillion's public financial misstatements caused material detriment to the likelihood of the pension scheme members receiving benefits, or that they were undertaken with the main purpose of avoiding employer debt: there was, therefore, no prospect of the Regulator imposing contribution notices. Neither was there any scope for financial support directions: the Group's utter collapse left no targets capable of providing support. Lastly, the facts of the cases did not support the Regulator's use of its criminal-law powers to punish the provision of false or misleading information.

One wonders whether the Regulator's position would have been any stronger had the events occurred after the new contribution-notice grounds and criminal offences introduced by the Pension Schemes Act 2021 came into force. The Regulator does not speculate on the matter.

[2] In Northern Ireland, prosecutorial discretion lies with the Regulator and Department for Social Development. In both England and Wales and Northern Ireland it is also possible for cases to be initiated by the Director of Public Prosecutions for each jurisdiction. In Scotland, the decision to prosecute would be taken by the Crown Office and Procurator Fiscal Service.

The ‘actual or prospective right’ to a protected pension age

The High Court has lent support to His Majesty’s Revenue and Customs' interpretation of the legislation on '*protected pension age*': the ability to take benefits before ‘*normal minimum pension age*’ (NMPA) under the tax rules.[3]

The judge agreed, in effect, with the construction set out in HMRC’s guidance, which says that the member’s right to retire earlier must not be contingent upon the permission of another party. The member behind the court case is a chief fire officer, and his ability to retire before the current NMPA of 55 is subject to the permission of his fire and rescue authority. In the judge's opinion, that means that the payment of pension prior to age 55 would be an unauthorised member payment (with undesirable tax consequences).

The issue of who is and is not eligible for a protected pension age will have increased salience as we approach 6 April 2028, when the NMPA is set to increase from 55 to 57.

FCA seeks data on iffy transfers

The Financial Conduct Authority (FCA) is seeking information from trustees and administrators about transfer requests that raise concerns. It is hoping to gather intelligence on matters such as the involvement of unauthorised advisers, suspicious numbers of cases involving the same adviser, transfer requests prompted by cold calling and other unsolicited contacts, questionable investments, and suspected scams.

The FCA has set up separate email addresses by which users can report DB-to-DC and DC-to-DC transfers[4].

Public sector news

Increases

His Majesty’s Treasury has announced details of this year’s increases to public sector pensions in payment and in deferment.

Pensions that have been in payment for a year or more will increase from 10 April 2023 by 10.1%, in line with Consumer Prices Index (CPI) inflation over the year to September 2022, with proportionate increases to pensions commenced more recently.[5] The same percentage will govern revaluation in deferment in the historical, final salary schemes. Revaluation in the newer, career-average revalued earnings (CARE) schemes will be based either upon prices inflation of 10.1% or earnings inflation of 7%, depending on scheme rules.

The Treasury has published multiplier tables to enable the calculation of cumulative increases due over multi-year periods.

LGPS revaluation date

The Department for Levelling Up, Housing and Communities (DLUHC) proposes to shift the revaluation date for Local Government Pension Scheme CARE benefits from 1 April to 6 April, to better align it with annual allowance calculations. The immediate impetus for the change is to take the large increase (10.1%) based on September 2022 CPI out of consideration for pension input amounts for the tax year 2022/23. The amendment would mean that the increase goes through in the 2023/24 tax year instead, when it would be cancelled out by uprating of ‘*opening value*’ in accordance with the statutory pension input calculation.

The super-short consultation period ran from 10 to 24 February 2023.

McCloud calculator

The Government Actuary’s Department has created a calculator to help public-sector scheme members[6] decide whether their old (final salary) or new (CARE) schemes are better for them, when the Government implements the remedy for ‘*McCloud*’ discrimination. The calculator has gone live for 12 schemes.

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[3] *Devon and Somerset Fire and Rescue Authority v Howell* [2023] EWHC 257 (Ch).

[4] The webpage originally suggested that the FCA was concerned only about DB-to-*DB* (as well as DC-to-DC) transfers, but was corrected within a few days.

[5] At the time of writing, the *Pensions Increase (Review) Order 2023* had not been laid before Parliament. A Treasury covering note says that the Order is expected in March.

[6] Not those in the Local Government Pension Scheme (LGPS): there, the *McCloud* remedy will be implemented by an automatic underpin, so that LGPS members will not be required to make choices.

HMRC newsletters: February 2023

Pension Schemes Newsletter 147 has articles on:

- the look-up service allowing relief-at-source administrators to establish a member's residency status.
- the Public Service Pension Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023, which provide for some changes to tax treatment in connection with the remedy for McCloud discrimination in public sector pension schemes.
- some forthcoming McCloud-driven changes to quarterly Accounting for Tax (AFT) returns, with a note that the implementation of those changes will prevent compilation or submission of online AFT returns from 4pm on Friday 10 March 2023 to 9am on Thursday 16 March 2023.

And Finally…

Peer pressure

The *Retained EU Law (Revocation and Reform) Bill* has been roundly criticised (beaten like a flaccid piñata) by the House of Lords Delegated Powers and Regulatory Reform Committee. Under the Bill, EU-derived laws and legal principles would expire at the end of 2023, unless otherwise specified, and anything that's kept would be re-branded as '*assimilated law*'. The Bill would also prevent EU law from having the advantage over UK law in the event of a tie, and allow UK courts to depart from EU judicial precedent.

The gist of their Lordships' disapproval is that the Bill is an extraordinary Ministerial power grab, and that that's just not cricket when its stated goal is to '*firmly re-establish our Parliament as the principal source of law in the UK*'. This seems to set the scene for a showdown between the revising chamber and the Government's majority in the House of Commons.

AF will leave the political controversy to those better qualified, other than to observe that, when 60 years' and thousands of items of legislation—more than a few pensions-related—are in the balance, it seems like there's a lot that could gang agley (in *AF*'s mind, Murphy's Law has a status akin to a fourth law of thermodynamics). However, we do enjoy a good zinger, and so commend the Committee's sally that:

> '*The Bill is sufficiently lacking in substance not even to be described as "skeletal"*'…

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