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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.

PASA guidance on GMP equalisation methods | TPR: record-keeping, dividends, recovery plans | Investment Association targets executive pensions | Early retirement due to redundancy: High Court appeal | TPO Corporate Plan 2019-2022 | New FCA rules for funds investing in illiquid assets

PASA guidance on GMP equalisation methods

The PASA GMP working group has published a guidance note on GMP equalisation methods – this is the first in a series of notes aiming to provide guidance on proportionate and pragmatic good practice. Separate guidance notes will also be published on data issues, impacted transactions, tax issues and GMP rectification.

The guidance is divided into three sections: correcting past underpayments; approaches for equalising future benefit payments; and common unanswered questions. It includes commentary on areas where legal input is required (for example, dealing with historic transfers-in, or applying different approaches to different categories of members). There are also worked examples of the impact on a 'straw man' member to illustrate how benefits could be adjusted, and how past underpayments could be corrected. Topics covered in the section on 'unanswered questions' include: transfers-in; split normal retirement ages; survivors' pensions; revaluation and anti-franking; GMP underpins; GMP conversion; divorce; and top-up schemes.

Trustees may wish to discuss this guidance with legal advisers as part of current work on equalisation projects and pending information and guidance from HMRC.

TPR: record-keeping, dividends, recovery plans

The Pensions Regulator (TPR) has announced that it is 'cracking down' on schemes with poor record-keeping, and that it intends to contact schemes about dividends and recovery plans. Its press release states that:

- TPR has asked trustees of 400 schemes to conduct a data review within six months and to report to TPR the proportion of members for which accurate common and scheme-specific data is held. These are schemes which TPR believes have not reviewed their data in the last three years, and include DB, DC and public sector schemes.
- TPR is contacting 1,200 schemes to remind them to carry out data reviews of both common and scheme-specific data every year.

- TPR will send communications to more than 1,000 schemes this year about issues such as dividend payments to shareholders and the length of recovery plans.

TPR's announcement follows recent updates to its record-keeping guidance (for more information, see WNTW, 30 September 2019). It has previously announced that record-keeping standards would be a regulatory priority (see for example WNTW, 28 May 2019).

Investment Association targets executive pensions

The Investment Association (IA) has announced that its guidance for the 2020 AGM season will target executive pension contributions that are out of line with contributions for the majority of the workforce. This follows previous work by the IA on the issue (see for example WNTW, 25 February 2019) and the new UK Corporate Governance Code (WNTW, 23 July 2018).

Companies with existing directors who receive more than 25% of salary as a pension contribution will be flagged with the highest level of warning (red top) on the Investment Association's Institutional Voting Information Service (IVIS), unless they have set out a credible action plan to align the pension contributions with those of the majority of the workforce by the end of 2022 (in which case the company will be rated as amber top).

Companies will also be flagged with the highest level of warning (a) if they appoint a new executive director, or a director changes role, with a pension contribution not in line with the majority of the workforce, or (b) if they seek approval for a new remuneration policy which does not explicitly state that any new director will have their pension contribution set in line with the majority of the workforce.

IVIS is designed to assist shareholders with voting during AGM season; the red top warning is used to indicate the companies about which shareholders should have the strongest concerns.

Early retirement due to redundancy: High Court appeal

The High Court has allowed an appeal against a determination of the Pensions Ombudsman (TPO) that a member was not entitled to an unreduced early retirement pension on the grounds of redundancy: *Downe v Universities Superannuation Scheme*.

The scheme rules provided for unreduced early retirement on the grounds of redundancy, in which case the employer would be liable for an additional charge. The relevant test was that the cessation of employment was wholly or mainly attributable to the employer's requirements for employees to carry out work of a particular kind having ceased or diminished (or being expected to do so).

Ms Downe's employment was terminated in November 2012 in advance of a restructuring exercise on grounds recorded in a compromise agreement. The agreement included payment of 'enhanced redundancy pay' without admission of liability. She complained to TPO that she had been made redundant but that her employer had incorrectly informed the trustee that this was not the case. TPO did not uphold the complaint – in his view, the test for redundancy was not met because Ms Downe had instigated the termination by responding to an email about the restructuring; there was no coercion by the employer.

The judge held that TPO had made an error of law as he had incorrectly analysed whether the termination met the test for redundancy in the rules. There had been a misplaced emphasis on whether the termination arose at the instance of the employer and TPO had not considered the correct test or analysed all the necessary questions of fact. The matter was remitted to TPO for determination.

The judge commented that the scheme rules in question closely followed the statutory wording for a dismissal by reason of redundancy in employment legislation (except for not referring to dismissal). The decision (and subsequent TPO determination) may be of interest for schemes more generally.

TPO Corporate Plan 2019-2022

TPO has published its priorities for the next three years in its Corporate Plan 2019-2022. These include:

- reorganising its casework function, including an enhanced triage process, with the aim of achieving a quicker and more streamlined process;
- reviewing processes and procedures for cases that are appropriate for TPO's Early Resolution service;
- developing changes to legislation and signposting, including for complaints that have not gone through a scheme's internal dispute resolution process; and
- redesigning TPO's website by fully refreshing the available information and tools.

This plan reflects some of the proposals in the government's response to its consultation on TPO processes and signposting (see WNTW, 12 August 2019), and the recommendations in a recent high-level review of TPO (see WNTW, 2 September 2019).

New FCA rules for funds investing in illiquid assets

The Financial Conduct Authority (FCA) has announced changes to its rules for open-ended funds dealing in illiquid assets. The changes focus on non-UCITS retail schemes and include new rules on suspension of dealings, contingency plans for dealing with liquidity risks, and increased disclosure to investors.

The FCA is also considering whether the new measures should be applied more widely, and whether it should consider any additional measures – the FCA would consult in due course on any proposals for further changes to its rules.

The FCA's objective is to reduce potential harm to investors in funds that hold illiquid assets, especially under stressed market conditions. The changes will come into force on 30 September 2020.

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