ALLEN & OVERY

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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.

Supreme Court rules on ill-health pensions and disability discrimination | Court of Appeal rules transitional scheme closure arrangements are discriminatory | New consultation on TPO processes | Latest HMRC guidance | Pensions cold-calling regulations approved | Chappell v TPR: information-gathering powers | Brexit: new 'no deal' guidance for members

Supreme Court rules on ill-health pensions and disability discrimination

The Supreme Court has ruled that calculating an enhancement to an ill-health pension on the basis of a salary derived from reduced hours is not unfavourable treatment arising in consequence of a disability: *Williams v the Trustees of Swansea University Pension & Assurance Scheme and anor*.

Mr Williams had taken ill-health retirement at age 38 due to disability, and his pension was calculated on the basis of his final salary at retirement. He had previously reduced his hours as a reasonable adjustment to take account of his disability, and he claimed that the failure to calculate an enhancement to his pension based on his full-time salary was unfavourable treatment arising from his disability (under the Equality Act 2010). Before the Supreme Court it was argued the treatment was unfavourable because Mr Williams had been working part-time only because of his disabilities, and that if he had not been disabled he would have continued to work full-time.

The Supreme Court unanimously dismissed the appeal, stating that it was substantially in agreement with the Court of Appeal. It considered that Mr Williams' argument made an 'artificial separation' between the method of calculation and the award of the pension. Mr Williams was only entitled to the pension *because* of his disability. Had Mr Williams been able to work full-time, he would not have received a pension calculated on a more favourable basis – instead, he would not have been immediately entitled to a pension at all. Therefore there was no unfavourable treatment.

To read about the earlier decisions in the case, see WNTW, 31 July 2017, and WNTW, 3 August 2015.

Court of Appeal rules transitional scheme closure arrangements are discriminatory

The Court of Appeal has unanimously ruled, in a joint decision, that the transitional provisions in relation to reforms made to the Judicial Pension Scheme and the Firefighters' Pension Scheme are discriminatory: *McCloud; Sargeant*.

As part of a wider reform of public service pension schemes, a new judicial pension scheme and a new firefighters' scheme were implemented from 2015. Certain members received full or tapered protection in relation to the changes, depending on how close they were to retirement age (the 'transitional protections'). The *McCloud* case related to the judicial pension scheme, the *Sargeant* case to the firefighters' pension scheme. The claims were that the transitional protections constituted unlawful direct age discrimination and indirect race and sex discrimination; and equal pay claims were made, because older members were treated more favourably. The indirect discrimination claims derived from both the judiciary and firefighter personnel profile being more diverse among younger members. In both cases, there appeared to be little evidence before the Employment Tribunal (ET) about the reasons underlying the aims, and a key issue was the level of scrutiny to be applied when assessing the legitimacy of the aims, given that these were decisions made by the government.

Direct age discrimination

The Court of Appeal held that the government had failed, in relation to both cases, to show that the treatment was a proportionate means of achieving a legitimate aim. Essentially, the Court of Appeal considered that the government's rationale for the transitional protections (ie the legitimacy) needed to be supported by evidence, and that evidence was not before the tribunal.

In relation to the judicial pension scheme, the Court of Appeal held that there were no errors of law in the original decision by the ET judge (summarised here: WNTW, 23 January 2017; EAT ruling here: WNTW, 5 February 2018). In relation to the firefighters' pension scheme, the ET judge had not carried out the necessary objective assessment of whether the aims were legitimate (ET decision summarised here: WNTW, 13 March 2017, EAT ruling here: WNTW, 5 February 2018).

Equal pay and race discrimination

The Court of Appeal also concluded that these claims succeeded in both cases. As there was no objective justification to the age discrimination claims, there was no justification defence to the equal pay and indirect race discrimination claims, so the claims would succeed if a discrimination argument was established.

It remains to be seen whether the government will seek to appeal the decision to the Supreme Court, particularly since these reforms form part of a broader package of reforms to public sector pension schemes.

New consultation on TPO processes

The government is consulting on changes to the Pensions Ombudsman's (TPO) dispute resolution process, and 'signposting requirements'.

The consultation contains a couple of 'catch-all' questions about improvements to TPO's processes, but is particularly seeking input on the following areas:

- the features of an early resolution service for resolving disputes prior to a TPO determination, including whether the outcome should be binding on the parties, and how this would interact with a scheme's internal dispute resolution process (IDRP). TPO recently launched an Early

Resolution Service (ERS) (WNTW, 24 September 2018), so the consultation is partly directed at clarifying and setting the boundaries of the new service;

- whether TPO should be able to accept complaints which have not been through a scheme's IDRP;
- enabling an employer using a group personal pension to bring a complaint to TPO on its own behalf against the provider or administrator; and
- changes to TPO signposting requirements, including in relation to personal pension schemes. In September, the government announced an easement to current requirements until legislative changes are made (WNTW, 24 September 2018).

The consultation closes on 18 January 2019. TPO's press release is available here.

Latest HMRC guidance

HMRC has published new guidance on contracted-out rights, as well as issue 40 of its Countdown bulletin for administrators dealing with reconciliation processes after the end of DB contracting-out.

The new guidance on contracted-out rights is as follows:

- guidance on providing a guaranteed minimum pension (GMP) and post-1997 contracted-out salary related rights, including a description of how the anti-franking rules operate;
- guidance on calculating GMPs; and
- guidance on transferring contracted-out rights.

The new guidance does not address GMP equalisation and HMRC's position on payments to members and transitional pension protection following the recent *Lloyds* case (to read more about the case, see our briefing Equalising pensions for GMPs? High Court says 'yes').

The Countdown bulletin includes updates on Contributions Equivalent Premiums (CEPs), including an update on financial reconciliation processes (which largely relate to unpaid CEPs). Scheme administrators should note that unless they contact HMRC to request the scheme's financial position, the scheme will not receive any refund payable and any surplus will be retained in the National Insurance Fund. HMRC has also confirmed that new trustee approval to share information will be required. In addition, the bulletin notes that the 31 December 2018 deadline for scheme termination and stalemate queries has been extended to 9 January 2019 due to access issues. HMRC has also provided a contact email address to use if other deadlines have been affected (HMRC will consider these on a case-by-case basis).

Pensions cold-calling regulations approved

As expected, Parliament has now approved regulations banning pensions cold-calling. In November, the government published a draft version of the regulations, together with its consultation response (WNTW, 5 November 2018). There are no changes between the version approved by Parliament and the version released in November.

Trustees and managers of occupational and personal pension schemes are exempt from the ban, provided that the recipient consents to such calls or there is an existing client relationship such that the recipient might reasonably expect to receive cold calls (and has been given the opportunity to refuse such calls). The regulations come into force on 9 January 2019.

Chappell v TPR: information-gathering powers

Dominic Chappell has been sentenced to pay a GBP50,000 fine, GBP73,900 costs and a small victim surcharge for failing to provide information or documents to the Pensions Regulator (TPR), which has wide information-gathering powers. Chappell, the majority shareholder in the company that purchased BHS, was convicted of offences in January 2018 (to read more, see WNTW, 22 January 2018, and WNTW, 1 October 2018).

TPR has stated that 'Information notices are a vital investigative tool for us. As this case shows, if you ignore them you are committing a crime and should expect to be prosecuted' – TPR's press release is available here. You can read more about TPR's information-gathering powers here.

TPR's press release also notes that the anti-avoidance action against Mr Chappell (in relation to the BHS pension schemes) is continuing.

Brexit: new 'no deal' guidance for members

The government has published two new sets of Q&A 'no deal' guidance on pensions and benefits:

- UK nationals in the EU: benefits and pensions in a 'no deal' scenario
- EU citizens in the UK: benefits and pensions in a 'no deal' scenario

Although the Q&A documents are short and some issues are still uncertain, these may be useful to pass on to members with queries.

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