

Current issues

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Articles this month:

Council ordered to pay survivor's pension to cohabitee
Work & Pensions Committee examines pension costs and transparency
Ombudsman stresses need for decision-makers to give reasons
IORP II transposition update
Pension bodies' annual reports
HMRC newsletters

Council ordered to pay survivor's pension to cohabitee

A High Court judge has explained his reasons for ordering an English Local Government Pension Scheme (LGPS) administering authority to pay a survivor's pension (backdated, with interest) to the unmarried, and un-nominated partner of a deceased member.¹

The case was connected with the death of an unmarried LGPS member in November 2011. At the time in question, the LGPS Regulations provided benefits only to cohabiting partners who had been nominated by a member.² The claimant met all of the other conditions for a survivor's pension, but was refused because her deceased partner had not completed a nomination form in her favour. She applied for judicial review of the administering authority's decision in June 2013.

Her case was stayed (postponed) pending the outcome of near-identical legal proceedings in Northern Ireland. In February 2017, the Supreme Court ruled, in *Brewster*, that the analogous nomination requirement in the NI legislation was unjustified and a breach of the European Convention on Human Rights.³ The nomination condition was disapplied, and the Local Government Pension Scheme for Northern Ireland was ordered to pay a survivor's pension.

The claimant in the stayed proceedings understandably expected prompt action from LGPS administering authorities in England and Wales, following the *Brewster* judgment. However, in her case, the delay persisted. Whilst the administering authority effectively accepted her entitlement to a survivor's pension, it was concerned that, without amendment of the LGPS Regulations for England and Wales, a court judgment dealing directly with that legislation (rather than its NI equivalent), or central government action, any payment to her would be an 'unauthorized member payment' under the pensions tax legislation, and would result in penal charges for both the recipient and the authority. That fear dissuaded the administering authority from settling the claim by way of consent: it preferred to await the 'clarity' of a reasoned judgment from the Court.

At the central government end, HM Treasury wrote on 6 April 2017 to public sector schemes throughout the UK, advising that any similar cases, in which survivor's pensions were denied due to lack of nomination, should be reconsidered in light of the *Brewster* decision. Regrettably, it did not seem to have informed the Department for Communities and Local Government (DCLG), which is responsible for the LGPS in England and Wales, before doing so, as on the same day the Secretary of State for Communities and Local Government told the High Court

¹ *R. (on the application of Elmes) v Essex County Council* [2018] EWHC 2055 (Admin).

² *The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007* (SI 2007 No. 1166).

³ *In the matter of an application by Denise Brewster* [2017] UKSC 8.

that the Government was still considering the implications of the Supreme Court's ruling.⁴ In August 2017 the DCLG issued guidance indicating that, in its opinion, it would be reasonable for LGPS authorities in England and Wales to interpret the *Brewster* judgment as giving them a legal basis for disapplication of the nomination requirement, so that there would be no question of the payment being unauthorized, and that they 'should give careful consideration' to adopting such an approach.

One difference between the facts of the English case and those of *Brewster* was that in the former the deceased member had children whose dependants' pensions would have been lower had a pension been paid to the surviving cohabitee. The administering authority had, however, decided that it would not seek recovery of the overpayments (totalling £9,500) that had, with the benefit of hindsight, been made (it also said that it would not reduce the children's pensions, but that was somewhat academic as the payments had stopped by that time).

Judgment

The judge had no doubt that the nomination requirement in the LGPS Regulations for England and Wales had to be disapplied. Whilst he accepted that the administering authority's concern about unauthorized payments was genuine, he found it difficult to understand how it could have thought that there was any basis to it. The outcome of the Supreme Court's ruling in relation to materially identical legislation was that a survivor's pension *had* to be paid. It was authorized by the LGPS Regulations (interpreted in line with *Brewster*), and there was no reason for Her Majesty's Revenue and Customs (HMRC) to treat it as an unauthorized member payment. The authority's concern about tax penalties was, he said, 'a legal nonsense'.

The judgment touches upon several other issues, including several procedural matters. The judge thought that the deceased member's children should have been named as 'interested parties' in the initial claim, as there were risks that their future pensions would reduce and that they would be required to reimburse overpayments. In practice, because of the administering authority's decisions, those risks did not arise; but the Court endorsed the Secretary of State's suggestion that in other, similar claims the existence of children of the deceased should be determined and consideration given as to whether they ought to receive independent advice.

It came to light during the proceedings that the LGPS Scheme Advisory Board had heard that another administering authority had obtained counsel's opinion to the effect that payment of survivors' pensions off the back of *Brewster* without a change to the LGPS Regulations would be *ultra vires* (beyond the powers of the administering authority). This 'adverse opinion' turned out to be a reference to comments made during a telephone conversation. The Government Legal Department had concluded that the analysis behind the adverse opinion was 'not compelling'; in light of the legislation and the *Brewster* ruling, the judge concurred with that assessment; however, he was concerned that the existence of the adverse opinion had not been brought promptly to the Court's attention.

We sense a tone of frustration underlying some of the judge's comments about the delays in resolving an ostensibly 'open and shut case'. We hope that the judgment gives administering authorities the confidence that they need to deal with other, similar claims.

⁴ The Department for Communities and Local Government became the Ministry of Housing, Communities and Local Government in January 2018.

Work & Pensions Committee examines pension costs and transparency

The House of Commons Work and Pensions Committee has launched an inquiry into whether the pensions industry provides consumers with sufficient transparency around charges, investment strategy and performance.⁵ This inquiry will also consider whether consumers get value for money on their pension savings; whether they understand the impact of costs on retirement outcomes; whether they are engaged enough to use this information to make informed choices about their pension savings; and whether consumers get good-quality advice from financial advisers.

As background to the inquiry, the Committee points to the rapid growth in workplace pension savings as well as the significant increase in transfers out of defined benefit schemes to take advantage of pension freedoms. These developments have increased concerns about the level and effect of charges – especially for drawdown – plus the low levels of engagement and understanding, all of which increase the risk of poor consumer outcomes. The Committee is also concerned about the quality of defined benefit transfer advice; it refers to recent Financial Conduct Authority research where less than half of the cases reviewed provided suitable advice.⁶ The Committee recently held related inquiries into the British Steel Pension Scheme⁷ and the operation of the money purchase pension freedoms⁸.

The Committee is looking for evidence from interested parties in the following areas:

- the connection, if any, between higher charges and higher performance;
- what the Government needs to do to ensure that workplace pension savers get value for money;
- the relative importance of empowering consumers or regulating providers;
- how to encourage savers to engage with their savings;
- the importance of investment transparency to savers;
- the existence of barriers to going elsewhere if customers are unhappy with their providers' costs and investment performance or strategy;
- the effectiveness of Independent Governance Committees in driving value for money; and
- whether pension customers get value for money from financial advisers.

The deadline for written submissions is 3 September 2018.

Ombudsman stresses need for decision-makers to give reasons

The Pensions Ombudsman has reiterated his belief that trustees and scheme managers should, when exercising discretionary powers, document the reasons beneath their decisions.⁹

The complaint concerned the death benefits under a self-invested personal pension (SIPP). The SIPP's rules provided that the scheme administrator had discretion to pay a pension to a dependant of the member. Lump sum death benefits could also be paid, again at the administrator's discretion, to anyone in a category of individuals that covered the member's spouse and dependants, persons mentioned in his will, or his nominees.

The member, a solicitor, had nominated himself (effectively, his estate) for receipt of his death benefits. Shortly thereafter, he had purchased a house together with his unmarried partner, with whom he also had a joint bank account. There was some hearsay evidence that he had intended to revise his death-benefit nomination to make provision for her, but as things turned out he did not do so. She was, however, provided for in his will.

⁵ <www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/inquiries/parliament-2017/inquiry11/>.

⁶ <www.fca.org.uk/news/news-stories/our-work-defined-benefit-pension-transfers>.

⁷ <<https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/828/828.pdf>>.

⁸ <<https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/917/917.pdf>>.

⁹ Dr G (PO-18953).

This was in fact the third time that the matter had been referred to the Ombudsman. On the first occasion, he concluded that the administrator, in deciding how to distribute the death benefits, had not properly considered the partner's eligibility; and directed it to obtain evidence of her financial dependency on him and reconsider its decision.

When the administrator's decision not to award her any benefits was referred to him for the second time, he found that it had attributed disproportionate significance to the absence of conclusive evidence that the member had intended to revise his nomination in her favour. He said that, having determined that she fell within the class of potential beneficiaries, the administrator should have considered her claim equally with that of the member's children, grandchildren and estate. Once again, the administrator was directed to revisit its decision.

The administrator decided against providing her with a pension, and said that the lump sum should go to the member's estate. The decisions, and the factors that went into them, were recorded in the minutes of a meeting. The member's partner complained to the Ombudsman a third time.

The Ombudsman's decision was as follows:

'The payment of death benefits is a discretion of the Scheme Administrator and I am mindful of the remit of this Office and our basis for interfering in discretionary decisions.

... However, in this instance, it is not clear what the basis for [the administrator's] decision was and it is this omission which is problematic.

[The administrator says] that the factors which were taken into consideration in reaching its decision were clearly set out in the minutes. No reasons were given for its decision though. I consider the absence of any documented reasons to support a decision as indicating that there were in fact no supportable reasons for the decision. Documented reasons need not themselves be lengthy but should be sufficient to convey to the reader an understanding of the factors which have been given some weight. It may also be appropriate to record why some factors have been discounted. The reasons should be sufficient to enable an aggrieved party to know whether there are grounds to challenge the decision.

By not providing reasons to support its conclusions [the administrator] has failed to carry out a complete exercise, hence it is not possible to establish whether it exercised its discretion appropriately.'

The boomerang feature of this complaint may have influenced the Ombudsman's decision, and the member's self-nomination is rather unusual. Nevertheless, it will be of great general interest because of the candour with which the Ombudsman expressed his belief about the importance of explaining the reasons leading to an exercise of discretion, and his implication that the absence of documented reasons will result in a presumption of arbitrariness. The determination is at odds with the traditional understanding of trustees' obligations in this area.

IORP II transposition update

In correspondence with industry bodies, the Department for Work and Pensions (DWP) recently set out its proposals for the transposition of the EU's IORP (Institutions for Occupational Retirement Provision) II Directive¹⁰ into UK legislation. The DWP has made it clear that the current levels of political uncertainty, especially with regard to Europe, could still result in changes to its proposals.

Approach to transposition

The IORP II Directive became EU law on 13 January 2017. Member states – including the UK, until it exits the EU – have until 13 January 2019 to incorporate it into their own legislation. UK pension schemes must continue to comply with the UK regulatory framework and do not have to comply with IORP II directly. According to the DWP, the UK was influential in the drafting of the Directive and already complies with many of its requirements. It can therefore be implemented without extensive new legislation.

The DWP will not expect pension schemes to make any changes by January 2019. Any amendments to pension scheme legislation will allow sufficient time for familiarisation and planning. The DWP says that schemes should be clear about what is expected of them and will have sufficient time to make any changes with minimum cost and disruption. The smallest schemes (those with fewer than 100 members) will continue to be exempt from many of the requirements.

Scheme governance legislation

The DWP proposes to lay regulations in response to the Directive's increased emphasis on effective governance. These regulations would replace the existing requirement for internal controls in the *Pensions Act 2004* and would require TPR to publish an updated Code of Practice to explain what is expected of trustees. The DWP proposes that the regulations will come into force in December 2018 and that TPR will publish the Code of Practice within the following year. The Code would have the same 'comply or explain' status as the existing Codes of Practice.

The details of the implementation period have still to be decided. Trustees could be given a year or more to make any changes that are necessary, and may be allowed to fit them into their existing work-cycles.

The DWP wants to ensure that any new requirements are aligned with existing policy plans and timescales as well as new policy developments such as the proposed DB chair's statement and the Regulator's 21st Century Trusteeship initiative. Where possible, the intention is to minimise any duplication of effort by schemes. It is expected that schemes which are authorised master trusts under the *Pension Schemes Act 2017* will not need to make any changes to comply with the new governance requirements.

We welcome the DWP's proposal to avoid a January 2019 'cliff edge' for schemes, amid the uncertainty about the future relationship between the UK and the EU. However, it does raise the question whether the Government would take such a seemingly relaxed approach if it did not have its hands full with the UK's exit from the EU. Despite this, the extent to which the Directive impacts on pension schemes remains to be seen.

¹⁰ Directive (EU) 2016/2341 'on the activities and supervision of institutions for occupational retirement provision (IORPs)' <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L2341&from=EN>>.

Pension bodies' annual reports

The Pensions Regulator and the Pensions Ombudsman have recently published their annual reports and accounts for the year to 31 March 2018.¹¹¹²

The Pensions Regulator

The Pensions Regulator claims that it has been a '*challenging*' year but it has also been a successful one. It says that it is now a more proactive organisation and, through a significant change programme, it has become '*clearer, quicker and tougher*'. The Regulator also reports:

- its new role authorising and supervising master trust schemes from October 2018;
- the launch of the '*21st century trusteeship*' campaign in September 2017 aimed at improving the standards of governance;
- welcoming the '*Protecting defined benefit pension schemes*' white paper's focus on the existing funding standards and the improvements to the Regulator's powers;
- that eighteen out of its nineteen key performance targets set at the beginning of the year have been achieved; and that
- it is developing a joint strategy for the regulation of pensions in conjunction with the Financial Conduct Authority.

Pensions Ombudsman

The Pensions Ombudsman (TPO) reports on a '*momentous*' year due to further changes in, for example, working practices, technology and culture which are '*transforming*' the organisation. The backlog of 730 cases at the start of the year had been reduced to a backlog of 20 cases by 31 March 2018.

There was a 26 per cent increase in the number of complaints for investigation compared with 2016/17 and the subject of new investigations was very similar to previous years apart from a large group of similar complaints about the calculation of transfer values (20.5 per cent). The percentage of cases being closed within six months remains almost unchanged (43 per cent in 2017/18 compared to 40 per cent in 2016/17) and the average time for the completion of new investigations was five months.

Finally, in March 2018 TPO completed the project to integrate the dispute resolution work previously carried out by The Pensions Advisory Service.

¹¹ <www.thepensionsregulator.gov.uk/docs/annual-report-and-account-2017-2018.pdf>.

¹² <www.pensions-ombudsman.org.uk/wp-content/uploads/TPO-AR-2018-FINAL-ONLINE.pdf>.

HMRC newsletters

Her Majesty's Revenue and Customs (HMRC) has published several updates since the last edition of *Current Issues*.

Pension Schemes Newsletter 101

The Newsletter¹³ includes information on the new master-trust authorisation regime that will come into effect from 1 October 2018. Pension scheme administrators must inform HMRC within thirty days of their scheme becoming or ceasing to be a master-trust. Existing master-trusts will have six months in which to apply for authorisation from the Pensions Regulator; if they do not receive authorisation the scheme will have to wind up. HMRC will also be able to de-register a master-trust scheme that fails to obtain or maintain its authorisation. New master-trusts after 1 October 2018 cannot operate until they become authorised.

It includes a reminder that there is no time limit on how long HMRC can take when deciding whether or not to register a pension scheme, although it is possible to appeal to a tribunal if HMRC has not decided within six months of receiving the application. Schemes that claim relief at source must use the tax rate based on a member's residency status provided by HMRC and not based on a member's address. Lastly, having confirmed in the last Newsletter¹⁴ that the current PAYE treatment of flexible pension drawdown payments would remain in place, HMRC reveals that it repaid nearly £29m in tax in the second quarter of 2018.

Countdown Bulletin 36

HMRC has also published the latest Bulletin in a series designed to deal with the aftermath of the abolition of contracting out.¹⁵ The final date to request a Scheme Reconciliation Service (SRS) re-run has been put back from 30 June 2018 to 30 September 2018. In March 2019, schemes will be issued with the scheme membership records held by HMRC at that time and no further membership queries should be submitted after that.

Scheme administrators are reminded of the 31 October 2018 deadline for submitting SRS queries that require a response from HMRC, although automated queries can continue after this date. It remains the position that HMRC expects to have answered most queries by December 2018, and to resolve any outstanding matters in early 2019.

¹³ <www.gov.uk/government/publications/pension-schemes-newsletter-101-july-2018/pension-schemes-newsletter-101-july-2018>.

¹⁴ <www.gov.uk/government/publications/pension-schemes-newsletter-100-june-2018/pension-schemes-newsletter-100-june-2018>.

¹⁵ <www.gov.uk/government/publications/countdown-bulletin-36-august-2018/countdown-bulletin-36-august-2018>



And Finally...

'Tis the cucumber time, with Parliament in recess, the law courts not sitting, and many other people on holiday. In this Silly Season, a young journalist's fancy may lightly turn to the attractiveness of Nigeria's nascent pensions system to foreign investors¹⁶, or Vladimir Putin (henceforth, Vlad Backpeddla, or Vlad the Placator) trying to quell protests over pensions-age increases that were coincidentally/deliberately announced on the day of Russia's first match of World Cup 2018.

So when the news media learned of the Pensions Regulator writing to some schemes to express concerns about transfer activity it was, unsurprisingly, seized upon with alacrity. In some cases, however, headline writers may have let their natural effervescence get the better of them:

- **Regulator urges troubled schemes to cut transfer values** (FT Adviser) [*No it didn't*];
- **Pensions regulator urges schemes to cut transfer values** (Professional Pensions) [*It really didn't*];
- **Pension transfers 'too generous', says regulator** (BBC Online News) [*Nope, and whose words were they?*]; and
- **Gold-plated pension cash-ins are too big, says regulator** (Daily Telegraph) [*Still no, but triple-word score bonus for 'gold-plated pensions'*].

It's only fair to mention that the questionable phrasing of some captions was noted by Justin Cash¹⁷, a journalist whose employment by *Money Marketing* is surely either wonderfully serendipitous or powerful evidence of nominative determinism in action...

¹⁶ <www.ft.com/content/2dcbdc9e-1271-3df9-a416-3a069a49bce2>.

¹⁷ <https://twitter.com/Justin_Cash_1/status/1034710121891414016>.