

# Sixty second summary

## GMP equalisation obligation extends to historical transfers

In the latest instalment of the *Lloyds Banking Group* litigation, the judge concludes that trustees must top-up past transfer payments if no provision was made for the need to equalise benefits for differences attributed to guaranteed minimum pensions.<sup>1</sup>

### History

On 17 May 1990, the European Court of Justice (ECJ) ruled that, from that date onward, occupational pensions had to be equal for men and women in similar circumstances.<sup>2</sup> Despite significant judicial development of the principle and its implications in the years since—and much, *much* debate—it was not until the first *Lloyds* judgment in 2018 that the courts confirmed that the obligation to equalise applies to differences attributable to guaranteed minimum pensions.

Rights to GMPs, as they are known, were accrued by members of defined benefit (DB) occupational pension schemes that were ‘contracted out’ of the earnings-related aspect of the UK’s State pension system between 1978 and 1997. The accrual rate of GMP differed for men and women, as did (does) the age at which payment commences. These disparities, and differences in the ways in which GMP and non-GMP benefits are revalued during deferment and increased whilst in payment, mean that a man and a woman of the same age and with identical service and salary histories may be entitled to different benefit totals; and that the advantage may shift from one sex to the other over time.

The October 2018 *Lloyds* ruling established (among other things) that trustees have an obligation to adjust non-GMP benefits so that the total pensions received by men and women in comparable circumstances are equal. However, there are several lawful methods by which this equalisation can be accomplished. The parties to the *Lloyds* litigation have since returned to the court twice to obtain guidance on issues raised by the initial decision: a judgment in December 2018 was concerned with the use of statutory powers to convert GMPs into non-GMP benefits, and the latest (20 November 2020) ruling was about trustees’ obligations in connection with historical transfers.

### Judgment on past transfers

#### Individual statutory transfers

The judge ruled that, in cases in which the member exercised the statutory right to transfer, the trustee was under a duty to make a transfer payment that correctly reflected the member’s right to equalised benefits, and remains liable to the member if it breached that duty by making an inadequate transfer payment. That was the case despite discharge provisions in the transfer legislation, scheme rules, and the forms signed by transferring members. Members’ claims to a top-up transfer payment were not barred either by scheme forfeiture rules or the *Limitation Act 1980*.

<sup>1</sup> *Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank PLC* [2020] EWCH 3135 (Ch).

<sup>2</sup> *Barber v Guardian Royal Exchange* (Case C-262/88).

The judge stopped short of saying that the trustee was under an obligation to identify and rectify transfers shortfalls *proactively*. Having noted that he was asked not to take into account wider considerations such as the potentially disproportionate costs entailed by proactivity, he concluded that all he could usefully say was that

*'the Trustee does need to be proactive in that it must consider the rights and obligations... identified, the remedies available to members and the absence of a time bar and then determine what to do.'*

### Bulk transfers without member consent

Where the transfer was not the result of an exercise of the member's statutory right to transfer, but one that took place without the member's consent under the preservation legislation that protects early leavers, the judge said that the trustee had been discharged from the obligation to equalise. However, it appears that he was asked specifically about 'mirror-image' transfers in which members obtain rights under the receiving scheme that are identical to their rights under the transferring scheme, so it is unclear that this discharge from the equalisation obligation would apply in all cases.

### Individual extra-statutory transfers

The judge was also asked about member-instigated transfers that took place outside of the statutory right to transfer. This can happen, for example, when trustees exercise their powers to permit a transfer despite the member having passed the date that falls one year before his or her normal pension age. He said members in such cases would no longer have rights under the transferring scheme, unless the court set aside the trustees' exercise of their powers, and that it would only do so if the trustees had breached their duties by giving '*inadequate deliberation*' to the matter. As that would involve investigation of the circumstances of each particular transfer, and he had not been provided with relevant evidence or asked to set aside such a decision, he left the question there.

### Inward transfers

In 1994's *Coloroll* judgment, the ECJ decided (among other things) that when an employee changes job and transfers pension rights from one occupational scheme to another, the receiving scheme is bound to equalise the benefits attributable to post-17 May 1990 service under the transferring scheme.<sup>3</sup> This was on the assumption that the transferring scheme had not already gone through the process of *Barber* equalisation, and the capital amount transferred was therefore inadequate. The judge in the *Lloyds* case saw no conflict in the member having rights to equalised benefits under the receiving scheme whilst also having a right to require the transferring scheme to top up its transfer payment.

The ruling will be good news for some members who took a transfer value, as they may now be in line for a top-up payment. However, the effort involved in revisiting transfers paid out by pension schemes across the industry over the last 30 years will be a very significant challenge, and in many cases historical data will not be available.

For sponsors of pension schemes who report accounting figures under IAS 19 the ruling is likely to trigger a need to assess extra accounting liabilities and the impact on P&L. Those due to report as at 31 December 2020 do not have much time to analyse this.

The impact of the judge's findings about the limited effectiveness of discharge clauses and the absence of a time bar may be felt beyond the confines of GMP equalisation. Ex-members may be emboldened to challenge past transfer payments on other grounds, such as calculation errors or misinterpretation of scheme rules.

<sup>3</sup> *Coloroll Pension Trustees Ltd v Russell and others* (Case C-200/91).