

Current issues

June 2022

Articles this month:

DB transfers: good-practice guidance
Regulator airs draft enforcement & prosecution policies
The challenges of disputing regulatory penalty notices
Work and Pensions Committee: recent activity
Pension Schemes Newsletter 139
Other news...

DB transfers: good-practice guidance

The Pensions Administration Standards Association (PASA) has published guidance on good practice in the processing of defined benefit (DB) transfers.¹ It is intended to improve the member experience, lead to timely and helpful communication, and protect members from scams.

Relevance

The guidance is not meant for cases involving (amongst other things) bulk transfers, wind ups, transfer value illustrations, or pensions on divorce. Although it is concerned with DB transfers, application of the same principles is encouraged when members also have rights to money purchase benefits within the scheme.

Principles-based

The PASA says that the principles set out in the guidance (see box below) ought to be followed at all times, but that administrators can adapt the suggested processes to their own circumstances. It predicts that the Pensions Ombudsman will cite the guidance as evidence of good practice.

Principles:

- the member experience is paramount;
- communications should be timely, fair, clear, unbiased and straightforward;
- members should be informed about any processing delays;
- be mindful of the importance of safety and security;
- follow the guidance as far as possible, use the transfer template, and recognize administrators' vital role in supporting informed member decision-making; and,
- work with third parties as necessary to meet the objectives and principles of the guidance.

Templates

The guidance encourages use of a transfer template first published by the Financial Conduct Authority (FCA), in collaboration with the PASA and Pensions Regulator. It is a list of the scheme and member information required for the

¹ *Defined Benefit Transfers: Faster, Safer, Better* (May 2022) <www.pasa-uk.com/wp-content/uploads/2022/05/PASA-DB-Transfers-Good-Practice-Guidance-Final.pdf>.



provision of good quality financial advice on the benefits and risks of a transfer. The aim in promoting the template is to foster consistency and efficiency and forestall follow-up requests and questions.

There is also a template for acknowledgement of a member's request, which can be used to provide notice of and collect information relevant to the new transfer conditions, effective from 1 November 2021.

Regulator airs draft enforcement & prosecution policies

The Pensions Regulator has begun a consultation exercise on draft enforcement and prosecution policies.² It has also announced the outcome of a September 2021 consultation exercise into its policies for use of overlapping powers, monetary penalties (high fines), and information-gathering abilities.³

The draft enforcement policy is for anyone who might be subject to investigation or enforcement action, and will replace three current policy statements (for defined benefit, defined contribution, and public sector schemes). Finalized versions of the overlapping-powers and information-gathering policies that were circulated during last year's consultation exercise have been absorbed into the new document. Both it and the revised prosecutions policy also incorporate material on the new criminal offences established by the *Pension Schemes Act 2021*, and extra examples have been included in the overlapping-powers section of the draft enforcement policy in response to queries about the circumstances in which the Regulator might opt to pursue criminal prosecution rather than use its other statutory powers.

Comments about the draft policies should be submitted by 24 June 2022.

The challenges of disputing regulatory penalty notices

The first months of 2022 came with a spate of (recently reported) tribunal decisions involving the Pensions Regulator. They were appeals against penalties imposed for various compliance failures: missing automatic enrolment declarations, tardy reactions to unpaid contributions notices, and neglecting to produce an annual governance ('Chair's') statement. If there is a general lesson that one might infer, it is that anyone seeking to have a penalty overturned faces a steep uphill battle.

More particularly, the statutory presumption that notices were received if posted to an intended recipient's last known address is a strong one, so that the addressee bears the burden of proving non-receipt.⁴ However, it would be wrong to conclude that the presumption of receipt cannot be rebutted: for example, when considering whether notices were actually posted as claimed, evidence that copy notices sent by email were not received was relevant.⁵

Timely provision of information to the Regulator, enabling it to ascertain whether an employer has complied with its AE obligations, is crucial.⁶ Upon receipt of an unpaid contributions notice, an employer must not only pay the outstanding contributions, but must provide evidence of having done so—even if it believed (erroneously, it seems) that it was in credit.

Naturally, the SARS-CoV-2 pandemic impinges here, too. Neither it nor the resulting lockdowns provided a reasonable excuse for an employer not to comply with the obligation to renew its declaration of auto-enrolment (AE) compliance in time.⁷ In a case in which the employer argued that its business premises had been shut for long periods and did not have a letter box, the Tribunal noted that no explanation had been given as to why some correspondence had been received, and said that a responsible employer would have in place effective arrangements for timely receipt of post, especially important official communications.⁸

This message was repeated by the same judge in another case, in which the employer pointed to pandemic-enforced office closures, and the stranding abroad (Thailand) of the responsible director, as excuses for non-payment of AE contributions. The Tribunal said that a reasonably diligent employer should have ensured that it was complying with its AE employer duties throughout the time in question; and that, by 2021, more than a year after the initial lockdown, the

² <www.thepensionsregulator.gov.uk/-/media/thepensionsregulator/files/import/pdf/tpr-enforcement-and-prosecution-policies-consultation-document.ashx>.

³ <www.thepensionsregulator.gov.uk/en/document-library/consultations/new-enforcement-policies-consultation/proposed-approach-to-our-new-powers-consultation-response>.

⁴ *Davey West Limited v The Pensions Regulator* [2022] UKFTT PEN_2021_0271 (GRC).

⁵ *Phillip Freeman Mobile Welders Limited v The Pensions Regulator* [2022] UKUT 62 (AAC).

⁶ *Kingswear Gallery Limited v The Pensions Regulator* [2022] UKFTT PEN_2021_0257 (GRC).

⁷ *Total Industrial Machines Limited v The Pensions Regulator* [2022] UKFTT PEN-2021-0264 (GRC).

⁸ *Davey West*.



business should have had arrangements in place to enable it to read and deal with correspondence notifying it that it was in breach of those employer duties.⁹

The fact that all of an employer's staff had been furloughed, that it had relied upon the Coronavirus Job Retention Scheme, and had cashflow problems did not give it a reasonable excuse for failure to comply with an escalating penalty notice (issued when the employer failed to comply fully with an unpaid contributions notice).¹⁰ Although the judge acknowledged the difficulties caused by the pandemic, particularly in the leisure and hospitality industry, the employer duties under the AE legislation had persisted, and the Government's CJRS guidance was clear that pension contributions had to be made (indeed, from 1 March to 31 July 2020 CJRS payments included AE minimum contributions, which had to be returned if not made to the scheme). The contributions were not optional, and the employer was not permitted to prioritize other aspects of its business.

Lack of knowledge of one's legal obligations does not constitute a reasonable excuse.¹¹ Neither does difficulty communicating with a pension provider (albeit the Tribunal exercised some leniency, resetting the starting date for an escalating penalty to a point after its decision, thereby giving the employer additional time to put its affairs in order).¹² The judge observed that the employer in question had had access to professional advice, and that the time allowed by the Regulator for rectification of the issue provided ample opportunity for resolution of the communications problem. Furthermore, the employer had provided scant evidence of the difficulties experienced.

Financial difficulties have been raised elsewhere too. In response, the Tribunal has pointed to invitations in the Regulator's correspondence for employers to contact it if compliance challenges are anticipated.¹³ One judge commented somewhat pithily, in two separate cases, that '*the fact that the penalty may be burdensome is inherent in the fact that it is a "penalty"*'.¹⁴

Mandatory penalties, such as those required when Chair's statement failures are identified, leave the Regulator—and tribunals—with no room for manoeuvre.¹⁵

Work and Pensions Committee: recent activity

There has been a flurry of activity from the House of Commons Work and Pensions Committee (WPC) recently including the Government response to the WPC recommendations on accessing pension savings, the Treasury's response to a letter on the collection of unauthorised payment charges from scam victims, various letters from the Committee chair Stephen Timms and a second call for evidence on saving for later life.

Government response to report on accessing pension savings

The WPC published responses from the Government and Financial Conduct Authority (FCA) to the recommendations that it made in its January 2022 report on *Accessing Pension Savings*.¹⁶ The Government rejects the recommendation to set a goal for those using Pension Wise and paid-for advice when accessing defined contribution (DC) pension pots for the first time. It also rejects calls for a trial of automatic Pension Wise appointments. The Government states that the 'stronger nudge' measures, coming into force in June 2022, will give members extra encouragement to take up Pension Wise guidance before accessing their benefits.

The WPC recommended that the Government look to reform the pensions advice allowance (which allows members or scheme beneficiaries to access up to £500 from their DC pension pots a maximum of three times during their lifetime to pay for advice). The Government disagrees that it should remove the annual limit and uprate it annually, though it will keep the allowance under review.

⁹ *Phasor Electrical v The Pensions Regulator* [2022] UK FTT PEN_2021_0242 (GRC).

¹⁰ *Morecambe Bay Wines Limited v The Pensions Regulator* [2022] UKFTT PEN_2021_0296 (GRC).

¹¹ *Ease & Co. (Banquette Seating) v The Pensions Regulator* [2022] UKFTT PEN-2021-0219 (GRC).

¹² *Davey West*.

¹³ *Davey West*.

¹⁴ *Pelaw MOT v The Pensions Regulator* [2022] UKFTT PEN-2021-0179 (GRC); *Davey West*.

¹⁵ *Ease & Co.*

¹⁶ <publications.parliament.uk/pa/cm5802/cmselect/cmworpen/1270/report.html>.



The Department for Work and Pensions (DWP) expects to issue a call for evidence shortly, on decumulation within DC occupational pension schemes. It will ask whether trustees need new duties relating to decumulation, and if there is a need to implement investment pathways equivalent to those offered by FCA-regulated pension providers.

The Government also confirms that it will be holding discussions with interested parties about how collective money purchase schemes could accommodate unconnected employers.

HMT response on collection of unauthorised payments charges from victims of pension scams

Her Majesty's Treasury (HMT) responded¹⁷ to a WPC recommendation that Her Majesty's Revenue and Customs (HMRC) should consider using its discretion not to pursue the collection of tax from pension scam victims who have made no financial gain.¹⁸ It explains that it has a duty to collect tax that is due, including seeking unauthorised payment charges where there is evidence that a person received an unauthorised payment by entering into arrangements designed to circumvent the tax rules. It also implies that some of those claiming to be victims of scams knew that the aim of the scheme was tax avoidance.

Query to trustee of the Water Companies Pension Scheme on transfer of surplus

Stephen Timms, Chair of the WPC, wrote to the trustee of the Water Companies' Pension Scheme regarding its decision to transfer the surplus in the Bristol Water section of the Scheme to the employer.¹⁹ The section in question is being wound up and annuities have been purchased to secure members' benefits.

Members of the scheme contacted the WPC because a provision in the scheme rules allows the trustee, in consultation with the employer, to use any surplus to augment benefits. They alleged that the trustees decided to transfer the funds to the employer without '*adequate consultation or explanation*'.

Timms asked whether the trustee had considered augmenting member benefits, whether it went through the proper process before making its decision, and how it consulted with members. He said that he is considering asking the Committee to discuss whether the legislation on surplus distributions and member-nominated trustees are effective and sufficient.

The trustee's very detailed response was published on 18 May.²⁰ It states that, '*In exercising its power to distribute surplus (and, in particular, in determining not to exercise its discretion to augment members' benefits) the trustee has followed the correct process, taken account of all relevant factors and has considered the matter very carefully. It remains of the view that it is appropriate for the surplus to be returned to Bristol Water plc*'.

As Mr Timms notes in his letter, the Committee seldom takes an interest in specific schemes, and it seems particularly unusual for it to question the exercise of trustee discretion. As one would expect, the trustee had followed the process set out in the scheme documentation and the legislation before returning the surplus to the employer.

Letter to Pensions Regulator on compensation for Norton scheme members

Timms also issued a letter to the Pensions Regulator requesting an update on progress in securing compensation for members of the Norton Motorcycles pension schemes, following the recent sentencing of the former owner of the business and sole trustee of the schemes for breaching employer-related investment rules.²¹ The process has been '*frustratingly slow*' for members, he says.

Response to GMP factsheet

The WPC has also published a letter from Timms to the Minister for Pensions and Financial Inclusion, Guy Opperman, regarding the DWP's review of its factsheet, *Guaranteed Minimum Pensions (GMPs) and the Effect of the New State Pension*.²² The factsheet covers the change in State pension rights for those retiring after 5 April 2016, which meant that the Government no longer meets the balance of inflationary increases on GMP in payment. In the letter, Timms requested that a revised version of the factsheet be produced, because it has been contacted by members of the public who are

¹⁷ <committees.parliament.uk/publications/22080/documents/163808/default/>.

¹⁸ <committees.parliament.uk/publications/5322/documents/53036/default/>.

¹⁹ <committees.parliament.uk/publications/21929/documents/163080/default/>.

²⁰ <committees.parliament.uk/publications/22292/documents/164918/default/>.

²¹ <committees.parliament.uk/publications/22045/documents/163689/default/>.

²² <committees.parliament.uk/publications/22145/documents/164418/default/>.

concerned that the existing one is '*insufficiently clear about the potential impact and that people may be eligible for compensation*'.

Second call for evidence on *Saving for Later Life*

The Committee has made a second call for evidence concerning its enquiry on *Saving for Later Life*.²³ This one is targeted at employers and trade unions, and asks questions about the role of employers in supporting pension saving, the timing of planned reforms to the automatic enrolment (AE) rules, the need for increases to minimum AE contribution rates (and whether employees should be permitted to 'opt down' rather than opt out of higher contributions), whether the £10,000 earnings trigger for AE should be reduced or removed, and whether a new independent Pensions Commission is needed. Responses should be submitted by 8 June 2022.

Data protection & communication with scheme members

In a letter to the Minister of State for Department for Digital, Culture, Media & Sport (DCMS), Julie Lopez, the WPC says that it has heard evidence that schemes '*are restricted in their ability to communicate helpful information to their members*' because of the *Privacy and Electronic Communications (EC Directive) Regulations 2003*.²⁴ The DCMS consulted on proposals to reform the current data protection regime in September 2021, and its response is awaited. The Committee asks Ms Lopez to '*assure the Committee that this important issue is being considered as the Department formulates its response to the consultation*'.

State Pension underpayments response

The WPC has also published a response from DWP Permanent Secretary Peter Schofield regarding underpayment of State pensions.²⁵ In response to a question asking for clarification on the DWP's plan for completing a 'Legal Entitlements and Administrative Practice' (LEAP) exercise (intended to identify those who have been underpaid), Mr Schofield stated that the Department is '*on track*' to complete the exercise '*by the end of 2023*', and that he intends to provide full details before the summer recess, in its annual report and accounts.

Pension Schemes Newsletter 139

Her Majesty's Revenue and Customs (HMRC) published a May 2022 edition of its pensions tax bulletin.²⁶ It contains information for administrators operating relief at source, and yet another reminder about migrating schemes from the old Pension Schemes Online service to its successor, Managing Pension Schemes (which needs to be done soon if an Accounting For Tax return for Q2 2022 must be submitted). In the latter case, there is a suggestion that some people have tried to register new schemes instead of transferring the existing ones across to the new service.

²³ <committees.parliament.uk/call-for-evidence/2626/>.

²⁴ <committees.parliament.uk/publications/22293/documents/164919/default/>.

²⁵ <committees.parliament.uk/publications/22290/documents/164916/default/>.

²⁶ <www.gov.uk/government/publications/pension-schemes-newsletter-139-may-2022/pension-schemes-newsletter-139-may-2022>.

Other news...

Financial Service Compensation Scheme compensation increase

The Financial Service Compensation Scheme would like to see its compensation limit in pensions cases (currently the £85,000 cap in investment business claims) brought closer to the £375,000 maximum award that will apply, from 1 April 2022, in Financial Ombudsman decisions.²⁷

The change would be of most relevance to those affected by bad financial advice and the failure of self-invested personal pension (SIPP) providers.

VfM in DC schemes

The Financial Conduct Authority (FCA) and Pensions Regulator have published a statement about value for money (VfM) in defined contribution (DC) schemes, describing the responses to their September 2021 joint discussion paper on the subject.²⁸ Contributors agreed that a holistic view of VfM is necessary, and about the main considerations (investment performance, governance and service, and costs and charges); but there was no clear consensus in other areas.

The statement says that the regulators will continue to develop their proposals and to consider what scheme metrics should be disclosed to enable VfM comparisons. They are also thinking about how their approach could be aligned with assessment of VfM in the decumulation phase, when members draw upon their funds. They plan to come forward with proposals for consultation *'towards the end of this year'*.

Pension Wise bookings portal

The Pensions Regulator recently updated its guidance on communicating & reporting for defined contribution (DC) schemes²⁹ to link to the online system by which trustees can book Pension Wise appointments for their members³⁰, in connection with the 'stronger nudge' obligations that came into force on 1 June 2022.

The Regulator has also replaced the letter from it, the Financial Conduct Authority (FCA) and the Money and Pensions Service (MaPS), that trustees are expected to give to DB members who request a transfer.³¹

Note that the 'stronger nudge' changes can also apply when members of defined benefit schemes, or their surviving beneficiaries, are considering transferring or accessing rights that include *'flexible benefits'*, such as money purchase additional voluntary contributions.

Green finance strategy update

The Government has called for evidence for an update to its Green Finance Strategy, to review progress and consider how the financial services industry can support the UK's energy-security, climate and environmental objectives.³² The call for evidence is open to responses until 22 June 2022, and the Government plans to publish the updated Strategy in *'late 2022'*.

Queen's speech 2022

The Queen's Speech, on the occasion of the State Opening of Parliament for the 2022/23 session, announced the Government's intention to bring forward many new Bills. None is directly pensions-related, but the *Data Reform Bill* and the *Boycotts, Divestment and Sanctions Bill* could have implications (the latter in the case of the Local Government Pension Scheme).

Others that might be of interest:

- the *Audit Reform Bill* (which will establish the ARGAs—the incoming regulator of the audit and actuarial professions),

²⁷ <www.fscs.org.uk/globalassets/publications/the-balancing-act-of-compensation.pdf>.

²⁸ <www.thepensionsregulator.gov.uk/en/document-library/consultations/value-for-money-discussion-paper/feedback-statement-on-driving-value-for-money-in-defined-contribution-pensions>.

²⁹ <www.thepensionsregulator.gov.uk/en/document-library/scheme-management-detailed-guidance/communications-and-reporting-detailed-guidance/6-communicating-and-reporting#7eda97c0308b485db4ec30b01d3e267a>.

³⁰ <www.moneyhelper.org.uk/en/pensions-and-retirement/pension-wise/book-a-free-pension-wise-appointment/how-to-book-a-phone-appointment/book-a-phone-appointment>.

³¹ <www.thepensionsregulator.gov.uk/-/media/thepensionsregulator/files/import/pdf/cetv-members-letter.ashx>.

³² <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1074650/green-finance-strategy-cfe.pdf>.

- the *Brexit Freedoms Bill*,
- the *Procurement Bill*,
- the *Financial Services and Markets Bill*,
- the *Online Safety Bill*, and
- a Bill of Rights to replace the *Humans Rights Act 1998*.

And Finally...

It is with some embarrassment that we admit that a significant part of *AF's* oeuvre has consisted of archly misinterpreting expressions stumbled across in the course of our employment. However, the announcement of HMRC guidance on '*mini umbrella company fraud*' gave us genuine cause to pause and wonder.³³ Disappointingly, the briefest of investigations revealed that it has something to do with the use of multiple small companies to obscure criminal activities, and is not, as we'd hoped, about intrigue and malfeasance in the dark corners of the cocktail-parasol trade. It took several pina colodas to get us over the anti-climax.

We experienced no real confusion about the First-tier Tribunal's judgment in *Kilted Fudge v The Pensions Regulator*, but were drawn to the title like a toddler to a sticky mess.³⁴ Although the tartan component of his ancestry might suggest otherwise, *AF* prefers his fudge unadorned by worsted wool, whether plaid or plain. And, in the way of a public safety announcement, humbly suggests that, amidst Highland games season, our readers exercise discretion when uttering the phrase 'kilted fudge' within range of burly persons wielding cabers, heavy stones and hammers...

³³ <www.gov.uk/guidance/mini-umbrella-company-fraud>.

³⁴ *Kilted Fudge Company Ltd v The Pensions Regulator* [2022] UKFTT PEN-2021-0272 (GRC).