

Snapshot

July 2022

Overview

- [Pensions dashboard developments](#)

The Pensions Regulator (**TPR**) has issued [initial guidance](#) setting out the obligations of trustees to onboard onto a pensions dashboard. TPR emphasises the importance of schemes starting to take steps now, regardless of their staging date. The project will require schemes to have accurate, up-to-date and digitised scheme information and this is something that trustees should be looking at now.

In addition, the DWP has proposed amendments to the draft dashboard regulations. These set out when the 'go live' date will be determined - this is the date the dashboard will be available to the public.

- [DWP and TPR joint statement on transfer out regulations](#)

The joint statement emphasises that the Occupational and Personal Pension Schemes (Conditions for Transfer) Regulations 2021 (**Transfer Out Regulations**) are not meant to be an obstacle to transfers which are at a low risk of scams. The statement provides that, if the Transfer Out Regulations mean there is no statutory right to transfer out and the transfer is at a low risk of a scam, the trustees can proceed with a non-statutory transfer under the scheme rules.

- [GMP equalisation updates](#)

- PASA has issued new administration guidance in relation to GMP equalisation and past transfers out.
- HMRC has issued a newsletter confirming the status and tax treatment of interest payments on pension arrears in respect of GMP equalisation.

- [James Cropper PLC v Aviva Life and Pensions UK Ltd](#)

The High Court has agreed with a claimant employer and scheme trustees, in a strike out and summary judgment Application brought by the defendants in a pensions negligence case, that misstatements in an actuarial report could be a basis on which to bring a negligence claim.

Further information

Pensions dashboard developments

In our [Quarter 2 2022 legal update](#), we discussed how the government was consulting on draft regulations setting out when pension schemes would have to onboard to a pensions dashboard.

Background

A pensions dashboard is an electronic service by which an individual can access information about their various pension schemes (including the state pension) in a single place. The first pensions dashboard will be provided by the Money and Pensions Service and be non-commercial in nature. Other providers will subsequently be able to develop their own commercial dashboard services, subject to complying with strict requirements and being approved and regulated by the FCA.

The requirement for an occupational pension scheme to onboard to a pensions dashboard will apply to registrable UK based occupational pension schemes (including public service schemes) with active and/or deferred members. Onboarding to dashboards will be staged, with the largest schemes - of 1000 (non-pensioner) members or more - staging between April 2023 and September 2024. Those with 100-999 (non-pensioner) members have a proposed staging date of October 2024 to October 2025.

Changes to draft regulations

In its [response](#) to the consultation on the draft Pensions Dashboard Regulations 2022, the DWP has stated that the staging deadline for the first two staging cohorts will be deferred by two months, while the connection window for the first cohort has been expanded so that connection may still begin from 1 April 2023. This will affect:

- Master trusts with 20,000 or more relevant members, whose staging deadline will change from 30 June 2023 to 31 August 2023; and
- Money purchase schemes used for automatic enrolment with 20,000 or more relevant members, whose staging deadline will change from 31 July 2023 to 30 September 2023.

The DWP has also proposed further amendments to the draft regulations in respect of when the 'go live' date (or 'Dashboards Available Point' as it is termed in the draft regulations) will be determined. This is the date on which the dashboard will be available to the public. It is proposed that 90 days' notice will be given of this date.

Guidance

TPR has issued [initial guidance](#) setting out the obligations of trustees to onboard onto a pensions dashboard. TPR emphasises the importance of schemes starting to take steps now, regardless of their staging date. The project will require schemes to have accurate, up-to-date and digitised scheme information and this is something that trustees should be looking at now. [PASA have also issued guidance on data accuracy](#). In addition, trustees may need to update or enter into new agreements with their suppliers to cover the work involved in the dashboard project. TPR's guidance sets out a checklist of steps that trustees should be taking.

Next steps

There has been a lot of commentary about the tight timescales of the dashboard programme, especially given the amount of work involved. Trustees should therefore have this firmly on the agenda at trustee meetings and be undertaking steps to ensure they are ready when their staging date comes.

DWP and TPR joint statement on Transfer Out Regulations

In our [November alert](#) we discussed how, pursuant to the new Transfer Out Regulations, trustees would need to undertake additional due diligence prior to a statutory transfer out to assess if either a red or amber flag was present.

In practice the Transfer Out Regulations have caused some delay and concern over transfers, especially where overseas investments exist in the receiving scheme or small-scale incentives feature in the transfer. The DWP and TPR have now issued a joint statement emphasising that the Transfer Our Regulations are not intended to impact transfers that, prior to the Transfer Our Regulations coming into force, would have caused no concern.

The joint statement emphasises that, if trustees believe the Transfer Out Regulations mean there is no statutory right to transfer out but that the transfer is at a low risk of a scam, the trustees can proceed with a non-statutory transfer under the scheme rules.

GMP equalisation developments

PASA issues new administration guidance in relation to GMP equalisation and past transfers out

PASA's cross-industry GMP Equalisation Working Group has published [Guidance](#) from its Administration sub-group focused on the administration implications of past transfers out.

The Guidance highlights that:

- in order to equalise past transfers out for the effects of GMP (the **Project**), trustees need to make a number of decisions which will influence both the scope of the Project and the number of former members where a top up payment is due;
- many of these decisions have the potential to impact the administration aspects of the Project; and
- an important part of planning the Project is therefore to detail the decisions which need to be made, why they're important and the potential impact on administration.

This new Guidance comes in the form of a checklist which details the generic issues which can arise in relation to past transfers out and, for each issue, the decisions required from the trustees and associated administrative implications. It is intended that the checklist will be used to inform discussions around GMP equalisation and treatment of past transfers, capture the decisions made and provide an audit trail for the future.

The issues included in the checklist include:

- the treatment of non-statutory transfers - should they be treated in the same way as statutory transfers? Differentiating between the two types of transfer could be time-consuming and costly;

- the adoption of a de-minimis policy - should a policy be adopted to limit the number of past transfer out cases which will be reviewed? Calculations will be required for all past transfers out to understand which members will not receive a top-up payment; and
- the possibility of paying the top-up payment as a cash lump sum - should the top-up be extinguished by paying an authorised lump sum payment direct to the member rather than a transfer payment to a receiving arrangement? The pension tax rules allow such payments in certain circumstances and such payments might involve less work and cost from an administrative perspective.

HMRC guidance on interest payable

A recent [HMRC newsletter](#) provides information on circumstances where a scheme administrator pays interest in respect of the late payment of pension instalments. This will also cover pension arrears payments being made in the context of GMP equalisation.

Interest payments will be authorised payments (amounting to scheme administration member payments) if interest is provided on an arm's length commercial basis i.e. it is no more than a "reasonable commercial rate of interest". For GMP equalisation purposes, this would include interest at 1% above base rate in line with the Lloyds decision (either on a simple or compound basis), or an interest rate specific in the scheme rules.

Interest payments paid in addition to pensions arrears are taxable. The interest will be taxable in the tax year in which it is paid.

Where the arrears relate to a period of years (as is likely to be the case for GMP equalisation cases), the interest paid is likely to qualify as yearly interest. In that case, if the yearly interest relating to pension arrears is paid by:

- individual trustees, a corporate trustee, or a third-party administrator on a trustee's behalf, there will be no obligation on the payer to deduct income tax at source (unless the payment is made to a person who usually lives outside the United Kingdom); or
- a company (other than in a fiduciary or representative capacity), there may be an obligation to deduct income tax at source regardless of the recipient's place of abode.

James Cropper PLC v Aviva Life and Pensions UK Ltd

This judgment concerned a strike out and summary judgment Application brought by Aviva Life and Pensions UK Ltd (**Aviva**) in respect of a negligence claim brought by James Cropper PLC (the principal employer of the James Cropper PLC Pension Scheme (the **Scheme**)) and Entrust Pension Limited (the scheme trustee) (the **Claimants**).

The underlying negligence claim concerned the apparent failure of one of Aviva's historic predecessor entities, Friend's Life, to equalise the Scheme's normal retirement date (**NRD**) at 65, from July 1995. It was not until December 2002 that a deed of amendment was executed that, apparently, inadvertently equalised the Scheme. The Claimants claimed that, in preparing the 2002 deed, Aviva ought to have advised the Claimants that the Scheme had not been equalised in 1995. The Claimants had therefore been deprived of the ability to sue their previous advisors in negligence, as it was no longer possible to claim for the 1995 error directly.

The Claimants and Aviva entered into a standstill agreement (i.e. a contract agreeing to suspend limitation) the effect of which was that errors by Friends Life (or Aviva) from 15 December 2002 onwards remained in time for claims against Aviva. Any claim against Friend's Life before that date was statute barred. Aviva's strike out and summary judgment Application was brought on

the grounds that any alleged negligence by either Aviva or Friend's life was hopelessly time-barred, as any such breach of duty occurred before 15 December 2002. This is because, Aviva argued, the last date at which Aviva provided advice regarding the 2002 deed was on 14 November 2002 and there was no continuing duty after that date to advise the Claimants of the failure to equalise in 1995. Therefore, on its face the claims were time-barred.

The Claimants were, however, successful in demonstrating to the Court that it was more than 'merely arguable' that Friends Life ought to have spotted the error at a date after 15 December 2002 and brought this to the Claimants' attention. The Claimants argued that, when actuarial reports issued after 2002 were prepared by Aviva stating that the Scheme had been equalised in 1995, it was more than merely arguable that Aviva ought to have spotted the error then. Judge Hodge agreed.

The case is interesting, not least because judgments on professional negligence claims are not released very often. However, it should be remembered that the judgment does not confirm that the claim against Aviva will ultimately succeed or even whether it is time-barred through limitation or not. However, it is a warning to Defendants that, in the right circumstances, even very stale claims may survive being struck out, allowing them to proceed to a full trial. Since the vast majority of professional negligence pensions cases are settled, it remains to be seen if this case will actually proceed to full trial; if it does, it will deal with a number of issues where judgments have rarely been given in pensions cases, so will be something to look out for.

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