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Pensions Update

June 2019

UK PENSIONS UPDATE

Welcome to the June edition of our UK Pensions Update. This month has been particularly busy on the pension disputes front, with the Court of Appeal dismissing ITV's appeal against the Regulator's exercise of its anti-avoidance powers and a European case concerning the German equivalent of the PPF which could have potentially significant implications for private occupational DB schemes in the UK. We also take a look at a couple of interesting decisions in which the tax tribunal came to differing conclusions in cases where scheme members argued that they should be granted relief from adverse tax consequences arising from mistakes.

In This Issue

General Pensions News

Recent articles authored by Baker McKenzie pension team members

In the June edition of Pensions Age, Chantal Thompson and Mark Solomon wrote an article on environmental, social and governance (ESG) factors, and why they should be important to trustees. Please click here for a link to the article.

If you didn't have a chance to read Arron Slocombe and Tom McNaughton's article from the April edition of Pensions Age on creative funding strategies, then here is another link to the article.

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PASA publishes new Cyber Security guidance for pension schemes

PASA has published new cyber security guidance for trustees, which provides practical support in formulating relevant safeguards from cyber security risks. ***Several Baker McKenzie pensions and commercial law specialists were involved in reviewing and providing technical input into the Guidance, and so please do contact Jonathan Sharp or Lauren Awoyinka if you have any questions in this area.***

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Pension schemes' investments: final CMA Order on investment consultancy and fiduciary management published

The Competition and Markets Authority ("CMA") has published the final Investment and Consultancy and Fiduciary Management Market Investigation Order 2019. This implements the bulk of the CMA's remedies following the CMA's investigation into the investment consultancy and fiduciary management market, which we have reported on previously. ***The Order includes new requirements on trustees to carry out competitive tendering of fiduciary management services and to set objectives for investment consultants, as well as reporting requirements.***

We will be sending out a separate update covering the key points which trustees should be aware of.

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New investment and disclosure rules being introduced from October 2020

Under new regulations coming into force later this year, trustees will be under additional duties with effect from 1 October 2020 regarding their investment engagement policies. In order to comply with their new duties, trustees will have to work closely with their investment managers over the coming months, in particular to ensure that the managers' investment strategies align with those of the pension scheme and to obtain the relevant disclosures required for schemes' statements of investment principles (SIPs).

For background, the new regulations are being put in place as a result of the EU Shareholder Rights Directive II. They will go further than the statutory changes coming into force in October 2019, which will require trustees to give detail about their policies on financially material ESG risks in their SIPs (see May 2019 Update for more information). As a result of the new regulations, amongst other requirements, trustees will need to include detail in their SIP (which will have to be made available online, including for DB schemes) on their policies with asset managers, covering matters such as how those managers are incentivised to align investment strategies with trustee investment policies and how managers are incentivised to make investment decisions based on medium to long-term financial (and non-financial) asset performance.

The PLSA has recently published a guide on trustee duties in the area of ESG factors and stewardship, which can be accessed here.

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Pension Scams Industry Group updates pension scams code of practice

The Pension Scams Industry Group (PSIG) has updated its code of good practice on combating pension scams. ***The new version addresses the various legal and other developments in this area over the last year, including the introduction of the cold calling ban, the establishment of the Money And Pensions Service (MAPS) and the joint protocol between the FCA, the Pensions Regulator (the "Regulator") and TPAS in relation to pension scheme transfers***. Please see our January 2019 Update for more information on the cold calling ban, our March 2019 Update for more information on MAPS and our February 2019 Update in relation to the joint protocol.

The updated code can be viewed here.

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GMP equalisation initial guidance to be published imminently

The GMP Equalisation Working Group, which contains representatives from across the pensions industry, has published an open letter in which it states that it hopes to publish "initial information" on GMP equalisation by the end of June 2019 (covering data issues, impacted transactions and suggested approaches to GMP reconciliation and rectification exercises). The letter also notes that the Group intends to produce the first version of its full guidance by the end of September 2019.

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Pensions Disputes News

Court of Appeal dismisses ITV's appeal against the Regulator's FSD in Box Clever case

In the case of *Granada Rental & Retail Ltd vs The Pensions Regulator*, the Court of Appeal has ruled that it was reasonable for the Upper Tribunal to have found in favour of the Pensions Regulator when it imposed a financial support direction (FSD) on ITV and several of its subsidiaries in 2011 in respect of the Box Clever Group Pension Scheme (the "Scheme").

The Regulator's approach was almost entirely vindicated by the Court of Appeal, as the Court found against the targets of the FSD in each of the three areas that were subject to the appeal: (1) the question of whether the relevant provisions of the Pensions Act 2004 could have retrospective effect (the joint venture at the centre of the Regulator's investigation took place in 2000/2001, whereas the FSD powers were only given to the Regulator from 2004); (2) the extent to which the targets had a sufficient legal connection with the Scheme employers at the relevant time to be subject to the FSD powers; and (3) whether it was reasonable for the Regulator to impose the FSD. It is particularly relevant that the Court of Appeal agreed that the Regulator could take into account events that took place prior to 2004, notwithstanding that it found that this retrospectivity aspect of the case had to be considered by the Regulator as a factor going to the reasonableness of imposing the FSD. The Court of Appeal agreed that the Upper Tribunal had considered this factor, but that it was outweighed by other factors (namely the benefit that the target companies received from the Scheme's employers as part of the joint venture). The Court of Appeal gave useful guidance when it commented on the need for a "balance to be struck" between relevant factors and for a key question for the Regulator to be whether it would be fair for a pension deficit to be picked up by the PPF / scheme members or by the target companies under an FSD.

The decision will be particularly welcomed by the Regulator at a time at which it is seeking to be more proactive in the potential exercise of its powers.

The Court of Appeal did not grant leave to appeal the decision to the Supreme Court, but we understand that the targets of the FSD have sought permission to appeal directly.

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PPF compensation may have to provide full benefit coverage following Advocate General Opinion

In the case of *Pensions-Sicherungs-Verein VVaG v Gunther Bauer*, the Advocate General has recommended to the European Court of Justice (CJEU) that Article 8 of the EU Insolvency Directive be interpreted as requiring Member States to put in place measures which protect members' pension benefits in full on an employer insolvency. If followed by the CJEU, this could result in significant changes having to be made to the PPF's compensation regime.

Whilst this case was referred by the German courts, a CJEU ruling which follows the AG's Opinion could impact the UK's PPF's compensation rules (although a judgment that comes out after the UK's exit from the European Court may not have to be addressed by the UK, depending on the terms of the withdrawal). Currently, the PPF's compensation rules comply with the obligations set out in Article 8 of the EU Insolvency Directive by providing members with benefits that are at least 50% of their full entitlement. Following the recent *Hampshire* case (see our May 2018 and September 2018 Updates for more details), the CJEU confirmed that PPF compensation rules have to result in *each individual member* receiving at least 50% of their original DB pension. If the CJEU does follow the AG's recommendation and imposes an obligation on Member States to put in place full pension protections on members on employer insolvency, then the required amendments to the existing PPF compensation levels may have other, far-reaching, consequences, including in the areas of PPF levy payments and scheme funding obligations.

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HMRC drops appeal in breach of lifetime allowance case

HMRC has dropped its appeal against the decision of the First Tier Tax Tribunal (the "Tribunal") that contributions which had been mistakenly paid into pension arrangements by a member which resulted in him losing valuable tax protection should be set aside. As well as coming as a relief to the member in question, the news that HMRC will not be appealing this decision in *Hymanson v HMRC* will no doubt encourage other individuals to challenge HMRC where protection has been revoked in circumstances where the member has made a mistake - something which is not uncommon given the complexity of the rules. The decision will also of interest to employers and trustees, who, although unable to provide tax advice to employees and members, should, as a matter of best practice, be aware of situations in which valuable tax protections can be lost.

Mr Hymanson was granted a fixed protection certificate in 2012, which provided him with protection against future reductions in the lifetime allowance. One of the conditions for fixed protection is that no further benefit accrual occurs. He arranged to stop lump sum contributions into his main pension arrangement, but had not taken steps to cancel standing orders under which contributions were made into two of his other pension arrangements. When the payment of contributions came to light in 2015, HMRC revoked his certificate, causing Mr Hymanson to suffer a tax charge of approximately £50,000. Mr Hymanson had argued successfully before the First Tier Tax tribunal that he had misunderstood the consequences of failing to stop the standing orders in addition to the lump sump contributions. He had also been confused by the fact that he was able to continue to make rent payments into his main arrangement but not contributions (the pension schemes owned his company's premises).

It remains to be seen whether the dropping of this appeal reflects a move towards a more lenient approach to breach of lifetime allowance (and potentially annual allowance) rules more generally. The particular facts of a case (and available evidence) will continue to be highly relevant in determining whether or not members are successful in appealing HMRC decisions on this point.

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Relief from tax charge not available where member relies on pension scammers' assurances

The Tribunal referred to above has also ruled, in the case of *Franklin v Revenue& Customs Commissioners*, that a member cannot be relieved of an "unauthorised payments surcharge" under the Finance Act 2004 simply because she relied on assurances given by the providers of a pensions liberation vehicle.

For background, the member in question had entered into a transaction which, unknown to her, constituted pensions liberation. When this was discovered, HMRC levied a 40% "unauthorised payments charge" and a 15% "surcharge" on the member under the Finance Act 2004 in respect of a payment made to her under the arrangement. The member appealed the 15% surcharge on the basis that it would not be "just and reasonable" for her to be liable for this charge (the defence is available only in respect of the 15% surcharge, and not the main tax charge). This was on the basis that she believed that the payment made to her was a loan (which was not subject to tax charges) and that she had relied on advice from the provider, based on guidance from the provider's tax advisor, both whom she believed to be experts. However, the Tribunal found that, despite the member not having acted dishonestly or negligently and despite the fact the member had not known that the payment constituted an unauthorised payment, the relevant statutory defence could not apply so as to discharge her of the penalty. The judge found it relevant that the member had been alerted to at least some risk of there being a tax charge in the literature provided to her, and had still not taken independent professional advice or carried out any due diligence.

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Contact us

If you wish to discuss any of these issues further, please contact your usual Baker McKenzie lawyer.

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