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GMP equalisation and transfers

Back in October 2018, the High Court ruled that occupational pension schemes must equalise GMPs.

In a [further judgment in the Lloyds case](#), the High Court has ruled that defined benefit (DB) pension schemes providing GMPs, must revisit and top up historic transfer payments that were calculated on an unequal basis.

This duty extends all the way back to 1990 and is not limited either by the rules of the scheme in question or by any statutory provision.

Trustees and sponsoring employers of occupational pension schemes, already facing the difficult and costly task of implementing GMP equalisation, now have a mammoth task ahead trying to identify and rectify 30 years of potentially underpaid transfer payments.

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Background

GMP equalisation is one of the biggest current projects for DB pension schemes, and while a great deal of time has already been spent on this, few schemes are close to being fully equalised for the effects of GMP.

Many trustees and sponsors are still waiting for clarification on certain points, such as the tax treatment to apply in cases where GMPs are converted into other scheme rights. Another long-standing question has related to the treatment of past transfers out.

The original Lloyds judgment confirmed there was a duty to equalise, and in the summer of this year the High Court turned its attention to what that meant for historic transfers from DB schemes that provided GMP but had not equalised transfer values over the 30 years since the Barber judgment. The judgment has just been published and considers several different types of transfer. While the judgment is long and detailed, the judge has made a conscious decision to not answer all the questions asked.

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The judgment is also based on the facts and rules of this specific case and there is potential for variation in other cases based on differently drafted rules and unique facts.

Statutory transfers

Perhaps not surprisingly, the High Court has now ruled that in making statutory transfers (under the cash equivalent legislation) the trustees owe a duty to a transferring member to make a correctly calculated transfer payment which reflected the member's right to equalised benefits.

Breach of trustee duties

Failure to ensure a transfer value is calculated using equalised benefits could lead to trustees committing a breach of that duty, which the Court has ruled to have occurred at the point of transfer, and the trustees remain liable to the transferring member for the breach of duty.

This means that the breach could have existed for over 30 years now, and trustees cannot seek a discharge from their liability to pay equalised cash equivalent transfer values by any statutory provision or scheme rule, or by any agreement with the transferring member. Affected members will be entitled to seek a remedy against the trustees and, in particular, an order from the court that the trustees belatedly perform their duty to pay the correct transfer payment.

As the judgment makes clear, trustees are in breach of their fiduciary duty to the members who transferred out, where the cash equivalent transfer values were not equalised. It concluded that the trustees could fulfil their duty without a court order and thus needed to be proactive in identifying the members concerned and the action that should now be taken.

In addition, interest is payable on any shortfall from the date of the original payment to the date the shortfall is made good. The judge set the interest at 1% above base rate.

Non-statutory transfers

In non-statutory transfer cases, where trustees transfer benefits under powers conferred by the rules of their scheme, the member no longer has any rights in the transferring scheme unless the court sets aside the exercise of the power. For a non-statutory transfer to be reconsidered, the member would have to ask the court to set aside the earlier exercise of the power if the trustees have committed a breach of duty when exercising it. Whether the trustees have committed a breach of duty in that way would depend on the facts of the case in question. While the judgment leaves the position of non-statutory transfers open to some debate, it is likely that a court would treat them in a similar way to statutory transfers, unless there are provisions in the rules of a particular scheme, or the transfer documentation, to justify reaching a different conclusion.

Bulk transfers

Bulk transfers often take place as a result of a scheme merger or a commercial transaction. Trustees' obligations in relation to bulk transfers were briefly considered in this latest judgment with the main focus being on cases where mirror image benefits were provided by the bulk transfer, (i.e. the intention was to put members in exactly the same position in the receiving scheme as they had been in the transferring scheme). Where a bulk transfer has taken place, the transferring members are entitled to benefits under the receiving scheme and are no longer entitled to benefits under the transferring

Scheme. Such transfer cases would not have to be revisited by the trustees of the transferring scheme, unless, for example, there was something to the contrary in the commercial transaction.

Comment

Some 30 years after the Barber judgment, the judgments in the Lloyds case are not the end of the matter. Real issues remain around the method of equalisation and the possibility that trustees who did equalise might subsequently be found not to have properly done so.

We don't yet know if this judgment will be appealed, but as things stand, trustees of affected schemes, who are already taking steps to equalise the benefits of current male and female members, will have to revisit every transfer they have made in the last 30 years and make top up payments where a member has not received their full entitlement. (Since the first Lloyds judgment most cash equivalent transfer values have been calculated using equalised benefits, but all transfers preceding the original judgment will now be in scope.)

For past bulk transfers, the judgment appears to concentrate on transfers made on a mirror image basis, but the basis of all bulk transfers would need to be considered to understand whether trustees have any remaining liability or not.

In many cases the cost of investigating any transfer will outweigh any additional benefit to members. Many schemes are likely to find the data issues of identifying transferred members a challenge, with members and receiving schemes needing to be located and historic transfers recalculated.

There will also be issues around how many top up payments can be made, for example, where a receiving scheme will not take an additional payment, or where the member has ceased to be a member of the receiving scheme.

Sponsoring employers who report accounting figures under IAS19 are likely to need to assess their extra accounting liabilities and the impact on their profit and loss account.

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