Sackers

GMP equalisation and past transfers out – the High Court decides

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Introduction

Over two years on from its original decision, on 20 November 2020, the High Court handed down its judgment in the latest instalment of the *Lloyds* saga. It addresses the impact of the need to equalise for the effect of GMPs on past transfers out.

Key points

- The case involved the trustee ("the Trustee") of the "Lloyds No.1 Scheme", the "Lloyds No.2 Scheme", and the "HBOS Scheme" ("the Schemes"), as well as the principal employers of the Schemes ("the Banks"). As with the original judgment, the DWP was once again joined as an interested party.
- The judge concluded that the Trustee owes a duty to a transferring member to pay a statutory CETV which was correctly calculated, reflecting the member's right to equalised benefits.
- Trustees are on the hook to pay a top-up to the receiving scheme, together with interest. Any claim by a transferring member is not time barred, either under the Schemes' rules or under relevant legislation (ie the Limitation Act 1980).
- In addition, the Trustee's obligations in relation to individual transfers under the Schemes' rules, as well as bulk transfer provisions, were briefly considered.
- The parties agreed to leave aside the effect of any bespoke contractual obligations or individual estoppels (which could preclude a claim) that might arise in relation to particular transfers out. This is because, as far as possible, the purpose of the proceedings was "to resolve points of principle that will apply to the generality of transfers from the Schemes". An exception to this carve-out was made in relation to member discharges (based on five sample forms).

Background

On 26 October 2018, Mr Justice Morgan held that schemes are under a duty to equalise for the effect of GMPs. Whilst the judgment helpfully approved certain methods for achieving equalisation, some key questions were left unanswered.

DWP guidance on using the GMP conversion legislation to help address inequality, as well as HMRC and

industry guidance (such as PASA's methodology guidance), have now gone some way to filling in the gaps. However, a specific High Court hearing on transfers out was on the cards from the outset.

In his original judgment, as a matter of EU law, the judge concluded that some of the Schemes were liable to equalise benefits for members who had transferred in. In the current case, it was argued that this "exonerated the Trustee from any obligation to take any remedial action" in relation to past transfers out. Noting that the "far-reaching submissions" made by the parties "would have major implications for various kinds of receiving schemes" which were not represented at the hearing, Mr Justice Morgan chose primarily to focus on domestic legislation and the Schemes' rules.

The duty to equalise for the effect of GMPs **only applies in respect of GMPs accrued on and from 17 May 1990 up to and including 5 April 1997**, ie from the date of the *Barber* decision to the day before GMPs were abolished (on 6 April 1997).

Statutory transfers

Legislation

Unsurprisingly, the CETV legislation has evolved over time. As such, the judge looked at the legislation during the following three periods in turn:

- 17 May 1990 to 5 April 1997 ("period 1")
- 6 April 1997 to 30 September 2008 ("period 2"), and
- from 1 October 2008 onwards ("period 3").

The major change in the drafting of the CETV legislation between periods 1 and 2 was that, from 6 April 1997 onwards, a DB member has a right to a statement of entitlement and, as a consequence, a guaranteed CETV. Although further changes were made to the legislation from 1 October 2008 (period 3), including the Trustee being responsible for calculating and verifying the amount of the CETV, this did not result in any such calculation being "final and binding on a member, even if erroneous".

Summary conclusions

The judge's main conclusions in respect of all three periods were as follows:

- the Trustee owed a duty to a transferring member to make a transfer payment which was correctly calculated, reflecting the member's right to equalised benefits. In some cases, the Trustee committed a breach of that duty by making an inadequate transfer payment (the breach having occurred at the time of the transfer)
- whilst a transferring member is entitled to seek a Court order that the Trustee "belatedly perform its duty" by "making a top-up payment to the receiving scheme", the Trustee remains liable to the transferring member for its breach and can fulfil its duty without such an order. In other words, the Trustee needs "to be proactive" in considering the rights and obligations identified, and the remedies available to members, "and then determine what to do"
- interest is payable on the shortfall for the period from the date of the original payment to the date when the shortfall is made good. Given that most top-ups will be modest, and in the interests of administrative simplicity generally, the judge settled on interest of 1% above base rate
- finally, if the Trustee is unable to make a top-up payment (eg because the receiving scheme is unwilling

to accept such a payment or no longer exists) the possibility of an alternative benefit was explored. No firm conclusion was reached, as the outcome in a particular case would most likely turn on what solution the parties might agree, or what a Court might ultimately order (including the possibility of "compensation in lieu"). However, the Trustee is unable to require a member to accept a residual benefit, or vice versa.

Individual transfers under scheme rules

Like the CETV legislation, the rules of the three Schemes had evolved over time. The judge was not asked to assess whether a particular transfer decision was valid or not, nor the Trustee's considerations underlying it, but rather "to proceed on the basis that all that is currently known" was that the transfer did not take account of the need to equalise for the effect of GMPs.

Based on the drafting of the Schemes' rules, the transferring member no longer has rights under the transferring scheme unless the Court "sets aside the exercise of the power and the transferring member can require the Trustee to exercise the power afresh". A request to set aside the earlier exercise of the power can only be made if the Trustee "committed a breach of duty when exercising the power". This would require an investigation into the relevant circumstances surrounding the transfer, which was not carried out as part of the hearing. So, we are left with a slightly open-ended conclusion here.

Effect of any discharge

The Banks argued that, despite things having "gone wrong", under legislation and/or the Schemes' rules, the Trustee no longer owes any obligation to transferring members. For this purpose, five sample forms under which members granted express discharges to the Trustee on a transfer payment were put before the Court.

As described above, the judge ultimately concluded that the Trustee owes an obligation to the transferring member, under EU law as well as domestic legislation, to make a top-up payment in relation to an inadequate CETV. That obligation was not discharged by the original inadequate payment. Similarly, the Trustee was not discharged from that liability "by any statutory provision or any rule of the Schemes", or by any agreement with the transferring member.

That said, for individual transfers using a power under the Schemes' rules, "the relevant rules provide for a discharge for so long as the decision as to the amount of the transfer payment remains a valid and effective decision".

Bulk transfers

The background underlying a bulk transfer is commonly a commercial transaction or a scheme merger.

The main focus was on so-called "mirror-image bulk transfers", ie where the rights of the members under the receiving scheme are the same as (or "mirror") their rights under the transferring scheme. It was agreed that such transfers "were valid and effective and no further top-up payments fell to be made".

Therefore, on the assumption that the bulk transfer complied with relevant legislation (including regulation 12 of the 1991 Preservation Regulations) and that the entirety of a member's entitlement was transferred across, the Trustee was discharged from its obligation to equalise. As such, transferring members are no longer able to claim benefits under the Schemes. (The position of non-mirror-image schemes was, however, left open.)

The judge's views are generally in keeping with PASA's methodology guidance, although that guidance also sensibly suggests reviewing any legal agreements entered into at the time of a bulk transfer for possible

indemnities.

What's next?

Although it is quite technical, the judgment provides clarity on the extent of trustees' obligations to revisit past transfers out when it comes to GMP equalisation. But it also begs the question just how easy it will be for trustees to accurately retrace their transfer steps all the way back to 1990.

No doubt industry guidance will be updated to reflect the judge's key conclusions and, hopefully, it will also help to devise some pragmatic solutions for what could be a costly forensic exercise.

If you have any questions on any of the above, **please speak to your usual Sackers contact**.

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