

PASA publishes GMP equalisation guidance on historical transfers

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Introduction

The latest addition to PASA's suite of GMP equalisation [guidance](#) was published, today ("the Guidance"). Aimed at finding "a pragmatic approach to equalising historical transfers", the Guidance builds on the High Court's most recent [Lloyds decision](#) (in November 2020) that DB schemes should, in certain circumstances, top up past unequalised transfers out.

Key points

- The duty to equalise for the effect of GMPs ("GMP Equality") only applies in respect of GMPs accrued on and from 17 May 1990 up to and including 5 April 1997. That is, from the date of the *Barber* decision to the day before GMPs were abolished (on 6 April 1997). The Guidance refers to this as "the Equalisation Period".
- As trustees need to be "proactive" in addressing whether they have obligations to top up past transfers out, the Guidance makes a number of practical suggestions as to how they might achieve this.
- Looking from the other end of the telescope, DB and DC scheme trustees will need to decide whether to accept GMP Equality top-up payments offered by former transferring schemes. In addition, DB schemes which have received individual transfers in the past must decide upon any adjustments needed to the benefits granted in relation to those transfers.
- Past bulk transfers should also be reviewed to decide where any GMP Equality obligations lie.
- Given the complexity surrounding historic transfers, and that unresolved issues remain following *Lloyds* which may never be clarified by the Courts, the Guidance advises trustees to seek legal advice in any number of circumstances.

Background

Following the *Lloyds No.1* case in October 2018 (see our [Alert](#)), PASA set up a cross-industry working group with the aim of producing guidance to help schemes equalise for the effect of GMPs.

In the past, schemes contracted-out on a salary-related basis would have typically calculated transfer values on an unequalised basis. In *Lloyds No.3* (November 2020), the judge concluded that the trustees owed a duty to a transferring member to make a transfer payment which was correctly calculated, reflecting the member's right to equalised benefits. As a consequence, DB schemes should, in certain circumstances, top

up past unequalised transfers out.

The Guidance calls this case *Lloyds 2020*, and we use this term below to avoid confusion.

The Guidance – an overview

Noting that the judge in *Lloyds 2020* “recognised the administration costs involved could easily exceed any correction payments needed”, the Guidance considers separately the impact of the judgment on:

- transferring schemes which paid individual transfer values (Part A)
- receiving schemes which received individual transfer values (Part B), and
- bulk transfers between schemes (Part C).

Public sector type schemes and those operating transfer club arrangements are carved out of the Guidance.

Transferring schemes – individual transfers

Transfers affected

Lloyds 2020 concluded that schemes which have paid statutory CETVs in respect of former members who built up GMPs during the Equalisation Period could now be required to pay a top-up payment. The type of receiving scheme is immaterial. The Guidance notes that the right is to a top-up payment and not to a residual benefit in the transferring scheme, making the former member's entitlement akin to that of a creditor rather than a beneficiary.

Non-statutory individual transfers were considered separately in *Lloyds 2020*. Whether former members have a claim to a top-up payment will depend on a scheme's transfer power, as well as whether trustees committed a breach of duty when exercising that power. The Guidance suggests that transferring schemes might “choose to correct any non-statutory transfers in the same way as statutory transfers (unless there are exceptional circumstances)”. Additionally, in practice, the administrator “may not be able to differentiate between statutory and non-statutory transfers paid in the past”.

Schemes which have paid enhanced transfer values should take specific advice on how *Lloyds 2020* impacts those exercises. For the effect on pension sharing, the Guidance also refers to PASA's [methodology guidance](#).

Time limits, forfeiture and discharges

There is no statutory limitation period for underpaid transfers and the Guidance does not expect most schemes' forfeiture rules or member discharge provisions to apply in these circumstances. However, schemes “may wish to seek legal advice on the specific wording of their forfeiture rules”.

Schemes winding-up

Schemes winding-up face very specific uncertainties, such as the extent to which trustees would be protected by statutory advertisements and/or run-off insurance cover. The Guidance therefore notes that employer indemnities may be needed to cover liabilities that cannot be resolved before completion of winding-up.

Calculating the top-up

A top-up “would be required to the extent the transfer value actually paid would've been higher at the time of

payment had the value of the member's benefits and the mix during the Equalisation Period between GMP and excess been that of a comparator of the opposite sex". The transfer value assumptions "originally used for the member should be applied when making the comparison". However, where a lack of records mean that accurate top-up payments cannot be calculated, transferring schemes will need to take advice on how to proceed. For example, by estimating the top-up "using assumptions which are a reasonable estimate of the transfer value basis which might have applied at the time".

In *Lloyds 2020*, interest on top-up payments was set at 1% simple over bank base rates (from time to time). Unless a transferring scheme's rules prescribe a particular rate, 1% is likely to be the norm, "although some administrators may prefer to use compound rather than simple interest for simplicity".

Trustees must be "proactive", but can also be practical

Acknowledging that the cost of bringing a claim could be prohibitive for individual former members, the judge in *Lloyds 2020* commented that "the Trustee does need to be proactive in that it must consider the rights and obligations which I have identified, the remedies available to members and the absence of a time bar and then determine what to do".

The Guidance comments that this statement "appears to permit trustees to think about factors such as cost of calculation, data issues and other practicalities when determining how to implement a correction process". In practice though, transferring schemes "will need to take advice as to whether their approach to past transfers is appropriate recognising...there are a number of practical hurdles which will mean perfection cannot be achieved".

Receiving schemes – individual transfers

DB receiving schemes

Given the different descriptions given to them by both the European Court in the 1994 *Coloroll* case and *Lloyds 2020*, the exact nature of a receiving schemes' obligations are unclear. *Coloroll*, which arguably only covered transfers "owing to a worker's change of job", referred to increasing benefits to make good any shortfall in the unequal transfer value. In *Lloyds 2020*, the obligation focuses on equalising the quantum of pension for the effect of unequal GMPs.

These differences could lead to situations where:

- the transfer value paid may have exceeded that of the opposite sex comparator, so no top-up payment is required and no obligation under *Coloroll* arises. However, the receiving scheme may have awarded benefits in return for the transfer which could result in the member being disadvantaged when benefits come into payment, needing adjustment under *Lloyds*
- alternatively, the transferring scheme may be required to make a top-up payment, even though the service credit awarded by the receiving scheme results in the member always being advantaged.

In practice, a DB receiving scheme will need to decide "whether to equalise the benefits granted" in respect of the original transfer. The Guidance raises a number of practical questions here, such as how to achieve GMP Equality if a fixed pension was granted in return for the transfer. It concludes that there "may be no one right answer to these (and other) issues concerning transferred in benefits".

Recognising that it will not be possible to separate out a transfer credit from a member's other benefits in some schemes (in particular, where pension is in payment), the Guidance suggests treating "the total transfer credit as if it relates to benefits earned" in the receiving scheme. This has the merit of treating

transferred-in benefits consistently with benefits built up in respect of pensionable service in the receiving scheme during the Equalisation Period.

DB schemes accepting top-ups

If offered a top-up, a DB scheme will need to decide whether it is willing to accept it and, if it does so, what it should do with it.

Theoretically a DB scheme could, in some circumstances, simply “pocket” the extra cash, although members “may well consider it odd” that their benefits have not been increased to reflect the top-up. But providing extra benefits could incur more costs than the top-up actually received. Furthermore, having completed a GMP equalisation exercise and communicated with members, “there may be reluctance to re-open the position by accepting a subsequent top-up payment”.

DC receiving schemes

Lloyds 2020 steered clear of answering the important question as to whether a DC receiving scheme is under an obligation to correct inequalities resulting from past transfers. Analysing relevant cases, the Guidance concludes that DC receiving schemes (whether or not sponsored by an employer) are not “responsible for correcting any past inequalities in the original transfer payment”.

DC schemes accepting top-ups

In contrast, the Guidance expects DC receiving schemes “will be prepared to accept top-up payments where the former member remains a member...provided the former member consents and, in some cases, an administration fee is deducted from the payment”. However, some DC schemes may decide to set a minimum level of top-up payment they are willing to accept.

Bulk transfers

In *Lloyds 2020*, the judge held that there is no obligation on a transferring scheme to top up a bulk transfer made on mirror-image terms and with an actuarial certificate given under the preservation legislation.

The Guidance does not appear to distinguish between mirror-image transfers made with or without an actuarial certificate. This suggests the critical point is the mirror-image nature of the benefits, and not whether it was made with individual members’ consents or, alternatively, without their consents but with an actuarial certificate.

But not all bulk transfers would have taken place on a mirror-image basis. In some cases, transferred members were granted service credits based on the receiving scheme's benefit structure. In those cases, “specific advice should be taken”. In addition, schemes might want to review any legal agreements entered into on a scheme merger or as part of a business sale. These could “contain indemnities which may, subject to any time limits, cover some or all of the additional liabilities and costs which arise as a result of implementing GMP Equality”.

What's next?

Further PASA GMP equalisation guidance is expected on anti-franking and communications. Other events in the PASA pipeline include a “GMP equalisation week” in the autumn.

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

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