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pensions law group

Snapshot

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Overview

- New approach to funding of defined benefit schemes

The DWP is consulting on draft regulations which provide for defined benefit pension schemes to have a funding and investment strategy for the purpose of ensuring benefits under the scheme can be paid over the long term. A key principle that must be followed is that schemes must be in, at least, a state of low dependency on their sponsoring employer by the time they reach significant maturity. This means the scheme should not rely on further employer contributions to provide for accrued liabilities at the point of significant maturity.

- Pensions Dashboards Programme consultation on draft standards and guidance

The Pensions Dashboard Programme (**PDP**) has published a number of draft standards and guidance notes for consultation. The proposed PDP standards set out technical and operational details in relation to the pensions dashboards ecosystem.

- Further TCFD requirements come into force on 1 October 2022

Schemes that are already subject to TCFD governance requirements, or will be from 1 October 2022, will need to update their compliance arrangements to reflect a new requirement to calculate and disclose a Paris Agreement portfolio alignment metric from 1 October 2022.

- The Pensions and Lifetime Savings Association (**PLSA**) has published a guide on the requirement to prepare an own risk assessment (**ORA**).

It will be a requirement under the Regulator's single code of practice (the **Code**) for governing bodies of defined benefit and defined contribution pension schemes to have in place an effective system of governance and complete an ORA. As there is little guidance on how schemes should approach an ORA, the PLSA has produced a guide to address the uncertainty around an ORA and to give practical tips on how to collate the information needed.

- CMG Pension Trustees Ltd v CGI IT UK Ltd

This case looks at the interpretation of a forfeiture provision in a pension scheme's rules.

- PSGS Trust Corp Ltd v Aon UK Ltd and others

This case considers arguments relating to limitation periods for bringing claims and whether advisers are under a continuing duty to discover earlier mistakes.

Further information

New approach to funding defined benefit pension schemes

The Pension Schemes Act 2021 provided for a framework for a new defined benefit funding regime. In particular, the framework would require defined benefit schemes to have a funding and investment strategy for the purpose of ensuring benefits under the scheme can be paid over the long term. As part of this, trustees will be required to produce:

- A funding and investment strategy; and
- A statement of strategy.

The detail of what this would mean in practice was to be set out in regulations. The DWP has now published a draft of these regulations, on which they are consulting.

Funding and investment strategy

A key principle that must be followed when determining or revising the funding and investment strategy is that schemes must be in, at least, a state of low dependency on their sponsoring employer by the time they reach significant maturity. This means the scheme should not rely on further employer contributions to provide for accrued liabilities at the point of significant maturity.

Statement of strategy

The trustees must also prepare a written statement of strategy which will set out the scheme's funding and investment strategy, as well as other supplementary matters.

These supplementary matters include an assessment of whether the funding and investment strategy is being successfully implemented. The trustees should set out the main risks faced by the scheme in implementing the strategy and how the trustees intend to mitigate these. The trustees must also state what steps they will take if the risks identified, materialise.

Other proposed changes

Additional significant changes that are proposed by the draft regulations include that when trustees are determining if a recovery plan is appropriate, they should follow the principle that the deficit should be recovered as soon as the sponsoring employer can reasonably afford. The DWP is also considering whether this new factor would have primacy over the existing matters trustees should take into account when setting recovery plans.

For further information on this topic, please see our briefing here.

Pensions Dashboards Programme consultation on draft standards and guidance

The Pensions Dashboard Programme (**PDP**) has published a number of draft standards and guidance notes for consultation.

The proposed PDP standards set out technical and operational details in relation to the pensions dashboards ecosystem. They specify compulsory requirements on qualifying pensions dashboards service (**QPDS**) and pension providers (both FCA regulated and those that would fall within the ambit of the DWP's jurisdiction), setting out how they must meet the duties set out in

DWP legislation and FCA rules. Operating a QPDS will be an FCA-regulated activity and the FCA intends to consult on conduct of business rules for QPDS providers.

The following consultation drafts have been published by the PDP: (a) Data standards; (b) Technical standards; (c) Code of connection (in relation to how QPDS and data providers are to connect); (d) Reporting standards; (e) early connection guidance and (f) to approach to governance of standards.

The consultation period ends on 30 August 2022.

Further TCFD requirements come into force on 1 October 2022

Large occupational pension schemes are subject to a number of climate change-related governance requirements including a requirement to produce an annual climate change report outlining their governance compliance.

These requirements came into effect for schemes with assets over £5 billion on 1 October 2021, and will come into effect for schemes with assets over £1 billion on 1 October 2022.

Schemes that are already subject to these requirements will need to update their compliance arrangements to reflect a new requirement to calculate and disclose a Paris Agreement portfolio alignment metric. Schemes that will become subject to the requirements from 1 October 2022 will also need to update their compliance preparations to reflect the new requirement.

The Pensions and Lifetime Savings Association has published a guide on the requirement to prepare an own risk assessment

It will be a requirement under the Regulator's single code of practice (the **Code**) for governing bodies of defined benefit and defined contribution pension schemes to have in place an effective system of governance and complete an ORA. As there is little guidance on how schemes should approach an ORA, the PLSA has produced a guide to address the uncertainty around an ORA and to give practical tips on how to collate the information needed.

The Regulator's draft code of practice, which is anticipated to be finalised in late 2022, states that a governing body must prepare its first ORA within 12 months of the Code coming into force and that an ORA must be produced annually, or sooner if there is a material change to the risks facing the scheme or the way that it is governed. However, the timescales contained in the Occupational Pension Schemes (Governance) (Amendment) Regulations 2018 are more relaxed and state that an ORA must be completed only every three years and the first ORA is not due until 12 months after the first full scheme year after the Code comes into force. For example, if the Code comes into force in November 2022 and your scheme year begins on 1 January, the first ORA would be due within 12 months of 1 January 2024. The Regulator's view is that the first ORA should be prepared in a timely fashion, taking the legislative timescales as a maximum but preparing the document in a shorter timescale as a matter of best practice.

CMG Pension Trustees Ltd v CGI IT UK Ltd

CMG Pension Trustees Ltd (the **Trustee**) brought a claim concerning the construction and effect of a rule of the CMG UK Pension Scheme (the **Scheme**). In September 2019 a question arose as to whether the Trustee should pay arrears to members which fell due for payment more than 6 years earlier. The Scheme's Principal Employer, CGI IT UK Ltd (**CGI**), contended that rule 5.11 in the Scheme's rules (**Rule 5.11**) was a forfeiture provision and its effect is (and was) to forfeit all sums which fell due for payment more than 6 years earlier. The Trustee argued that Rule 5.11 was not a forfeiture provision and did not have the effect of forfeiting such sums.

Rule 5.11 provided as follows:

"5.11 Benefit forfeiture

Notwithstanding Schedule II if a benefit or instalment of benefits is not claimed by or on behalf of the person entitled to the benefit or instalment in accordance with these Rules within 6 years of its date of payment it shall be retained by the Trustees for the purposes of the Scheme."

The question arose following attempts to equalise members' normal retirement dates and to reduce benefit accrual rates, both of which had not taken effect until a number of years after they had been attempted. The result was that substantial pension arrears had fallen due.

The judge determined that Rule 5.11 is a forfeiture clause and should be construed on the basis that any benefit or instalment of a benefit which has not been claimed within 6 years of the date on which it fell due for payment is forfeited and the entitlement to that benefit or instalment is extinguished. He also held that Rule 5.11 was not limited to missing beneficiaries but applies to all unclaimed benefits once the six year period has expired.

He reached this determination based on the language of Rule 5.11 and held that the words *'shall be retained by the Trustee for the purposes of the Scheme'* had the same effect as the word *'forfeit'* or *'forfeiture'*.

The judge also looked at the Scheme's archaeology and felt that in this case it was appropriate to look at previous versions of Rule 5.11. He noted that the previous versions of the Scheme's rules all supported the conclusion that Rule 5.11 was intended to be a forfeiture rule.

The judge was asked a number of further questions relating to the effect of Rule 5.11, one of which was whether the office of the Pensions Ombudsman could be said to be a *'competent court'* for the purposes of section 91(6) of the Pensions Act 1995. The judge agreed with Arnold J's decision in *Burgess BIC UK Ltd* that the Pension Ombudsman was not a *'competent court'* within the meaning of section 91(6). Where arrears had already been paid which are to be forfeited and recovery is sought by way of equitable recoupment but the member disputes the amount to be recovered, the Trustee will need to obtain a declaration from a '*competent court'* which enforces the obligation to repay. The office of the Pensions Ombudsman was not, however, such a court.

This case is the latest in a number of cases concerning so-called 'forfeiture' provisions.

PSGS Trust Corp Ltd v Aon UK Ltd and others

This case concerns a reverse summary judgment application, made by Aon (the **Defendant**), in a professional negligence claim brought by the trustee and principal employer (the **Claimants**) of the Robert Horne Group Pension Scheme (the **Scheme**), on the basis that it was time-barred.

The Defendant was the provider of legal, consultancy, actuarial and administrative services to the Scheme. The claim concerns two sets of amendments to the Scheme, the "2003 Benefit Changes", intended to close the Scheme to new members from January 2003 and the "2007 Amendments", intended to close the Scheme to further accrual from 1 July 2007. The Scheme was then administered on this basis. However, the amending deeds implementing these changes were not executed until 2004 and 2008 respectively, leading to pension underpayments and increased Scheme liabilities.

The Claimants allege that the Defendant negligently failed to advise them that the changes could not be made retrospectively and failed to ensure that the amendments took effect from the intended date. The Claimants also alleged that the Defendants had a "continuing duty" to administer the Scheme on the correct basis, until its retainer came to an end in 2015.

The parties entered into two standstills concerning the two alleged errors in 2015 and 2016 respectively, by that time the 6-year primary limitation period had expired. The Claimants therefore relied on the secondary 3-year period under s.14A of the Limitation Act 1980. In order to do so, the Claimants must not have had actual or constructive knowledge of the errors within three years of those standstills. The Claimants argued they did not.

The Defendant disagreed and argued, in essence, that certain advice provided to the Claimants from time to time ought to have put them on notice that there were real risks that the changes were not effective from the intended dates. However, the judge found that these separate pieces of advice should not be examined together and so it was more than merely arguable that the Claimant had not been put on notice. Consequently, the judge did not strike out that part of the claim and did not give summary judgment.

The judge did, however, strike out the Claimant's assertion that the Defendant had a "*continuing duty to administer the scheme in accordance with its rules*" which extended to 2015. This was on the basis that there was "no continuing duty to discover earlier mistakes and put them right".

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