

GMP Equalisation: Where are we now?

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- *Lloyds* 1 [2019] Pens. L.R. 5
- *Lloyds* 2 [2019] Pens. L.R. 6
- *Lloyds* 3 [2021] Pens. L.R. 10

PASA

- *"Guidance Note on Methods"*, September 2019
- *"Guidance Note on Tax Issues"*, February 2021
- *"Guidance Note on GMP Conversion"*, July 2021
- *"Supplemental Guidance Note on Transfer Payments"*, August 2021

DWP

“Guidance on the use of the Guaranteed Minimum Pensions (GMP) conversion legislation”, April 2019

HMRC

- *“Guaranteed Minimum Pensions (GMP) equalisation newsletter”, Feb. 2020*
- *“Guaranteed Minimum Pensions (GMP) equalisation newsletter”, July 2020*
- *“Guaranteed Minimum Pensions (GMP) equalisation newsletter”, April 2022*
- *“Pension schemes newsletter 140”, June 2022*

White Paper Conferences: illustrious former speakers on this topic include

- 2016 Duncan Buchanan
- 2019 Giannis Weymouth

My topics

- Some general observations
- Conversion: the present position
- Recent HMRC Guidance
- A pot pourri of miscellaneous points

Some general observations

- *Williamson* [2001] Pens. L.R. 51
- *Allonby* [2004] Pens. L.R. 199 “opposite sex notional comparator”
- *Leadenhall Independent Trustees* [2004] O.P.L.R. 115
- Conversion legislation introduced by PA 07

Some general observations

- Government announcement: equalisation required, no comparator necessary (2010)
- DWP consultation and the draft amendment Regulations (2012) - “not well received by the industry” (“gold-plating”)
- *Kenworthy* determination (PO-4579, 2015)
- DWP consultation (2016)
- *Lloyds 1* (October 2018)

Conversion

- DWP Command Paper 6841 *"Security in Retirement: Towards a New Pension System"* (May 2006)
- Estimated would be used by 25% and 50% of schemes, average cost £7,000 for smaller and £12,000 for larger schemes
- *"There was a mostly positive reaction to allowing occupational schemes to convert Guaranteed Minimum Pension rights into scheme benefits although some respondents thought our proposals too complex"*

Conversion

PSA 93 five conversion conditions at section 24B

- (1) actuarial equivalence
- (2) no reduction to pensions in payment
- (3) no MP benefits as part of converted benefit
- (4) survivors' benefits half value of earner's pension
- (5) procedural requirements including (i) employer consent, (ii) all reasonable steps to consult with earner, (iii) notification to affected members and survivors and (iv) notification to HMRC

Conversion

- Section 24A: statutory obligation on SoS to give such guidance (if any) as he or she thinks appropriate
- PA 07 Royal Assent 26 July 2007, Guidance 8 April 2019
- Stimulated by *Lloyds 1* litigation
- Strictly not an issue as employers would not consent
- Trustee sought directions in the event of a change of heart

Conversion

Argument limited to fact (i) some references to only earner whereas (ii) others also to survivors

- Trustee submission did not extend to survivors
- Opposed by counsel for the DWP
- Held conversion of survivors permissible but left open question whether protection afforded to pensions in payment by condition 2 applied also to survivors
- *Lloyds* 1 left other drafting deficiencies unaddressed

Conversion

Pension Schemes (Conversion of Guaranteed Minimum Pensions) Act 2022:

- “P” instead of earner or survivor
- Addresses section 24B(2) issue - no reductions to any converted pension in payment
- Removes the requirement for a 50% survivor’s pension
- Replaces employer consent with “*relevant person*” consent
- Consultation with pensioner survivor and dispenses with HMRC notification

Conversion

But:

- Still waiting for a commencement date for amendments to be appointed
- New requirements for survivors' benefits and relevant person consent to be dealt with by Regulations
- Statutory instruments are government, not private member, business: involve exercise of a power vested in a minister

Conversion

No clarification on consultation:

- Not within the 2006 Regulations
- Primary and secondary legislation silent
- Analogy with PA 95 section 67C and tPR's Code of Practice 10, §60 - at least 4 weeks
- Section 24H, "*Enforcement of GMP conversion conditions*"
- Possible civil penalty under PA 95 section 10
- Non-compliant conversion voidable at suit of tPR: *Re Mitchells & Butler Pension Plan* [2022] Pens. L.R. 6

Conversion

Unilateral Trustee PoA conferred by section 24G:

Where a scheme is amended to effect GMP conversion the trustees may include other amendments which they think are necessary or desirable as a consequence of, or to facilitate, the GMP conversion (subs. (3))

What are its limits?

Conversion

PASA Guidance July 2021 at §2.2:

“The conversion process ... normally involves a member’s whole pension accrued to 05 April 1997, including that accrued before 06 April 1978.

Whilst it might be possible to modify benefits accrued after 05 April 1997, in practice trustees seeking to achieve GMP Equality haven’t tended to do so, and legal advice should be sought before doing so.”

Converters are playing it safe?

Conversion

Appetite for conversion?

ACA Survey March 2022 - excluding the “*totally undecided*”

21% of respondents had decided to use conversion and a further 27%, whilst they had not yet decided, had conversion as their preferred, whereas

the figures were 18% and 17% respectively for dual records.

Insurers now more accommodating of dual records?

Recent HMRC Guidance

6 April 2022 newsletter

Health warning: (HMRC v. Sippchoice Ltd. [2020] Pens. L.R. 22)

"... to interpret the legislation in accordance with the principles of construction described above and if we conclude, as we have, that the legislation bears a different meaning to that found in the HMRC manual, the legislation must be preferred."

Deferred member

Who is a deferred member?

- FA 04 section 151(4): *“neither an active member nor a pensioner member”*
- *Re Merchant Navy Ratings Pension Fund* [2015] Pens. L.R. 239 and *G4S Plc v. G4S Trustees Ltd.* [2019] I.C.R. 141
- PTM053910 - *“the definition of deferred member is a definition under the tax rules”*
- HMRC: member no longer in pensionable service but retaining final salary linkage is not a deferred member

Top-up payments

- Cost-effective way of dealing with transferred out member where under-calculated payment failed to reflect right to equalisation and does not exceed £10,000
- Consistent with the position taken by the Crown in *Lloyds 3*
- See also PTM063700, republished in August 2022.

Top-up payments

Also fairly relaxed approach as to when the prescribed 6 month period begins to run, meaning that the administrator has:

- established not just entitlement but also amount payable, and
- traced member and obtained required information such as bank details

Very practical reading of Regulations 6 and 7 of Authorised Payment Regs. 2009, but doubtful if what Parliament had in mind

Equally relaxed approach to the alternative routes under Regulations 11 and 12

Top-up payments

But:

- Assumes member retains an accrued right under transferring scheme as a result of under-calculation
- *Lloyds 3*: judge held the member did not remain entitled to a benefit under transferring scheme – a former member and trustee obligation to make good deficiency in under-calculated transfer payment
- Unlikely object to receiving a modest cash sum
- Suppose a competing claim from receiving scheme?

(3) GMP conversion and taxation

April 2022 Guidance split members into two classes

First, members not retired and deferred members, in the HMRC sense:

- Possible loss of DMCO
- Possible loss of fixed protection
- Need to undertake further work, including “*the potential for legislative change*” – primary legislation

(3) GMP conversion and taxation

Pensioners and those who left pensionable service pre-6 April 2006:

HMRC could “... *provide confirmation of the expected pensions tax position*”

For pensioners:

- no benefit accrual for AA purposes and no loss of FP if all benefits crystallised
- no loss of DMCO
- LTA - could constitute a BCE3 where increase more than the FA 04 section 216 permitted margin

(3) GMP conversion and taxation

Those who left pensionable service pre-6 April 2006:

- If outside AA regime will still remain outside provided converted benefit of same actuarial value
- No suggestion of any further legislation for this class
- Common for schemes to convert on “*at retirement*” basis – April 2022 Guidance unlikely to change that
- APL website webinar presented by Susie Daykin, Rowan Howard and Catherine McAllister

Miscellaneous points

Interest

- Duncan B's suggestion probably not been followed in practice
- Apparently a settled rate of 1% simple over base, but market movements suggest may need to be readdressed

Miscellaneous points

Taxation of interest

- Is interest on instalments of pension paid late is to be treated as yearly or short (SAIM9075)
- Previously PTM143100 said yearly and subject to deduction of tax by administrator
- Recently updated - now treated as short and paid without any deduction

Miscellaneous points

Section 99 statutory discharge: was the judge right?

- In *Lloyds* 3 was judge right on PSA 93 section 99 statutory discharge?
- Might the point be reargued?

Miscellaneous points

De minimis

- Important area but not easy
- Trustee's obligation is to pay correct entitlement of beneficiary
- May be particularly acute as regards under-calculated transfer payments
- Winding-up and insurance: *Kemble v. Hicks* [1999] Pens. L.R. 287 and *NBPF Pension Trustees Ltd. v. Warnock-Smith* [2008] Pens. L.R. 211.
- Benjamin order? *Capital ATL Pension Trustees Ltd. v. Gellately* [2011] Pens. L.R. 153 and *Re Axminster Carpets Group Retirement Benefits Plan* [2022] Pens. L.R. 1

Miscellaneous points

Transfers-in

- Broader question of principle arising from Barber and Coloroll
- Might it have been argued in *Lloyds* that a receiving scheme was not under a duty to equalise?
- PASA Guidance 2021
- Was transfer payment calculated on an equalised basis?
- Were transfer credits granted calculated on an equalised basis?

Questions

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