

Pensions law group – November 2020

GMP equalisation – clarification on requirements for past transfers-out

Lloyds judgment, Part II

Overview

The long-awaited conclusion to the guaranteed minimum pensions (**GMP**) equalisation litigation, concerning the Lloyds Banking Group's defined benefit (**DB**) scheme, was handed down on Friday, 20 November 2020. It comes two years after Morgan J's first judgement in this case, which determined that DB schemes were obliged to equalise scheme members' GMPs (**Lloyds I**). In the October 2018 judgment, Morgan J left the question unanswered of whether historically transferred-out members were entitled, under the cash equivalent transfer value (**CETV**) regulations, to have their transfer payments topped up where those payments had not been equalised at the point of transfer.

Friday's judgment has unequivocally answered that question. Where an individual member has transferred out of a scheme with an unequalised CETV, that member is entitled to a top up of that payment. In other words, transferring scheme trustees are legally responsible for equalising the GMPs of members who transferred out of their DB pension scheme.

This ruling affects all GMPs accrued between 17 May 1990 and 5 April 1997 and, unlike in *Lloyds I*, there is no time limit. This means that trustees will not be able to rely on any scheme forfeiture rules or the terms of the Limitation Act 1980 and there is no time limit for transferred-out members to seek a top up of their CETVs.

What does the Judgment say?

In the case of transfers made under the CETV legislation, Morgan J summarised the position as follows:

- the trustee owed a duty to a transferring member to make a transfer payment which was correctly calculated and which reflected the member's right to equalised benefits;
- the trustee committed a breach of that duty in some cases by making an inadequate transfer payment;
- the breach occurred at the time of the transfer;
- the trustee remains liable to the transferring member for its breach of duty;
- the trustee is not discharged from that liability by any statutory provision or any rule of the scheme or by any agreement with the transferring member;
- a transferring member is entitled to seek a remedy against the trustee and, in particular, an order from the court on the basis that the trustee failed to perform its duty to pay the correct transfer payment;
- a claim by a transferring member for an order that the trustee failed to perform its duty is not time barred, either under the rules of the schemes or under the Limitation Act 1980; and

- the trustee is able to remedy the position and perform its duty even without an order of the court.

What trustees must do now

Trustees of transferring schemes

Trustees of DB schemes with GMP components should already be working to equalise GMPs between male and female scheme members. However, following this judgment, trustees and their advisers must now look further to equalise CETVs that have been previously paid from their scheme.

Trustees of schemes where there has been a bulk transfer

Morgan J found that, in circumstances where a scheme received a bulk transfer, the transferring scheme trustees are discharged because the obligation to equalise (by topping up scheme benefits) rests with the receiving scheme. As a result, trustees of receiving schemes may need to undertake a wider GMP equalisation effort than first thought under the *Lloyds I* ruling.

Trustees where non-statutory transfers have been made

In the case of individual transfers made under relevant scheme rules (as opposed to under the CETV legislation) and where those rules provide for a discharge (assuming that the discharge would be otherwise effective), a transferring member no longer has rights under the transferring scheme. This is the case unless the court sets aside the exercise of the transfer power and the transferring member can require the trustees to exercise the power again. In order to do this, the member would need a court to find that the trustees were in breach of duty when they exercised their power. A breach of duty may be found, for example, if the trustees failed to “adequately deliberate”. This will be a fact-specific exercise, dictated by specific scheme rules and based upon the circumstances at the time the scheme trustees made their decision.

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