The Slaughter and May Podcast

Recent pension law developments – August 2020

Hello, my name is Richard Goldstein. I am a Consultant and Head of Pensions Knowledge in the Pensions, Employment & Incentives team here at Slaughter and May. In this podcast I'm going to cover three different items. The first one is HMRC and industry guidance on equalising for the effects of GMPs. Secondly, I'm going to talk about a significant European court case on data transfers to the United States, which has broader implications for the transfer of data outside the EEA, and thirdly, I'm going to cover the latest decision in Safeway & Newton on equalisation of retirement ages.

So, starting with GMP equalisation. The second tranche of HMRC guidance on the tax implications of equalising for the effects of GMPs covering lump sum payments was issued on 16 July. This follows the earlier guidance on the dual records methodology for equalisation. HMRC's guidance is helpful confirmation that in nearly all cases, past lump sum payments will not be treated by HMRC as unauthorised due to the decision in the first Lloyds Bank case in 2008, that schemes must equalise the effects of GMPs. The main concern relating to past lump sum payments was whether a lump sum paid, that did not take GMP equalisation into account, meant the authorised payment requirement for the lump sum extinguished the members' or dependants' rights. HMRC accept that the later identification of further entitlement due to GMP equalisation does not prevent the condition having been met. HMRC take the point in time at which the GMP equalisation benefit could reasonably have been known about, to be once the scheme administrator adopt their chosen GMP equalisation methodology. So this means lump sums paid after the Lloyds judgement can fall within the guidance.

A top up payment made to reflect GMP equalisation is treated by HMRC as a separate lump sum not a correction of the original lump sum and can be a different payment type. It is taxable in the tax year paid. The small lump sum, with a limit of £10,000, will be a useful payment type to consider, including for any top ups after death as scheme's rules permitting they can be paid to any person, not just the original scheme member. However, GMP equalisation benefits can cause the value limit for one type of lump sum, a trivial commutation lump sum already paid to be breached, potentially turning these into unauthorised payments. Note that trivial commutation lump sums are different from smaller lump sums. For this lump sum, the value of the members' total benefits across all registered pension schemes, has to be less than a fixed amount on a nominated date. So in practice, these have been rarely paid by pension schemes due to the difficulties of verification of the members' broader pension benefit position. HMRC repeats that it is unable to provide any guidance on the conversion due to the wider issues raised by that method, and states that schemes wishing to use conversion should take their own advice on the tax implications. There are a number of issues that arise when trying to convict conversion within the existing tax laws. The guidance does not comment on whether or not schemes should go back and top up lump sums already paid. It will be for schemes to determine whether or not this is required, and there may be helpful analogies to draw from the long awaited judgment in the third Lloyds case on transfers.

I also wanted to mention the cross industry GMP equalisation working group of PASA, the Pensions Administration Standards Association, which has published further highly technical guidance in July, on the data aspects involved in equalising GMPs. This follows previous PASA guidance on methodology and scheme rectification. This new guidance identifies five key data issues that are important for schemes undertaking GMP equalisation. First, data required and availability. The guidance sets out the potential data required and notes that some will not be readily available or available at all. Or the effort and

expense required to obtain it may be disproportionately high in the context and the benefit of the uplift amount. Second, member groupings, trustees should assess if all members will be dealt with in the same way, but they could decide to deal first with data issues for those members for whom there is an early material impact. Alternatively, they may decide it is most cost effective to obtain all data at once. Thirdly, adviser input, Trustees will need to consult advisers on the data required, the impact of making assumptions or approximations, and the availability of resource. Trustees need to decide which party will carry out the data related work and the process to be used. Fourthly, consistency and efficiency. Trustees should consider the potential need for decisions on data to be consistent with other similar decisions. For example, in relation to general viable equalisation and GMP reconciliation and rectification projects, and fifthly, calculation options. The post 16 May 1990 GMP and non GMP elements for the opposite sex, do need to be calculated. The option chosen for doing this will depend on data available, the benefit structure and the profile of effective members. These will be decisions for the trustees, sometimes in conjunction with the employer and, in most cases, requiring input from the advisers. It perhaps goes without saying that trustees will need adviser input and in particular should ensure they take legal advice before making any approximations on data.

OK, in this second section, I wanted to cover an important European Court decision on the export of data outside the EEA to the US. The case is 'Data Protection Commissioner Ireland v's Facebook Ireland and Maximillian Schrems. The first part I wanted to talk about was as regards the EU/US Privacy Shield. This is relied on by many data exporters that export personal data to the US, the so called EU/US Privacy Shield. The European Court called in to question the protections granted to personal data in the context of the US National Security and Intelligence Services. US domestic law on the use of personal data by public authorities does not, in the Court's view, provide protections essentially equivalent to those required under EU law. Given these issues, the Court ruled that the EU/US Privacy Shield was invalid. In the second part, I wanted to talk about the use of EU standard contractual clauses, or SCCs, and how these were treated by the Court decisions. SCCs can provide a legal framework for international transfers of personal data outside the EEA. The Court confirmed the validity and sufficiency of the SCCs. However, it went on to say the transfers of personal data pursuant to the SCC can and should be suspended or stopped entirely, if the protection for personal data required by EU law cannot be ensured in the recipient country. It is up to the data exporter and recipient to determine before any data transfer, whether the level of protection in the country is sufficient to ensure compliance with the SCC. The Court also reiterated the fact that national data protection authorities have an obligation to intervene to suspend data transfers where the SCC cannot be complied with in the recipient jurisdiction. The UK body responsible for data protection, the information commissioner's office or ICO has confirmed it is currently reviewing its guidance on the EU/US Privacy Shield and SCCs.

The ICO's advice to organisations, who are currently using the Privacy Shield framework for data transfers to the US, is to continue to do so until new ICO guidance becomes available, but organisations should not start to use the Privacy Shield during this period. The European Data Protection Board which brings together EU privacy enforcers has published a document to say it will provide more guidance to EU based data exporters on the use of data transfer tools, such as SCCs. It is worth noting that there are other mechanisms that can be used for the lawful transfer of data outside the EEA such as binding corporate rules or BCRs and other derogations in the GDPR. The EU body said it was looking into what kind of supplementary measures where the legal, technical or organisational could be put in place so that companies could continue to rely on SCCs or binding corporate rules for data transfers outside of the EU.

In the final part of the podcast, I wanted to cover the Court of Appeal decision in the Safeway Pension Scheme case regarding the equalisation of retirement ages. The Court of Appeal's decision offers only a limited concession for those schemes that still had an open viable window on the 1 January 1996. The Court held that a valid rule amendment under UK Domestic Law, so essentially valid under the amendment power in the scheme made between 1st January 1996 and 6 April 1997, could have retrospective effect to level down benefits or close the viable window from an earlier date. If as in the case of Safeway, the amendment purported to take effect from a date before 1 January 1996, the viable window is treated as having closed on 1 January 1996. Given the overall liabilities for the scheme in this case, the final financial implications of the savings were significant. However, for many schemes this judgment is unlikely to have any practical effect.

That ends this podcast. I would welcome any comments or questions. Please feel free to email me at richard.goldstein@slaughterandmay.com. Many thanks.