SQUIRE PATTON BOGGS

GMP Equalisation – Under the Microscope

HotTopics Special Edition

Our special edition of Hot Topics examines a spectrum of issues arising from the court judgment often referred to as *"Lloyds 3"**.

Background (to Ensure We Are All on the Same Wavelength)

Lloyds 3 is the latest ruling in legal proceedings relating to the guaranteed minimum pension (GMP) equalisation obligations of the Trustee of a number of pension schemes connected with the Lloyds Banking Group. In the judgment, the court examined the extent to which the Trustee is required to revisit past transfers out, if those transfers would have been a higher amount if the transferring scheme had equalised benefits between male and female members for the effect of unequal GMPs (referred to in this publication as an "unequalised transfer").

In brief, the court held that the transferring scheme remained liable to pay a top up to an unequalised transfer if the transfer was made under the cash equivalent legislation (a "statutory transfer"). No such liability automatically arose if the transfer was an individual non-statutory transfer paid using a power in the schemes' rules (although a member could apply to court to challenge this), nor in respect of bulk transfers paid from the schemes (without member consent), which resulted in "mirror image" benefits in the relevant receiving schemes. Our publication "GMP Equalisation – Some Transfers Are More Equal Than Others" contains more details on the court's conclusions.

Here are some of the hot topics arising from the *Lloyds 3* judgment that many pension scheme trustees are likely to encounter in practice. Over the coming weeks, we will examine these issues in more detail in our "GMP Equalisation Under the Microscope" series on our *Pensions and Benefits* blog, to present trustees with a clearer image of each issue and how this might impact their GMP equalisation implementation plans.

1. Proactivity Under the Lens

The court made it clear that, for past statutory transfers, the transferring trustees must proactively consider the relevant factors and decide what to do. The factors will include members' rightful claims to top-up payments, the trustees' obligation to calculate transfer payments correctly and the absence of time limits on members' claims. In many instances, the administrative costs of proactively calculating top-up payments are likely to exceed significantly the resulting modest payments to members, but it remains unclear whether such cost considerations can be taken into account.

2. Focusing In on Data Gaps

The ruling indicated that trustees may need to look back as far as 17 May 1990 to identify instances where top ups to past statutory transfers are payable. This is likely to give rise to practical issues for many trustees where missing data will impede attempts to contact members, calculate top ups due, identify the scheme that the top up should be paid to and establish whether the member took a statutory or non-statutory transfer. An immediate action for trustees is to review their scheme data so that gaps can be identified.

3. Bulk Transfers Will Require Close Examination

In *Lloyds 3*, the court only addressed one of many different possible types of bulk transfer (a mirror image transfer without the consent of members). For all types of bulk transfer, trustees need to consider the legal obligations they may have retained (or gained) as a result of the transfer agreement they reached. For example, have they inherited a liability to top up transfer values paid out from a predecessor scheme in respect of someone who was never a member of their scheme? Have they got indemnity protection?

4. Zooming In on Outstanding Top Ups

It is currently generally accepted that defined benefit (DB) schemes are obliged to equalise transferred in benefits for the effects of unequal GMPs. Receiving DB scheme trustees will welcome the payment of top ups to help offset some of their equalisation costs. Only the member has the right to bring a top-up claim, but receiving scheme trustees may seek to prompt or facilitate the payment of top ups by making enquiries of transferring schemes and providing missing information where possible. This issue is examined in more detail in our recent blog.

*Also, confusingly, known as *"Lloyds 2"*!

5. Payment of Lump Sum Settlements – Measure Up the Risks

The ability to pay a lump sum to a member to settle a claim may be useful to resolve a genuine dispute arising from a lack of member data, or where the payment of a top up to a receiving scheme is not possible. However, this is not a problem-free solution. Beyond usual settlement issues, the payment of lump sums may encourage more claims and could result in a windfall for members if they are already receiving equalised benefits in the receiving scheme. Careful consideration of the scheme rules will be also be required, as well as the tax treatment of the lump sum.

6. Illuminating the risk of member claims

A recent *Pensions and Benefits* blog examined whether trustees will be inundated with claims for top-up payments. Of course, former members will only make a claim if they know about the possibility of being able to do so and, at present, there is little publicity regarding this issue outside the pensions industry. Financial advisers and claims management companies may also be unwilling to generate interest in claims where the rewards (if any) are unlikely to justify the efforts and fees involved. However, trustees may, themselves, wish to raise awareness among their membership through newsletters or other member communications.

7. Dissection of Scheme Rules and Documentation

The obligation to top up individual statutory transfers is relatively clear. The position for non-statutory and bulk transfers will depend on the particular scheme rules and, possibly, the wording of any contractual discharge or indemnity from the member or receiving trustees. Another "scheme rules lottery" looms, potentially complicating a streamlined process to resolve historical transfer issues. Trustees should review their rules and scheme documentation to assess the likelihood of successful top-up claims and consider whether they need wider powers to address them efficiently.

8. Magnifying Some Tricky Transfer Issues

Difficulties arise where a transfer value calculation was not prompted by a routine transfer out request from a member, including where benefits have been calculated by reference to a cash equivalent transfer value (e.g. divorce settlements). Previous enhanced transfer value exercises will also need to be considered; for example, are top ups to enhancements required and were the transfers statutory or non-statutory? These issues and scenarios were not directly addressed in the judgment and there are no easy answers. Scheme specific advice is likely to be required.

9. Looking Into the Future

Pension scheme trustees should ensure that, going forward, GMP equalisation adjustments are properly factored into the calculation of transfer values, otherwise work will be duplicated and fees incurred calculating any top ups due in respect of those transfers at a later date. We also recommend that trustees review the scheme rules governing the payment of transfers and the documentation that members are asked to sign up to – how would these be interpreted by the courts and are they still fit for purpose in light of the *Lloyds 3* ruling?

10. Scoping out the Journey

It will not usually be possible/proportionate to address all GMP equalisation risks. The risk of future claims should be borne in mind when journey planning, to ensure that a pension scheme's long-term objectives can be met while limiting the exposure of former trustees and employers to residual risks. We expect trustee liability insurance to be crucial, particularly where schemes are winding up. It remains to be seen what actions insurers and annuity providers will expect trustees to have taken in respect of GMP equalisation.

You can hear more about these Hot Topics by subscribing to our *Pensions and Benefits* blog.

Contacts

Matthew Giles
Partner, Birmingham
T +44 121 222 3296
E matthew.giles@squirepb.com

David Griffiths
Partner, Manchester
T +44 161 830 5359
E david.griffiths@squirepb.com

Wendy Hunter
Partner, London
T +44 20 7655 1119
E wendy.hunter@squirepb.com

Catherine McKenna
Partner, Leeds
T +44 113 284 7045
E catherine.mckenna@squirepb.com

Clifford Sims
Partner, London
T +44 20 7655 1193
E clifford.sims@squirepb.com

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations, nor should they be considered a substitute for taking legal advice.

© Squire Patton Boggs. All Rights Reserved 2021