SQUIRE PATTON BOGGS

GMP Equalisation – Some Transfers Are More Equal Than Others

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The pensions industry has received further clarification on the issue of guaranteed minimum pensions (GMP) equalisation, and whether affected trustees will need to revisit past transfers out of a formerly contracted-out pension scheme.

On 20 November 2020, the High Court handed down a judgment regarding this issue, in the latest instalment in legal proceedings relating to a number of pension schemes connected with the Lloyds Banking Group (the "Lloyds schemes").

The Underlying Issues

Where a transfer payment relating to a member's benefits accrued between 17 May 1990 and 5 April 1997 is paid from one scheme to another, if the transferring scheme had not equalised benefits between male and female members for the effect of unequal guaranteed minimum pensions ("GMP equalisation"), there will be some cases where the transfer payment was less than it ought to have been. In this publication, we refer to a transfer like this as an "unequalised transfer". The big question is whether the transferring scheme is under an obligation to remedy any inequality in an unequalised transfer value and, if so, how?

Getting to grips with the judgment – which runs to over 100 pages – is no easy task. In particular, it is necessary to assess the extent to which the court's scheme-specific decisions, based on the particular circumstances of the Lloyds schemes and the wording of those schemes' rules, apply to other pension arrangements. Here is our summary of the key features of the judgment.

Dealing With Unequalised Transfers – the Court's View

The court came to different conclusions regarding the Lloyds schemes trustee's obligations to revisit unequalised transfers, distinguishing between transfers that had been made under the cash equivalent legislation, individual non-statutory transfers that had been made under the scheme rules and some bulk transfers out. We have summarised the conclusions reached in respect of these different types of transfer below.

Type of Transfer	Court's Conclusions Where an Unequalised Transfer Was Made
Individual transfers out made under the cash equivalent legislation	The transferring scheme remains liable to pay a top up to the receiving scheme (a "Top Up"). The Top Up payment should bear interest at 1% above base rate. A court can order the transferring scheme trustees to pay the Top Up if the member brings a claim, or the trustees can decide to pay the Top Up without a court order.
Individual non-statutory transfers out under the scheme rules (this may be the case where, for example, the member did not meet the eligibility criteria for a transfer under the cash equivalent legislation)	Based on the rules of the Lloyds schemes, the decision to pay the transfer value is valid and effective, and the member no longer has any rights under the transferring scheme. The member can, however, apply to the court to have the transferring trustee's decision (or the employer's decision if under the scheme rules the employer decides on the transfer) set aside on the grounds that the decision-maker's deliberation was "inadequate" (as it did not take account of GMP equalisation) and involved a breach of duty. Whether or not this application would succeed would be decided by the court and would depend on the circumstances.
Some bulk transfers out	The court only considered a bulk transfer providing "mirror image" benefits in the receiving scheme, which had been made without member consent. The court concluded that the transferring members are no longer entitled to benefits in the transferring scheme (assuming that relevant legislation and the scheme rules had been complied with).

There are some useful guidelines here for schemes looking to address unequalised transfers that have been paid in the past. Most schemes will have similar rules to the Lloyds schemes regarding the payment of transfer values in line with the cash equivalent legislation. These schemes have been given a clear steer that any GMP equalisation inequalities in such transfers can be remedied by the payment of a Top Up to the receiving scheme, and that trustees can do this without a court order. Of course, from a practical perspective, this solution is only available if the receiving scheme is able and willing to accept the Top Up (it is worth noting that the court did briefly consider some potential workarounds if this were not the case – the pros and cons of the options will need to be weighed up on a case-by-case basis).

One of the issues that schemes may encounter in practice is establishing whether individual transfers were made under the cash equivalent legislation, or whether they were non-statutory transfers paid using a power in the scheme rules. This will be particularly problematic if the scheme has limited data regarding historic transfers. The distinction is important, as the trustees can act without a court order in paying a Top Up where a transfer has been made under the cash equivalent legislation, but will require a court order to unravel and recalculate an inadequate non-statutory transfer under the scheme rules (based on the court's interpretation of the relevant law and its application to the Lloyds schemes' rules). Trustees and advisers will need to come up with pragmatic solutions to address these uncertainties and gaps in data.

The decision regarding bulk transfers is helpful (for the transferring scheme at least!), as it was ruled that the Lloyds schemes were no longer liable to pay benefits to the transferring members. However, this decision has limited application – it is only directly relevant to mirror image bulk transfers on a without consent basis. The court did not definitively rule on the position regarding other types of bulk transfer (for example, bulk transfers based on actuarial equivalence). Note that receiving schemes may also have separate rights under bulk transfer agreements that could be used to claim additional funds to meet their extra GMP equalisation liabilities.

Trustees of schemes who have made (or accepted) bulk transfers in the past will need to consider their positions carefully and should take legal advice on the effect of the provisions in any relevant transfer agreements.

Reliance on Discharges From Liability – an Uphill Struggle?

Trustees are likely to struggle if they seek to rely on discharge wording in scheme rules, or in discharge forms signed by a transferring member, to avoid paying a Top Up in respect of an unequalised transfer made under the cash equivalent legislation.

The court considered specific examples of wording in the Lloyds schemes' rules and discharge forms and, in every case, concluded that the discharge wording was ineffective. Note that the judge considered that references in the wording to the trustee being discharged from the liability to provide "benefits" did not extend to the separate liability to pay the Top Up. The court also held that the cash equivalent legislation did not provide a discharge from that liability.

Limitation and Forfeiture Provisions

The court held that claims for Top Ups by members who have taken a transfer under the cash equivalent legislation are not time barred by the Limitation Act 1980, or under the rules of the Lloyds schemes. Therefore, it is likely that trustees in a similar position to the Lloyds schemes trustee will need to go back to 17 May 1990 when identifying transfers for which a Top Up payment may be due.

Do Trustees Have to Be Proactive in Paying Top Ups?

The judgment contains a useful analysis on the extent to which the trustee of the Lloyds schemes was obliged to proactively identify and calculate shortfalls in previous unequalised transfers made under the cash equivalent legislation and take steps to pay Top Ups to receiving schemes. The court stopped short of ruling that the trustee should proactively pay Top Ups in respect of all such transfers as quickly as possible. Instead, the judgment recognised that a member can apply to court for an order that the trustee pays the Top Up, or the trustee can pay the Top Up without a court order. The judgment goes on to state that "the Trustee does need to be proactive in that it must consider the rights and obligations … identified, the remedies available to members and the absence of a time bar and then determine what to do." This is likely to be comforting where trustees encounter practical barriers to identifying the Top Ups due and to paying them.

And so?

Many pension scheme trustees have been waiting for this court judgment before taking the next step in progressing their GMP equalisation plans. The rulings made in the judgment were scheme-specific and not all types of transfer and scheme circumstances were addressed by the court, but we now have a much clearer picture regarding the extent of trustees' obligations to revisit historic unequalised transfers. Trustees should proceed with GMP equalisation exercises. These exercises will now need to involve scoping out the data available regarding individual transfers out and examining the history of bulk transfer activity. Top Up payments and other follow-up payments may need to be made in due course but, presumably, some schemes may expect to receive such payments as well.

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