

GMP Equalisation and Historic Transfer Payments

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On 20 November 2020, the High Court handed down its long awaited judgment in *Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank plc* [2020] EWCh 3135 (Ch) providing much needed clarity on a number of unresolved issues arising from its decisions in *Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank plc* [2018] EWHC 2839 (Ch) and [2018] EWHC 3343 (Ch).

A quick reminder – what are GMPs, why is there an issue and what did the earlier judgments say?

Guaranteed minimum pensions (GMPs) were introduced under the former contracting-out regime which permitted private pension schemes to take over the provision of some state pension benefits. GMPs accrued in accordance with overriding statutory requirements which were inherently discriminatory in so far as they provided for different retirement ages depending on whether the member was male or female.

The discriminatory effect of unequal retirement ages was considered in the 1990 case of *Barber*, where the European Court of Justice decided that the provision of unequal retirement ages constituted unlawful sex discrimination. However, the judgment did not apply to pension benefits provided by the state. This gave rise to considerable uncertainty regarding the treatment of GMPs, which are provided by private occupational pension schemes but are intended to replace state benefits and are calculated in accordance with legislation. Given this uncertainty, GMPs were excluded from the equalisation exercises of the 1990s.

The first Lloyds decision confirmed what many in the pensions industry had long suspected; there is a legal obligation on trustees to adjust benefits to take account of unequal GMPs (a process referred to as GMP equalisation). Whereas the decision in the first Lloyds case provided a detailed overview of the methods available to schemes to “equalise” benefits, a number of questions were left unanswered including the position relating to transfers of benefits to and from pension schemes.

What does the most recent Lloyds decision say?

The Court considered whether there was an obligation on trustees to top up historic transfer values paid from schemes where no adjustment had been made for unequal GMPs. In answering this question, the Court drew a distinction between the following types of transfer: (1) a statutory transfer pursuant to a member's rights under legislation; (2) a non-statutory transfer pursuant to a power contained in the pension scheme's rules; and (3) bulk transfers of benefits without member consent.

In relation to statutory transfers, the Court held that:

- Where no provision was made in the transfer value calculation for GMP equalisation, trustees have breached their statutory duty to pay a transfer value in accordance with legislation and are under an obligation to top up the underpaid transfer value.
- The statutory discharge does not operate in these circumstances to discharge trustees from liability.
- No statutory limitation period applies, meaning trustees are liable for underpaid transfer values dating back to 17 May 1990.
- Transfer values should be recalculated by reference to the original transfer date and simple interest applied at the rate of 1% above base rate.

In relation to non-statutory transfers, the position is potentially very different. Under the rules of the Lloyds Bank pension schemes, trustees had a wide discretion to determine the amount of the transfer value. The trustees' failure to take account of GMP equalisation in the transfer value calculation did not invalidate the exercise of the transfer power. Accordingly, transferring members have no further rights to benefits under the Lloyds Bank pension schemes. If transferring members wish to have their transfer values recalculated, they would need to apply to court to have the exercise of the transfer power set aside (and would need to show that the trustees committed a breach of duty when exercising the power).

Finally, in relation to bulk transfers that resulted in the provision of 'mirror-image' benefits in the receiving scheme and which were carried out in accordance with the regulatory requirements, members are entitled to benefits under the receiving scheme only, meaning they have no claim to any further benefits from the transferring scheme.

What are the implications for trustees?

On the assumption that most transfer values are paid pursuant to the statutory power, trustees will need to consider the correction of historic transfers as part of their GMP equalisation exercises. The Court commented that trustees need to be “pro-active” in terms of considering their obligations and the remedies available to members when deciding what to do. It is clear that there is an obligation on trustees to top-up underpaid transfer values; however, there are likely to be a number of practical difficulties. For example, the availability of member records for the purposes of identifying affected members and calculating top ups. Further complications arise in relation to those transferring members who no longer belong to the receiving scheme. The Court confirmed that members have a right to a top up only and neither the member nor the trustees can insist on the provision of residual benefits under the transferring scheme.

Where trustees undertake an exercise to top up underpaid transfer values, they may be required to treat members differently depending on whether they took a statutory or a non-statutory transfer (assuming it is possible to determine whether a member transferred under a statutory or non-statutory power). In the latter case (and depending on the relevant scheme rules), the trustees may have no power to pay a top-up if the legal analysis is that the member has no benefits left in the scheme.

Finally, the Court’s comments in this case are not limited to underpayments resulting from a failure to account for GMP equalisation in the calculation of transfer values. Rather they can be applied to all underpaid transfer values. If trustees are aware of any transfer values that have been miscalculated for whatever reason, they should consider themselves under a duty (and liable) to top up those that were paid pursuant to the statutory power.

Please do get in touch with your usual advisor in the Wrigleys’ pensions team if you would like to discuss the implications of this judgment for your scheme.

If you would like to contact us please email
kate.buckham@wrigleys.co.uk

www.wrigleys.co.uk

