THE PENSIONS COMPASS

JULY 2018

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INTRODUCTION

It's been a scorching start to the summer, and we hope you're all managing to make the most of the unprecedented weather! In the background the pensions industry has remained as busy as ever, and like most of you we are rather glad the furore surrounding the GDPR deadline has passed (albeit there is plenty of GDPR work to do!).
The June Pension's Compass includes the following:

- Clive's regular round up of developments in pensions law, in the form of his ready reckoner;
- Grace looks at the implications for employers who take it into their own hands to opt their members out of their auto-enrolment compliant scheme;
- Justin follows the theme of auto-enrolment and considers inducements to opt-out;
- Katie analyses the Dixons Carphone saga; and
- I take a look at pension scams and the latest Code of Good Practice.

We hope you enjoy this edition of the Pensions Compass.

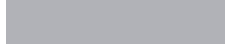
If you have any questions regarding any of these topics please do get in touch.

For further details on these matters or any other pensions related queries, please contact a member of the Pensions and Employee Benefits team.

Alison Hills, Partner and Editor-in-Chief

PENSIONS READY RECKONER

PARLIAMENT		
Legislation	**Enacted**	**Effect**
Finance Act 2018	15 March 2018	Pension scams: HMRC's powers to register and de-register schemes are tightened, especially where the employer is "dormant".
Pension Schemes Act 2017	27 April 2017	Regulation of Master Trusts to protect members. Most of the provisions will apply from a date to be appointed, expected to be 1 October 2018.
Financial Guidance and Claims Act 2018	10 May 2018	■ The Single Financial Guidance Body expected to replace Money Advice Service, The Pensions Advisory Service and Pension Wise on 1 October 2018. ■ Section 21 requires the Government to make Regulations banning *"unsolicited direct marketing related to pensions"* by end of June 2018. If the Regulations are not made by then the minister needs to explain to Parliament why not and to set a time table for making the Regulations.
Data Protection Act 2018	25 May 2018	Implements the EU General Data Protection Regulation in the UK, including implementing variations ("derogations") permitted by the GDPR.
Data Protection (Charges and Information) Regulations 2018	Regulations made on 10 April 2018 and took effect on 25 May 2018	Requirements for data controllers to pay fees to the Information Commissioner and to supply the Commissioner with specified information.
Multi-Employer Pension Schemes Bill	Published as Private Member's Bill on 11 June 2018	The Bill seeks to address the burden of Section 75 debts on unincorporated employers (e.g. plumbing businesses). More radically, the Bill seeks to replace the buy-out basis with the scheme specific funding basis. Our comment: the Government is unlikely to support the Bill and therefore it is likely to lapse.



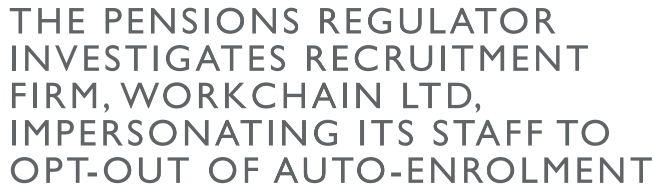
PARLIAMENT		
Legislation	**Enacted**	**Effect**
Divorce (Financial Provision) Bill	Second Reading in House of Lords 11 May 2018	This Bill started in Parliament in May 2016! It is now making progress. It seeks to introduce as a fair starting point equal division of pensions etc. acquired after marriage.
Amendments to Investment Regulations	June 2018	The DWP is consulting on new Regulations requiring trustees to consider "financially material considerations" which is defined as including environmental, social and governance factors, including climate change, in carrying out their investment duties. The amendments contemplated will, if made, come into force in October 2019 at the earliest.

FROM THE COURTS	
Topic	**Forthcoming important decisions**
Sex equality *Lloyds Banking Group* To be heard in July 2018	GMP equalisation claims by female employees of Lloyds Bank. The High Court is asked to decide whether the trustee is required to equalise benefits for the effect of GMP and, if so, how benefits should be equalised. Onward appeals seem a racing certainty.
RPI/CPI *Barnardo's* Court of Appeal heard on 12/13 June 2018	Appeal to the Supreme Court against Court of Appeal's decision that no switch from RPI to CPI was possible based on the rules of the Scheme. The issue of whether members have accrued rights to RPI increases 'protected by section 67' is also likely to be decided. Both the High Court and Court of Appeal decided there was no such protection.

FROM THE COURTS	
Topic	**Forthcoming important decisions**
RPI/CPI *BT Telecommunications Pension Scheme* Court of Appeal – to be heard on 9 October 2018	BT and the BT Trustees asked the High Court whether the index for increases to pensions in payment can be changed from RPI to CPI. The High Court decided RPI has not become inappropriate for the purposes of indexation under the rules of the scheme. Now we await the Appeal Court hearing.
TPR's anti-avoidance powers *Box-Clever (ITV)*	Scope of TPR's anti-avoidance powers in the context of joint ventures: on 18 May 2018 the Upper Tribunal found in favour of TPR. However, this could turn out to be a pyrrhic victory for TPR – the ITV group has appealed to the Court of Appeal. The Appeal Court hearing date is awaited.
HMRC contributions paid by members in specie *Sippchoice v HMRC* Heard on 26 February 2018 in first Tier Tax Tribunal	Issue: whether member contributions paid by transfer of assets to a SIPP are deductible for tax purposes. This is an important test case for HMRC. In its decision on 10 March 2018, the First Tier Tax Tribunal decided in the member's favour. The Tribunal considered the documentation reflected a legally binding obligation to make the contributions and that the meaning of "contributions paid" in section 188 Finance Act 2004 was satisfied. HMRC are appealing this decision. This is an area where much depends on the particular SIPP documentation.
HMRC Bayonet v HMRC High Court	On 16 May 2018 the High Court decided HMRC cannot deem someone to be a "scheme administrator" and that a scheme sanction charge for an unauthorised payment can be made only against the persons who are the actual scheme administrator.
Auto-Enrolment *TPR v Workchain Limited* 7 June 2018	TPR successfully prosecuted Workchain for improperly getting temporary workers out of the NEST pension scheme, after NEST reported its concerns. The sentencing of the two directors and five senior staff will be considered at the Crown Court on 28 June 2018. The prosecution is under the Computer Misuse Act 1990. According to TPR's press release, the maximum penalties are 2 years' imprisonment and/or an unlimited fine.

FROM THE COURTS	
Topic	**Forthcoming important decisions**
Proper exercise of Trustee powers *British Airways* Court of Appeal hearing in May 2018 – decision awaited	The High Court in May 2017 decided that the Trustee had acted properly in granting a pension increase above CPI. The appeal to the Court of Appeal is on two grounds: ■ the increase awarded is improper as the purposes of the scheme, under its trust deed, prohibits "benevolent" or "compassionate" payments; and ■ amending the scheme to introduce the power to award increases, and exercising that power, are both invalid as contrary to the proper purposes of the scheme. To some extent this case stands on its own as the amendment power is vested unilaterally in the Airways Trustee and the power to award such increases is also solely in the Trustee's hands. The case also raises wider issues as to how far trustees should take employer interests into account. See also our article on the High Court decision in our June 2017 Pensions Compass.
Inheritance tax and pension transfers *Staveley*	Appeal from Upper Tribunal decision heard in the Court of Appeal in June 2018, judgment reserved. Given the increase in significant DB to DC transfers and the opportunity to pass on wealth within DC flexi-access wrappers, the Inheritance Tax treatment of such transfer is in HMRC's sights.
Debt Regulations *G4S plc v G4S Trustees* High Court 6 June 2018	Issue: whether scheme open, or frozen under the Debt Regulations. The High Court has properly decided that members retaining a final salary link were no longer in pensionable service, and accordingly the scheme was a frozen scheme.
Debt Regulations *PS Trustees v China Shippy* High Court (date awaited)	Issue: whether a "segregated" section of the scheme exists for section 75 purposes.

Clive Weber, Partner – Pensions & Employee Benefits Team
Please contact Clive with any queries on this Ready Reckoner



THE PENSIONS REGULATOR INVESTIGATES RECRUITMENT FIRM, WORKCHAIN LTD, IMPERSONATING ITS STAFF TO OPT-OUT OF AUTO-ENROLMENT

A recent investigation by The Pensions Regulation (**TPR**) has found managers and directors at Workchain Ltd, a national recruitment company based in the Midlands, impersonating staff by opting them out of the auto-enrolment compliant pension scheme in order to save the company money. The senior staff were asked to log onto Workchain's temporary staff's online National Employment Savings Trust (NEST) system and were then able to opt-out these members of staff.

The owners and directors of the company, Phil Tong and Adam Hinkley, encouraged the company's Financial controller, HR and compliance officer, and branch managers to opt 67 temporary workers out of the pension scheme, in order for the company to avoid making employer contributions.

NEST originally reported its concerns about Workchain to TPR in May 2014 and as a result a joint investigation involving TPR, the Employment Agency Standards Inspectorate, Derbyshire Constabulary and Nottinghamshire Constabulary was launched. Since its investigation, TPR has now prosecuted Workchain, the two directors and five senior staff for an offence of unauthorised access to computer data, contrary to section 1(1) of the Computer Misuse Act 1990. All of the defendants pleaded guilty to the offence on the 7 June 2018 and will all be convicted for the offence. District Judge, Jonathan Taaffe, has committed the case to the Derby Crown Court for a sentencing hearing on 28 June 2018. The seven staff members face up to a maximum of two years' imprisonment and they and the company also face an unlimited fine. It should be noted that this is the first time that TPR has launched prosecutions for this type of offence.

TPR's Director of Auto-Enrolment, Darren Ryder stated that the company was misusing NEST's online portal and that it was an attempt to use a quick and easy way to save the company some money and cheat the auto-enrolment system. TPR's director then reiterated that: *"Automatic enrolment is not an option, it's the law and the law is clear – no one can opt a worker out of a pension scheme, even if the worker agrees. Those who try to avoid their pension responsibilities in this way face prosecution."*

Wedlake Bell Comment

TPR has warned that it is tightening down on those who do not comply with the pensions requirements, legislation and regulations. The regulator has stated that it will be increasing its use of its compliance and enforcement powers, and it should be noted that it has already issued close to 14,000 penalty notices since the beginning of 2018.

TPR's executive director, Nicola Parish, has said that TPR is working towards being *"clearer, quicker and tougher"*. With some of the previous criticisms TPR has received concerning speed of response and lack of clarity when making direct contact, this would indeed be a welcomed change.

It is evident that TPR, in many regards, is becoming tougher, and those who are not compliant should be aware. Reiterating our sentiments and tone in our articles published on 27 April 2017, there is a definite shift in TPR's previous soft and non-threatening approach to a much stricter and serious approach.

We definitely see this as a positive change.

Grace Ho, Solicitor – Pensions & Employee Benefits Team

AUTO-ENROLMENT INDUCEMENTS – THE SOLE OR MAIN PURPOSE TEST

In *Kostal UK Ltd v Mr D Dunkley and Others*[1] the Employment Appeal Tribunal (EAT) has upheld an employment tribunal's decision that an employer had unlawfully induced workers to vary the terms of their employment contract to avoid collective bargaining. Employment legislation protects collective bargaining by penalising employers who induce workers (who are members of a recognised trade union) to vary the terms of their employment in order to exclude a collective bargaining process.

Background

The employer (Kostal) recognised Unite as a trade union for collective bargaining purposes in 2015. Towards the end of the year the collective bargaining process between Kostal and Unite began to break down after Kostal made an offer that Unite felt it could not recommend to members. The offer was for a 2% increase in basic pay and a Christmas bonus in exchange for reduced sick pay and Sunday overtime rates. Kostal wrote to all employees stating that if the offer was not accepted before Christmas, then employees would not receive a Christmas bonus. In January, they wrote again to employees who had not accepted the offer. This time they promised a 4% increase in basic pay for those who accepted the offer and threatened dismissal to any employee who refused.

Subsequently, a group of 56 employees who were members of Unite raised employment tribunal claims on the grounds that the letters were unlawful inducements contrary to the relevant employment legislation. The tribunal agreed and found that there had been two unlawful inducements. The liability to Kostal was over £425,000.

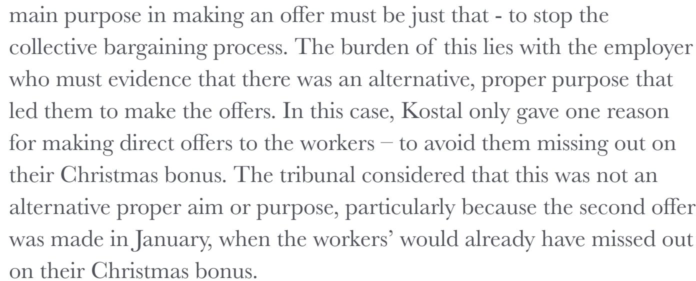
Kostal appealed against the tribunal's decision on a number of grounds however the EAT upheld the employment tribunal's decision and dismissed all of Kostal's grounds of appeal.

Automatic Enrolment and Inducements?

The Kostal case throws up some interesting issues in relation to the ban on employers inducing workers to opt out of pension saving.

Under s.54 of the Pensions Act 2008, employers must not take any action with the 'sole or main purpose' of inducing a jobholder to opt out, or give up membership, of a qualifying pension scheme (without becoming an active member of another scheme). It is also unlawful to induce an entitled worker to give up membership of a relevant pension scheme. It is irrelevant whether or not the inducement succeeds in persuading the worker to opt out or give up membership.

The 'sole or main purpose' test was considered in the Kostal case with the EAT confirming that for a prohibited result (i.e. to stop the collective bargaining process) to be triggered the employer's sole or



main purpose in making an offer must be just that - to stop the collective bargaining process. The burden of this lies with the employer who must evidence that there was an alternative, proper purpose that led them to make the offers. In this case, Kostal only gave one reason for making direct offers to the workers – to avoid them missing out on their Christmas bonus. The tribunal considered that this was not an alternative proper aim or purpose, particularly because the second offer was made in January, when the workers' would already have missed out on their Christmas bonus.

Although cases will inevitably turn on questions of fact and the degree of the inducement, the EAT did state that:

"…we consider that employers who act reasonably and rationally for proper purposes and are able to demonstrate that their primary purpose in making individual offers is a genuine business purpose, retain the ability to make offers directly to their workforce without fear of contravening [the sole or main purpose test]".

It would be unlawful, for example, for an employer to offer a worker a bonus on the express condition that he or she opt out of the qualifying pension scheme. A less explicit inducement to opt-out could still be unlawful under s.54; it is the employer's purpose that is relevant. Guidance from the Pensions Regulator[2] on Safeguarding individuals gives the example of a flexible benefits package where membership of a pension scheme is one of a range of elements on offer but which also includes non-pensionable benefits or cash alternatives such as a higher rate of pay. The Pension Regulator states that employers that offer such a scheme must be confident that their main or sole purpose is not to induce workers to give up membership of a qualifying scheme.

Wedlake Bell's view

The 'sole or main purpose' of inducing an individual to give an opt-out notice will inevitably come down to a question of fact. The EAT's decision is a handy reminder of the principles underlying this test. In a pensions context, it is essential that employers thoroughly document their purpose and decision-making processes. Furthermore, communications need to be fair, clear and neutral so that workers can make a free and informed choice. As agile working and 'flexibility' becomes a staple part of the working environment, the popularity of flexible benefits will only increase thereby leading many to opt-out of a workplace pension. In light of this, it is encouraging therefore to know that where there is a genuine business purpose, the ban on inducements should not pose a threat to a properly intentioned employer.

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[1] UKEAT/0108/17 and UKEAT/0109/17

[2] Safeguarding individuals: The new safeguards for workers

Justin McGilloway
Partner and Head of Pensions & Employee Benefits Team

DIXONS CARPHONE IN THE SPOTLIGHT

Geoffrey Budd, Chairman of the trustee of the Dixons Carphone defined benefit pension scheme, was the recipient of a letter from Frank Field dated 1 June this year.

The letter followed Dixons Carphone's most recent trading update announcing the closure of 92 Carphone Warehouse stores and a drop in projected pre-tax profits (estimated at £382m, down from £501m in 2016/17) and comes hot on the heels of the Business, Energy and Industrial Strategy and Work and Pensions Committees joint report on Carillion. Dixons Carphone's annual contributions into the pension scheme are currently set at some £46m, with a deficit at October 2017 on the IAS19 accounting basis of £492m.

The letter notes (among other points) that:

> *"The new Group Chief Executive remarked in the latest update that "there's plenty to fix" in the company and that "nobody is happy with our performance today""*

and asks the question:

> *"As the company pursues its plans to address these issues, to what extent is it keeping the pension scheme trustees informed and engaged?"*

The letter also makes particular reference to the fact that the company's full-year dividend will be maintained at the same level despite the profit warning. This comment points to the increasingly high-profile requirement for sponsoring employers to balance the need to attract and retain investors – potentially securing the viability of the business – with the funding and security of their pension schemes.

Dividends and senior executive bonuses paid by Carillion were the focus of intense criticism in the joint report published on 16 May. The report found that Carillion's dividend payments, which increased year on year, "bore little relation to its volatile corporate performance" and "long term obligations, such as adequately funding its pension schemes, were treated with contempt".

Whilst Carillion appears to have been an exceptional perfect storm, there is no doubt that the Pensions Regulator is under yet more pressure to show its teeth and move proactively. The joint report made scathing criticisms about the (lack of) action taken by the Regulator, commenting that it was feeble and timid (alongside the Financial Reporting Council) and citing seven instances of empty threats to enforce payment of pension contributions. The Regulator was criticised for not offering any serious challenge to Carillion's dividend policy in the context of inadequate contributions, despite its own guidance that dividend policies should be considered as part of a recovery plan.

Andrew Warwick-Thompson (the Regulator's Executive Director for Regulatory Policy) has now stated in a press release on 13 June 2017 that:

> *"[I]f we [the Regulator] see a situation where we believe a scheme is not being treated fairly, we are likely to intervene. For example, if a company is paying out more in dividends than in deficit reduction contributions, we will expect to see a short recovery plan. And we will expect that recovery plan to be underpinned by an appropriate investment strategy."*

As the Regulator's role continues to develop, it will be very interesting to see how the Dixons Carphone trustees and the Regulator work together whilst Dixons Carphone deals with these challenges. It will be difficult not to draw comparisons (however fair or unfair these might be) against the actions we have seen the Regulator take in respect of Carillion in the years leading up to the construction company's collapse.

Katie Whitford, Solicitor – Pensions & Employee Benefits Team

PENSION SCAMS AND THE LATEST CODE OF GOOD PRACTICE

It has been estimated that in the region of £1bn of pension savings has been lost to scams (and $42m of this has gone missing since the pension freedom and choice regime was announced as part of the 2014 budget). Indeed, the actual figure could be significantly higher. Some of the stories regarding duped pensioners are heartbreaking and scheme administrators are often left in the difficult position of balancing:

- the risk of getting in the way of members' free choice; and
- the risk of facilitating a transfer which results in potentially devastating losses to the member.

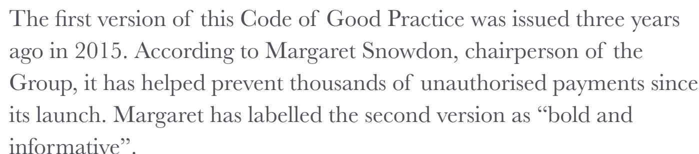
There is no doubt that well-trained administrators can make a huge difference (and, in fact, are doing so) to the number of scam-transfers which proceed. However, despite administrators being trained to provide appropriate information and to ask relevant questions of members, there will always be a body of members who insist on transferring their benefits against the better judgment of the administrator involved.

Whilst many of the scammers' schemes are not illegal they often have disastrous consequences by promising members benefits which will incur significant unauthorised payment charges, be this because they promise them more than 25% of their pot as a tax-free lump sum, or they promise access to benefits before age 55.

The requirements which now apply in relation to members seeking to transfer funds worth £30,000 or more have gone some way to reduce the amount of scans which get over the line, but scammers can be clever, and there are still many unscrupulous people and organisations which seek (and often succeed) in duping pension scheme members. Indeed Michelle Cracknell of The Pensions Advisory Service has been quoted as saying "The scourge of pension scams continue with the scammers taking advantage of people being disconnected and not fully understanding their pensions".

Thankfully the Pensions Scams Industry Group (formerly the Pensions Liberation Industry Group) has identified the shifting nature of pension scams and on 22 June they issued an updated Code of Good Practice ("Combating Pension Scams").

The industry group consists of voluntary representatives from consumer bodies, trade bodies, trustees, administrators, providers, legal experts, technical experts and other industry bodies.



The first version of this Code of Good Practice was issued three years ago in 2015. According to Margaret Snowdon, chairperson of the Group, it has helped prevent thousands of unauthorised payments since its launch. Margaret has labelled the second version as "bold and informative".

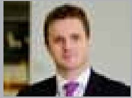
Indeed, the second version of the Code includes more case studies (including examples of real decisions taken by real schemes) and template letters and forms, all of which indicate a focus on ensuring the Code is user friendly.

You will recall from past editions of Clive's ready reckoners that legislation to ban cold calling has been passed and will be effective in 2020. It is hoped that this modernised Code will help to plug the gap until that law comes into force. Although it is no mean feat, Aviva conducted a study which indicated there were around 2.2bn nuisance calls and texts in 2017 alone (the equivalent of 6m a day!).

Education remains the key, however, and Margaret Snowdon has called for investment similar to that seen in relation to the PPI debacle, to educate the public about pension scams. The FCA and the Pensions Regulator are also doing their bit – this month they wrote to several high profile schemes (including Lloyds Banking Group and J Sainsbury) to warn them about rogue advisers targeting defined benefit savers, saying they have learned from the lessons with British Steel Pension Scheme where they didn't move fast enough to provide information and guidance to help prevent such transfers.

For anyone who believes they have been a victim of this type of fraud we would be very happy to discuss it with them, but their first port of call should be to report it to Action Fraud on 0300 123 2040.

Alison Hills, Partner – Pensions & Employee Benefits Team



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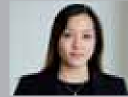

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