Pensions Today

Highlighting the practical, legal and investment issues facing the pensions specialist

incorporating **Pension Scheme Trustee**

Rectification of Scheme Rules

Correcting scheme rules - never easier? SPS Technologies UK Pension Plan

Clive Weber (Pensions Partner) and Paul Ashcroft (Pensions Solicitor), Wedlake Bell LLP, identify key lessons from the High Court's decision in SPS Technologies UK Pension Plan (the "Scheme")

Some 22 years after the drafting error, the High Court rectified (corrected) the Scheme's rules. And – the icing on the cake – summary judgment was given without the need for a full trial. The High Court gave its reasons on 11 September 2020 and these provide a very useful blueprint for other schemes considering corrections.

This article explains:

- what rectification means;
- how it can be put to good use; and
- key lessons from the SPS Technologies' decision.

The Courts are taking a pragmatic approach to rectifying pension schemes and it is important that employers and trustees are fully up to speed in this developing area.

What does "rectification" mean?

"Rectification" simply means the Court correcting a mistake in a document. The Court re-writes part of the scheme rules just as if the rules had *always* existed in their correct form.

As rectification is a Court remedy, some of the usual obstacles and restrictions that typically apply to pension scheme trustees do not apply (e.g. the scheme's own amendment power and/or section 67 of the Pensions Act 1995 restricting certain alterations to members' benefits).

Legal background

The background is well described in the SPS Technologies decision: rectification is a "*discretionary"* remedy and it is for the Court to decide on all the evidence whether or not to order a correction to a document. Rectification is a powerful remedy as the Court rewrites wording used by the parties in a document signed by them and so the Court is careful to order rectification only where plainly justified.

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What evidence is needed?

Pension schemes occupy the middle ground between contract and trust and it has taken time for the Courts to decide the right test for correcting pension scheme documents. The trend towards an objective test for deciding the parties' intentions was thankfully rejected by the Court of Appeal in 2019 in the *FSHC* case, in favour of identifying the parties' actual intentions.

So what evidence is needed? Answer: there must be clear and cogent evidence of the original intentions of the employer and trustees. The standard of proof is the civil standard of the balance of probabilities.

In SPS Technologies, the rules specified, erroneously, that the actuarial reduction for certain transferred-in members who took early retirement direct from pensionable service were subject to a greater actuarial reduction than comparable members who took early payment of their deferred benefits. This error did not feature in the original 1992 Rules. It first appeared in the 1998 Rules and was repeated in the 1999 and 2003 Rules. In 2009 the error was eventually discovered and a Court application to correct the error was made. For ease of reference a timeline is included at the end of this article.

Evidence gathered for the Court in SPS Technologies included:

- statements on behalf of the employer and the trustees as to what was originally intended;
- statements from various original and subsequent professional advisers; and
- the fact that there was no evidence of any intention to introduce the error.

Key to the case were the long standing employer representatives/trustees who could be contacted and were available to provide written statements, as was the quality of the trustees' records and the advisers' papers. The scheme had, in practice, continued to operate as originally intended in 1993 i.e. without applying the error. This evidence helped the Court to understand the true intention of the parties notwithstanding the documents signed by the parties in 1998, 1999 and 2003 which took a different line.

The moral is clear: if despite best efforts something subsequently is found to have gone wrong, the quality of the scheme's records is crucial in putting things right. And "records" here is wide ranging, including such matters as the instructions given to advisers and the advisers expressly recording the intended changes, as well as contemporaneous trustee minutes, employer board minutes and member communications. In SPS Technologies, the absence of any specific instruction to introduce the error was key.

Providing the Court is presented with a clear picture of what has gone wrong and how to put it right, one can typically expect the Court to correct what the Court referred to in SPS Technologies as complex and long pension documents where it is "*unsurprising*" that errors sometimes occur.

Legal process for rectification

At its simplest, the parties represented in Court will be the employer, trustees and a scheme member representing the class of membership affected. Typically, the employer will ask the Court to make the correction, the trustees are usually neutral (although there is nothing to stop the trustees from forming a view and in some cases they do) whilst often the member will be a "representative" of the members who would lose out if the correction is made.

In SPS Technologies, the member having been advised by Counsel, agreed that the rectification order should be made and did not oppose the employer's application. The Court followed the developing trend of reviewing a confidential Opinion prepared by the member's Counsel. The Opinion explained why in Counsel's view the representative member did not have grounds for opposing rectification. Seeing and being able to discuss the Opinion with the member's counsel is of considerable help to the Court. Accordingly, the Court dealt with the matter by the summary judgment process – which meant there was no need for the parties to come to Court to give evidence or be cross-examined.

The delay in discovering the error and the delay in applying to the Court (some 17 and 9 years respectively as per the timeline below) were not defences to the cogent rectification case.

Legal process where rectification opposed

There will be cases where the representative member does not, on advice from his/her Counsel, support the rectification application. In these circumstances, a full trial is necessary. Nonetheless, the sums at stake may be very large and the saving if rectification is granted, may far exceed the costs of a trial. In the *Univar* case decided in June 2020, the High Court was asked to rectify scheme rules which hard coded pension increases in line with RPI. The employer said this had never been intended and both the employer and the trustees had misunderstood the legal result of the wording in the document they had signed. Counsel for the representative member argued against this, but having reviewed the evidence of the parties' intentions the Court found for the employer and dismissed the representative member's objections.

Are there alternatives to rectification?

Three other avenues may be worth exploring, albeit they may not always be available in all circumstances:

(1) pure legal interpretation – rectification is distinct from merely asking the Court to correct an error on the face of a document *as a matter of legal interpretation* without need for external evidence and where the intention of the parties can readily be seen from the document itself;
(2) the rule in *Saunders v Vautier* – putting it very generally, it is a principle of trust law that where all the beneficiaries agree, a trust document can be amended by agreement of all the parties. In the context of pension schemes with numerous members this will often be unachievable but for small schemes – perhaps with a small number of family members – the *Saunders v Vautier* principle may be worth considering; and
(3) severance – established in *Re Hastings-Bass* and developed by subsequent case law, is the principle of disapplying the ineffective aspects of a document whilst retaining the aspects of the document that are effective. This principle can come in handy where, for example, the scheme's trust deed and rules have been amended but it is later discovered that, on reflection, not all of the amendments made to the rules were consistent with the scheme's amendment power. In these circumstances, it might be preferable to save as much of the amending document as is possible whilst disapplying those aspects which are ineffective. Dissecting what can and cannot be saved is often a complex legal question, which ought not be attempted without obtaining legal advice.

Overall message

If you discover that your scheme's trust deed or rules contains an error, all may not be lost and you should obtain legal advice to see whether rectification and/or other solutions may be open to you. Searching the scheme's archives may be rewarding, particularly where scheme and employer "records" (in the wide sense used in this article) are in good order. The costs in management time and professional fees for the rectification process may be worth the saving where rectification is ordered – SFS Technologies faced an extra £4.9 million of scheme liability had the Scheme's early retirement rules not been rectified.

Appendix

Timeline SPS Technologies Limited v Moitt and others

Date	Document
1992	Correct Definitive Deed and Rules
1998	Incorrect Rules
1999	Incorrect new Rules
2003	Incorrect Amending Deed
2009	Error discovered
2018	Application to High Court to rectify 1998, 1999 and 2003 scheme documents
2020	Order rectifying the documents and the Court's reasons for summary judgment given

Clive Weber and Paul Ashcroft, Wedlake Bell LLP Pensions Team

The SPS case is also mentioned in the regular Legal column at the end of this issue of Pensions Today

News

Pensions schemes probed over abuse of virus holidays

Regulators are investigating several company pension schemes for suspected abuse of measures that allowed employers facing coronavirus-induced financial pressures to suspend payments into retirement funds. As part of its response to the Covid-19 pandemic, the Pensions Regulator relaxed its guidance in March to allow distressed employers with defined benefit pension schemes to take payment holidays of up to three months, the Financial Times reported recently.

In June, the regulator advised pension scheme trustees to not "unquestioningly" agree to extensions of these contribution holidays without checking whether employers' requests were appropriate. The watchdog said it had received about 200 revised pension payment plans from schemes where employers had taken advantage of extensions to contribution holidays. However the regulator also revealed it was questioning several schemes where it was not clear whether they had behaved appropriately.

"A proportion of [the 200] have clearly followed our advice and done what we asked them to do in terms of the action that they have taken," said David Fairs, the watchdog's executive director of regulatory policy. However he added: "There are some where it is less clear that they took account of our advice. We are asking those schemes further questions and looking into the decisions that they made." The regulator declined to disclose how many schemes it was investigating.

The watchdog's emergency measures in March gave trustees scope to agree to employer requests for pension payment holidays of up to three months, without heavy scrutiny of the companies' financial position. The Pensions Regulator said: "We will review trustees' decisions to ensure that our guidance has been followed and take a case-by-case approach as to whether enforcement action is appropriate or necessary."

Calls grow for reforms to European pension systems as coronavirus takes toll

The coronavirus pandemic has dealt a blow to pension systems across Europe, heaping pressure on policymakers to introduce reforms to avoid a decades-long retirement crisis, according to an influential consumer group.

Big increases in unemployment will shrink the tax revenues used to fund state pensions and reduce contributions to retirement saving schemes run by employers and individuals. At the same time, cuts to interest rates and new government-backed bond-buying programmes have reduced the income pension funds earn from their fixed-income investments.

Guillaume Prache, managing director of Better Finance, which represents European savers, said that economic headwinds and the emergency measures taken by governments in response to the pandemic represented "the perfect mix" to destroy the long-term value of pension savings. "Governments have explicitly chosen to sacrifice the protection of pension savers in favour of the artificial reduction of EU member states' debt costs by granting unprecedented subsidies in the form of negative interest rates and massive public debt purchases," said Mr Prache.

Even before Covid-19, savers faced challenges generating enough income for their retirement. Better Finance examined private pensions data from 18 European countries for up to 20 years and found that a 50:50 equity/bond tracker fund had outperformed the vast majority of pension products, with high fees reducing returns for savers. While Dutch Pillar II pension plans (occupational pension schemes that employers and employees both pay into) delivered annualised returns of 5.5 per cent after fees and inflation over the decade ending in 2019, equivalent plans in other countries failed to match this.

Voluntary privately funded pension plans, known as Pillar III schemes, delivered net annual real returns of just 1.3 per cent in France, 1.6 per cent in Germany and 2 per cent in Italy over the latest 10-year period available. Returns generally improved strongly in 2019 because of buoyant equity and bond markets, but some of those gains have been eroded this year.

Wide variations in the performance of pension savings schemes across countries are a concern to EU policymakers. Better Finance urged regulators to impose standardised disclosures of pension funds' past performance data to make it easier for savers to compare products. It also called for the EU to protect retirement savers if insurance companies, which are key providers of pension products, go bust.

Mr Prache added it was "disappointing" the European Commission had not acted to curb the payment of financial inducements to advisers, which Better Finance said created conflicts of interest and encouraged the sale of unsuitable and expensive pension products.

Concerns are mounting that rising unemployment will prompt older workers to raid their pension savings early. "Spending pension savings now means that money will not be available for later life and there could be consequences during retirement," said Alistair Byrne, head of retirement strategy for Europe at State Street Global Advisors. 'Governments have sacrificed the protection of pension savers in favour of reducing states' debt costs'.

TPR chair awarded CBE in Queen's birthday honours list

The Pensions Regulator's (TPR) Chair, Mark Boyle, has been made a Commander of the Order of the British Empire (CBE) for services to the pensions industry. Mr Boyle, who joined TPR in 2014, received the honour – the highest-ranking Order of the British Empire award – in the delayed Queen's birthday honours. He said: "I am thrilled to have been recognised in this way and would like to dedicate this award to the outstanding group of colleagues, past and present, that I have had the privilege to work with at TPR."

Charles Counsell, TPR's Chief Executive, added: "Since Mark joined our Board as Chair in 2014, we have successfully delivered the automatic enrolment programme and delivered multiple case successes from securing £363 million for members of the BHS schemes to our first custodial sentence for a pension fraud conviction.

"He has led our Board with the right balance of support and challenge, championing our transformation to a clearer, quicker and tougher regulator and being a committed lead on our work to combat pension scams.

"I am delighted for Mark that his dedication to protecting pension savers has been recognised in this way. When his term ends next year, he will leave TPR with a legacy he can be rightly proud of as we move confidently forward to continue building a system that works for savers."

Barbara Bush, who served as TPR's Director of Human Resources, was honoured with an OBE for services to the pensions industry, diversity and charity.

Mark Boyle became Non-Executive Chairman of The Pensions Regulator in April 2014 and was reappointed for a further three-year term in March 2018. For more about Mark, see his biography. Publication of the Queen's birthday honours list was delayed from June, so it could fully reflect contributions made in the battle against COVID-19.

Pension Scheme Trustee

Risk management for pension scheme consultants in the "new reality"

This year has seen a sea change in the way in which pensions professionals carry out their day-to-day activities, as a consequence of the COVID-19 pandemic. In particular, there has been a significant rise in fee earners working remotely, from their homes, with meetings conducted by telephone or video link.

It remains to be seen to what extent such working practices will become the "new normal" going forward. For now, the renewed stipulation by the UK government that people should work from home wherever possible, and be prepared to do so for a further six months, keeps a sharp focus upon the consequent risk factors that pensions professionals need to consider carefully.

Documents

The practice of remote working can give rise to issues insofar as access to documents is concerned. Such documents might include pension scheme documentation (whether in original or copy form) in the custody of the professional firm, which is required by a fee earner in order to carry out his or her work. It will also likely include the professional's own correspondence, working papers and records.

Where multiple fee earners are required to work together to provide services in respect of a particular pension scheme, and are doing so from separate, remote locations, a central access to all relevant documentation is of key importance. The most efficient way to achieve this is through the use of a central document management system, on which all necessary documents can be accessed electronically by multiple fee earners at the same time. To be effective, this requires fee earners to be rigorous in the appropriate electronic filing of documents and correspondence.

Ideally, all requisite hard copy documents and files should be scanned and uploaded to such a system. Where a professional is required to undertake work without access to all relevant documents, for example because certain hard copy files are stored in a different remote location and cannot be accessed within a necessary timescale, there is a very real risk that something could be missed.

Similarly, while continuing to work remotely, fee earners should avoid the temptation to store electronic documents on personal laptops or other devices. Email communications should also only be sent from, and stored on, the professional firm's (rather than personal) email accounts.

When fee earners start to return to the office, it is important that documents are also migrated back to a "central storage" environment. Individuals may have had hard copy documents – for example, original and copy scheme documents and working papers – sent out to their home addresses for ready access during lockdown. If these documents are not returned to the office as part of a "coming back to work" process, there is a risk they may be lost or inadvertently destroyed, or improperly disposed of. This could create problems in terms of the ongoing performance of an engagement, the maintaining of confidentiality, and if a claim is made in the future (as to which, see below).

The same is true of electronic documents that (notwithstanding the above) may have been saved onto local computers or in personal email accounts. In such circumstances, thorough steps need to be taken to ensure that all such electronic documents are captured and move to a central document management system.

The storage and accessibility of documentation in this way is not only important for undertaking a particular engagement. If a claim is made against a professional firm, it is fundamentally important that the firm is able quickly to take steps to preserve and collate documents potentially relevant to the matter in question. Indeed, this is now required by Practice Direction 51U of the Civil Procedure Rules. In the absence of a central document management system, and with fee earners working from various different, remote locations, this preservation and collation exercise becomes far more complicated and onerous. Where a dispute arises, it will be important for professional firms to work with their insurers and solicitors to ensure that this exercise of identifying and preserving potentially relevant documents is managed appropriately and effectively, under a cloak of legal professional privilege.

Supervision

One of the biggest challenges presented by remote working has been the supervision of work undertaken by other fee earners. Frequent discussions, informal meetings and the sharing of ideas in an office environment, for so long taken for granted, have been (and, for many, continue to be) sorely missed.

It is perhaps inevitable that, as a consequence, there will likely be an increase in the number of mistakes that slip through the cracks. This, in turn, may see an upturn in the volume of claims brought against pensions professionals going forward.

Where fee earners continue to work remotely, it is important that a carefully-structured plan of supervision is put in place. At the heart of this is a frequency of communication between fee-earners (whether by telephone or video-link), and written plans of work – with clear deadlines – to ensure that all fee earners in a particular team understand precisely what they are being required to deliver, and by when.

Cyber risks

During the COVID-19 pandemic, there has been a reported upturn in cyber and data-related fraud and crime.

The pensions industry generates an enormous amount of data, much of which is of a personal nature – for example, relating to individual scheme members and pensioners. This makes those who handle such data – including scheme trustees and pensions professionals – a target for cyber crime, the consequences of which can be significant and far-reaching.

It is important that pension professionals are very alive to such risks, and protect themselves through the use of appropriate, robust, layered cyber defences. Steps must be taken to ensure that the requisite level of technical expertise is in place, and that fee earners follow necessary protocols when undertaking their work. For example, unsolicited emails received from unknown, external sources must be treated with caution. Remote working should also only be done on secure WIFI networks, with access to the professional firm's systems requiring appropriate security log-in credentials that are altered periodically.

Client communications and instructions

Another consequence of the COVID-19 pandemic has been the inability for pension professionals to have live, "face to face" meetings with scheme trustees and employers, and other professional service providers, to discuss the pension scheme in question and work to be undertaken.

Because of this, it is now more important than ever that pension professionals establish a clear understanding, and written record, of the clients' requirements and the work they are being required to undertake at any given point in time.

It is also vital that pension professionals put in place up to date, accurately drafted engagement letters for their work. Each engagement letter should set out the scope of work to be undertaken, and also reflect any categories of work for which the pension professional will not be responsible. The inclusion of appropriate liability limitation/exclusion provisions – for example, by way of a liability cap – should also be carefully considered.

Key takeaways

- Put in place rigorous and secure central electronic filing systems for all relevant documentation – do not save client documents locally
- Ensure hard copy documents are returned to their rightful filing place or disposed of securely
- Set out, and adhere to, carefully-structured plans of supervision
- Use appropriate, robust, layered cyber defences
- Put in place up to date, accurately drafted engagement letters

Jim Shepherd, partner in the litigation and dispute resolution team, and Beth Brown, counsel in the pensions practice, both at international law firm Mayer Brown

DWP consultation proposes new DC pension scheme compliance regime

A significant consultation has been released by the Department for Work and Pensions (DWP) affecting defined contribution (DC) pension schemes. It covers a number of matters but the standout item is a statutory and regulatory drive to encourage smaller DC occupational pension schemes to consolidate (eg by transferring their members and assets to a master trust or group personal pension scheme).

In a nutshell, the consultation proposes that from 5 October 2021:

- trustees of DC schemes with less than £100 million of assets will be required to carry out a value for members (VFM) assessment annually;
- the parameters for the VFM assessment are far reaching and require trustees to consider how their scheme performs in the following areas:
  - costs and charges;
  - net investment returns; and
  - seven administration and governance metrics.
- as part of any VFM assessment of a scheme's costs, charges and net investment returns, trustees will need to compare their scheme against three 'comparator schemes';
- trustees will be required to report on their VFM assessment in their annual DC Chair's statement and their scheme's annual return to The Pensions Regulator; and
- subject to certain exceptions, if trustees consider that their scheme is not delivering good overall value following its VFM assessment, the government expects them to take prompt steps to consolidate and wind up their scheme.

This will be a significant new compliance development for occupational DC schemes and their trustee boards. While the consultation suggests that well-run smaller schemes have nothing to fear, the administrative and financial burden of complying with this new VFM assessment regime is likely to be material for most affected schemes.

Some trustee boards and scheme sponsors may see this as a cue to start making consolidation queries straight away, which may not be a bad idea since the route to consolidation will not necessarily be straight forward. Each transfer has its own risk issues and there may be some material practical and legal hurdles to grapple with. While various parts of the consultation acknowledge these challenges, the DWP does not offer many (if any) silver bullets to solve them.

Alex Rush, BDB Pitmans

HMRC Pension Schemes Newsletter No. 124

HMRC has provided the following information in its September newsletter issued in October 2020:

1. Temporary changes to pension processes as a result of coronavirus (COVID-19)

1.1 Extension to the temporary changes to pension processes as a result of coronavirus

In recent newsletters we've told you about temporary changes to some pension processes to help scheme administrators during the coronavirus pandemic. We've reviewed the following temporary changes and are extending them until 31 March 2021.

We provided guidance on:

- rent and loan payment holidays
- R63N repayment requests for registered pension schemes
- AFT return submission and payment delays
- APSS262 – reporting transfers to qualifying recognised overseas pension schemes
- pension scheme returns for 2019 to 2020
- benefits crystallisation event 1 and valuing sums and assets held within a registered pension scheme
- other scheme valuations
- APSS105 relief at source repayment claims
- APSS106 relief at source repayment claims
- submitting the APSS107 registered pension schemes annual statistical return without a signature
- APSS590 relief at source declaration
- relief at source – excess relief

You can find more information on these temporary changes in Pension Schemes Newsletters 118, 119, 120 and 121.

We'll continue to keep you updated on any further changes in future pension schemes newsletters.

1.2 Re-employment in response to the coronavirus outbreak

Update on 6 October 2020

The protected pension age easement will not be extended and will expire on 1 November 2020.

In Pension Schemes Newsletter 120 we explained the protected pension age easement had been extended up to 1 November 2020. We're currently unable to provide an update on this easement but as soon as we can, we'll update you through our pension schemes newsletters.

1.3 Relief at source and suspension of the process for applying for a National Insurance number

In Pension Schemes Newsletter 120 we explained that we had suspended the process for applying for a National Insurance number, as a result of coronavirus. We provided guidance on what you should do if your relief at source repayment claims include individuals who have been unable to get a National Insurance number because we've suspended the process.

You should continue to follow the guidance in Pension Schemes Newsletter 120 and we'll update you once the National Insurance number application process has been reinstated in a future newsletter.

2. Relief at source

2.1 Annual return of information – notification of residency status reports

If you need to submit an annual return of information for 2019 to 2020 and you haven't already done so, it's really important that you successfully submit this as soon as possible. Without this we'll be unable to give you a notification of residency status report in January 2021.

You can find more information about the notification of residency status reports our GOV.UK guide check a pension scheme member's residency status for relief at source.

2.2 Call for evidence: Pensions Tax Relief Administration

We explained in Pension Schemes Newsletter 122 that the government's Pensions tax relief administration: call for evidence closes on 13 October 2020.

If you want to respond to this you should email your response to Pensionstaxreliefadministrationcfe@hmtreasury.gov.uk before 11pm on 13 October 2020.

3. Managing Pension Schemes service

3.1 Schemes without PSTRs

As part of the work we're doing to prepare for migrating schemes to the Managing Pension Schemes service, we're currently looking at pension schemes that were registered before 6 April 2006 that were provided with an SF reference number.

If you're a scheme administrator for one or more of these pension schemes and do not currently have access to the scheme on the Pensions Schemes Online service, so do not have the PSTR, please contact us at pensions.administration@hmrc.gov.uk with 'SF reference pension schemes' in the subject line. You should include a list of your SF reference numbers and scheme names in your email.

We'll provide you with more information on the migration timeline in a future newsletter.

3.2 Signing in to online services

As we explained in the Managing Pension Schemes service Newsletter – July 2020 HMRC is due to start an ongoing programme of deleting credentials (user ID and password) for users who have not signed in to a service for 3 years. We'll start this work in October 2020.

It's important for all scheme administrators and practitioners who have not signed onto either the Pension Schemes Online service, the Managing Pension Schemes service or other tax services for a while, to make sure that you log into your Business Tax Account as soon as you can so that your credentials remain active and are not deleted.

In particular, we want to encourage those scheme administrators who are registered and have schemes registered on the Pension Schemes Online service to log onto either the Pension Schemes Online service or other tax services as soon as possible so that we don't delete your credentials.

Credentials for pension scheme administrators and practitioners who regularly use the Pension Schemes Online service, the Managing Pension Schemes service or other tax services through your Business Tax Account will remain active and we will not delete these.

We'll provide guidance in a future newsletter on what to do if your credentials are deleted and you still need access to the services.

HMRC Pension Scheme Newsletter 123

1. Relief at source – annual returns of information for 2019 to 2020

1.1 Annual return of information – interim repayments

The deadline for submitting the 2019 to 2020 annual return of information and APSS590 declaration to HMRC has passed, but we know that there are still returns outstanding from scheme administrators who've submitted interim repayment claims for 2020 to 2021. Any subsequent interim repayments will be withheld, pending receipt of the outstanding information.

If you submit your annual return of information but your return fails processing, we'll still deem this to be outstanding and will stop any subsequent interim repayments pending re-submission.

If your submission fails for a third time we'll stop all future interim repayments to your scheme until a further re-submission is received and processed successfully.

1.2 Annual return of information – residency status reports

It's important that you successfully submit your annual return of information and the APSS590 declaration for 2019 to 2020 by 30 September 2020.

Successful submission by 30 September 2020 will make sure that we can give you the correct residency status for your members on your January 2021 notification of residency status report. You can then use this to give your members tax relief from 5 April 2021 and claim the right amount of repayment from HMRC.

2. Relief at source – APSS106 annual claims for 2019 to 2020

We also want to remind scheme administrators of pension schemes operating relief at source that you must submit the APSS106 – registered pension schemes relief at source annual claim for 2019 to 2020 to HMRC by 5 October 2020.

3. Migration of pension schemes to the Managing pension schemes service

3.1 Multiple scheme administrator IDs

As we explained in the Managing pension schemes service newsletter – July 2020, scheme administrators with multiple administrator IDs will need to move their schemes under one administrator ID on the Pension Schemes Online service ahead of migration to the Managing pension schemes service.

To help you with this we can check:

- your scheme administrator IDs
- the schemes for which you are the administrator

You must send us a separate request for each of these and give the following information.

For a list of your scheme administrator IDs you must give your:

- scheme administrator name
- scheme administrator address, including postcode
- contact telephone number
- email address

You should email this information and put 'List of my scheme administrator IDs' in the subject line of your email to: pensions.businessdelivery@hmrc.gov.uk.

For a list of registered pension schemes attached to your scheme administrator ID you must give your:

- scheme administrator name
- scheme administrator ID
- contact telephone number
- email address

You should email this information and put 'List of my registered pension schemes' in the subject line of your email to: pensions.businessdelivery@hmrc.gov.uk.

We'll validate the information you give and may ask you for more information before we provide any scheme or scheme administrator details.

You should use the information to check your records and tell us of any scheme administrator IDs or schemes that you no longer need.

Scheme administrators operating with more than one Corporation Tax Unique Taxpayer Reference (UTR) can have a scheme administrator ID for each Corporation Tax UTR held.

Once you have a list of your schemes and scheme administrator IDs and you have decided which scheme administrator ID you want to keep, you can contact us if you need help with moving your schemes under your chosen scheme administrator ID. Email and put 'Help with scheme admin IDs' in the subject line to: pensions.businessdelivery@hmrc.gov.uk.

We're starting to write to scheme administrators with a large number of scheme administrator IDs to help with this process.

3.2 Multiple scheme practitioner IDs

Like scheme administrators, practitioners will only be able to use one practitioner ID for each Corporation Tax UTR or National Insurance number.

If you're a pension scheme practitioner with one Corporation Tax UTR but multiple scheme practitioner IDs, you'll also need to move your schemes under one practitioner ID on the Pension Schemes Online service ahead of pension scheme migration to the Managing pension schemes service.

To help you with this we can check:

- your scheme practitioner IDs
- the schemes for which you are the practitioner

You must send us a separate request for each of these and give the following information.

For a list of your scheme practitioner IDs you must give your:

- scheme practitioner name
- scheme practitioner address, including postcode
- contact telephone number
- email address

You should email this information and put 'List of my scheme practitioner IDs' in the subject line to: pensions.businessdelivery@hmrc.gov.uk.

For a list of registered pension schemes attached to your scheme practitioner ID you must give your:

- scheme practitioner name
- scheme practitioner ID
- contact telephone number
- email address

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We'll validate the information you provide and may ask you for more information before we give any scheme or scheme practitioner details.

You should use the information to check your records and tell us of any scheme practitioner IDs or schemes that you no longer need.

Scheme practitioners operating with more than one Corporation Tax UTR can have a scheme practitioner ID for each Corporation Tax UTR held.

Once you have a list of your schemes and scheme practitioner IDs and you have decided which scheme practitioner ID you want to keep, you can contact us if you need help with moving your schemes under your chosen scheme practitioner ID. Email us, putting 'Help with scheme practitioner IDs' in the subject line to: pensions.businessdelivery@hmrc.gov.uk.

We're starting to write to scheme practitioners with a large number of scheme practitioner IDs to help with this process.

3.3 Pension Scheme Accounting

As you may know, in readiness to migrate pension schemes to the Managing Pension Schemes service, we've started to look at pension scheme accounting.

We're starting to write to scheme administrators with details of payments and charges that are unallocated, asking for more information.

Where payments are outstanding we'll ask you to pay the outstanding amount. If you think you've already paid, we'll ask you to give us details of the payment you made. We can then allocate your payment against the right charge.

If your payment is or was late, we may charge you penalties under Schedule 56 of Finance Act 2009 and you'll have to pay interest on the late payment.

Where credits are unallocated we'll ask for details of the associated charges so that we can allocate your payments correctly.

You can help us with this by making sure that all payments you make contain the relevant charge reference number. You can find more information about paying tax to HMRC in the guide pension scheme administrators: how to pay tax.

4. Annual allowance – pensions savings statements for 2019 to 2020

In Pension Schemes Newsletter 122 we reminded scheme administrators that the deadline for issuing annual allowance pension savings statements for tax year 2019 to 2020 is 6 October 2020.

You must issue annual allowance pension savings statements for tax year 2019 to 2020:

- to your scheme members who made pension savings of more than the annual allowance to your pension scheme
- where you have reason to believe that they have flexibly accessed their pension rights, their pension savings under money purchase (and where appropriate hybrid) arrangements under your scheme are more than £4,000.

If a member exceeds their annual allowance (standard or tapered as applicable to the individual) or the money purchase annual allowance (or both) across all pension schemes and does not have sufficient unused annual allowance to carry forward from previous tax years, an annual allowance tax charge will be due.

You can find more information about this requirement in the Pensions Tax Manual – PTM167100.

Legal

News from the courts – *TMD Friction, SPS Technologies Ltd v Moitt* and *R (on the application of Goodland) v Chief Constable of Staffordshire Police*

This month's article is an autumn store of recent pensions cases readers might have missed, starting with the latest chapter in the long-running saga of pension rights on insolvency.

Pension protection: European Court reiterates key messages

TMD Friction [2020] EUECJ C-674/18 was a ruling on insolvent business transfers. In it, the Court of Justice of the EU considered a German law which restricted a transferee employer's liability for accrued pension rights where the undertaking being transferred was insolvent. The Court held that neither the Acquired Rights Directive (which governs business transfers) nor the Insolvency Directive precluded the existence of such restrictions, so long as their effect did not deprive employees of their minimum "*necessary measure*" of protection under the Insolvency Directive (as described in earlier CJEU case law including the decision in Hampshire [2018] EUECJ C-17/17, which looked at the UK regime and the Pension Protection Fund).

In doing so, the Court took the opportunity to restate the findings of that case law, set out most recently in Pensions-Sicherungs-Verein v Bauer [2019] EUECJ C-168/18 last winter. These were that article 8 of the Insolvency Directive (dealing with the rights of members of occupational pension schemes) had direct effect; that all employees must receive at least half of the old-age pension benefits deriving from their accrued pension rights under an occupational scheme; and that minimum protection did not in any instance allow a manifestly disproportionate reduction that seriously affected the ability of the person concerned to meet his or her needs, where they would have to live at below the at-risk-of-poverty threshold.

The case suggests there is no prospect of the Court budging from its previous approach. This may be disappointing, if not surprising, for the PPF in particular: in its new Annual Report it laments both the "*operationally complex and resource intensive*" work caused by the CJEU's verdict in Hampshire, and the "*significant operational complexity*" added by its ruling in Bauer.

Earlier this year, the High Court arguably compounded these difficulties by striking down the 'compensation cap' that applies to higher earners who enter the PPF after their employer becomes insolvent. At the time of writing, the PPF and the Government are seeking the Court of Appeal's blessing to appeal against that decision.

Correcting 'embedded' drafting errors in successive scheme rules

In *SPS Technologies Ltd v Moitt* [2020] EWHC 2421 (Ch) a pension scheme was established in 1988 on the merger of three former schemes. Rule amendments made by a 1998 deed were intended to give transferred-in members from those predecessor schemes, whether active or deferred, the right to take early retirement from age 60 (subject to an actuarial reduction). The scheme was subsequently administered on this basis. Unfortunately, the drafting of the deed inadvertently disapplied the actuarial reduction for deferred members. This potentially costly error was carried through subsequent rules re-writes in 1999 and 2003, and only discovered in 2009.

The employer's claim for rectification of the error was not issued until late 2018 but he Master, referring to the 'painstaking work' done in locating and considering scheme records, noted that Counsel for the representative beneficiary had not argued that the delay in bringing the case provided a defence to the rectification claim. The scheme had a unilateral principal employer amendment power - meaning that it was only the claimant's intention that was relevant to the application - although in practice the trustees had both agreed to and signed the amending deeds, which meant that the evidence of their intention *"would necessarily be added to the scales"*.

The Master said that it was clear from the detailed evidence put before him that the claimant had never intended to provide the more generous benefit for deferred members, and that scheme administration and subsequent actuarial reports had made no allowance for any change. And the Court held that in cases of serial rectification of successive deeds (where an initial error had become 'embedded'), the continuity of established practice over an extended period supported an intention for the successive deeds to reflect the rights the members had as a matter of law, with the first deed in the chain duly rectified. The parties had therefore made out a compelling case for rectification of the 1998, 1999 and 2003 deeds and rules.

[*Editor's note – readers should also note the article on page 1 of this issue of Pensions Today on the SPS case.]*

Members could not enforce a promise not to review their pensions

R (on the application of Goodland) v Chief Constable of Staffordshire Police [2020] EWHC 2477 (Admin) concerned the Police Injury Benefit Regulations. The regulations provided that where an injury pension was payable the police pension authority (here, the Chief Constable) would, at such intervals as might be suitable, consider whether the pensioner's degree of disablement had altered; and if it found the degree of disablement had substantially altered, revise the pension accordingly.

In this case, members complained about their injury pensions having been reconsidered, not least as they had previously received letters saying that once in payment, the pensions would not be reviewed. Nevertheless, the Court found that given the wording of the regulations, the defendant Chief Constable had never had power to make that commitment: and such correspondence did not give rise to a legitimate expectation that the pensions would not be revisited. The Chief Constable could not be held to a promise which he had no power to make or which undertook to do something that conflicted with his statutory duty. The Court also rejected an ingenious argument that the promise not to review the pension award was itself a 'possession' protected by the European Convention on Human Rights.

In an earlier case (Butterworth v Police & Crime Commissioner for Greater Manchester [2016] 11 WLUK 274) the High Court ruled that the Pensions Ombudsman could not direct the Police & Crime Commissioner to pay a pension promised to a member, in circumstances when the Commissioner had no legal power to make the pledge in the first place. The principle, however, is not limited to the police force: schemes and employers must not agree to provide pension benefits on special terms unless they have good grounds for knowing those commitments comply with relevant legislation.

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