

First Briefing, November 2020 – Lloyds Banking Group judgment No 3

GMP EQUALISATION

Justice Morgan has given his final judgment in the Lloyds Banking Group case, which relates to GMP equalisation.

The outcome of the judgment is that trustees will need to revisit some past transfers out and consider whether a top-up payment is required to address GMP equalisation.

We are not lawyers and trustees will need to seek their own legal advice to understand what this means for their scheme.

Lloyds Banking Group judgments

The first judgment, on 26 October 2018, established that trustees have a duty to pay equal pension benefits (in respect of benefits earned since 17 May 1990), and where necessary will need to adjust benefits to address the inequalities that arise from Guaranteed Minimum Pensions (GMPs). The work required is known as GMP equalisation.

At that time, Justice Morgan also stated that this requirement extended to benefits that members had transferred into the scheme. However, the matter of whether trustees needed to revisit past transfers out of the scheme was deferred. It is on this matter that Justice Morgan has now passed judgment.

Legislation governing transfer values

Legislation sets out different ways for benefits to be transferred from one pension arrangement to another. Knowing which route was used will be important in establishing whether the scheme retains a liability where a member transferred out but the transfer value was inadequate as it made no allowance for GMP equalisation. We refer to these as “affected members” and look at each type of transfer in turn:

Statutory transfers

This covers individuals who exercised their statutory right to take a cash equivalent transfer value and will cover most individual transfers.

Where the transfer value made no allowance for GMP equalisation then Justice Morgan says that the transfer payment was incorrectly calculated, and hence:

- the trustees committed a breach of their duty at the point of transfer;
- the trustees remain liable to the affected member for this breach; and
- the trustees are not discharged from that liability by any statutory provision, scheme rule or any agreement with the transferring member, such as a signed discharge form.

He went on to say that affected members can now ask for a top-up payment by applying for an order from the court, and there is no time limit for that order to be made. However, the trustees can perform their duty (correct the breach) even without an order of the court.

Bulk Transfers without consent

This covers the transfer of liabilities from one scheme to another, usually as part of a scheme merger. The transfer takes place without member consent, and to protect members the transfer must comply with the ‘preservation’ regulations. In most cases, benefits provided by the new scheme will mirror those provided by the transferring scheme.

In these cases, where the relevant requirements have been complied with, Justice Morgan said it will not be necessary for the transferring scheme to revisit the transfer value paid.

The receiving scheme will be required to pay equalised pensions in respect of the rights transferred.

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Non statutory transfers

The final situation covers individuals who did not have a statutory right to transfer (for example, they were within one year of their normal pension age) but were permitted by the rules of the scheme to take a transfer.

In this case, Justice Morgan said that providing the power was properly exercised and in accordance with the 'preservation' regulations, then the affected member no longer has any rights against the transferring scheme. The exception is if there was a breach of duty when exercising that power, in which case the member could go to the court to ask for the power to be set aside.

The top-up payment

Any top-up payment will reflect the underpayment that applied to the original transfer value, with interest added at 1% above bank base rate.

Justice Morgan ruled that an affected member cannot ask for a residual benefit to be set up in the scheme.

Therefore, a top-up payment would be paid to the original receiving arrangement, although depending on the circumstances the trustees and the affected member may be able to agree another form of payment.

What next?

Unless the case is successfully appealed in the courts, the scope of the GMP equalisation project has been widened.

A key question Justice Morgan was asked was whether trustees were under an obligation to proactively identify and calculate any shortfalls in previous transfers out and take steps to equalise them, or can trustees wait until a request is made by the receiving scheme or by the transferred-out member?

His response was not clear *"all that I can usefully say is that the Trustee does need to be proactive in that it must consider the rights and obligations... the remedies available to members and the absence of a time bar and then determine what to do."*

Justice Morgan also said *'in the majority of cases, the amount of the top-up payment will be modest. The calculation of that top-up payment will involve considerable expenditure of time and involve considerable cost. In many cases, the cost of the exercise will exceed the amount of the top-up payment.'*

We recommend initial work should include identifying:

- the number of transferred-out members in scope of review,
- whether sufficient information is still held by the scheme to enable any top-up payment to be calculated

Once this has been done, we recommend trustees speak to their legal adviser to determine a pragmatic course of action.

Further information

For further information, please contact your usual First Actuarial consultant.