

Recent developments in pensions

Hogan Lovells Pensions Team

9 July 2020



GMP equalisation: where are we?



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The Courts



- **October 2018**

- Must equalise for the effects of GMPs relating to the period 17 May 1990 – 5 April 1997
- Various methods approved (B, C2 and D2)
- Need to correct for the past as well as for the future
- Time limits

- **May 2020**

- Liability for past (unequalised) transfers out
- Top up or residual pension (how calculate)
- Time limits
- Judgment expected soon....



So what is stopping schemes equalising?

**Unanswered
questions**

Data Issues

Tax Issues

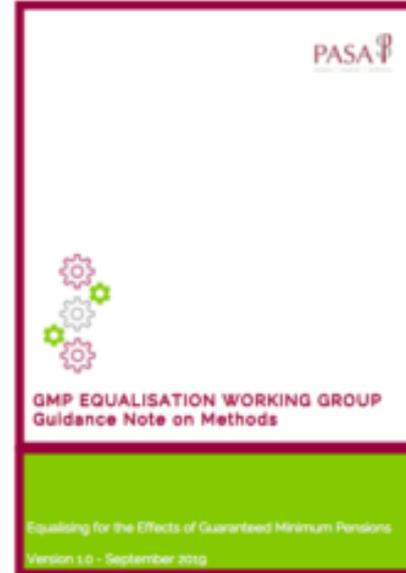
**GMP conversion
legislation -
uncertainty**

**Not wanting to be
the first**

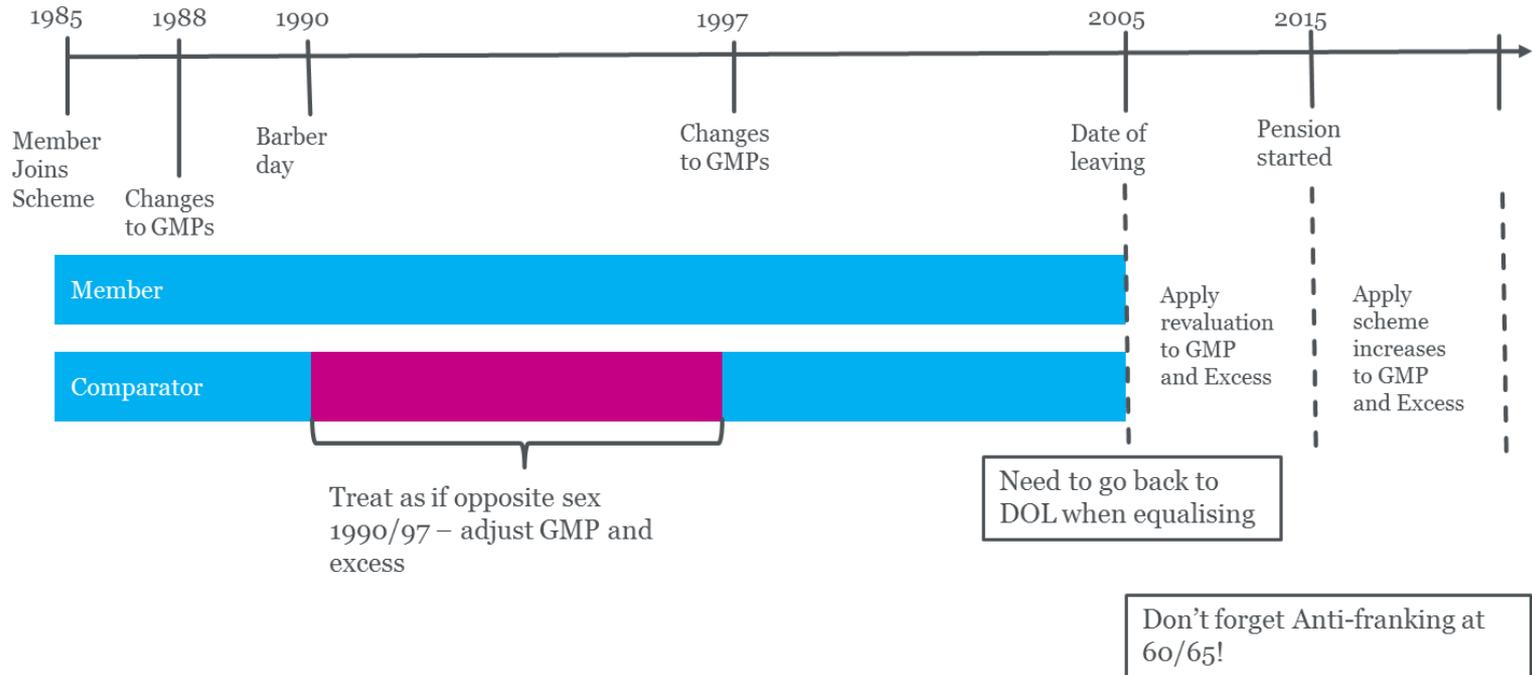
**Administrators
building new
systems**

Unanswered questions – GMP Equalisation Working Group

- **Guidance on Methods**
 - Issued in September 2019
 - Proposed solutions to "dark corners"
 - Version 2 will be issued after Lloyds judgment
- **Guidance on Data** to be issued shortly
- **Guidance on Communications** being prepared and will be issued shortly
- **Guidance on tax** being prepared



Data issues - constructing the comparator



Tax issues

- **Issues for schemes are:**
 - Lifetime Allowance – need to recalculate to reflect any uplift
 - Annual Allowance – for deferred members (conversion only)
 - Members with LTA protections – is protection lost on conversion
 - Deferred member carve out where GMP is converted
- **HMRC guidance issued in February 2020 (silent on conversion)**
- **Not clear whether guidance on conversion will be issued by HMRC**

Issues with GMP equalisation legislation

- Conversion needs "Employer" consent
- Members need to be "consulted" before conversion
- Converted scheme must provide minimum level of contingent spouse
- It would be good if conversion took place when benefits come into payment (but legislation is clunky)

Statutory guidance

Guidance on the use of the Guaranteed Minimum Pensions (GMP) conversion legislation

Published 18 April 2019

Conclusions

- Schemes unlikely to equalise until tax position is clearer
- Most ongoing schemes looking at 2021/2022 to equalise
- Schemes can start to prepare now – Call to Action
- Issues about linking in with GMP reconciliation/rectification exercises
- Schemes taking steps to equalise transfer values for effects of GMPs
- Schemes winding up are having to take steps to equalise GMPs

Developments in scheme funding



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Corporate Insolvency and Governance Act 2020 (CIGA)

- **Introduces ability for company to enter a moratorium, giving it protections from creditors**
 - aim is to facilitate a rescue of the company and a return to profitable trading
- **Came into force on 26 June 2020**
- **Company makes a filing at Court for a moratorium and licensed insolvency practitioner is appointed to act as monitor**
- **During a moratorium creditors cannot take steps to enforce their debts, enforce security or wind the company up**

CIGA – moratorium period

- **Initial moratorium period is 20 business days**
- **Monitor must notify the trustees, tPR and PPF as soon as reasonably practicable after moratorium comes into force**
 - notice must state when moratorium came into force and when it comes to an end
- **Moratorium can be terminated early or extended in certain circumstances:**
 - for example, monitor can terminate early if no longer thinks company can be rescued as a going concern
 - the extension can be between 20 business days and a year depending on whether the company has creditor consent

CIGA – payment holiday

- **During a moratorium company has payment holiday from all pre-moratorium debts**
- **Pre-moratorium debts:**
 - include deficit repair contributions and liabilities such as contribution notices and financial support directions even if the request to pay arises after the moratorium
 - but exclude contributions to occupational pension schemes for future provision of benefits (note exclusion doesn't apply to contributions to GPPs)
- **Moratorium doesn't trigger section 75 debt or PPF assessment period**

CIGA – issues for trustees

- **Could have a negative impact on the trustees place in the priority order on a subsequent insolvency**
- **Trustees won't be able to enforce security or floating charges during the moratorium**
- **Restructuring plans – the new cross-class cramdown may limit trustees' options as creditor**
- **Take advice if have a sponsor in distress who might want to use these new procedures**

TPR's Annual Funding Statement 2020

Legal framework

- **Particularly relevant to schemes with valuation dates between September 2019 and September 2020, as well as schemes undergoing significant changes that require a review of their funding strategies**
- **Valuations will be regulated according to requirements of existing legislation and guidance but tPR notes:**
 - intention is to introduce legal requirement for specific long-term strategy. Trustees should consider taking steps to incorporate this approach into their thinking, and agree it with the employer.
- **Therefore, trustees who do not have a long term funding target should think about agreeing one as part of this valuation cycle**

TPR's Annual Funding Statement 2020

Setting TP assumptions

- **Trustees should consider a range of possible future outcomes when considering their technical provisions (TP) assumptions. These outcomes should consider the different paths for the economy to recover:**
 - the rate at which recovery happens
 - the period over which it happens
 - whether it leaves any longer-term effects
- **Consider key assumptions in models used by the actuary, and if they have or will change in the current environment.**

TPR's Annual Funding Statement 2020

Covenant considerations

- **Trustees should carry out additional due diligence in accordance with tPR's COVID-19 guidance to form their own assessment of the employer's covenant.**
- **Consider taking account of post valuation experience BUT make sure do so consistently**
- **Trustees must be vigilant of employer covenant leakage – most obvious leak being shareholder dividends**
 - covenant leakage not justified – trustees expected to seek compensation for the scheme

TPR's Annual Funding Statement 2020

Covenant considerations (cont.)

- **Trustees should have contingency plans in place so they can react appropriately to adverse changes in covenant**
 - ideally drawn up in conjunction with the employer
 - agreed trigger points with specified actions
 - don't have to cover all eventualities
- **The Statement contains the same tables as the 2019 Funding Statement that segment schemes by covenant strength, investment and funding characteristics**
- **Trustees need to decide which table their scheme falls into so that they can understand tPR's expectations**

Pension Schemes Bill and Investigatory Powers Regulations



Katie Banks
Partner, London
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New Pension Regulator Powers: overview

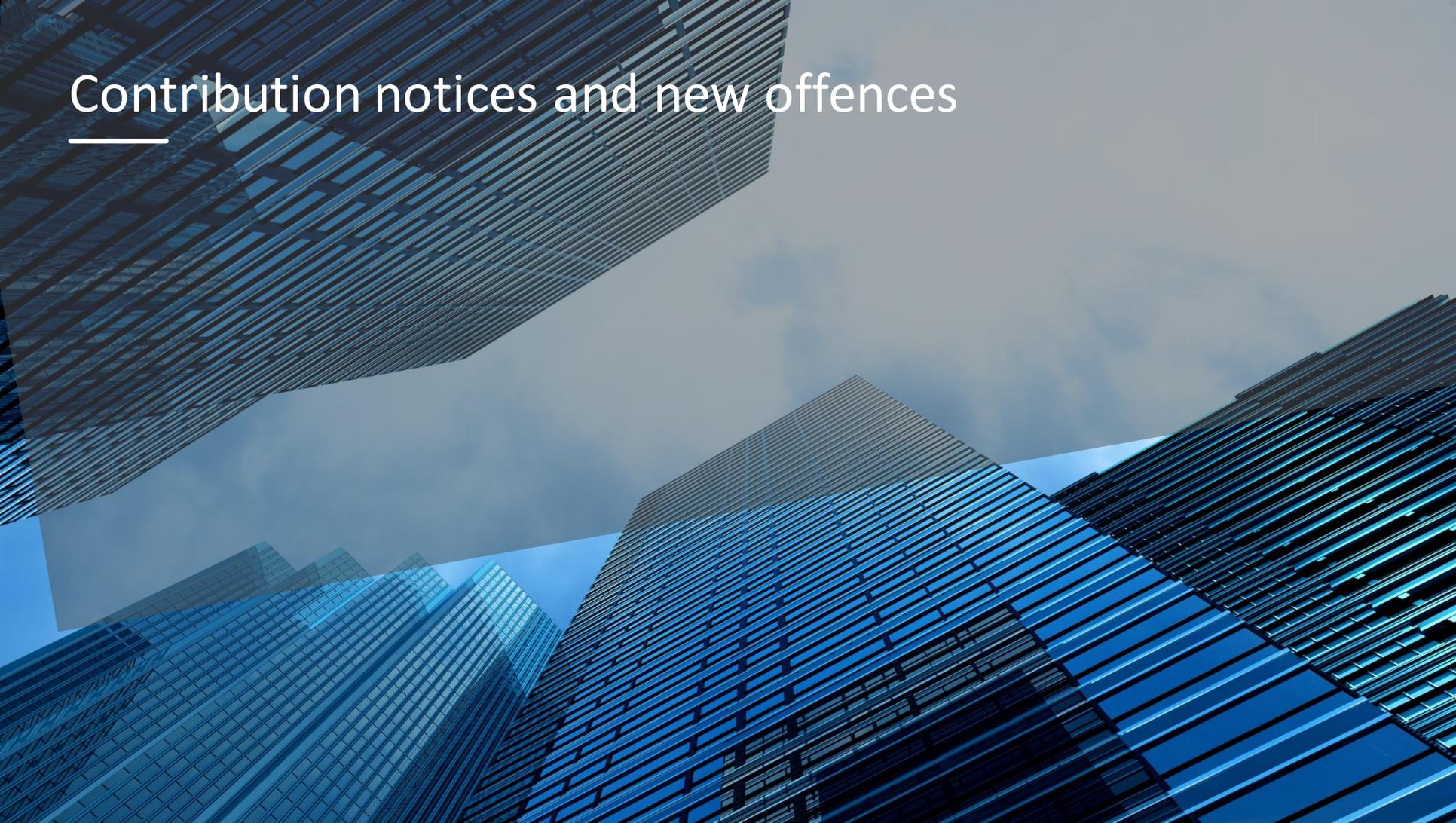
- **Pension Schemes Bill covers:**

- Wider power to issue a Contribution Notice
- New crimes and penalties
- Amendments to the notifiable events regime
- Wider investigation powers

- **General points to note:**

- Wider power to issue a Contribution Notice
- New crimes and penalties
- Amendments to the notifiable events regime
- Wider investigation powers

Contribution notices and new offences



Contribution notices (CNs): reminder

- **Pensions Regulator may currently issue an CN if:**
 - “Material detriment” test met: in relation to target’s act (or failure to act)
 - Act (or failure to act) *detrimentially affected in a material way the likelihood of accrued scheme benefits being received* ; or
 - Main purpose of act (or failure to act) was to:
 - Prevent recovery of whole or part of s75 debt; prevent s75 debt becoming due; reduce amount of s75 debt becoming due; or compromise or settle a s75 debt
 - Target can be employer or person associated or connected with an employer

Additional CN tests

“Employer insolvency” test met

- Met if:
 - Scheme is in deficit on s75 basis; AND
 - Act/failure to act would have *materially reduced* the s75 debt recovered on a pre/post basis

(not really insolvency...)

“Employer resources” test met

- Met if:
 - Act/failure to act *reduced* the value of the employer’s resources; AND
 - The reduction was a *material reduction* relative to the estimated s75 debt

Additional CN tests (cont)

- **Wide potential application – dividends, corporate transactions, share buy-backs, etc**
- **Defences:**
 - If target gave *due consideration* to whether there would be a material reduction in the s75 debt being recovered / value of employer's resources, having made all enquiries that a *reasonably diligent person* would have made; AND
 - Target took *all reasonable steps* to eliminate or minimise the potential reduction (where relevant); AND
 - Having regard to the circumstances at the time it was reasonable for target to conclude the act (or failure to act) would **not** materially reduce the chance of the s75 debt being recovered / value of employer's resources
- **Clearance provisions unchanged but wide enough to cover new tests**

Crimes & penalties: DB schemes

- **New offence of avoiding employer debt:**
 - Person engages in conduct (including failure to act) which prevents recovery of a s75 debt; prevents a s75 debt becoming due; reduces the amount of a s75 debt etc; AND
 - Person intended the act to have this effect; AND
 - Did not have a reasonable excuse
- **New offence of risking scheme benefits**
 - Person engages in conduct (including failure to act) that *detrimentally affects in a material way the likelihood of accrued DB benefits being received*; AND
 - Person knew or ought to have known the conduct would have this effect; AND
 - Did not have a reasonable excuse
- **Penalties in both cases:**
 - Criminal: unlimited fine, or prison term of up to 7 years ...
 - Civil: fine of up to £1 million

Strengthened notifiable events regime



Notifiable events: reminder

- **Notifiable events regime is intended to act as early warning system for the Regulator**
- **Current employer notifiable events (s69):**
 - Employer decision which will (or is intended to) result in debt to scheme not being paid in full
 - Employer ceasing to carry out business in UK
 - Breach of employer's banking covenant
 - Relinquishment of control of employer
 - Conviction of director for a dishonesty offence

Notifiable events: new s69A

- **An appropriate person must notify the Regulator of:**
 - A prescribed notifiable event/failure to act in relation to employer
 - A material change (defined in regulations) in a notifiable event, or its expected effects; or
 - Non-occurrence of a notifiable event
- **Notifiable events likely to be:**
 - Sale of *material proportion* of business of employer responsible for funding 20% or more of scheme liabilities
 - Granting security with priority over debt to scheme
- **Appropriate person is:**
 - Scheme employer, or person connected or associated with the employer
 - Person of a prescribed description

New notifiable events

- **Must send accompanying statement covering:**
 - Notifiable event; adverse effects on scheme; mitigation; communication with trustees
- **When must notification be given?**
 - As soon as reasonably practicable after appropriate person becomes aware of notifiable event, material change, or non-occurrence of material event; and
 - If required by regulations, at least a prescribed period before notifiable event / material change
- **Copy to trustees at same time**
- **Non-compliance**
 - Criminal: knowing/reckless provision of *materially false or misleading information* in relation to s69 or s69A duties: unlimited fine or imprisonment up to two years
 - Civil: breach of s69 & s69A duties: s88A penalties up to £1m
- **New duties to be covered in a code of practice**



New information gathering powers for the Regulator

New Powers and Penalties

- **Power to interview**
 - Trustee, employer, adviser, person with relevant information
- **Power to inspect premises**
 - Moral hazard powers
 - PSA 93, PA 04, pension sharing, charges and administration requirements for DC schemes, IFA advice for transfers
- **New criminal and civil penalties for non-compliance and providing false information**

New Powers and Penalties (cont)

- **Power to obtain communications data under Investigatory Powers Act 2016**
 - To prevent or detect serious crime
 - To prevent or detect other crime or disorder
 - Data which identifies or describes an event consisting of one or more entities engaging in activity at a specific time
- **Introduced by Investigatory Powers (Communications Data) (Relevant Public Authorities and Designated Senior Officers) Regulations 2020**

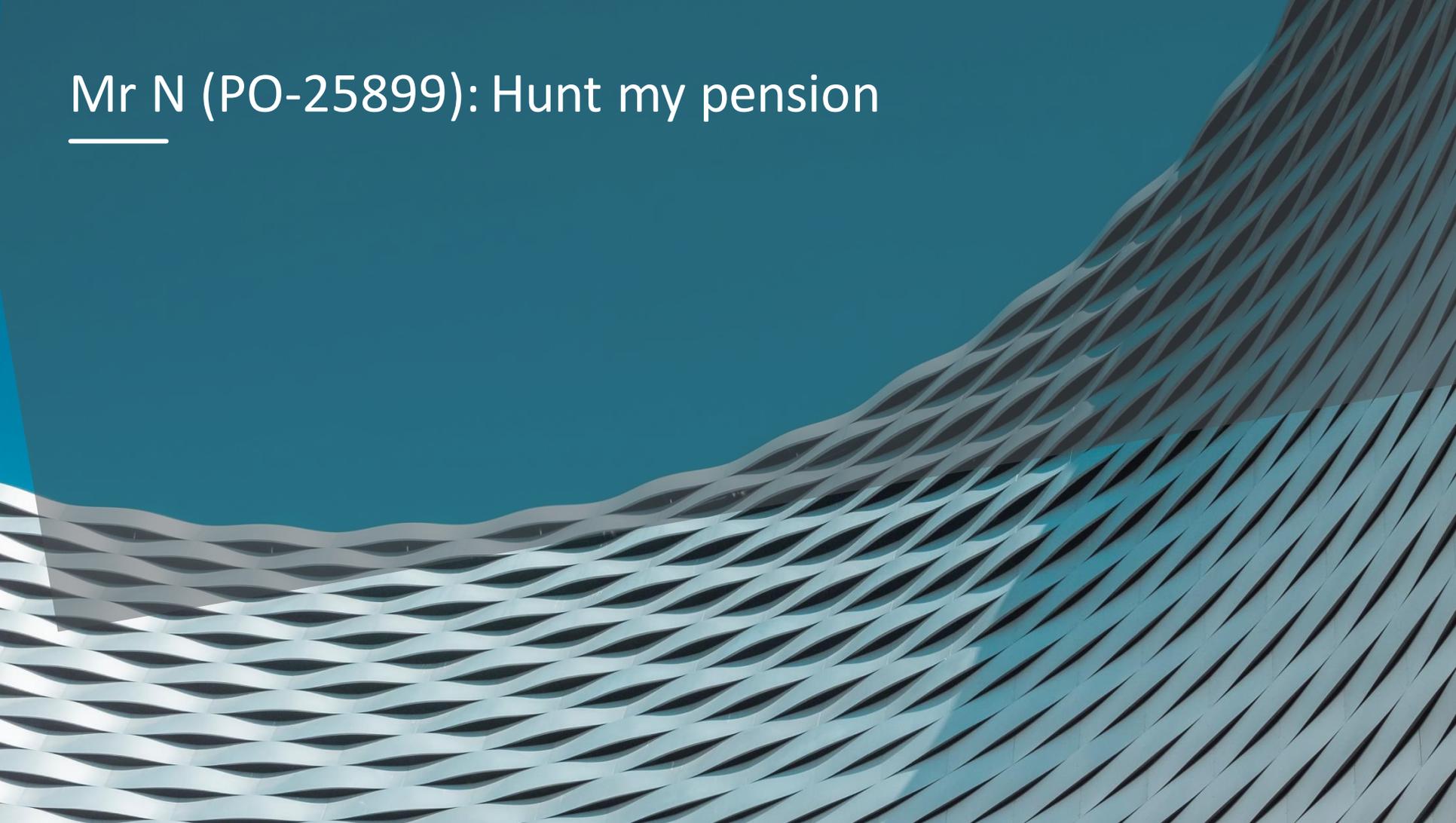
Recent Pensions Ombudsman determinations



Beth Sheehan

Senior Associate, London
Pensions

Mr N (PO-25899): Hunt my pension

The background features a teal upper section and a lower section with a complex, wavy pattern of overlapping grey and light blue lines, creating a sense of depth and movement.

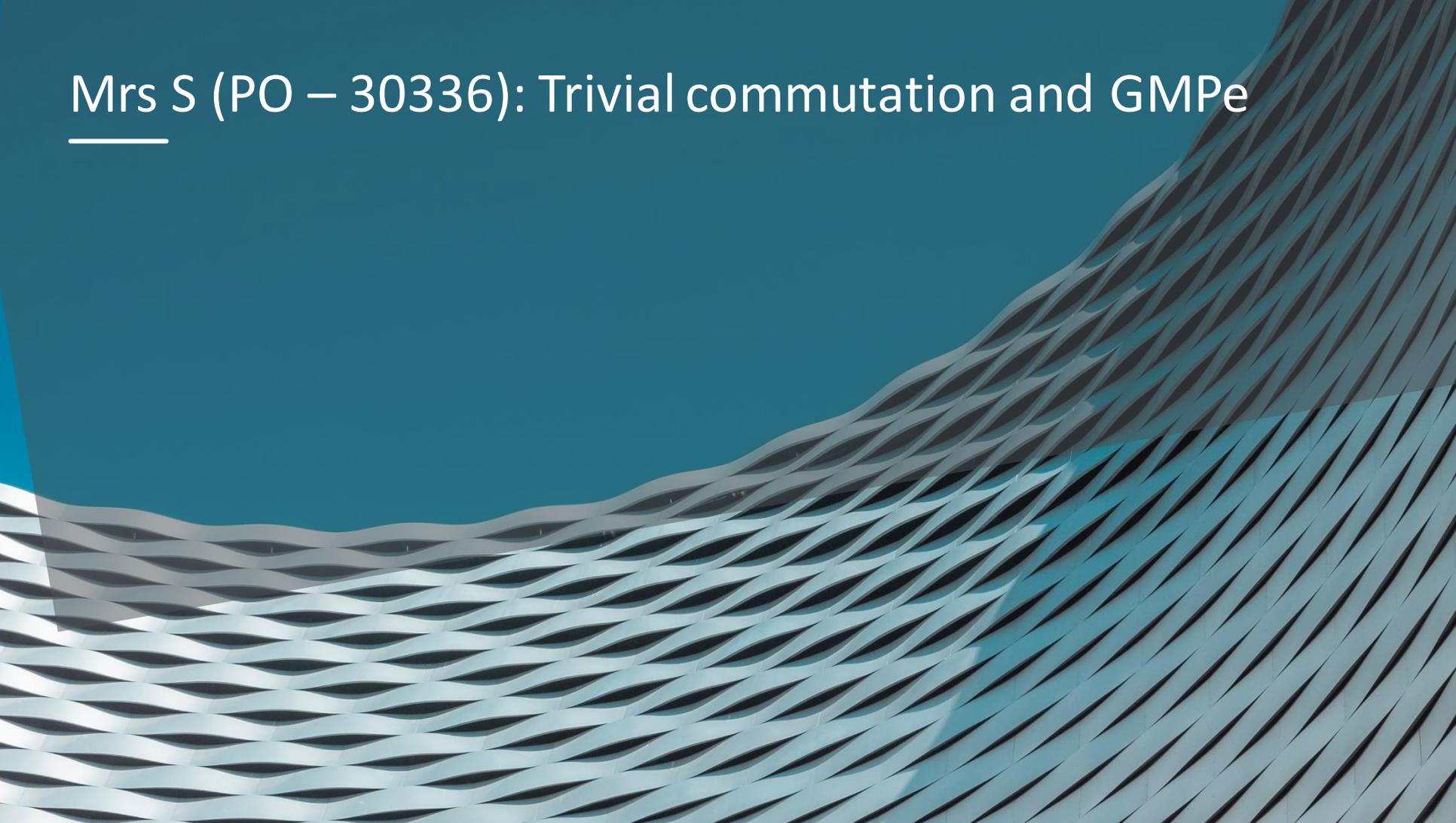
Mr N and “hunt my pension...”

- **Mr N:**
 - 1975-1986: Employee of Clydesdale Bank
 - 1986-1992: Employee of Bradford & Bingley
 - 1992-1999: Employee of HSBC
 - 1999-2017: Employee of HBOS
- **In 2017 asked Clydesdale where his pension was**
- **Clydesdale said no record of him, docs shredded (data protection!) and HMRC GMP service said no GMP in Clydesdale. He had “probably” transferred-out somewhere**
- **B&B said whilst he had accrued benefits in B&B scheme from 1986, no record of a transfer-in (and benefits only based on 1986-1992 service) – better ask Clydesdale...**

Mr N (cont)

- **PO's office contacted HMRC themselves:**
 - Liability for Mr N's 1978-1986 GMP transferred to B&B, and subsequently transferred-on to HSBC and HBOS
 - Form B&B completed in 1992 said Mr N's contracted-out service in B&B scheme was 1978-1992 (not 1986-1992)
- **Mr N's principal complaint was against Clydesdale – argued burden of proof was on them to prove they were not responsible for the benefits.**
- **But PO held:**
 - He decided on balance of probabilities what had happened
 - HMRC evidence indicated there had been a transfer-in to B&B (B&B gave no explanation for why form said GMP was from 1978 not 1986)
 - No criticism of Clydesdale for having no records – data protection!
 - Although subsequent transfers to HSBC & HBOS, fault was B&B's
 - B&B ordered to provide him with a pension on basis of 1975-1986 service with Clydesdale!

Mrs S (PO – 30336): Trivial commutation and GMPE



Trivial commutation and GMPe

Facts

- **Mrs S: member of Scottish Power Pension Scheme with post-90 GMP**
- **Retirement: opted for TCLS of £4,789.59, Capita acknowledged payment due 15 March 2019**
- **6 Feb 2019: Capita letter to Mrs S post-Lloyds: risk of unauthorised payment if TCLS paid before GMPe carried out, Trustee suspending all TCLS payments until further notice**

Trivial commutation and GMPe

Facts

- **FA04 Sch 29 Para 7(1): “... a lump sum is a [TCLS] if – ... (d) it extinguishes any entitlement to defined benefits ... that the member has under the pension scheme ...” – risk of not being satisfied if GMPe corrections required**
- **Mrs S was unhappy that having completed the necessary paperwork before the suspension decision was made, her TCLS payment would not be honoured**
- **11 Feb 2019: Mrs S sent letter to Capita asking for TCLS payment as expected on 15 March 2019 ... escalated to IDRPs with no success.**

Trivial commutation and GMPe

Adjudicator's opinion: no further action required by Trustee/Capita

- **Retirement pack explained all figures subject to change, ie not a promise**
- **Trustee suspended TCLS payments after taking legal advice – legitimate decision, not maladministration, even if Mrs S left disappointed**
- **Trustee not required by FA04 to offer TCLS option so did nothing wrong in withdrawing option to protect members**
- **Mrs S has option to transfer out to another provider which offers TCLS**

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Trivial commutation and GMPE

Ombudsman's decision: Adjudicator's opinion upheld

- **TCLS option removed to protect members' interests; not maladministration**
- **Mrs S signing and completing paperwork accepting TCLS \neq entitlement to TCLS as "process had not been completed and in the interim the option was removed for valid reasons"**
- **Unfortunate timing – but benefits not lost, reiterated that free to transfer out to another provider which offers TCLS**

Any questions?



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