

Current issues

December 2023

Articles this month:

Pensions measures in the Autumn Statement 2023

Statutory revaluation hits the buffers (again)

Clearing exemption for pension schemes—call for evidence

Ombudsman upholds by-the-book transfer approach

Ombudsman not ‘competent’ in overpayment cases

New Pensions Minister

HMRC newsletters: November 2023

Dates set for pensions-law appeals

Pensions measures in the Autumn Statement 2023

The Chancellor of the Exchequer, Jeremy Hunt, presented an Autumn Statement to the House of Commons on 22 November 2023. The pensions-related elements were dominated by updates on the ‘Mansion House’ initiatives, first mentioned in July 2023. The industry is bracing itself for another series of consultation exercises over the coming months.

The Chancellor announced a [package of pension reforms](#), all with roots in his speech at Mansion House earlier in the year. They are intended to improve outcomes for pensioners and other investors, and unlock capital for UK businesses. Driving market consolidation is a key theme.

Defined contribution (DC) reforms

The Department for Work and Pensions (DWP) [called for evidence](#) on a proposed ‘**multiple consolidator**’ model for **small defined contribution (DC) pension pots** that would enable a few authorised schemes to act as automatic consolidators for inactive DC pension pots under £1,000, using a central clearing house. The call for evidence goes on to explore the prospects for a ‘**lifetime provider model**’ that would help to minimise the creation of new stranded DC pots, by letting members specify the scheme to which auto-enrolment contributions are paid when they move to a new employer. It also seeks views on the possible role for collective defined contribution (CDC) schemes. The call for evidence closes on 24 January 2024.

The DWP [proposes](#) to legislate, ‘*at the earliest opportunity*’, to **oblige trustees of DC occupational pension schemes to offer a suitable suite of decumulation products and services** to members at retirement. They will be required to have a default solution for any member not making an active choice. Trustees can achieve this either directly or in partnership with another provider.

The DWP has [reviewed](#) (and expects to tweak) the authorisation and supervisory regime for **DC master trusts**, which are expected to play a major role in market consolidation, decumulation services and the expansion of CDC. The Pensions Regulator (TPR) will aim for **better outcomes in the master trust market**, through investment governance, challenging trustee boards’ decision-making and expertise, and prompting underperforming boards to reconsider their strategies.

Defined benefit (DB) reforms

During the winter, the DWP [plans](#) to consult on measures that would **make surplus extraction from defined benefit (DB) schemes easier**, and establish, by 2026, a **public-sector consolidator for DB schemes** that are '*unattractive to commercial providers*'. The aim is to incentivise investment in higher-returning assets by '*well-funded schemes*'. The Pension Protection Fund (PPF) is '*well placed*' to run the public consolidator. The consultation proposals will discuss the safeguards around easier surplus extraction and possible **100% PPF coverage for schemes that opt to pay higher levies**. Meanwhile, **the authorised surplus payments charge will be reduced from 35% to 25%**, with effect from 6 April 2024. Amongst the detail, the revised DB funding regulations get a brief mention noting these will '*make explicit that there is headroom for more productive investment*' within prudent funding plans.

General reforms

The Government also published its [response](#) to a call for evidence on **trusteeship issues**. TPR will develop proposals for a **trustee register** and expects to publish guidance on investment decision-making and alternative assets by the end of 2023. The DWP will reassess whether professional trustees should be accredited. It will work with TPR to guide employers on what to consider when selecting a pension provider, to emphasise long-term outcomes rather than just low fees.

A [Treasury press release](#), the day before the Autumn Statement, announced '**New investment vehicles tailored to the needs of pension schemes to support investment into the UK's most promising high-growth companies**.' There is to be a new Growth Fund established by the British Business Bank, and a commitment of £250m to two successful bidders under the LIFTS (long-term investment for technology and science) initiative.

LGPS investment reforms

The Chancellor [announced](#) measures specific to **investment by the Local Government Pension Scheme (LGPS)** funds in England and Wales. The statutory guidance on investment strategy statements (ISS) will change to say that funds should **transfer all assets into their respective investment pools by 31 March 2025**, with 'comply or explain' provisions backing this expectation. The revised guidance will also require that funds formulate **plans to invest up to 5% of their assets in levelling-up projects** (actual investments may be more or less than 5%, depending on what is appropriate for the fund) whilst other guidance will expect them to report on progress against the plan. The ISS guidance will reflect the Government's '*ambition*' for funds to **invest 10% in private equity**; they will be encouraged to explore suitable opportunities with the British Business Bank.

Revised pooling guidance will set out expectations about the characteristics and outcomes of funds' pooling arrangements, including delegation of strategy implementation and manager selection, and will encourage inter-pool collaboration. Annual reporting and governance guidance will expect funds to publish, and report against, **training policies for pensions committee members**. The amended reporting guidance will also look for more data and commentary on the progress of pooling and asset allocation. The LGPS investment legislation and guidance will be amended to require that funds **set objectives for their investment consultants**.

Lifetime allowance abolition

A [policy paper](#) from His Majesty's Revenue and Customs confirms that the **repeal of the lifetime allowance** legislation will take effect from 6 April 2024. It clarifies the future treatment of lump sums and lump sum death benefits (including the introduction of taxable 'pension commencement excess lump sums'), the carrying forward of existing transitional protections, the replacement of the current system of benefit crystallization events with a new list of *relevant* events (concerned with lump sum payments), transfers to qualifying recognised overseas pension schemes, post-abolition reporting requirements, and the valuation of pre-6 April 2024 benefits.

Other announcements

Despite speculation that the Chancellor would use alternative inflation measures, the basic and new State pensions will be uplifted using July's 8.5% earnings-inflation figure, and other state benefits will rise in line with September 2023's 6.7% price-inflation rate. The main employee National Insurance Contribution rate will be cut from 12% to 10% from 6 January 2024.

The Autumn Statement has (seasonally) brought us a blizzard of pensions measures to contend with, though no great surprises (because the flurry was forecast months ago). Nevertheless, they could have significant impacts on the future pensions landscape. For commentary on each part of the package and the potential implications, please visit [our website](#).

Statutory revaluation hits the buffers (again)

The [Occupational Pensions \(Revaluation\) Order 2023](#) was laid on 27 November 2023, and enters into force in the new year.¹ The Order applies to final-salary benefits, establishing the minimum statutory revaluation for the rights of early leavers who reach their normal pension ages (NPAs) in 2024 (a separate Order will govern the revaluation of guaranteed minimum pensions).² Due to the high inflation rate for September 2023, the statutory caps on revaluation come into play in the Order.

Reval recap

Broadly speaking, statutory revaluation in deferment is set by reference to the increase in ‘*the general level of prices in Great Britain*’. The minimum revaluation required for any individual member depends on the number of complete years between the end of pensionable service and NPA. The reference period for each increase ends on the 30 September immediately preceding the making of the annual Order, and the measure of inflation now used for the purpose is the Consumer Prices Index (CPI). However, the revaluation required for any revaluation period cannot exceed 5% a year compound in respect of pensionable service prior to 6 April 2009, and 2.5% a year compound for benefits accrued subsequently.

The effects of the statutory revaluation caps on the 2023 Order are most apparent in the minimum revaluation percentages for the latest, one-year revaluation period: 5% for pre-6 April 2009 accrual, and 2.5% otherwise. That's because CPI inflation to September 2023 was 6.7%.

In fact, the caps' impacts percolate back through several successive revaluation periods. For example, it's not until one reaches the four-year revaluation period that the 5% p.a. cap relaxes its grip.

Clearing exemption for pension schemes—call for evidence

The Treasury has [called for evidence](#) on pension funds' exemption from the obligation to clear, through a central counterparty, their derivative transactions.

The clearing obligation came into being via the European Market Infrastructure Regulations (EMIR) and was copied and pasted into UK law at the time of Brexit. The exemption recognizes the particular challenges that pension funds would face in holding sufficient cash reserves to cover variation margin demands entailed in centralized clearing of derivatives. It was meant to be temporary, but was extended repeatedly by the EU whilst industry participants tried to work out practical ways in which schemes could meet their margin requirements. The UK's version of the exemption is currently set to expire in June 2025.

The call for evidence questions how pension funds make use of the exemption currently; and how they would be affected were it to expire in June 2025. The Treasury also asks what role the exemption played during the ‘LDI crisis’ of the autumn of 2022, and how the situation might have developed had it not been in place.

Responses should be submitted by 5 January 2024.

¹ SI 2023 No. 1265.

² There are exceptions. For example, scheme rules can instead provide for revaluation by reference to the Retail Prices Index.



Ombudsman upholds by-the-book transfer approach

The Pensions Ombudsman has published details of the first complaint about the 'Conditions for Transfers' Regulations that were introduced in 2021. He rejected the member's claim that the trustee had delayed processing his transfer request by insisting that he attend a Pension Safeguarding Guidance appointment with MoneyHelper.

Conditions for Transfers

The *Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021* came into force on 30 November 2021.¹ Since then, statutory transfer requests have had to meet one of two conditions before proceeding. The first, and most straightforward, condition is that the transfer destination is a public-service pension scheme, defined contribution (DC) master trust, or collective DC scheme.

Otherwise, trustees are required to look out for certain amber or red 'flags' indicative of scams. The presence of a red flag means that the second condition cannot be met, effectively preventing the transfer from proceeding under the statutory rules. The consequence of identifying an amber flag is less final: the member must provide evidence that he or she has undergone safeguarding guidance from MoneyHelper, a division of the Money and Pensions Service.

The red flags include such circumstances as the involvement of an unregulated adviser, in breach of financial services rules; unsolicited contact (cold-calling); the dangling of incentives; and the application of pressure. Failure to show the requisite proof of completion of a MoneyHelper guidance session, when required, will also raise a red flag.

Amber flags arise, for example, if a member makes an incomplete response to requests for information, or when the evidence that was supplied appears to be bogus or to have come from someone other than the member; when the receiving scheme has high-risk or unorthodox investments; when high charges are involved; or when the receiving scheme has overseas investments. It was the overseas-investment flag that was the basis for the dispute that came before the Ombudsman.

Case facts

The member made a transfer request on 21 February 2022. In answer to a questionnaire from the transferring scheme trustee, the member (and subsequently his financial adviser) indicated that he would be invested in global funds if the transfer went ahead. The trustee therefore referred him to MoneyHelper.

The member's financial adviser complained, so the trustee obtained additional legal advice. It too identified the presence of the overseas-investment amber flag, although it was acknowledged that the flag was not operating as intended in some cases.

The member attended a MoneyHelper appointment on 13 May 2022, and provided the requisite evidence on the same day. The trustee asked for fund to be disinvested on 18 May, and received them from its investment manager on 27 May. The transfer was made on 6 June 2022. The amount transferred was just under £228,000; the member had previously been provided with transfer estimates of around £245,000 (in March 2022) and £246,000 (in April 2022).

The member complained that the trustee had misinterpreted the Conditions for Transfers legislation, and said that the delay whilst he unnecessarily underwent guidance had caused him loss, financial hardship, and delayed his retirement.

Determination

The Ombudsman concluded that the transferring scheme's trustee had had a reasonable foundation for its belief that the overseas-investment amber flag was raised. The decision was one for the trustee to make, and its conclusion had been based upon legal advice. It was entitled to reach such a conclusion, and '*its literal interpretation of the Transfer Regulations [was] not unreasonable.*'

The Ombudsman considered the Pensions Regulator's guidance and the statement that it and the DWP made in July 2022. Both documents acknowledge the concerns within the industry about the phrasing of the Regulations, and suggest that trustees might be able to proceed using their non-statutory, discretionary powers if transfers that they perceive as low-risk are nevertheless blocked by the legislation. They did not alter the Ombudsman's view that the trustee in this case had acted reasonably. He noted, pithily, that '*the wording of [sic] Transfer Regulations and intended practical application may not be aligned.*'

The trustee in this case asked questions to tease out evidence of the statutory warning flags, and took expert advice on the member's responses and the interpretation of the law. Other trustees who pursue a well-considered procedure now have some reassurance that the Ombudsman will support them, even if it leads to strict letter-of-the-law conclusions that are at odds with the policy intention (they should, however, be aware that the PO does not need to follow his own precedents).

Frustrating as it doubtless is for members, no-one should be surprised—perhaps they ought to be reassured—that trustees and their advisers are uncomfortable with ignoring clear legal requirements. Not even the DWP, which was responsible for the law, and knew that mistakes had been made in its drafting, felt able to recommend such action. In short, the problem lies in the legislation, so a legislative fix is needed (the DWP said in June 2023 that it would consider whether changes could be made to improve the transfer experience, without undermining its scam-prevention goal).

Ombudsman not 'competent' in overpayment cases

The Court of Appeal has confirmed that the Pensions Ombudsman's determinations of disputes about recoupment of overpayments are not enforceable until rubber-stamped by a county court.³ He is not himself a '*competent court*'.

Background

Section 91 of the *Pensions Act 1995* establishes the principle that occupational pension rights are 'inalienable'. It prevents (amongst other things) the application of charges, liens and set-offs against pension instalments.

However, the legislation goes on to create exceptions to the general rule. The pertinent one for current purposes is that, subject to certain conditions, set-offs, etc. are allowed '*for the purpose of discharging some monetary obligation due from the person in question to the scheme arising out of a payment made in error in respect of the pension.*' One of the stipulations is that, if the pensioner disputes the amount, the obligation must '*become enforceable under an order of a competent court*' before the trustees can proceed.

The interpretation of that requirement has come before the judiciary in the recent past, in the 2018 case of *Burgess v BIC*⁴, and in last year's *CMG Pension Trustees Limited v CGI IT UK Limited*.⁵ In the latter it was held that:

- in cases in which the plan is to recoup an overpayment from instalments of pension, the 'amount' in dispute could be either the total amount of the overpayment or the proposed rate of deduction;
- a declaration from the competent court stating the amount of the overpayment and the details of how it is to be recouped would be sufficient; and
- the Pensions Ombudsman is not a '*competent court*'.

The Ombudsman [resisted](#) the view that he is not 'competent' in that sense. He was not a party to last year's High Court proceedings; however, he received legal advice that the judgment was wrong on the 'competent court' issue, and was granted permission to appeal (on condition that he agreed to cover the trustee's legal costs).

Judgment

The Court has unanimously dismissed the Ombudsman's appeal, with the leading judgment delivered by Lady Justice Asplin, who rhymed off several reasons for her conclusion. For example:

- Although the Ombudsman, like a court, has power to determine questions of fact and law, he also investigates maladministration on an inquisitorial basis, which (UK) courts do not.
- In cases involving disputes between members (or their beneficiaries) and trustees, the Ombudsman only has jurisdiction if the matter is referred to him by or on behalf of the member (or beneficiary). This 'one-sided' jurisdiction is dissimilar to that of a court, and it was unlikely that Parliament intended for the Ombudsman to be a 'competent court' within which trustees can seek to enforce a recoupment decision if they cannot apply directly to him.

³ *Pensions Ombudsman v CMG Pension Trustees Ltd & another* [2023] EWCA Civ 1258.

⁴ [2018] EWHC 785 (Ch).

⁵ [2022] EWHC 2130 (Ch). See *Forfeiture, set-off & the 'competence' of the Ombudsman* in the [September 2022 edition of Current Issues](#).

- The legislation establishing the role and powers of the Ombudsman makes provision for him to have the same powers as a court in specific circumstances: it thereby creates a distinction between the Ombudsman and the courts, and suggests that if Parliament had intended for him to be a 'competent court' for overpayment purposes it would have said so.

The Court of Appeal rejects the suggestion that, once the Pensions Ombudsman has determined a recoupment-related complaint, there is no longer any dispute and therefore no need for the involvement of a competent court. It said that the wording of the legislation makes it clear that, when the amount is disputed, no charge, lien or set-off can be exercised until the repayment obligation has become *enforceable*; it does not say that must merely have become *capable* of enforcement. Parties must, if necessary, go to a county court (sheriff court in Scotland) to enforce an Ombudsman's determination, the Ombudsman having no powers of enforcement of his own. That and other factors led the Court to conclude that a county court step is required. The alternative interpretation would also undermine the protection that the legislation affords to members involved in disputes about alleged overpayments.

However, the Court also disagreed with the suggestion that trustees must commence a separate action in a county court to obtain a declaration of overpayment and a repayment order against the member. It said that the Ombudsman's determinations and directions are '*enforceable without the need for further judicial input*': enforcement in the county court is therefore an administrative matter that is to be carried out by a court officer, and there is no need for the court to consider the merits of the matter.

The outcome of the case might not be entirely congenial for those involved in such disputes, but it brings a measure of clarity to the issue. It seems that trustees must accept the need for an additional stage in recoupment cases, though it's to be hoped that it's merely the sort of administrative step envisaged by the Court, and nothing too onerous.

Mind you, perhaps that will only be necessary if the member insists (we defer to the legal experts). At a recent virtual 'Technical Forum' gathering, the Ombudsman's representatives said that, in anticipation of losing the appeal, they had been considering how trustees might convey to members the message that the county-court stage is just a formality and not an opportunity to re-litigate the dispute.

This is not the first time that the limits on the Ombudsman's jurisdiction in overpayment cases have obliged the courts to come up with workarounds that, it seems to us, might be sub-optimal. We're thinking of the *Webber* decision on the operation of limitation in repayment (rather than recoupment) disputes. Ordinarily, we might suggest that the Government consider tweaking the legislation, but it seems to have quite enough on its plate just to follow through on measures that it has already promised. Still, it would spare the Ombudsman the indignity of repeated public expressions of dubiety about his 'competence'.

New Pensions Minister

Paul Maynard has replaced Laura Trott as Minister for Pensions, following a cabinet reshuffle. Trott has been promoted to the role of the Chief Secretary to the Treasury.

Maynard will have his hands full just seeing through pensions initiatives begun under his predecessors; perhaps Trott's appointment to the Treasury, which is behind the Mansion House reforms, can help ensure that they're realised.

HMRC newsletters: November 2023

[Pension Schemes Newsletter 154](#) from His Majesty's Revenue and Customs (HMRC) contains—

- a summary of the pensions-tax-related aspects of the Autumn Statement (see separate article in this issue for more information);
- a reminder that scheme members will need to declare any 2022/23 annual allowance charges—with mention of the special reporting arrangements where the charge is triggered by the remedy for *McCloud* discrimination in the public sector schemes;
- a request that scheme administrators provide the relevant charge references when making payments to HMRC (and how it will handle payments made without such references);
- details of how ex-administrators that are still registered for the Pension Schemes Online service, but no longer intend to act for any pension schemes, can have their registrations deleted; and
- information about residency status reports for administrators of schemes operating 'relief at source' on member contributions.

Dates set for pensions-law appeals

Virgin Media

The *Case Tracker for Civil Appeals*, operated by HM Courts and Tribunals Service, [indicates](#) that the hearing in the *Virgin Media* case may take place on 26 June 2024. The appeal is against a High Court ruling that scheme amendments were invalid in the absence of actuarial confirmation that the changes did not prevent the scheme from remaining contracted-out of the State additional pension, after 5 April 1997.⁶ The Case Tracker service suggests that the hearing could require six hours of court time.

BBC

The BBC's appeal, about its ability to alter its defined benefit scheme in the face of an amendment rule that protects members' 'interests', is [due to be heard](#) on 25 June 2024.⁷ The estimated duration of the Court of Appeal hearing is, once again, six hours.

⁶ See *Rule change without 'section 37 certificate' declared void*, in [Current Issues July 2023](#).

⁷ See *Judge blocks changes to future accrual*, in [Current Issues September 2023](#).

And Finally...

A [recent Pensions Ombudsman determination](#), about an employer's failure to pay across contributions, caught AF's eye. Not for anything to do with the jurisprudence, mind you; there's a depressing stream of such cases, involving small businesses, very possibly in straitened financial circumstances, neglecting their auto-enrolment duties, and often hoping (mistakenly) that if they ignore the Ombudsman's correspondence the complaint might go away. No, what piqued our interest was the unusual name of the firm finding itself on the wrong end of the PO's censure: Fenestration Recycling.

As a dilettante student of gruesome moments in medieval history, AF was secretly hoping that it would turn out to be linked to the Defenestrations of Prague (rather 'direct' expressions of protest against local government, which our LGPS colleagues are glad to note haven't caught on more widely). After all, *someone* must have cleared up the mess afterwards.

However, we suspected that that a more likely (less exciting) explanation involved someone reaching for the thesaurus to zhuzh up their brand. Sure enough, a quick visit to the [Companies House website](#) revealed that the business was originally named Windows & Doors UPVC Recycling Ltd.

Another hope flung unceremoniously oot the windae⁸...

⁸ Out of the—oh, never mind; we're sure you'll work it out.