

What's happening in Pensions



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DC decumulation

Budget 2014: Radical changes to DC decumulation rules

In his Budget speech on 19 March 2014, the Chancellor of the Exchequer announced what he described as *"the most far-reaching reform to the taxation of pensions since the regime was introduced in 1921"*. The requirements for DC pension pots to be used to buy an annuity and the drawdown restrictions will be removed entirely from 6 April 2015. In the meantime, from 27 March 2014, the rules for drawdown and small pension commutation have been relaxed.

Our briefing note **Budget 2014: Decumulation changes – immediate issues for trustees** outlines the changes and considers the most immediately pressing issues for pension scheme trustees.

In response to lobbying by the Association of British Insurers, concerning the time limit for starting a scheme pension after taking a pension commencement lump sum, the Government later announced that *"people who have recently taken a tax-free lump sum from their defined contribution pension will be given more time to decide what they wish to do with the rest of their retirement savings and will not be put at a disadvantage should they wish to wait to access their pension savings more flexibly"*.

Budget announcements:

<https://www.gov.uk/government/consultations/freedom-and-choice-in-pensions>

Later announcement:

<https://www.gov.uk/government/news/pensions-freedom-for-400000-hardworking-people-from-today>

Finance Bill

The Finance Bill was published on 27 March 2014, including draft legislation on the changes intended to take effect from that date but not the changes intended to take effect from 6 April 2015. Royal assent is expected in July. A consultation on some aspects of the proposed April 2015 changes runs until 11 June 2014.

ABI new minimum standard

The Association of British Insurers (ABI) had earlier announced a new minimum standard on retirement choices:

"Starting now, ABI members will implement the changes over the next 18 months with completion targeted for summer 2015 committing pension providers to:

- *A conversation for customers with their pension provider or an impartial advice or guidance service about their retirement options. This conversation will include a high-level overview of alternatives to annuities as people approach retirement.*
- *A comparison of annuity quotes for customers, whereby all providers will offer a comparison, or introduction to an intermediary who will deliver the comparison, early and prominently in their retirement process. The comparison will be offered as an integral part of the process not as an optional extra.*
- *Ask all customers for information about their health and lifestyle, which they can use to shop around for an enhanced rate."*

DC governance and charges

DC trust-based schemes: Pensions Regulator templates

The Pensions Regulator has published a template standard governance statement for DC occupational pension scheme trustees to show the extent to which their scheme has the 31 DC quality features expected by the Regulator's new code of practice (see **WHIP Issue 43**). It adopts a "comply or explain" approach, expecting trustees to do the following.

- *"Confirm that the scheme complies with the requirements of the regulator's DC code of practice, guidance and in particular that it exhibits the quality features.*
- *Explain where the scheme has adopted a different approach where a quality feature is absent or partly in place.*
- *Set out what action the trustees intend to take to correct the position where a feature is absent or improve an existing feature."*

The statement can be adapted to reflect the specific circumstances of the scheme. The Regulator expects trustees to issue their statement to employers and members at the end of each scheme year, for example in the scheme's annual report and/or on a website.

An example scheme assessment template has also been published, to assist with preparing the statement. It takes each of the 31 principles and asks trustees to apply a colour-coded system to indicate compliance or otherwise, giving explanations in areas of non-compliance. The Regulator expects this document, or any alternative document used by trustees, to be made available on request to employers and members (and to the Regulator).

Consultation on new governance requirements and charges cap

The Government is consulting until 15 May 2014 on further measures to ensure the fair treatment of DC scheme members. Its proposals, included in a Parliamentary command paper, are as follows. ("Qualifying schemes" are schemes that are of sufficient quality to be used as automatic enrolment schemes for new members and also for existing scheme members, such that they do not need to be automatically enrolled in another scheme.)

- From April 2015, there will be new statutory governance standards for all DC schemes, including a statutory duty to act in members' interests and requirements to consider administration standards and investment strategies and charges. Trustees will have to consider and report on how their scheme meets them. Compliance will be policed by the Pensions Regulator. There is some overlap here with its new code of practice (see **WHIP Issue 43**), which will need to be updated.
- From April 2015, providers of contract-based schemes will have to operate independent governance committees (IGCs). An IGC will assess the value for money delivered by the scheme and report on how it meets the new quality standards. The FCA will be consulting later in the year on aspects of this new requirement.
- A charge cap of 0.75% of funds under management for default investment funds under qualifying DC schemes will apply from April 2015. Investment transaction charges are excluded but most other charges are included. Tables in the consultation document indicate how flat fees and charges levied on contributions would be assessed for this

Finance Bill:

<http://services.parliament.uk/bills/2013-14/financen2.html>

Press release:

<https://www.abi.org.uk/News/News-releases/2014/03/ABI-sets-out-reforms-to-help-boost-retirement-incomes-for-millions-of-savers>

Press release:

<http://www.thepensionsregulator.gov.uk/press/pn14-03.aspx>

Consultation:

<https://www.gov.uk/government/news/an-end-to-rip-off-pension-charges-webb>

purpose. In 2017, the Government will consider whether some or all transaction costs should be included in the default fund charge cap and whether the level of the cap should be lowered.

- Active member discounts will be prohibited in qualifying schemes from April 2016. From April 2015, they may be applied but, as noted above, all charges must be less than 0.75%.
- Consultancy charging structures, already prohibited under automatic enrolment schemes, will be banned under qualifying schemes from April 2015.
- From April 2016, member-borne commission payments will be prohibited. From April 2015, they may be applied but as noted above all charges must be less than 0.75%.
- Trustees of DC occupational pension schemes and IGCs of contract-based schemes will have new duties from April 2015 to consider and report on all costs and charges (including investment transaction charges). There will be new requirements on providers to disclose to trustees and IGCs (and for trustees and providers to disclose annually to employers and members) details of all costs and charges. This will be in a standard format that enables comparisons. The consultation also asks whether these transparency requirements should in the future be extended to DB schemes, so that employers are fully aware of all applicable charges.

The proposed legislation will be introduced in autumn 2014 by regulations under the Pensions Bill (see **WHIP Issue 39**), which is currently in its final Parliamentary stage.

Research report on charges

The Government has published a research report on charges and quality in DC pension schemes. It found as follows.

- Most DC members pay an annual management charge (AMC), calculated as a fixed percentage of their fund size.
- For trust-based schemes, the average AMC was 0.75%; for contract-based schemes, it was 0.84%.
- AMC variations were mainly due to scheme size, commission, contribution rates, scheme age, and fund choice (though 80% to 90% of members are in default funds).
- 3% of trust-based schemes and 10% of contract-based schemes reported using "active member discounts". The average differential is 0.38%.

OFT report

The Office of Fair Trading has decided not to refer the DC workplace pensions market to the Competition Commission, despite concluding that the test for doing so was met. This was on the basis that the ABI, Pensions Regulator and the Government are already taking steps to improve the market.

VAT on services to DC pension schemes

In *ATP PensionService A/S v Skatteministeriet*, the European Court has ruled that the "special investment fund" VAT exemption, which applies to certain managed investment funds, applies to services provided to DC pension schemes if the scheme has certain characteristics, namely:

- they are funded by the persons to whom the retirement benefit is to be paid;
- the funds are invested using a risk-spreading principle; and
- the pension customers bear the investment risk.

The Court added: *"In that regard, it is of little consequence that the contributions are paid by the employer; that the amount paid in is based on collective agreements between labour-market organisations; that there are different ways of paying out the funds invested; that contributions are deductible under income tax law; or that it is possible to add an insurance element which is ancillary to the other services provided"*.

The kinds of services in scope include:

- "services by means of which an undertaking establishes the rights of pension customers vis-à-vis pension funds through the opening of accounts in the pension scheme system and the crediting to such accounts of the contributions paid";
- "accounting services and account information services"; and
- "any transactions which are ancillary to those services or which combine with those services to form a single economic supply."

Research report:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/281132/rr859-defined-contribution-pension-schemes-summary.pdf

OFT web page:

<http://www.of.gov.uk/OFTwork/market-s-work/pensions/>

Case report:

<http://www.bailii.org/eu/cases/EUECJ/2014/C46412.html>

This was a Danish case. HMRC had previously denied that the "special investment fund" exemption applies to pension schemes in the UK. DC scheme trustees may now be able to reduce their bills and claim back VAT they have paid on invoices for management and administration services. We await an update of HMRC's guidance on this subject to see the extent to which HMRC is willing to change its policy.

UK schemes which use insurance wrappers already benefit from another VAT exemption and there will be no claim to be made.

Two other recent VAT decisions of the European Court should be distinguished:

- In the *Wheels (Ford CIF)* case (see **WHIP Issue 38**), the European Court found that the "special investment fund" exemption did not apply to investment management fees charged to trustees of DB pension schemes. Similar claims had been put on hold by the UK tax tribunals pending the outcome of the *ATP* case, in case it shed further light on the matter.
- In the *PPG* case (see **WHIP Issue 41**), the European Court ruled that a Dutch employer which had established a pension scheme as a separate legal entity, as required by law, could deduct the VAT that it (rather than the scheme) paid on administration and investment management fees. This was on the basis that the liability was not passed on to the scheme. The Court ruled that such deductions can be made if the existence of a direct and immediate link with the employer's economic activities is apparent from all the circumstances of the transactions in question. This case prompted HMRC to issue Brief 06/14, announcing a review of its policy on VAT treatment in relation to occupational pension schemes (see **WHIP Issue 44**).

Automatic enrolment

Please see our briefing note **Automatic enrolment** for details of how the automatic enrolment legislative requirements currently apply.

Exceptions from the employer duties

The Government has issued its response to the consultation on introducing exceptions to the employer automatic enrolment duties (see **WHIP Issue 39**). It is far from reaching a final decision in several areas but the following points may be noted.

- **Individuals with tax protections:** Individuals with enhanced or fixed protection, who lose their protection if they accrue new benefits (for example, where they have failed properly to opt out), seem likely to be excluded from the automatic enrolment requirement. The position is less clear for individuals who are drawing a pension under flexible drawdown arrangements, who can also be adversely affected by new accrual.
- **Jobholders serving an employment notice period:** Jobholders who have given, or have been given, notice of termination of employment still have to be enrolled when their automatic enrolment date arrives. If their notice period ends after their automatic enrolment date but during the scheme enrolment period, they may have to be enrolled even after their employment has already ended. The Government accepts that there is a strong case for excluding affected individuals but needs to give further consideration to practical issues.
- **Individuals who have given notice of retirement:** The Government will develop proposals to exclude individuals whose automatic enrolment date falls after they have given notice of retirement.
- **Contractual enrolment:** Individuals who opt out after being contractually enrolled but who were not, at the time of their automatic enrolment date, eligible jobholders must be automatically enrolled if they later qualify as eligible jobholders. Proposals and draft regulations will be developed to address this issue.
- **Serious ill-health:** The Government is not convinced that those absent from work with serious ill-health or terminal illness should be excluded. Although it recognises that they may not be in a position to opt out, there are practical difficulties and survivors' pension rights would be affected.
- **Non-UK residents:** Personal pension providers cannot lawfully contract with a non-UK resident (even if he or she normally works in the UK) unless they have the relevant regulatory permissions to conduct business in the individual's country of residence. The EU's Distance Marketing Directive also makes it illegal to contract with an individual resident in another EU member state without his or her prior agreement. This presents problems for employers using contract-based schemes.

The Government points out that employers can use an occupational pension scheme (eg, NEST or another master trust) to avoid this issue but recognises that this means that they might have to use two schemes when they wanted to use one. It does not

Consultation response:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279225/automatic-enrolment-exceptions-to-employer-duties-government-response.pdf

want to apply an exception just to personal pensions, because this could create regulatory arbitrage. It has therefore ruled out excluding "any individual with an address outside the UK". This seems to mean that the Government will not be doing anything about this issue and some employers may have to use two schemes.

Hybrid and career average schemes

Amending regulations that came into force on 1 April 2014 confirm that hybrid schemes may phase in contribution rates for their DC arrangements in the same way that schemes that provide only DC benefits can. This was always intended but it was arguable that the legislation did not achieve the policy intention.

They also amend the conditions for a career average scheme to be a qualifying scheme by extending the options for revaluing active members' benefits to allow schemes to qualify if their rules provide for revaluation in line with a measure other than price inflation, eg, national average earnings. In order to qualify under this criterion, they must fund for at least LPI revaluation (ie, CPI or RPI up to 2.5%) and include reference to this in their statement of funding principles (or equivalent document). This is the same test that applies to schemes that apply only discretionary revaluation.

Thresholds for 2014/15

An Order has confirmed the previously announced (see **WHIP Issue 44**) threshold figures that will apply from 6 April 2015 as follows:

	2013/14 figure	2014/15 figure	Derivation
Earnings trigger:	£9,440	£10,000	Same as the income tax personal allowance
Qualifying earnings – from:	£5,668	£5,772	Same as the lower earnings limit for NICs
Qualifying earnings – up to:	£41,450	£41,865	Same as the upper earnings limit for NICs

Civil partnerships and same sex marriages

Please see our briefing note **Same sex marriage** for details of the issues that arise in this area.

Civil partners' pensions: 5 December 2005 limitation

The Employment Appeal Tribunal (EAT) has overturned the decision of the Employment Tribunal (ET) in *Walker v Innospec* (see **WHIP Issue 38**). It held that it is lawful to limit DB survivors' pensions for civil partners to benefits accrued since 5 December 2005 (except for contracted-out rights).

Mr Walker had been in pensionable service from 1980 to 2003, when he retired on an annual pension of about £85,000. He entered into a civil partnership in 2006. The scheme informed Mr Walker that on his death there would only be a contracted-out pension payable to his civil partner of about £500 pa. This was due to the 5 December 2005 limitation. If Mr Walker had married a woman, or if he were to dissolve his civil partnership and marry a woman now, the spouse's pension would be £41,000 pa. Mr Walker claimed unlawful discrimination on grounds of sexual orientation.

Overtaking the ET's decision, the EAT held as follows.

- It is well established under European law that pensions are deferred pay. There is no claim in respect of unequal pay for periods of employment before the relevant EU legislation was in force. The same principle applies here. The Equal Treatment Directive does not purport to have retrospective effect and does not have such effect.
- There was either direct discrimination, or indirect discrimination that had not been objectively justified. The UK legislation was not, however, incompatible with the Directive and it defeated Mr Walker's claim.

The decision may be appealed to the Court of Appeal, if permission is granted.

Scotland

The Marriage and Civil Partnership (Scotland) Act 2014 received Royal Assent on 12 March 2014. It will allow same sex marriages in Scotland from a date yet to be announced.

Revised EU IORP Directive

The European Commission has published the text of its proposed revised IORP (Institutions for Occupational Retirement Provision) Directive. It is intended that the

Regulations:

<http://www.legislation.gov.uk/uksi/2014/715/contents/made>

Order:

<http://www.legislation.gov.uk/uksi/2014/623/contents/made>

Case report:

http://www.bailii.org/uk/cases/UKCAT/2014/0232_13_1802.html

Scottish Act:

<http://www.legislation.gov.uk/asp/2014/5/contents/enacted/data.pdf>

Draft revised Directive:

http://ec.europa.eu/internal_market/pensions/directive/index_en.htm

Directive will replace the existing IORP Directive, requiring changes to national legislation in EU member states by 31 December 2016.

There are no longer proposals to introduce scheme funding requirements similar to the solvency requirements for insurance companies. The draft Directive does, however, include a large number of provisions that would place new, sometimes onerous and expensive, requirements on UK pension schemes. The draft often uses terminology that is not familiar in the UK pensions context, often drawn from the field of insurance, so the precise impact is not always clear. The most significant proposals for change seem likely to be as follows.

- Trustees and other parties with key functions will have to be “*of good repute and integrity*” and must have adequate professional qualifications, knowledge and experience. The corresponding requirement in the existing IORP Directive can be satisfied by having appropriately qualified advisers but this will no longer be enough.
- EU member states must allow registered schemes to make cross-border transfers.
- Member states may not prevent pension funds from investing in long-term assets.
- Schemes must have a sound remuneration policy for “*those who effectively run the institution*”.
- There are new requirements for risk management and internal audits, which are not to be carried out by the same party.
- Schemes will be required to carry out risk assessments and produce risk evaluations, to be refreshed following any significant change in the risk profile of the scheme.
- Outsourcing of key functions must be notified to the national regulator in advance.
- DC schemes must have a single “depository” (or custodian). Member states may also apply this requirement to non-DC schemes.
- Schemes (DB as well as DC) must issue standardised, two-page benefit statements at least annually.
- Schemes must have a website.
- Information must be given to prospective members, including information on how environmental, climate, social and corporate governance issues are considered in the scheme’s investment approach.
- There will be a new requirement for pre-retirement information, including information about the advantages and disadvantages of the different options.

The expected removal of the requirement for cross-border schemes to be fully funded has not come to pass.

Pension protection levy – insolvency scores

The PPF has announced that the new tailored model for insolvency scores that it has been developing with Experian has been delayed until October 2014. For the period from April 2014 until then, no failure scores will be recorded; for the 2015/16 levy year, they will instead be averaged over the shorter than usual period from October 2014 to March 2015. In the mean time, schemes will be able to verify their own data and address any individual issues. A leaflet gives some detail of the new model but a fuller consultation on how it will work and how levies may be affected is expected in May.

Miscellaneous amendment regulations

Miscellaneous Amendment Regulations come into force on 6 April 2014. They do the following.

- In the context of the minimum pension provision that must be made following a TUPE transfer of occupational pension scheme members, transferee employers will now be able to satisfy the pension protection regulations by paying at least the DC contributions paid by the transferor employer immediately before the transfer, as an alternative to matching employee contributions up to 6%.

Please note:

- This new option does not apply in respect of transferred employees who were eligible to be members of the transferor employer’s scheme but who had not joined, nor to those who would have been enrolled or eligible to join after a waiting period. This may be an oversight.

Press release:

<http://www.pensionprotectionfund.org.uk/news/Pages/details.aspx?itemID=356>

Regulations:

<http://www.legislation.gov.uk/uksi/2014/540/contents/made>

Consultation response (administration):

<https://www.gov.uk/government/consultations/private-pensions-regulations-simplifying-the-administration-of-pension-schemes>

- A consultation proposal to provide that the employee may choose his or her DC contribution rate (subject to the scheme rules specifying what can be chosen, eg, a minimum rate or whole number percentage rates) and then receive matching employer contributions up to a maximum of 6% has been dropped. It was discovered that such an amendment requires primary legislation. The Government now seems to have accepted that transferred employees do not have a statutory right to choose their DC contribution rate.
- The Government has decided not to include personal pensions, including group personal pensions, in the types of DC scheme that can be used to satisfy the minimum contribution requirement after a TUPE transfer. The reason given is that this was outside the scope of the consultation. This is a long-standing anomaly.
- The requirement that a pension scheme auditor be independent presents difficulties for large multi-employer schemes, such as NEST and master trusts. The Scheme Administration Regulations are amended to exempt trust-based occupational pension schemes where there are at least 500 employers in the scheme. It was originally proposed that at least two thirds of the employers must not be associated or connected but that part of the proposal has been dropped.

Consultation response (TUPE transfers):
<https://www.gov.uk/government/consultations/transfer-of-employment-pension-protection-amendment-regulations-2013>

Pension liberation

Please see our briefing note **Pension liberation** on the issues that arise in this area.

HMRC processes

HMRC's Newsletter number 60 includes a section on the steps it now takes to help combat pension liberation. The most interesting parts are as follows.

HMRC Newsletter:
<http://www.hmrc.gov.uk/pensionschemes/newsletter60.pdf>

Scheme registration: HMRC says:

"On receipt of a new application, HMRC will review the application to make a decision on whether or not to register the pension scheme. In many cases we are writing out to the scheme administrator for further information to help us make this decision. Schemes have 45 days to submit the required information, or the application will be rejected. Only once we have carried out all necessary checks will a decision be made on whether to register a pension scheme."

HMRC has found that the number of registration applications has reduced. 5% of registration requests have been refused. Around 90% of schemes where no problems are identified are being registered within five working days.

Transfers to suspected liberation schemes: HMRC has set up an email address for requests for confirmation of a scheme's registration status. Trustees who suspect that a transfer request is a liberation attempt are encouraged to check this.

"Requests sent via email must include a scanned copy of a letter requesting confirmation of the registration status of a scheme that you have been asked to make a transfer to, including all the relevant scheme details."

Email requests will receive a standard automatic confirmation of receipt, however we will only respond to these requests by post.

Online guidance will be updated in due course.

The email address is pensionschemes@hmrc.gov.uk."

We understand that schemes checking with HMRC about scheme registrations before making a transfer have faced waits of up to five months for a response. In recent weeks, the wait has reportedly come down to about three months.

Reporting a suspected liberation attempt: HMRC reminds trustees to tell it about suspected pension liberation attempts. It says that it will not hesitate to de-register a scheme where rules are not adhered to, and will pursue the scheme promoters for all penalties due under the legislation.

Budget announcements

It was announced in the Budget that HMRC will be given new powers, by amendment of the Finance Act 2004, to help tackle pension liberation.

HMRC will be able to refuse to register a pension scheme, or may de-register a scheme, where it believes that the administrator is not a fit and proper person to fulfil that role or that the scheme has been established for purposes other than providing authorised benefits. HMRC will also be given new information and premises entry powers in connection with registration applications. New penalties (up to £3,000) will apply for giving false information.

New legislation will provide that independent trustees appointed by the Pensions Regulator (and new administrators appointed by new independent trustees) will not

HMRC guidance note:
<https://www.gov.uk/government/publications/pensions-liberation-guidance-note>

HMRC information note:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/294287/Pension_Liberation_Policy_Pack_v2_0.pdf

become liable for tax liabilities arising in relation to prior events: the previous administrator will remain responsible. As under existing rules, employers and members can also be held liable.

Some of this applies from 20 March 2014 and some (mainly the "fit and proper person" provisions) from 1 September 2014. Comments are requested by 27 June 2014.

The new Finance Bill includes proposed legislation to implement these announcements.

Pensions Ombudsman complaints

The Pensions Ombudsman has issued an update on the complaints he has been considering where pension liberation is an alleged factor. It includes the following points of interest.

- Most of the complaints (just under 40) concern transfer requests that were not allowed because pension liberation was suspected.
- There are a handful of complaints about transfers that were made to arrangements that were subsequently "frozen" by regulatory action.
- The complaints may not give a true impression of pension liberation activity because only those who think they are on the right side of the law are likely to complain.
- The Ombudsman is aware that his decisions may have wider implications for pension scheme members and the pensions industry.
- It is likely that the initial cases will be decided in "April/May".

Budget announcements: Individuals aged over 75

In addition to the matters outlined above, there were the following pensions-related announcements in the Budget.

- The Government will consult on options for simplifying the taxation of dependants' pensions. At present there are adverse tax consequences, designed to prevent abuse of the lifetime allowance by setting up disproportionately high survivor pensions, where a member dies aged 75 or over.
- The Government will be considering revision of the restrictions that deny individuals aged 75 or over tax relief on pension contributions.

Part-time workers' retrospective claims

In *Ministry of Justice v O'Brien*, the Employment Appeal Tribunal has held that a part-time fee-paid court recorder excluded from pension scheme membership was entitled to a pension calculated by reference to service backdated to 7 April 2000. This is the date on which the EU Part-Time Workers Directive should have been transposed into UK law. It overturned the Employment Tribunal decision that pensionable service should be backdated to the date the recorder started work, in 1978, holding that the fundamental principle of legal certainty in EU law meant that it was wrong to backdate rights to a period before they existed in law.

Pensions Ombudsman

Appeals to the High Court

From 6 April 2014, changes to the Civil Procedure Rules of the courts system mean that appeals of Pensions Ombudsman and PPF Ombudsman determinations to the High Court in England and Wales will need the permission of the Court.

CPI/RPI – British Airways scheme complaint

The Pensions Ombudsman has given his determination of Captain Post's complaint against the trustees of the Airways Pension Scheme (APS) (the original British Airways pension scheme) over the switch from RPI to CPI for increasing pensions in payment. He dismissed all of Captain Post's complaints and determined that the trustees reached a decision that took into account relevant advice, was within the range of reasonable decisions, and was not procedurally flawed.

The scheme rules provided that pension increases would be in accordance with the Government's annual review orders that increase civil service pensions. In June 2010 it was announced that CPI would be used instead of RPI for those increases. The APS trustees met to consider whether to accept this, amend the scheme rules to continue with RPI (perhaps with a CPI underpin), or accept CPI but introduce a discretionary power to give higher increases. The scheme amendment power gives sole power to the trustees to amend the scheme. The trustees decided to obtain leading counsel's opinion but in the

Finance Bill:

<http://services.parliament.uk/bills/2013-14/financen2.html>

Press release:

<http://www.pensions-ombudsman.org.uk/News/>

Overview of Tax Legislation and Rates:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/294190/OOTLAR_19_March_2014__1_.pdf

Case report:

http://www.bailii.org/uk/cases/UKEAT/2014/0466_13_0403.html

Statutory instrument:

<http://www.legislation.gov.uk/uksi/2014/407/contents/made>

Determination:

<http://www.pensions-ombudsman.org.uk/determinations/docs/2014/jan/po-824.doc>

meantime to introduce a discretionary power to increase pensions above CPI if two thirds of the trustees agreed.

The relevant majority was not obtained to making a 2011 discretionary increase and Captain Post, who was a member-nominated trustee, resigned from the trustee board. The trustees ultimately decided to continue with CPI increases and a discretionary power to award more.

Captain Post complained that the trustees' decision making was flawed in several respects. The Ombudsman determined the most interesting parts of his complaints as follows.

- Captain Post argued that the trustees acted on flawed legal advice from their solicitors, this being that a CPI underpin would be required if they reinstated RPI increases. Leading counsel had reportedly advised that this might not be necessary and Captain Post claimed that this was not taken into account. The Ombudsman determined that the trustees were entitled to base their decision on the advice they had received, that nobody had definitively determined which of the solicitors and leading counsel was correct, and that in any event they had acted on leading counsel's advice (even if they did not again go over the ground previously covered). When dealing with Captain Post's IDRPs complaint, they had considered whether they should reopen the previous decision and decided not to do that, because the new decision would not be different.
- Captain Post argued that the trustees had not taken expert advice on whether CPI was an "appropriate national index ... reflecting fluctuations in the cost of living", as required by the pension increase rule. The Ombudsman determined that in the light of the (later) Court of Appeal judicial review decision in R (*Police Negotiating Board*) v *Secretary of State for Work and Pensions* (see **WHIP Issue 31**), CPI was an appropriate index, whether or not the trustees had taken expert advice on the matter.
- The decision affected benefits under the New Airways Pension Scheme, another British Airways scheme. The two schemes have the same trustee board and some of the trustees were NAPS members. Captain Post complained that there was a conflict of interest that had not been properly managed. The Ombudsman found no evidence of this, noting that the trustees had taken legal advice and followed it.
- Captain Post complained that a pension scheme communication (issued by BA, not the trustees) led him to expect RPI increases and that he decided to stay in the APS rather than join the NAPS because of this. A 1984 edition of "BA News" said that NAPS would index link pensions "in line with cost of living index" up to 5% pa but would "not offer unlimited 'inflation proofing' like the present scheme". The Ombudsman found nothing in this that promised RPI increases.

Recovery of overpayments: member could not rely on administrator's failure to notice

In the case of *Mrs E Irvine*, the Pensions Ombudsman determined that the member could not resist recovery of four years of overpaid early retirement pension after she failed to notify the scheme administrator of her re-employment, which she was required to do by the scheme rules. This was the case even though the repayment demanded was significantly higher than it would have been had the administrator noticed the overpayment in 2009, when it had the opportunity to do so, rather than three years later.

The Ombudsman directed the scheme administrator to pay the member £350 for distress and inconvenience caused by its failure to notice the overpayments in 2009 and for a later mistake in calculating the amounts to be repaid.

Pensions Regulator

New portal for reporting unpaid contributions

The Pensions Regulator has launched an online portal for trustees and managers of pension schemes to report contribution payment failures.

Pensions Regulator and FCA joint regulatory guide

The Pensions Regulator and FCA have jointly published a new guide to how they will operate in the field of DC workplace pensions, especially in the field of contract-based schemes where their regulatory scopes overlap.

Statutory money purchase illustrations

The Financial Reporting Council has published revised statutory money purchase illustration (SMPI) rules under Actuarial Standard Technical Memorandum 1 (AS TM1), applicable from 6 April 2014. The changes are designed to allow more personalised illustrations to be issued, as now permitted under the amended disclosure of information regulations (see **WHIP Issue 43**).

Determination:

<http://www.pensions-ombudsman.org.uk/determinations/docs/2014/feb/po-2464.doc>

Pensions Regulator web page

<http://www.thepensionsregulator.gov.uk/trustees/maintaining-contributions.aspx>

Press release:

<http://www.thepensionsregulator.gov.uk/press/pn14-08.aspx>

Press release:

<https://www.frc.org.uk/News-and-Events/FRC-Press/Press/2014/February/New-version-of-Statutory-Money-Purchase-Illustrati.aspx>

EU Portability Directive

The European Commission has accepted proposals of the EU Council for amending the draft EU Pension Portability Directive. Those proposals were that:

- combined eligibility and vesting periods must not exceed three years and a minimum age for vesting should not be higher than age 21; and
- the scope of the proposed Directive be restricted to cross-border employment changes.

It seems, therefore, that when a scheme member leaves to take up employment in another EU member state, he or she must not be denied vested benefits if he or she is at least age 21 and has worked three years or more (presuming he or she joined at the first opportunity). The Commission also invites member states to apply the same standards to workers changing jobs within that state, but this will not be required.

The European Parliament is now in a position to adopt the final text in second reading before the end of the current legislature (in May 2014). The final text is awaited.

Abolition of contracting-out

Protected persons

The Government has published its response to the consultation (see **WHIP Issue 38**) on whether it should allow employers of "protected persons" to reduce their future service scheme benefits in the light of the additional employer National Insurance Contributions that will result from the abolition of contracting-out in April 2016. Protected persons are workers in privatised industries such as coal, electricity and rail who were working there at the time of privatisation and have continued to do so. A protected person's final salary benefits (which are the same as those applicable under the relevant public sector scheme at the time of privatisation) cannot be adversely amended unless he or she agrees to give up his or her protected status.

The Government has concluded that it should not give a statutory power to employers in this regard. It says that the matter should be dealt with by negotiation between employers and employees.

The Pensions Bill has been amended to provide that the general statutory power to be given to employers to reduce benefits will not apply in respect of protected persons.

Please see our briefing note **State pension reform and the end of contracting-out** for details of the employer power to reduce benefits.

HMRC reconciliation service

HMRC has launched a scheme reconciliation service to help trustees and administrators reconcile their records for non-active members before contracting-out ends in April 2016. This is included, among other things, in the first issue of a new "*Countdown Bulletin*".

Lifetime allowance: individual protection

HMRC has updated its guidance note on individual protection, to reflect changes to the proposals for this form of protection against the 2014 reduction of the lifetime allowance from £1.5 million to £1.25 million from 6 April 2014 (see **WHIP Issue 40**).

The most significant change to the original proposals is that individual protection will now be available to members who have enhanced protection (but not if they have primary protection). Enhanced protection is better than individual protection but individuals with both these forms of protection will be able to fall back on individual protection if they lose their enhanced protection.

In order to apply for individual protection, individuals must tell HMRC the value of their pension savings as at 5 April 2014. The HMRC guidance explains that the member will have to obtain this information from the pension scheme administrator and notes that whilst "*the scheme administrator is not obliged to give you this information ... it is unlikely they will refuse to do so*".

The ability of a pension scheme to provide this information will depend on the data and records it keeps. Trustees may want to start considering now (at least in respect of members most likely to be considering registering for protection) whether their scheme records would enable the relevant information to be provided, bearing in mind that a member may request the information at any time in the next three years. For DC arrangements, will the scheme have a record of the value of a member's account as at 5 April 2014? For active members of DB arrangements, will the scheme be able to calculate the value of a member's benefits as if he or she had retired on 5 April 2014?

European Parliament web page:
[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2005/0214\(COD\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2005/0214(COD))

Consultation response:
<https://www.gov.uk/government/consultations/possible-statutory-override-for-protected-persons-regulations>

Statement to Parliament:
http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140212/wmstext/140212m0001.htm#140212m0001.htm_spm14

HMRC Countdown Bulletin:
<http://www.hmrc.gov.uk/nic/count-bull-contract1.pdf>

HMRC guidance:
<https://www.gov.uk/government/publications/pensions-individual-protection-2014>

Notwithstanding the lack of a legal requirement to provide this information, there is a risk that a member who cannot obtain individual protection (and incurs a lifetime allowance charge as a result) solely because the scheme cannot provide this information might try to hold the trustees accountable.

Transfers from Local Government Pension Scheme

The Local Government Pension Scheme (LGPS) has a new career average design from 6 April 2014. The Government Actuary's Department has announced that existing broad comparability certificates for transfers from the LGPS have ceased to be valid. Receiving schemes will now have to take account of the new LGPS design.

Schemes may now apply for broad comparability passports and certificates in relation to the new LGPS scheme design but there will be a delay while GAD updates its systems. In some cases, backdating may be agreed.

NICs on pre-A-Day FURBS contributions

The Supreme Court has ruled against HMRC, overturning the Court of Appeal decision (see **WHiP Issue 34**), in the long-running case of *HMRC v Forde and McHugh Limited*. The case concerns the NICs treatment of non-contractual and non-cash employer contributions to a funded unapproved scheme under the pre-6 April 2006 tax regime. The Supreme Court held that the contributions were not subject to NICs.

GAD announcement:

<https://www.gov.uk/government/publications/broad-comparability-against-the-lgps-important-announcement-12-march-2014>

Case report:

http://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0162_Judgment.pdf

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If you wish to discuss any points arising from this note, please speak to your usual contact in the Travers Smith Pensions team or to one of the Pensions partners: Paul Stannard, Peter Esam, Philip Stear, Susie Daykin and Daniel Gerring.

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