

What's happening in *Pensions*



Issue 12

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Finance Act 2009

Royal Assent

The Finance Bill has received Royal Assent and is now the Finance Act 2009.

The Act contains "anti-forestalling" measures. These are designed to stop those with taxable income of £150,000 or more in a tax year from avoiding the restriction of tax relief on pension contributions that will come into force on 6 April 2011, by making extra contributions (or receiving benefit increases) before then. Please see WHiP Issue 10 for more detail but note the late changes described below.

Before Royal Assent, the Finance Bill was amended to give a limited concession. It has effect where a person has taxable income in a tax year of £150,000 or more and where he or she pays contributions to a DC arrangement less frequently than quarterly. In these circumstances, the protection for new contributions will be given up to the lower of (a) £30,000 (previously £20,000) per tax year and (b) the average annual contribution for the previous three tax years.

The Government has also reportedly agreed to make further relaxations to the anti-forestalling measures, as follows:

- Full protection will be given in respect of pension contribution agreements contractually agreed before Budget day (22 April 2009), even if the first contribution was not made before then.
- Where a saver changes pension provider but maintains the same pattern of contributions, the pension input will be protected for the purposes of the special annual allowance.

We expect these relaxations to be set out in regulations.

HMRC Q&As

HMRC has issued some questions and answers on its interpretation of the anti-forestalling measures. The questions cover the following:

- varying quarterly contributions
- schemes with member choice of contribution rates requiring an annual opt-in
- pay increases
- discretionary benefit increases
- salary sacrifice arrangements
- annual renewal of salary sacrifice (for calculating relevant income)
- redundancy payments and relevant income
- contributions from redundancy payments
- sacrificing redundancy payments for pension contributions, and
- contracting-out rebates paid to schemes

Our view is that the Q&As accurately reflect the legislation.

Finance Act 2009:

http://www.opsi.gov.uk/acts/acts2009/ukpga_20090010_en_1

HMRC Q&As:

<http://www.hmrc.gov.uk/budget2009/anti-forestalling-qa.pdf>

Anti-avoidance regulations

Regulations have added a new requirement to report tax avoidance to HMRC. This applies to any arrangement involving the accrual or expected accrual of benefits in a pension scheme where the main benefit is that the special annual allowance charge would not apply (or a smaller charge would apply). This supports the anti-avoidance provisions in the Finance Act 2009, which broadly provide for anti-avoidance measures to be ineffective.

Members of non-UK pension schemes who receive UK tax relief

Regulations coming into force on 12 August 2009 (but with effect backdated to 6 April 2009) will ensure that the Finance Act's anti-forestalling measures will apply to members of non-UK schemes who benefit from UK tax relief on their contributions.

Foster Wheeler equalisation case

The Court of Appeal has overturned the High Court decision in *Foster Wheeler Limited v Hanley and others*.

This case concerned the implications of Article 141 of the EC Treaty and the *Barber* decision for a scheme that had initially attempted to equalise by allowing men to take an unreduced early retirement pension from age 60 with employer consent.

The scheme originally had normal retirement ages of 65 for men and 60 for women. In the immediate aftermath of *Barber* the scheme was operated to allow men, with employer consent, the same early retirement terms as women (i.e. no early payment actuarial reduction after age 60). From 16 August 1993, normal retirement ages were equalised at 65 but members continued to be entitled, with employer consent, to immediate unreduced pensions on retirement between ages 60 and 65.

In April 2002, the early retirement rule was amended to allow for an early pension (with employer consent) "*reduced to such an extent (if any) as the Trustees shall, with the advice of the Actuary, consider to be reasonable and determine to be appropriate having regard to, among other things, the period between the date of its commencement and the Member's 60th birthday*".

In April 2003, the early retirement rule was amended again, but only in respect of future service, to refer to actuarial reduction by reference to age 65.

The High Court had held (see WHIP Issue 7) as follows:

- The words "*among other things*" in the early retirement rule applicable from April 2002 could not in the circumstances be read as allowing age 65 to be used for reducing any particular tranche of pension.
- It was necessary to look at the scheme rules and read them with as little modification as necessary to give effect to the requirements of Article 141.
- It was far easier to imply the giving of employer consent than to rewrite the rules to provide for a split pension with benefits partly based on age 60 and partly on age 65.
- The result of implying consent is that male members have the right to take all of their pre-April 2003 pension from age 60 with no early payment actuarial reduction, i.e. including not just the *Barber* "window period" tranche but also the tranches before and after (up to April 2003).
- The rules could have been rewritten in 1993 to provide for split pensions (which would have complied with *Barber* at a smaller cost) but this was not done until April 2003. The rules continued until 2003 to provide for a single pension and a single normal retirement age.

The Court of Appeal overturned the High Court's decision for the following reasons.

- Scheme rules should be adhered to so far as possible.
- An approach of "minimum interference" is the correct one where scheme rules are not consistent with Article 141. However, regard must be had to substance as well as form. Here, there was a need to look for another solution "*involving less interference with the rights of any party*" (i.e. other members and the sponsoring employer) rather than the solution involving the minimum of drafting changes.
- The High Court's decision conferred a windfall on members with "mixed" normal retirement ages and was therefore not correct.
- The fact that a separate stream of benefit is identified does not necessarily mean that there must be split pensions. Split pensions would not be consistent with the approach of minimum interference.

Regulations:

http://www.opsi.gov.uk/si/si2009/ukSI20092033_en_1

Regulations:

http://www.opsi.gov.uk/si/si2009/ukSI20092031_en_1

Case report:

<http://www.bailii.org/ew/cases/EWCA/Civ/2009/651.html>

- The deferred pension rule in the Foster Wheeler scheme provided for reduced early pensions subject to the employer's consent. That rule, rather than the rule for early retirement from active membership, could be applied to a tranche of pension with a normal retirement age of 65, but modified so that the employer's consent to early payment was not required (although there was no reason to think that the employer would withhold consent, given the reduction that would apply). This would be the analysis with minimum interference with other parties' rights.

The Court of Appeal therefore ruled that the effect of Article 141 for this scheme was that:

- pension earned by women before 16 August 1993, or by men during the *Barber* "window period" of 17 May 1990 to 15 August 1993, has a normal retirement age of 60, and
- pension earned by men before the *Barber* window period, or by men or women after the window period, has a normal retirement age of 65 but can be drawn early with actuarial reduction (or without actuarial reduction if the employer consents), but
- all tranches of pension must be taken at the same time.

Amendment power formality overlooked

In *Walker Morris Trustees Ltd v Masterson*, various changes made to the Yorkshire Chemicals Pension Scheme's benefits between 1981 and 2003 were declared invalid because a formality in the scheme's amendment power had not been complied with.

The amendment power said that no amendment could be made unless the actuary or other trustees' advisers had given a written opinion that members' rights and interests would not be prejudiced. In most cases, no evidence could be found that any such written opinion had been obtained. Those amendments were therefore declared void, even though many of them were meant to improve members' benefits and some had been given a section 67 certificate.

The case was brought to court by independent trustees appointed to the scheme following the employer's insolvency. They needed to know with certainty what members' entitlements were.

The scheme had a deficit and this made it even more difficult to tell which members would ultimately be better off as a result of the court's rulings on the various arguments. The court therefore appointed lawyers rather than representative beneficiaries to put the arguments for and against validity of each amendment.

This case highlights the importance of complying with formal and procedural requirements when making changes to pension schemes.

Pension Protection Fund

Changes to valuation assumptions

In light of recent developments in the buy-out market, the PPF is proposing to change section 143 and 179 valuation assumptions (for PPF levy and PPF entry purposes respectively), "to bring valuation in line with market prices". The changes may, the PPF says, "result in fewer schemes entering the PPF because valuations based on the proposed new assumptions may mean they are able to pay benefits greater than PPF levels of compensation".

The consultation closes on 11 September. It is proposed that the new assumptions apply to valuations with effective dates on or after 31 October 2009. PPF levies for 2011/12 and thereafter may therefore be affected, though there is no indication that the overall PPF levy will be reduced correspondingly.

Consultation on long-term levy future

The Pension Protection Fund is setting up a group of "senior business figures and others to help develop further its proposals for the long-term future of its pension protection levy". It will address issues raised by respondents to the November 2008 consultation (see WHiP Issue 7).

Key aspects of the original proposals were to take account of (a) the risk of the sponsoring employer becoming insolvent within a five year period (not just a one year period, as at present) and (b) the risk to the PPF inherent in the scheme's investment strategy. Whilst there was general support for these proposals, there were concerns about the detail.

Case report:

<http://www.bailii.org/ew/cases/EWHC/Ch/2009/1955.html>

Consultation paper:

http://www.pensionprotectionfund.org.uk/s143_and_s179_assumptions_july_2009_consultation_doc.pdf

Consultation update:

http://www.pensionprotectionfund.org.uk/levy_update_doc_july_2009.pdf

A consultation update has been published. Revised proposals are expected to be published for consultation in early 2010, with any new proposals not being implemented until 2012/13 at the earliest.

Sex equality: comparators and disparate impact

The Court of Appeal has given its decision in *Pike v Somerset City Council and another*.

The Teachers Pension Scheme rules provided that retired teachers who returned to employment could re-join the scheme if they returned full-time but not if they returned part-time. Mrs Pike claimed that this rule indirectly discriminated against women. The question under consideration was who comprised the relevant pool of comparators.

The Court of Appeal confirmed the decision of the Employment Appeal Tribunal (EAT) (see WHiP Issue 6). The EAT had held that the Employment Tribunal was wrong in deciding that the relevant pool was all teachers who were members of the scheme. The EAT held that the correct group for comparison is made up of those with an interest in the rule in question and who may be advantaged or disadvantaged by the operation of that rule. The correct pool therefore comprised members of the scheme who had returned to work after retirement. The evidence showed that the numbers of men and women within that pool were very similar.

Within the pool, 42.45% of the disadvantaged group (those returning to work part-time after retirement) were men and 57.55% were women. This 15% disparity in the disadvantaged group contrasted with a 38% disparity – in favour of men - in the advantaged group (those returning to work full-time after retirement), demonstrating a disproportionate adverse impact on women.

The case now returns to the Employment Tribunal to hear the respondents' defence of justification.

No duty to advise

In *Musawi v Bevis Trustees Limited and Legal and General Assurance Society Limited*, Mr Musawi failed in an appeal against a determination of the Pensions Ombudsman. His complaint was that no one had told him that he lost his right to take a transfer of his BCCI scheme benefits when (a) he took a lump sum in commutation of part of his pension and deferred drawing his residual pension and/or (b) the scheme commenced winding-up.

The High Court agreed with the Ombudsman that there was no duty on either the trustees or Legal and General (with whom the trustees had bought out the scheme's benefits) to have advised Mr Musawi. Their duty was only to take reasonable care that information provided was correct. Here, no incorrect or misleading information had been provided. The same legal duties were applied by the Judge to Legal and General as to the trustees.

The Pensions Regulator

Delegation

Regulations coming into force on 13 November 2009 will give the Pensions Regulator a wide power of delegation. The powers which the Regulator can delegate include the powers to:

- require payment of a penalty
- issue an improvement notice
- issue a third party notice
- recover unpaid contributions
- require the provision of information, and
- vary or revoke a determination, order, notice or direction already issued.

DC schemes

The Pensions Regulator has issued a statement "*Engaged employers and informed retirement choices – key to good outcomes for members of defined contribution (DC) pensions*", targeted at trustees and employers. It "*sets out how the Pensions Regulator ... aims to enable informed member choices at retirement, and improve the quality of employer engagement in DC pension provision*".

Case report:

<http://www.bailii.org/ew/cases/EWCA/Civ/2009/808.html>

Case report:

<http://www.bailii.org/ew/cases/EWHC/Ch/2009/1915.html>

Regulations:

http://www.opsi.gov.uk/si/si2009/uksi_20091888_en_1

Press release:

<http://www.thepensionsregulator.gov.uk/whatsNew/pn09-11.aspx>

The Regulator's guide "*Making your retirement choices: Think before you choose*" has been updated. The Regulator is reviewing retirement processes and literature in a sample of trust-based DC schemes and will report on findings later in the year.

An analysis of "the DC trust-based landscape" has also been published ("*DC Trust: A presentation of scheme return data*").

Trustee knowledge and understanding

Following a consultation (see WHiP Issue 6), the Pensions Regulator has published a report and draft revised code of practice on trustee knowledge and understanding. The draft code has been laid before Parliament and should be in force later in the year. The "Scope guidance" documents have also been revised.

Default retirement age of 65

The Government has announced that its review of the default retirement age of 65 under the 2006 age discrimination regulations will be brought forward a year, to 2010.

Pensions for children over age 23

Regulations will come into force on 1 September 2009, but with effect backdated to 6 April 2006, concerning the payment of pensions to children over the age of 23. The final version differs from the consultation draft (see WHiP Issue 4). The regulations allow pensions to be paid to dependent children who are over the age of 23 in a wider range of situations than previously, without attracting unauthorised payment tax charges.

The relaxation applies principally to children over age 23 caring for an elderly parent, where there is mutual dependence. Scheme rules must have provided for such a pension before 6 April 2006 and entitlement must have arisen, or could have arisen, before 1 July 2008. There is provision for the relaxation to continue where there is a bulk transfer (e.g. a scheme merger or following a corporate transaction).

Pensions Ombudsman/PPF Ombudsman – annual report 2008/09

The Pensions Ombudsman has published his annual report for 1 April 2008 to 31 March 2009. The main headline is that inroads have been made into the backlog of cases. As at 31 March 2009 (with the previous year's figures in brackets), there were 476 (1,413) unresolved cases, 46 (450) over a year old.

The report confirms that there were no successful complaints to the Pension Protection Fund Ombudsman.

TPR guide:

<http://www.thepensionsregulator.gov.uk/pdf/MakingYourRetirementChoicesJuly2009.pdf>

Analysis report:

<http://www.thepensionsregulator.gov.uk/pdf/DCTrustJuly2009.pdf>

Press release:

<http://www.thepensionsregulator.gov.uk/whatsNew/pn09-10.aspx>

Press release:

http://www.hmg.gov.uk/buildingasocietyforallages/press_release.aspx

Regulations:

http://www.opsi.gov.uk/si/si2009/uksi_20091989_en_1

Annual report:

<http://www.pensions-ombudsman.org.uk/Publications/docs/AnnualReport2008-09.pdf>

This and previous issues of WHiP can be found on our website: www.traverssmith.com/?pid=24&level=2&eid=17

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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 and Andrew Block.

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