



What's happening in Pensions

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Pensions Regulator survey of DC schemes

The Pensions Regulator has reported on a survey of pre-retirement literature issued by 97 occupational pension schemes with DC arrangements. Its findings were as follows.

- 98% offered the (legally required) open market annuity option. (The take up rate for this option was 23%.)
- 57% could improve the pre-retirement information they sent to members.
- 30% were considered to have breached the disclosure requirements.
- 6% were referred to the Regulator's casework teams for further investigation in view of "the substantial changes required to their retirement literature or processes".
- Only 25% of DB schemes in the survey with DC AVC arrangements fully complied with the DC retirement disclosure requirements.

The report also cites examples of good practice and poor practice, and reminds readers that issuing the Regulator's booklet "*Think before you choose*" at least six months before expected retirement will ensure compliance with most of the disclosure requirements.

The Regulator is writing to the trustees of 4,500 schemes with DC arrangements highlighting the findings and encouraging them to review the pre-retirement literature they send to their members.

Pension Protection Fund

2009/10 pension protection levy invoices

The Pension Protection Fund ("PPF") has started to issue 2009/10 pension protection levy invoices. Payment is due, and any challenge needs to be made, within 28 days of the invoice date. A booklet, "*A Guide to the Pension Protection Levy 2009/10*" is included with invoices. There are also some FAQs about the 2009/10 levy on the PPF's website.

Consultation on draft amending regulations

The Government is consulting on draft regulations that would:

- modify the calculation of PPF compensation for active members of Career Average Revalued Earnings schemes to reflect the way in which pension benefits are calculated in those schemes;
- introduce the provision allowed by the Pensions Act 2008 to enable the Board of the PPF to charge interest when the pension protection levy is paid late; and
- change the earliest age from which most people can be entitled to payment of PPF compensation from age 50 to 55 to align with the provision in the Finance Act 2004 which changes the minimum pension age from 50 to 55 from 6 April 2010.

The consultation closes on 15 January 2010. It is intended that these changes are brought into force from April 2010.

GMP equalisation

The PPF has issued its response to its April 2008 consultation (see **WHIP Issue 2**) on equalising PPF compensation where there are GMP-related differences in scheme benefits for men and women.

Press release:

<http://www.thepensionsregulator.gov.uk/whatsNew/5137.aspx>

PPF web page:

<http://www.pensionprotectionfund.org.uk/levy/invoicing/Pages/invoicing.aspx>

Consultation document:

<http://www.dwp.gov.uk/docs/ppf-misc-amend-regs-2010-consultation261009.pdf>

Consultation response:

<http://www.pensionprotectionfund.org.uk/News/Pages/details.aspx?itemID=135>

It has decided to follow the legal advice it had obtained from leading counsel and fully equalise compensation in accordance with the requirement in the Pensions Act 2004. (This is a different equalisation obligation from that applicable to trustees and employers.)

Much remains to be decided, in particular how equalisation will be achieved on a practical level. However, the general approach will be to equalise the aggregate, overall benefit rather than each component. The PPF seems to be backing away from saying that trustees must equalise before a scheme can enter the PPF.

PPF updates valuation assumption guidance

The PPF has updated its valuation assumption guidance for both s179 (PPF entry) and s143 (PPF levy) valuations, following its July 2009 consultation (see **WHiP Issue 12**). The originally proposed assumption changes are to be implemented. The new guidance applies to valuations with an effective date on or after 31 October 2009.

Press release:

<http://www.pensionprotectionfund.org.uk/News/Pages/details.aspx?itemID=129>

Age discrimination

Dismissal without consultation to avoid enhanced pension costs

In *Woodcock v Cumbria PCT*, Mr Woodcock was dismissed on grounds of redundancy. It was conceded that his dismissal was unfair, because the statutory procedure had not been followed. He claimed that he had been dismissed on grounds of his age, so as to avoid liability for the enhanced pension payable under the NHS pension scheme to those made redundant aged 50 or over.

Efforts had been made, over a period of about a year, to find him suitable alternative employment. This had been unsuccessful because he was only interested in a high-level position and none was vacant. He was ultimately given his 12 month notice entitlement, expiring less than a month before his 50th birthday.

The Employment Tribunal found as follows.

- The evidence showed that Mr Woodcock's age was a significant factor in the ultimate decision to issue the redundancy notice when it was issued. He had therefore been dismissed because of his specific age, i.e. his impending 49th birthday.
- Although the avoidance of costs is not in itself a legitimate aim for the purposes of objective justification, a "*discriminatory act to avoid an employee receiving a windfall can be a legitimate aim*". Here, the ET considered that there would have been a windfall because he could have been lawfully dismissed for redundancy well before his 49th birthday.
- The way of achieving this legitimate aim was proportionate because efforts were made to find him alternative employment at a level that he would accept. In the meantime the redundancy notice was not served, resulting in an extra year's employment in addition to the 12 month notice period.

Mr Woodcock therefore failed in his claim of unlawful age discrimination. It appears that a key factor was that he was not made redundant because of his age: age was just a factor in determining when the redundancy notice was issued, within a justifiable range of termination dates.

Justification of redundancy policy

In *MacCulloch v ICI plc*, ICI's contractual redundancy policy entitled employees to enhanced redundancy payments calculated by reference to age and length of service (but not based on the statutory scheme, which would have been specifically exempted under the age discrimination regulations). The Employment Appeal Tribunal (see **WHiP Issue 5**) had considered that in principle the following factors could amount to legitimate aims:

- encouraging and rewarding staff loyalty;
- creating a contented and therefore effective, commercially viable work force and business;
- facilitating employee turnover (to prevent "blockages" in career progression); and
- protecting older employees, who might be expected to find it harder to find new employment.

The EAT had referred the matter back to the Employment Tribunal to consider whether the redundancy scheme was a proportionate means of achieving these aims. The ET found that it was, for the following reasons.

- ICI had sought to make the redundancy scheme less discriminatory but the workforce had rejected its proposals because some employees would be worse off. It was therefore not implemented. No one had suggested a better alternative. This was relevant to the legitimate aim of avoiding poor industrial relations.
- A redundancy scheme featuring criteria of length of service linked with age was a proportionate way to achieve the legitimate aim of encouraging and rewarding staff loyalty.
- The redundancy scheme is "*clear, transparent and across the board*" and makes the company viable. Over a long period of time it had enabled ICI to manage change without disruption and maintain industrial relations. This was therefore a proportionate way of enabling employee turnover and providing a payout to older workers who might find it harder to find new employment.

Default retirement age

In connection with its review (see **WHiP Issue 12**) of the default retirement age of 65 under the age discrimination regulations, the Government is asking employers and individuals to submit evidence of how it is operated in practice. The deadline is 1 February 2010.

Delay in processing pension sharing credit was maladministration

Mrs Boughton complained that on receipt of a pension sharing order following her divorce, the scheme administrators and trustees unreasonably delayed the provision of information about the scheme, her options and pension credit, and the payment of her pension credit transfer to Scottish Life.

The Pensions Ombudsman found the administrators liable for maladministration, even though they had performed the necessary actions within the statutory four month implementation period, because they had created unnecessary delay that resulted in financial loss. They were ordered to make good the loss in Mrs Boughton's Scottish Life fund but no award for distress and inconvenience was made.

The trustees were not responsible for the delays, so the complaint against them was not upheld.

Registered pension schemes manual updates

HMRC has updated several pages of the online Registered Pension Schemes Manual. The updates include:

- changes following the 2009 authorised payments regulations (see **WHiP Issue 10**); and
- new pages (previously published – see **WHiP Issue 13**) on the "anti-forestalling" special annual allowance charge.

Pensions Regulator – new valuation summary form

The Pensions Regulator has made changes to the valuation summary form (the form that is sent to the Regulator with a recovery plan). It aligns the requested mortality information with scheme returns and makes other changes to help the Regulator consider recovery plans.

The new form is to be used from 9 November 2009 for valuations with an effective date on or after 22 September 2008. The Regulator's approach to regulating DB schemes will remain unchanged.

Contribution notices after transfers to DC schemes

The Government is consulting on draft regulations setting out how a contribution notice will be calculated if there has been a transfer to a DC scheme. Existing legislation, designed to protect against transfers out to avoid section 75 liabilities, only works if there is a transfer to a DB scheme. The consultation closes on 11 December 2009.

Press release:

<http://www.dwp.gov.uk/newsroom/press-releases/2009/october-2009/dwp054-09-281009.shtml>

Determination:

<http://www.pensions-ombudsman.org.uk/determinations/docs/2009/sep/74851.doc>

Updated pages:

<http://www.hmrc.gov.uk/manuals/rpsmmanual/updates/rpsmupdate271009.htm>

New form:

<http://www.thepensionsregulator.gov.uk/pdf/ValuationSummaryOct09.xls>

Consultation document:

<http://www.dwp.gov.uk/docs/consultation-pen-reg-cont-notice-sum-spec-reg.pdf>

New Deputy Pensions Ombudsman

The new Deputy Pensions Ombudsman (and Deputy Pension Protection Fund Ombudsman) is Jane Irvine. She is to perform the role part-time while also chairing the Scottish Legal Complaints Commission and (from January 2010) the disciplinary board of the Faculty and Institute of Actuaries. A separate Casework Director is to be appointed to fill the remainder of the role formerly performed by the Deputy Pensions Ombudsman.

Press release:
<http://dev2.ntd.co.uk/News/>

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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