



What's happening in Pensions

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Equalising benefits: GMPs

The proposed transfer to Government of the assets of schemes eligible for the Financial Assistance Scheme (FAS) has caused ministers to look into the issue of inequalities arising from GMPs. The Government intends to amend the law concerning the equalisation of benefits that include GMPs. Details have not been announced but it is intended that the regulations will apply to all schemes that hold GMPs, not just FAS-eligible schemes.

In a statement to Parliament, the Pensions Minister Angela Eagle said:

"In the Barber judgment of May 1990 the European Court of Justice ruled that, as occupational pensions are a form of deferred pay, scheme rules must treat men and women equally. The UK Government incorporated this obligation into domestic law in the Pensions Act 1995. A similar obligation was placed on the Pension Protection Fund (PPF) in the Pensions Act 2004 in relation to PPF compensation. In line with the understanding of the ECJ judgment at the time, these provisions apply only where there is a comparator-that is, where more favourable treatment has been afforded to an individual of the opposite sex engaged in comparable work.

As part of the work relating to the draft Financial Assistance Scheme (Miscellaneous Amendment) Regulations recently laid before the House, the Government have been preparing guidance for trustees who are preparing to transfer their scheme assets to government. As part of that work, the Government have considered whether further practical guidance on equalisation for these transferring schemes is desirable, to ensure that payments of assistance do not discriminate between men and women.

The examination of the relevant legislation and case law has led the Government to conclude that where a scheme member has accrued entitlement to a guaranteed minimum pension (GMP) after May 1990, European law requires that any inequality in scheme rules which results from the legislative provisions governing GMPs should be removed, whether or not a person can show that a comparator exists.

The Government intend to bring forward amending legislation when parliamentary time allows. However, in the mean time, it is the Government's opinion that, in order to ensure full compliance with European law, trustees and others should act as if existing domestic legislation requires equalisation in respect of differences resulting from GMPs whether or not real comparators exist."

We have spoken to the DWP about what is proposed. Their concern is that UK law does not, in their view, comply with European Union law. Their primary intention is to provide that a real comparator of the opposite sex need not be identified when equalising GMP-related differences in benefits. It is not clear yet whether the amending legislation will go further than this, e.g. by specifying how those differences must be equalised. We will report further as more detail emerges.

Disclosure of information by email or website

The DWP has published a new consultation paper setting out proposed amendments to the disclosure of information requirements and responding to the March 2009 consultation (see **WHIP Issue 9**). The new consultation closes on 1 March 2010 and the amending legislation is expected to take effect from 1 October 2010.

The concept of principles-based disclosure of information - which had previously been accepted - has been abandoned, as has the proposal to replace specific time limits with "reasonable periods" backed up by a code of practice. Instead:

Hansard extract:

<http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100128-wms0001.htm>

DWP website:

<http://www.dwp.gov.uk/consultations/2010/pen-scheme-disclosure.shtml>

- The draft regulations concentrate on new options for electronic disclosure (i.e. by email and website). Members must be told in writing before any move to electronic disclosure and will be able to choose to continue to receive hard copy documents. Importantly, the proposals only apply to disclosure under the 1996 disclosure of information regulations (and the equivalent regulations for personal pensions), so not all disclosure is covered. For example, early leaver statements, pension sharing on divorce disclosure, and the statutory announcement necessary before a transfer without consent will not be within the electronic disclosure regime (as currently drafted).
- The period for providing basic scheme information is to be reduced from two months to one month, in line with the automatic enrolment requirement (see below). This would take effect from 1 October 2012.
- The requirements for statutory money purchase illustrations will be simplified by allowing members to be referred to websites for certain generic information that currently has to be included within the illustration.

Paid paternity leave

"Additional paternity leave" will be introduced for parents of babies expected on or after 3 April 2011. Fathers will be able to take up to six months' additional paternity leave, by reducing the mother's additional maternity leave correspondingly. Up to three months' additional paternity leave will be paid by "additional statutory paternity pay" in place of additional statutory maternity pay.

Paid paternity leave will need to be treated in the same way as paid maternity leave for pension purposes.

Transfer inducements

Speaking at the NAPF's annual trustee conference, David Norgrove, the chairman of the Pensions Regulator, attacked transfer inducements. He told trustees that they "*should start from the presumption that such exercises and transfers are not in member interests. If a company is willing to encourage the transfer, the company's gain is likely to be the member's loss*".

He added "*There may be individual circumstances that lead some individual members to make a transfer decision based on sound rationale and advice – but in general it is unlikely to be in members' interests to transfer out of a DB scheme*".

It may still be proper for employers to offer inducements (and for trustees to facilitate this) in certain circumstances. However, trustees and employer should take specific legal advice in each case,

At the time of writing, the Regulator's online guidance had not been updated to reflect these statements.

Automatic enrolment and personal accounts

The Government has issued a consultation response and various sets of regulations confirming most of the final details for automatic enrolment and Personal Accounts. The regime will begin in October 2012 and the Personal Accounts scheme will be called "National Employment Savings Trust" (NEST).

The headline change is that the phasing-in period for DC arrangements is extended from three to four years. We will report on the detail at a later date.

Age discrimination: flexible retirement

The DWP has published its response to the consultation (see **WHIP Issue 8**) on draft regulations to exempt specific flexible retirement practices from the age discrimination regulations in certain, limited circumstances. It has decided to abandon its proposal to introduce regulations. It will, however, "*consider the prospects for further general guidance on occupational pension schemes and age discrimination*".

Commencement order:

http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100128_en.pdf

Press release:

<http://www.thepensionsregulator.gov.uk/whatsNew/pn09-20.aspx>

DWP website:

<http://www.dwp.gov.uk/policy/pension-s-reform/latest-news/>

Consultation response:

<http://www.dwp.gov.uk/docs/flexible-retirement-responses.pdf>

Risk sharing: collective DC schemes

The DWP has decided not to proceed any further with collective DC schemes as a new option for risk sharing in occupational pension schemes. The main reasons identified are (a) the risks of inter-generational unfairness (because of cross-subsidies) and (b) the difficulty in fitting collective DC schemes into a category permitted by the EU IORP directive. It had already been decided not to proceed with legislation to allow conditional indexation.

Please see **WHiP Issue 7** for background to this.

Normal minimum pension age

HMRC has issued its Pension Schemes Newsletter 38. It covers the change of normal minimum pension age – the earliest age from which a pension may normally be paid - from 50 to 55 on 6 April 2010. HMRC's views are as follows.

- Pensions in payment on 6 April 2010 to individuals then below age 55 will continue to be authorised payments despite language apparently to the contrary in the Finance Act 2004.
- The first pension instalment (or associated lump sum) does not have to be paid before 6 April 2010 in order for the member to be within the age 50 regime. It is enough that the benefit crystallisation event ("BCE") occurs before then (e.g. the member retires early and opts to take his/her pension). The pension and lump sum will therefore always fall within the same normal minimum pension age regime.
- Due to the Easter weekend, 2 to 5 April are not working days. Members reaching age 50 between 2 and 5 April (inclusive) may not, therefore, have a BCE until 6 April. HMRC will treat the BCE for such people as occurring on their 50th birthday.

HMRC has also published a guide for pension scheme members to the increase of normal minimum pension age to 55 from 6 April 2010, including Q&As and a section on protected pension ages.

Pensions Regulator

Tougher approach on record-keeping

The Pensions Regulator has issued a consultation setting out standards for member records and requiring schemes that fall short to improve their performance. It follows a review of record-keeping in the light of the Regulator's January 2009 "good practice" guidance (see **WHiP Issue 7**) which, the Regulator says, showed no evidence of marked improvement.

The Regulator proposes to select a sample of schemes for data audits and will take action, including the issue of improvement notices and possibly "naming and shaming", where breaches of legislation are found.

The consultation closes on 27 April 2010.

Valuations around 31 March 2009

The Pensions Regulator has added a technical query to its website concerning schemes with a valuation date around 31 March 2009. The question asks whether such schemes may take account of significantly improved investment returns after the valuation date when agreeing the valuation and recovery plan. The Regulator makes the following points.

- The discount rate assumed when determining the scheme's technical provisions must be based on the level of risk that can be tolerated by the scheme.
- The scheme funding legislation permits post-valuation developments to be allowed for in recovery plans and it is reasonable for some schemes to take into account some of the increase in asset value in the recovery plan. Trustees must, however, be acting in members' best interests when doing this.
- There is a choice over whether the schedule of contributions is certified as at the valuation date or the date of certification (with an updated valuation). If actual investment experience is taken into account to justify a reduction in employer contributions, the Regulator asks that this be explicitly stated.

Consultation response:

<http://www.dwp.gov.uk/docs/collective-defined-contribution-schemes-dec09.pdf>

HMRC Newsletter:

<http://www.hmrc.gov.uk/pensionschemes/ps-newsletter38.htm>

HMRC guide:

<http://www.hmrc.gov.uk/pensionschemes/min-pen-age.pdf>

Press release:

<http://www.thepensionsregulator.gov.uk/whatsNew/pn10-03.aspx>

TPR guidance:

<http://www.thepensionsregulator.gov.uk/guidance/schemeFunding/technical/5360.aspx>

Understanding and managing the risks of securities lending

The Pensions Regulator has issued a statement about the risks associated with securities lending (e.g. stock lending). The Regulator has become aware of instances of scheme assets being lent by fund managers on schemes' behalf without the full awareness of the trustees, with inadequate collateral in place to cover the risk. In some cases, the fund manager retains most of the fees charged to the borrower but the trustees bear the risk. The statement outlines key questions for trustees to consider and address with fund managers.

Trustees may wish to check with their fund managers and custodians whether their agreement allows stock lending and, if so, under what terms.

Treatment of deficits in schemes sponsored by price-regulated employers

The Pensions Regulator has issued a statement to trustees of schemes with employers subject to price regulation, for example those in industries providing monopoly infrastructure services. It is intended to make it clear to trustees that periods over which such employers may pass on pension charges to customers are not the same as periods over which pension scheme deficits should be corrected.

There are also some Q&As providing more detail on matters covered by the statement.

Special annual allowance charge

HMRC has issued draft regulations to implement the Pre-Budget Report announcement concerning the applicable rate for contributions that benefit from tax relief at 50% following the introduction of the new 50% income tax band from 6 April 2010 (see **WHiP Issue 15**). As expected, the charge will in most cases recoup 30% of the 50% tax relief obtained on relevant contributions.

Pension Protection Fund

Pension protection levy 2010/11

The Pension Protection Fund has published the 2010/11 Pension Protection Levy policy statement, the final levy determination, levy practice guidance, and various associated documents (including revised forms for contingent assets). The policy statement sets out:

- the aim of collecting an overall levy of £720 million;
- the levy scaling factor of 1.64;
- a risk-based levy cap of 0.5% of liabilities;
- a change to the way probabilities of insolvency for foreign employers are calculated;
- changes to the requirements for certification of block transfers; and
- a 9 April 2010 deadline for the certification of deficit reduction contributions.

The PPF has also published an accompanying statement on insolvency risk. It reflects changes we reported on in **WHiP Issue 15**.

Contingent assets guidance

The PPF has published updated guidance concerning contingent asset certification by this year's 31 March deadline.

Compensation cap

Draft regulations will increase the PPF compensation cap from £31,936.32 to £33,054.09 from 1 April 2010, based on the increase in national average earnings for the year to April 2009.

Financial Reporting Council: 2010/11 levies

The Financial Reporting Council is consulting on its proposed 2010/11 levies, including the levy on pension schemes. The 2010/11 levy is intended to be £3.15 per 100 members (up from £3.10 in 2009/10) with a minimum levy of £31.50. The figures will be finalised once the Pensions Regulator has provided scheme membership data.

TPR statement:

<http://www.thepensionsregulator.gov.uk/pdf/stock-lending-statement-Jan2010.pdf>

TPR statement:

<http://www.thepensionsregulator.gov.uk/pdf/deficits-statement-dec2009.pdf>

<http://www.thepensionsregulator.gov.uk/pdf/QAs-deficits-statement-Jan2010.pdf>

Draft regulations:

http://www.opsi.gov.uk/si/si2010/draft/ukdsi_9780111490464_en_1

PPF levy website:

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

PPF statement:

<http://www.pensionprotectionfund.org.uk/News/Pages/details.aspx?itemID=154>

PPF guidance:

http://www.pensionprotectionfund.org.uk/DocumentLibrary/Documents/Contingent_asset_guidance_Dec09.pdf

Draft regulations:

http://www.opsi.gov.uk/si/si2010/draft/ukdsi_9780111490419_en_1

Press release:

<http://www.frc.org.uk/press/pub2196.html>

Marine pilots litigation

The hearing of a complex pensions case began on 18 January 2010. It involves the Pilots National Pension Fund, which reportedly has a deficit in the region of £200 million.

The PNPf has a unique status with special treatment in tax legislation: it was established as an industry-wide DB occupational pension scheme for marine pilots, who were then all self-employed and taxed under Schedule D. Over time, some pilots became employees of harbour authorities. The PNPf now has some members who have always been self-employed, some who have been both self-employed and employed, and some who have always been employees. Some harbour authorities now employ all their pilots, some authorise but do not employ their pilots, and some do both. Some harbour authorities have now made separate arrangements for their employed pilots and the PNPf reportedly has fewer than 200 remaining active members.

The purpose of the litigation is to clarify the trustee's powers in relation to funding, and the members' and harbour authorities' potential liabilities, under the PNPf's constitution and the Pensions Acts.

The case raises a wide range of questions for decision by the Court. It is likely to be some time before judgement is given. It remains to be seen whether the Court makes rulings that have implications for other schemes.

Pensions Ombudsman: limitation periods

The High Court has overturned the Pensions Ombudsman's decision in *Ralph v Arjo Wiggins Ltd (the Pensions Ombudsman intervening)*, concerning the limitation periods (time limits) applicable to Pensions Ombudsman claims.

The Ombudsman (see **WHIP Issue 10**) had exercised his discretion to accept a complaint that fell outside the statutory limitation periods for claims to the Ombudsman (generally three years) and, perhaps, for claims to the Court (generally six years). The complaint related to advice given to Mr Ralph by his employer, Arjo Wiggins, in 1986 to transfer his benefits to a buyout policy. He became aware that the advice was deficient, at the latest, when he received a statement dated April 2004 but he did not complain to the Ombudsman until July 2007.

The Court held that the Ombudsman had no power to award substantive relief to a complainant whose claim would have been defeated by a limitation defence had it been brought before a court. However, there was no applicable limitation period for "pure maladministration" (i.e. "*bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on; covering the manner in which a decision is reached or discretion is exercised; but not the merits of the decision itself*"). The Ombudsman may therefore award whatever remedy is appropriate for maladministration only.

Terminating accrual: Pensions Ombudsman determination

Mr Barton and 42 other members of the defined benefit SAB WABCO Pension Scheme complained to the Pensions Ombudsman about the closure of the scheme to existing members on 30 September 2005.

A deed of amendment dated 20 April 2006 amended the scheme rules to the effect that all active members would "*cease to be Eligible Employees and leave the scheme*" as at 30 September 2005. The definition of Eligible Employee was "*a person who is regarded by the Principal Employer as being in pensionable employment...*".

The scheme's amendment power specifically allowed retrospective amendments but said that no alteration shall be made which in the scheme actuary's opinion would "*reduce the aggregate value of the retirement benefits payable under the Scheme in respect of contributions already received by the Trustees*" except with member consent.

Mr Barton appears to have conceded that the employer and the trustees had power to terminate pensionable service, but it is not clear on what basis. However, he argued that the restriction in the amendment power prohibited the termination of accrual at least as regards the ongoing final salary link applicable to the accrued DB benefits.

The trustees argued that it was not the exercise of the power of amendment that broke the salary link but rather the termination of their pensionable service that followed on from the members ceasing to be Eligible Employees (as defined) when the employer stopped regarding them as being in pensionable employment.

In a short determination, the Pensions Ombudsman agreed with the trustees.

Case report:

<http://www.bailii.org/ew/cases/EWHC/Ch/2009/3198.html>

Determination:

<http://www.pensions-ombudsman.org.uk/determinations/docs/2009/dec/74532.doc>

Trustees under no duty to review benefit levels

In *Power v Open Text (UK) Ltd Group Life Assurance Scheme Trustees*, a member had died and his death benefit lump sum beneficiary sued the trustee (which was also the employer) over the level of cover provided under his life assurance scheme.

Mr Hyland's life cover was restricted by the earnings cap in accordance with pre-A Day HMRC limits on benefits for approved pension schemes. At A Day, greater life assurance benefits (subject to the lifetime allowance) became permissible but transitional regulations continued to apply the earnings cap. Ms Power argued that the trustee was under a duty to have considered increasing the life assurance cover.

The Court held that, having agreed the terms of the trust, the trustee was under no immediate obligation to consider whether the terms should be changed. It was not required to put itself into a position where it was able to form a view as to whether the level of cover was appropriate.

The intention behind the scheme, from an appraisal of the scheme rules, was that it was for the employer, not the trustee, to determine the level of cover. However, there was no evidence that the employer had acted in breach of its implied duty of good faith to its employee in not reviewing the level of cover and there was no higher duty than that applicable. In any event, the duty did not extend to potential beneficiaries.

Commissions on GPPs, stakeholder pensions and SIPPs

The FSA is proposing that providers of group personal pensions, stakeholder schemes and self-invested personal pensions should not be allowed to pay commission to consultants who advise employers about providing such schemes for their employees.

This would mean in practice that employers will have to pay fees to their consultants instead.

Notional earnings cap for 2010/11

HMRC has confirmed the notional earnings cap for the year beginning 6 April 2010 as £123,600. This is the last year for which HMRC will announce the figure: trustees of schemes with rules that continue to operate an earnings cap after 5 April 2011 will be able to calculate it themselves using the pre-determined statutory formula.

Inheritance tax on overseas pension schemes

The Finance Act 2008 extended, to UK tax-relieved pension savings held in overseas pension schemes, the protection against inheritance tax provided to benefits under UK registered pension schemes. New regulations specify the criteria for an overseas scheme to qualify for this protection.

Perpetuities and Accumulations Act 2009

The Perpetuities and Accumulations Act 2009 will come into force on 6 April 2010. It applies a perpetuity period of 125 years to new trusts generally but exempts occupational pension schemes, personal pension schemes and public service pension schemes (in much the same way as existing law). Please see **WHIP Issue 15** for more details. There may be issues for death benefit trusts for children: please ask us to advise if you are considering setting one up.

FSA consultation:

http://www.fsa.gov.uk/pubs/cp/cp09_31.pdf

HMRC announcement:

<http://www.hmrc.gov.uk/pensionschemes/earns-cap-1011.htm>

Press release:

http://www.opsi.gov.uk/si/si2010/uksi_20100051_en_1

Commencement order:

http://www.opsi.gov.uk/si/si2010/uksi_20100037_en_1

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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