



What's happening in *Pensions*

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Electronic disclosure of information

The Disclosure of Information Regulations are amended from 1 December 2010 to allow trustees to comply with disclosure requirements under the regulations by sending information by email and/or by reference to a website. Members as at 1 December 2010 must be told in writing before any move to such forms of disclosure and may choose to continue to receive hard copy documents. There are detailed requirements in the amended regulations for the content of notices about disclosure using a website.

This change only applies to items covered by the Disclosure of Information Regulations, for example basic scheme information (of the kind usually included in the scheme booklet), benefit statements and the annual report. Trustees cannot currently move to electronic disclosure for things such as:

- early leaver statements;
- transfer value quotations;
- pension sharing or earmarking notices;
- consultation of members in relation to "listed changes"; and
- notices regarding the selection of member-nominated trustees or directors.

The Government is, however, considering extending the electronic disclosure facility in due course.

At the same time, the requirements for statutory money purchase illustrations are simplified by allowing members to be referred to websites for certain generic information that currently has to be included in the illustration.

The proposed change (see **WHIP Issue 16**) to the requirement to disclose basic scheme information within one month rather than two (in line with the automatic enrolment requirement) has been removed but seems likely to be included in other regulations before October 2012.

Amending regulations:
<http://www.legislation.gov.uk/ukSI/2010/2659/contents/made>

Consultation response:
<http://www.dwp.gov.uk/docs/pen-scheme-disclosure-consultation-response.pdf>

Pensions Regulator: DC matters

The Pensions Regulator has issued various materials relating to DC pension arrangements.

Investment Governance Group (IGG): "Investment governance principles for DC schemes"

The IGG (which is associated with the Pensions Regulator) has issued governance principles for DC schemes. They are intended to apply to both trust-based and contract-based DC arrangements.

An earlier draft (see **WHIP Issue 17**) had been criticised for failing to recognise the distinctions between occupational and personal pension schemes, particularly regarding the role of the employer. The final version fudges that issue by referring to "decision makers" and leaving it to those involved to decide who that means in their circumstances.

"Talking to your employees about pensions"

This updated guide, issued jointly with the Financial Services Authority, is intended to tell employers what they can and cannot say to employees about pensions. It takes account of FSA rules and of potential legal liability issues with regard to giving advice.

"Making your retirement choices: think before you choose"

This is an updated guide for occupational pension scheme members with DC benefits (even if they are only AVCs or transfer credits) who are approaching retirement. It focuses on the benefits of the open-market option for annuities, which the Regulator is keen to promote.

DC Trust: A presentation of scheme return data

This "snapshot of the trust-based DC pensions landscape" analyses scheme return data from DC occupational pension schemes.

Pensions Regulator: other matters

Employer-related investment

The Pensions Regulator has issued a statement on employer-related investment (ERI).

In recent times, employers have been using assets such as real property and intellectual property rights to help fund their pension scheme, often by use of a special purpose vehicle in which the scheme trustees hold an interest. If there is any concern that such a funding arrangement might amount to unlawful ERI, the Regulator expects the agreement with the trustees to include alternative funding (e.g. cash) as an underpin (though the Regulator does not have power to require this). The Regulator also expects both it and scheme members to be informed of these funding arrangements.

As regards collective investment schemes whose underlying investments are now caught by the ERI legislation (which now include certain CISs which were previously exempt - see **WHIP Issue 21**), trustees are expected to manage indirect ERI "in a reasonable and proportionate way". They are also expected to ensure "as far as possible" that they do not breach the restrictions. It is suggested that where an unintentional breach occurs, trustees who remedy the breach within a reasonable time frame will not be penalised by the Regulator.

Guidance on multi-employer schemes and employer departures

The Pensions Regulator has finalised its guidance for trustees of multi-employer DB schemes about what can happen when an employer leaves the scheme, or when an employer group is restructured, after 5 April 2010. There are no significant changes from the consultation draft (see **WHIP Issue 20**).

Pensions Regulator: Purple Book 2010

The 2010 edition of the Purple Book has been published jointly by the Pensions Regulator and the Pension Protection Fund. It focuses on the risks faced by DB pension schemes, predominantly in the private sector.

DWP Business Plan 2011-15

The Department for Work and Pensions (DWP) has published its Business Plan for 2011 to 2015 and intends to update it annually. Most of the pensions elements are already known but the following are of interest.

- The Pensions and Savings Bill will be introduced in January 2011. The Bill is only mentioned in the context of changes to state pension age: there is no mention in the Business Plan of section 251 of the Pensions Act 2004 (concerning the notices and resolutions needed to preserve rights to make payments to employers – see **WHIP**

IGG principles:

<http://www.thepensionsregulator.gov.uk/about-us/principles-igg-dc.aspx>

TPR/FSA guide:

<http://www.thepensionsregulator.gov.uk/docs/tpf-fsa-guide-for-employers.pdf>

Press release:

<http://www.thepensionsregulator.gov.uk/press/pn10-20.aspx>

Press release

<http://www.thepensionsregulator.gov.uk/press/pn10-19.aspx>

Press release:

<http://www.thepensionsregulator.gov.uk/press/pn10-21.aspx>

Guidance:

<http://www.thepensionsregulator.gov.uk/guidance/multi-employer-schemes-and-employer-departures.aspx>

Consultation response:

<http://www.thepensionsregulator.gov.uk/docs/multi-employer-consultation-response.pdf>

The Purple Book:

<http://www.thepensionsregulator.gov.uk/docs/purple-book-2010.pdf>

DWP Business Plan:

http://www.number10.gov.uk/wp-content/uploads/DWP_FINAL2.pdf

Issue 22) or of any assistance for schemes to switch from RPI to CPI for revaluation and/or pension increases (see **WHIP Issues 21** and **22**).

- Regulations to remove the default retirement age of 65 for age discrimination purposes (see **WHIP Issue 20**) will come into force in April 2011.
- The latest review of the employer debt legislation (see **WHIP Issue 17**) is due to be completed by October 2011.

Age discrimination: cost as objective justification

The Employment Appeal Tribunal (EAT) has upheld the Employment Tribunal's decision (see **WHIP Issue 14**) in *Woodcock v Cumbria Primary Care Trust*. This case concerns the use of cost as a factor in objectively justifying an act that is discriminatory on grounds of age.

Mr Woodcock was dismissed on grounds of redundancy. The dismissal was conceded to be automatically 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 an 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 (ET) had 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*". The ET had 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 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.

The EAT upheld the ET's decision and found that making someone redundant because his or her position was redundant was a legitimate aim in itself and that the avoidance of an unearned windfall was too.

Although the EAT made comments on cost avoidance as a factor in objective justification that were not essential to the decision, they seem to have been made with a view to ETs applying them in appropriate cases. The EAT said that:

"... as a matter both of principle and of common sense, considerations of cost must be admissible in considering whether a provision, criterion or practice which has a discriminatory impact may nevertheless be justified; and we see no reason to take a different view in the context of the justification of (what would otherwise be) direct age discrimination. But we find it hard to see the principled basis for a rule that such considerations can never by themselves constitute sufficient justification or why they need the admixture of some other element in order to be legitimised."

This is the first time that cost has been recognised as a potential objective justification in itself.

Vesting and other pension qualification periods

Advocate General Juliane Kokott of the Court of Justice of the European Union has given another (see **WHIP Issue 22**) controversial opinion, this time in the case of *Casteels v British Airways plc*. If the Court follows her opinion, there could be issues for UK schemes when members transfer between EU member states whilst working for the same employer.

Mr Casteels had worked for British Airways (BA) in various EU member states since 1974. He worked for BA in Germany for a little less than three years (November 1988 to October 1991) and then moved to a position with BA in France (and then Belgium)

Case report:

http://www.bailii.org/uk/cases/UKEAT/2010/0489_09_1211.html

Advocate General's opinion:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009C0379:EN:HTML>

and left the German occupational pension scheme. His German scheme benefits did not vest because one of the requirements for vesting was three years' membership. He claimed that the vesting rule was in contravention of an Article of the EU Treaty concerning freedom of movement and that his entire period of continuous employment with the same employer in various EU member states should count.

The Advocate General's opinion was as follows.

- The vesting rule impeded Mr Casteels' freedom of movement and could not be justified.
- Private individuals cannot invoke the principle of freedom of movement in the Treaty against their employers because the Article is not specific enough to create such a right.
- National courts must interpret and apply domestic law in conformity with the requirements of EU law. How to do so is a matter for the national court but the Article *"requires, with regard to the completion of qualification periods, that the entire duration of the employee's employment with the same employer at his establishments in various Member States be taken into account"*. If this is not possible, the national court would have to disapply the provision of the agreement that denied him a vested pension.

The Advocate General's role is to advise the Court how it should decide the case. Advocate Generals' opinions are accepted more often than not but there have been notable exceptions.

BT Pension Scheme litigation: "solvency" and "liability"

This case (*BT Pension Scheme Trustees Ltd v BT and BIS*) concerns a Crown guarantee, which most private sector schemes do not have. It was not disputed, however, that the guarantee existed: the case was about the meanings of the terms "solvency" and "liability" / "liabilities", so it is of wider interest.

The winding-up rule in the BT Pension Scheme ("BTPS") says that the scheme funds *"together with such sums as may be due from [BT] to restore the solvency of the Fund"* shall be applied in a specified order of priorities.

When BT was privatised in 1984, under the Telecommunications Act 1984, the State became *"liable on the commencement of the winding up [of BT] to discharge any outstanding liability of [BT] which vested in that company"* by virtue of the Act. Section 60 of the Act said that *"all the ... liabilities to which [pre-privatisation] British Telecommunications was ... subject"* immediately before privatisation vested in the privatised BT.

It was argued by the trustee of the BTPS that the words quoted above from the winding-up rule imported an obligation to contribute and that this applied on a buyout basis. BT accepted this but the Government did not. The trustee also argued that the Crown guarantee applied to this obligation in respect of both pre- and post-privatisation joiners. The BTPS is not a segregated fund so there was a possibility that any payment under the guarantee would have benefited post-privatisation joiners even if it did not apply to liabilities in respect of them.

The Crown guarantee issue has arisen primarily in the context of eligibility for the Pension Protection Fund: to the extent that a Crown guarantee applies, the BTPS is not required to pay a pension protection levy. As the BTPS is the biggest private sector pension scheme in the UK, the levy liability is very significant. The Crown guarantee might also amount to unlawful state aid under EU law.

The High Court held as follows:

- In the context of a winding-up rule requiring the buying of annuities, "solvency" meant the ability to meet the liabilities that applied at the time, i.e. on a buyout basis. In part, this decision was based on the scheme's derivation from the civil service scheme where, as an unfunded scheme guaranteed by Government, members enjoyed a very high degree of security. But *"the absence of any likely alternative meaning"* was also convincing.
- The Crown guarantee applied to the liabilities in respect of members who joined the BTPS after the privatisation as well as those who joined before then: *"the liability is a single, indivisible liability. The obligation, in legal terms, remained the same either side of the transfer date. The same is true of the liability. Its quantum is measured differently from time to time, but in legal terms the liability is the same"*.
- Although there was evidence that the Government at the time did not intend to guarantee pension obligations to future BTPS joiners, the language of the Act was

Case report:

<http://www.bailii.org/ew/cases/EWHC/Ch/2010/2642.html>

not sufficiently ambiguous, nor the result sufficiently absurd, to give the Act the meaning which the Government said was intended.

In a statement, BT said that "*A further hearing is expected to resolve some outstanding points of detail*". BT is reportedly (Financial Times, 22 October 2010) considering whether the ruling means that the Pensions Regulator has no jurisdiction to intervene over the scheme's ongoing funding. The Government is considering an appeal.

Miscellaneous amendment regulations

The Government is consulting on draft amending regulations. The following changes (among other, very minor changes) are proposed, to take effect from 6 April 2011.

- An employer in a multi-employer scheme who proposes to make a "listed change" need not notify the other scheme employers if it employs all the affected members itself. It still needs to consult the affected members, of course. This is relevant to industry-wide pension schemes in particular.
- The maximum Fraud Compensation Fund levy that may be demanded is increased from 23p to 75p per member. This levy is not always raised. It has been raised only in 1997, 2005 and 2010 (at 23p). It is raised by the PPF and collected by the Pensions Regulator.
- Actuarial guidance note GN16 (on bulk transfers without consent) will soon be withdrawn and replaced by principles-based guidance. The Government is therefore moving requirements for the certification procedure and the form of certificate into regulations.
- Similar changes are made in respect of actuarial guidance note GN28 (on reference scheme test certification).

The consultation closes on 10 January 2011.

State pension age

The Government has published a report confirming the changes to state pension ages announced in the recent Spending Review. Please see **WHIP Issue 22** for details.

The report also has a short section on integrated pensions (i.e. schemes with bridging pensions or state pension offsets). It is noted as follows.

- Some schemes have bridging pension rules that refer to age 65 whilst others refer to state pension age. The latter will find their liabilities increasing when state pension age rises. The Government will consider consultation responses further and look at ways of helping employers and trustees to make rule amendments.
- In the same context, the provision of the Finance Act 2004 which qualifies a pension with a bridging element as a "scheme pension" for authorised payments purposes refers to age 65 rather than to State Pension Age. HMRC will be amending this reference and will consider related issues that were raised in response to the consultation.

HMRC Newsletter

HMRC has published its 42nd Pension Schemes Newsletter. The following points are of interest.

- HMRC will no longer answer questions about the Finance Act 2004 under Code of Practice 10 (COP10). This is the Code that sets out how and when HMRC will give information and advice, including formal answers to questions, about tax legislation. The usual time limit for doing so is four years from the date Royal Assent is given to the relevant statute. For the Finance Act 2004, this was extended by two years in 2008 (see **WHIP Issue 4**) but there will not be a further extension.
- The four sections (Technical, Member, Scheme Administrator and Employer) of the online Registered Pension Schemes Manual (RPSM) will be merged, with individuals and scheme administrators, rather than pension professionals, as the new target audience. The current RPSM will remain available online via the National Archives website but will not be updated once the consolidation has been performed.
- HMRC will be looking at cases where contributions stop being paid to a registered pension scheme and are paid to an EFRBS instead, when considering whether annual allowance anti-avoidance provisions apply. This comment seems to apply to

Consultation:

<http://www.dwp.gov.uk/consultations/2010/occ-pen-regs-2010-consultation.shtml>

DWP report:

<http://www.dwp.gov.uk/docs/cp-nov10-spa-66-full-document.pdf>

Newsletter:

<http://www.hmrc.gov.uk/pensionschemes/ps-newsletter42.pdf>

the special annual allowance (see **WHiP Issue 12**) as well as to the reduced annual allowance (see **WHiP Issue 22**).

European Commission green paper: Government response

The UK Government has responded to the European Commission's consultation on pensions proposals (see **WHiP Issue 20**). These included a question whether the "Solvency II" directive (which applies to insurance companies) should be applied to "IORP"s such as occupational pension schemes (it "*could be a good starting point, subject to adjustments to take account of the nature and duration of the pension promise, where appropriate*"). The Pensions Minister is quoted as saying:

"We fully support creating a robust and sustainable single market for insurance, but we don't believe the new capital solvency requirements [for insurance companies] should be applied to occupational pensions."

Additional paternity leave

The Government has confirmed that the right to additional paternity leave will come into force next year as originally planned. Fathers of babies due, or matched for adoption, on or after 3 April 2011 will be able to take up to six months' additional paternity leave in addition to the current entitlement of one or two weeks. The right applies not only to biological fathers, but also to the spouse, civil partner or partner of the mother. It also applies in relation to adoptive couples.

Paid paternity leave must be treated in the same way as paid maternity leave for the purposes of pension contributions and accrual.

Key features of the new right are that:

- it applies only to employees with at least 26 weeks' service who, apart from the mother, expect to have the main responsibility for the child's upbringing;
- the leave must be at least two weeks and no more than 26 weeks long and can only be taken if the mother has returned to work or ended her maternity leave;
- the earliest the leave can start is 20 weeks after the child's birth;
- the leave will be paid at the statutory rate but only if taken when the mother would otherwise be entitled to statutory maternity pay or maternity allowance, and only if the father has normal weekly earnings no less than the lower earnings limit; and
- both parents will be required to certify the father's eligibility to his employer.

General and PPF administration levies

The Government has confirmed that the General Levy and the PPF Administration Levy will be frozen at their current levels for 2011/12. They have not been increased since 2008/9.

Press release:

<http://www.dwp.gov.uk/newsroom/press-releases/2010/nov-2010/dwp155-10-121110.shtml>

UK Government consultation response:

<http://www.dwp.gov.uk/docs/ec-pensions-green-paper-uk-gov-response.pdf>

BIS web page:

<http://www.bis.gov.uk/policies/employment-matters/strategies/paternity-leave>

Ministerial statement:

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101115/wmstext/101115m0001.htm#101115200010>

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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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