TRAVERS SMITH

What's happening in Pensions

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Unisex factors: European Court decision

The Court of Justice of the European Union has given its decision in the *Test-Achats* case on unisex insurance premium and annuity rates.

The Court ruled that EU Member States must require insurance companies to offer insurance contracts on unisex terms by 21 December 2012. The judgment will affect annuity purchase by members of DC pension schemes and has implications for the use of sex-based actuarial factors by DB schemes.

Please see our briefing note "**Unisex actuarial factors and annuities**" for details and **WHiP Issue 22** for further background.

CJEU web page:
http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-236/09

Pensions Bill

A new Pensions Bill has been introduced in the House of Lords. It contains (among other things) provisions on the following.

- The use by private sector occupational pension schemes of CPI instead of RPI as the measure of price inflation for revaluation and pension increase purposes. Please see our briefing note "**Use of CPI instead of RPI**" for details.
- The need (or otherwise) for notices and trustee resolutions in relation to payments to employers. Please see our briefing note "**Payments to employers: new Pensions Bill**" for details.
- State pension age changes. Please see **WHiP Issue 22** for details.
- Modifications to the automatic enrolment regime. Please see **WHiP Issue 22** for details.

Pensions Bill:
http://services.parliament.uk/bills/2010-11/pensionshl.html

Annual allowance

Pension input periods

In **WHiP Issue 24**, we reported that there is a short window of opportunity for trustees retrospectively to nominate pension input period end dates before the Finance Bill removes the possibility. It had been thought (based on earlier HMRC materials) that the deadline for doing this would be 5 April 2011. HMRC, however, has now said that in its view trustees may retrospectively nominate pension input period end dates at any time before the Bill receives Royal Assent. It is anticipated that this will be on 1 July 2011 but it might be sooner.

Option to require schemes to pay the charge

Following a recent consultation (see **WHiP Issue 24**), the government has announced in a consultation response that for the tax year 2011/12 onwards:

- There will be no option for individuals to defer payment of the annual allowance charge until their benefits come into payment.
- Individuals with an annual allowance charge of more than £2,000 will be able to elect for their pension scheme (whether DB, DC or hybrid) to pay the full charge for them if their pension input to that scheme exceeded the annual allowance. The scheme will then become jointly and severally liable to pay that part of the charge which relates to the pension input to the scheme in question in excess of the annual allowance. The corresponding benefit reduction will have to be *"just and reasonable having regard to normal actuarial practice"*.

  Where the individual has not exceeded the annual allowance by virtue of pension input to any one scheme, he or she will not be able to require any scheme to pay any of the charge. The consultation response says that schemes may nevertheless agree to do so but the draft legislation does not appear to cater for this. This might, however, be dealt with by later amendments to section 91 Pensions Act 1995 (prohibition on surrender etc. of benefits).

Draft Finance Bill clauses have been published. Comments on these are requested by 17 March 2011.

Information requirements

Draft regulations have been published requiring trustees to give members information relevant to the new annual allowance. The consultation closes on 31 March 2011.

They will require scheme administrators (normally the trustees) to provide information automatically to members whose scheme pension input amounts exceed the annual allowance, and on request to other members. They also cover the information that must be provided by employers to scheme administrators to enable them to calculate pension input amounts. In particular:

- where an individual has pension input in a scheme that exceeds the annual allowance, the scheme administrator must notify the individual of that amount, and the pension input amounts for the three previous years, by the 6 October after the relevant tax year;
- individuals may request their pension input amount for a tax year, which must be provided (free of charge once a tax year) within three months of the request or (if later) by the 6 October after the relevant tax year; and
- for schemes with defined benefit, cash balance or hybrid arrangements, employers must provide information to the scheme administrator about members' service and pensionable remuneration by 6 July each year. If the employer misses this deadline, the deadline for the scheme administrator to provide information to the member will be extended beyond 6 October accordingly.

The deadlines for 2012 will be extended by 12 months (i.e. to the same dates in 2013) to allow time for new systems to be put in place. For the 2011/12 tax year, individuals will have to estimate their pension inputs and then confirm the figures to HMRC later.

Ministerial statement:
http://www.hm-treasury.gov.uk/d/wms_pension_tax_summary_responses030311.pdf

Consultation response:
http://www.hm-treasury.gov.uk/d/pensions_benefits030311.pdf

Draft Finance Bill clauses:
http://www.hmrc.gov.uk/budget-updates/pensions-tax-relief.pdf

HMRC announcement:
http://www.hmrc.gov.uk/pensionschemes/aa-info-regs-note.htm

Contracting-out

Rebates

Contracting-out National Insurance rebates for DB schemes will be reduced from April 2012, following a Government Actuary Department report as part of the scheduled five-yearly rebate review. The rebate will be reduced by 0.5%: the employer rebate will be reduced from 3.7% to 3.4% of band earnings and the employee rebate will be reduced from 1.6% to 1.4%. The cost to the employer of providing scheme benefits will therefore increase by 0.5% of active members' band earnings.

Press release:
http://www.dwp.gov.uk/newsroom/press-releases/2011/feb-2011/dwp014-11.shtml

GAD report:
http://www.dwp.gov.uk/docs/gad-review-2011.pdf

GMP increase order

The draft GMP increase order for 2011 has been published. The order specifies 3% as the percentage by which GMPs in payment that are attributable to the tax years 1988/89 to 1996/97 are to be increased.

Under the Pension Schemes Act 1993 the percentage to be specified is the actual percentage increase in the general level of prices (now CPI) in the period under review or 3%, whichever is less. The CPI increase was 3.1% for the relevant period, so the switch from (currently higher) RPI to CPI has in fact made no difference this year (except to the government, which in most cases pays an increase to the state pension to compensate for the excess over 3%).

Draft order:
http://www.legislation.gov.uk/ukdsi/2011/9780111506165

GMPs and sex discrimination

Government proposals

The government has issued a note confirming its position, after taking further legal advice, that European law requires equalisation for GMP-related inequalities, whether or not actual comparators exist. The government intends to legislate accordingly. Please see our briefing note "**Equalisation of benefits that include GMPs**" for details.

PPF and FAS

The PPF has issued a new consultation on addressing GMP-related inequalities for schemes in PPF assessment periods (or already in the PPF or Financial Assistance Scheme). It proposes that the overall pensions should be equalised, making a comparison with someone of the other sex who is otherwise identical. The comparison need be made only once, not annually. The consultation paper recognises that this method will not necessarily be appropriate for schemes that are not in a PPF assessment period.

The consultation closes on 21 March 2011. See **WHiP Issues 2** and **14** for details of the previous consultation.

Press release:
http://www.pensionprotectionfund.org.uk/news/pages/details.aspx?itemID=208

Non-registered schemes: "Disguised remuneration"

We reported in **WHiP Issue 24** that the government is proposing to introduce "disguised remuneration" legislation as part of the Finance Act 2011. This is intended to prevent employers and employees avoiding or deferring tax and/or national insurance charges through the use of employee benefit trusts and other similar vehicles.

There has been widespread criticism of the breadth of the legislation. In response to the consultation, the government has issued a set of "frequently asked questions" explaining how the legislation is intended to operate and what amendments they intend to make to the Finance Bill as a result.

Assuming that the government's policy intention is accurately translated into legislation:

- The disguised remuneration legislation will not apply to:
  - contributions paid to registered pension schemes;
  - contributions paid to non-UK schemes which fall into the definition of "relevant non-UK scheme". A "relevant non-UK scheme" is, broadly, a scheme which attracts UK tax relief on contributions made to it; or
  - unfunded employer-financed retirement benefit schemes ("EFRBS").
- The disguised remuneration legislation will apply to:
  - contributions made to a funded ERFBS; or
  - EFRBSs which are unfunded but where the promise to pay benefits is backed by security or by the hypothecation of any asset (however informally).

A number of features are still unclear and we will report further in due course. In particular, the proposals in relation to secured EFRBS are not practical in their current form.

Draft Finance Bill 2011 clauses:
http://www.hmrc.gov.uk/budget-updates/autumn-tax/tiin2675.htm

Ministerial statement:
http://www.hmrc.gov.uk/budget-updates/autumn-tax/wms-aa.htm

HMRC FAQs:
http://www.hmrc.gov.uk/budget-updates/disguised-remuneration-faqs.pdf

Abolition of default retirement age

Draft regulations, followed by a corrected version, have been published relating to the abolition of the default retirement age of 65 from 6 April 2011 (see **WHiP Issue 24**). From 6 April 2011, these regulations will remove the right of employers to dismiss employees who reach age 65 (or their normal retirement age, if later) without the need

Corrected draft regulations:
http://www.legislation.gov.uk/ukdsi/2011/9780111507735

for objective justification.

There are transitional provisions allowing employers to require employees to retire at age 65 (or their normal retirement age, if later) after 6 April 2011 if they have notified them of their retirement before then.

The draft regulations will allow employers to withdraw risk benefits (e.g. life assurance, medical insurance and permanent health cover) from age 65 (or an employee's state pension age if later) but these provisions too are badly drafted:

- Withdrawing a risk benefit at any other age will not qualify for this specific exemption (and so would have to be objectively justified).
- Only insurance or "related financial services" (not defined) are covered, so "self-insured" occupational pension schemes may not be specifically protected by the drafting as it stands.

Employer debt legislation

The government has issued a discussion paper on possible amendments to the "section 75" employer debt legislation. It was issued to a very limited audience: if amendments are to be taken forward, there will be a public consultation.

The discussion paper explores the possibility of avoiding the triggering of section 75 debts in multi-employer schemes where group guarantees are in place for the scheme, which would allow more complex group restructurings than the "one to one" restructurings currently catered for by the legislation. Guarantees by non-associated companies would be permitted.

It also considers extending the period of grace whereby an employer can avoid triggering a section 75 debt when it ceases to employ active members but intends to do so again in the next 12 months and in fact does so. The proposal is to give trustees a discretion to agree a period of grace of up to 24 (or perhaps even 36) months.

Contribution notice: Bonas Group Pension Scheme

Case report:
http://www.bailii.org/uk/cases/UKUT/TCC/2011/B3.html

In **WHiP Issue 19**, we reported that the Pensions Regulator's Determinations Panel had authorised the Regulator to issue its first contribution notice to Michel Van De Wiele NV ("MVDW") in the sum of £5.089 million. This was the amount needed to fund the Bonas scheme on the PPF valuation basis.

MVDW is appealing against the contribution notice decision. As a preliminary matter, the Upper Tribunal (Warren J presiding) was asked to strike out the Regulator's defence to that appeal on the grounds that it stood no reasonable prospect of success.

Warren J dismissed the application on the basis that it could not be said that the Regulator had no reasonable prospect of success in defending the proceedings. However, he said that he had "*serious reservations about whether the Regulator has a sustainable case that the amount to be specified in any contribution notice should be anything like the figure of £5.089 million which the Panel determined*". This was on the basis that the acts resulting in the contribution notice, being:

- "*walking away without engaging openly with the Trustees or the Regulator*";
- "*minimising the sum paid by Michel Van De Wiele NV for the buyback of the Bonas business*"; and
- "*retaining the business while avoiding the ongoing liabilities*"

would reasonably seem to call for a contribution of no more than £100,000 (subject to the Regulator bringing forward further evidence). The figure should, Warren J thought, represent the loss to the scheme resulting from the acts in question rather than the whole funding deficit, but the matter will be examined by the full Tribunal in due course.

The Regulator's Determinations Panel had refused to authorise a contribution notice against Mr Beauduin, MVDW's chairman. The Tribunal ruled that it had no power to overturn that decision: the scheme's trustees had not appealed it and the Regulator was unable to do so itself.

Regulatory differences between occupational and personal schemes

Consultation:
http://www.dwp.gov.uk/consultations/2011/personal-pensions.shtml

The government has issued a call for evidence on regulatory differences between occupational and personal pension schemes that could undermine the policy intentions of automatic enrolment. The government is concerned that employers may choose an occupational pension scheme over a contract-based arrangement (or NEST), to the

detriment of employees. It is looking in particular at the following areas.

- **Short service refunds**

  Occupational pension schemes can give members who leave within two years of joining, and who do not exercise (or do not have) a right to a cash transfer sum, a refund of their own contributions, keeping the employer's contributions and recycling them for other purposes. Personal pension schemes have immediate vesting for all contributions. If there is evidence of a high risk that occupational schemes' ability to make contribution refunds will reduce individuals' pension savings, the facility could be withdrawn. Another option (not mentioned in the government's paper) could be to extend the right to a cash transfer sum (currently available to members with at least three months' pensionable service) to all members.

- **Trivial commutation**

  There has already been an HM Treasury call for evidence on early access to pension savings (see **WHiP Issue 24**). This raised the prospect of relaxing the trivial commutation rules for personal pensions, which are less flexible than those for occupational pension schemes because there is no option to commute de minimis amounts (up to £2,000) - see **WHiP Issue 10**.

- **Disclosure of information**

  The government is considering harmonisation of disclosure rules for occupational and personal pension schemes.

The call for evidence closes on 18 April 2011 and the government expects to respond in the autumn.

In this context, the government has also published a report of research exploring (a) the use of vesting and contribution refund rules and (b) default investment options in occupational pension schemes.

Press release:
http://www.dwp.gov.uk/newsroom/press-releases/2011/mar-2011/dwp023-11.shtml

Age discrimination: objective justification

Leave to appeal to the Supreme Court has been granted to Mr Seldon in his age discrimination claim (see **WHiP Issue 20**) against Clarkson, Wright & Jakes. The case concerns a partner in a law firm who was forced to retire at age 65. The default retirement age ("DRA") does not apply to partners in a partnership. The firm successfully defended the claim in the Employment Tribunal, Employment Appeal Tribunal and Court of Appeal, relying on objective justification. Since the DRA is now being abolished for employees, this case may attract wider interest.

Pension Protection Fund

Pension protection levy: 2012/13 onwards
The PPF has confirmed its intention to change the pension protection levy framework from 2012/13 in the way previously proposed (see **WHiP Issue 22**):

Press release:
http://www.pensionprotectionfund.org.uk/news/pages/details.aspx?itemID=209

- Barring exceptional circumstances, the PPF intends to fix levy rules for three years at a time.
- The new formula will give more weight to a scheme's funding level and will for the first time take account of investment risk, these being matters that are more in the levy payers' control.
- To increase stability, it proposes to use average measures for underfunding and insolvency risks (averaged over five years and 12 months respectively) so that temporary changes in the scheme's funding level or an employer's insolvency risk score will not disproportionately affect the scheme's levy bill.
- Dun & Bradstreet failure scores of 1 to 100 will be grouped into six bands. Levy rates will then vary depending on the band rather than the specific failure score. A consequence of this is that credit for a "Type A" guarantee will be given only if the guarantor is in a higher band than the scheme's sponsoring employer. If the score is better but in the same band, there will be no credit given.

More details are to follow.

2011/12 pension protection levy: block transfer guidance
The PPF has published guidance for calculating and certifying block transfers in relation to the 2011/12 pension protection levy. The deadline for certification of full transfers is 5pm on 30 June 2011.

Press release:
http://www.pensionprotectionfund.org.uk/news/pages/details.aspx?itemID=214

Compensation cap and levy ceiling

Final and draft orders (respectively) have been issued to increase the PPF compensation cap and overall levy ceiling from 1 April 2011. The compensation cap will increase by 0.5% from £33,054.09 to £33,219.36. The maximum amount of compensation to a capped member at age 65 will then be £29,897.42.

Orders:
http://www.legislation.gov.uk/ukdsi/2011/9780111506240/contents

http://www.legislation.gov.uk/ukdsi/2011/9780111506202/contents

http://www.legislation.gov.uk/uksi/2011/169/contents/made

Public sector transfers: "Fair deal"

The government has issued a consultation on its "Fair deal" policy, which relates to the treatment of pension rights when staff are transferred to a private sector employer in connection with an outsourcing of a government function. The policy means that employers are required to provide a broadly comparable pension scheme and to enable a bulk transfer of past service benefits on favourable terms.

Press release:
http://www.hm-treasury.gov.uk/press_28_11.htm

The consultation paper asks if there is a case for changing or ending the policy. A review of public sector pensions led by Lord Hutton (see **WHiP Issue 22**) reported that a relaxation or abolition of the policy could lead to a broader range of bidders and providers for the provision of public services but that there was also a need to retain good employment practices. Comments are requested by 15 June 2011.

Pensions Regulator

DC schemes

The Pensions Regulator has issued a discussion paper on *"enabling good member outcomes in work-based pension provision"* in DC schemes, looking at *"appropriate contribution decisions, appropriate investment decisions, efficient and effective administration, protection of assets, value for money, [and] appropriate decumulation decisions"*. The Regulator is looking for views by 22 April 2011 as to how it can best be involved in these areas.

Discussion paper:
http://www.thepensionsregulator.gov.uk/docs/dc-discussion-paper-2011.pdf

The paper questions the ability of many small schemes to meet the required standards, suggesting that using NEST (or a private sector alternative) will in many cases be a preferable option.

Scheme administration

The Pensions Regulator has launched an education drive on scheme administration.

Press release:
http://www.thepensionsregulator.gov.uk/press/pn11-05.aspx

"In the coming weeks the regulator will be:

- *Publishing a guide to assist trustees when talking to their administrators about achieving good quality data*
- *Publishing a statement detailing what trustees should expect of their auditors around record-keeping*
- *Publishing research on how our record-keeping guidance has been taken up, and the implications for record-keeping and administration*
- *Reiterating our expectations for schemes that are winding-up and setting out new examples of best practice which show that the process can be completed within two years*
- *Highlighting to trustees and administrators how engaging with NISPI can help them complete work around winding-up and contracting-out more effectively."*

Automatic enrolment

The Pensions Regulator has updated its very basic April 2010 guide for employers on automatic enrolment (see **WHiP Issue 18**) in the light of changes covered by the Pensions Bill. It intends to issue the following in the coming months:

Press release:
http://www.thepensionsregulator.gov.uk/press/pn11-01.aspx

- detailed guides for professional advisers, intermediaries and large employers (Spring 2011);
- guides for small and micro employers (Summer 2011); and
- details of the compliance and enforcement strategy (later in 2011).

HMRC

Normal minimum pension age

Two draft statutory instruments have been published relating to the increase of normal minimum pension age to 55 from 6 April 2010 as it affects (or does not affect) members

HMRC announcement:
http://www.hmrc.gov.uk/pensionschemes/norm-min-pension-age.htm

who transfer between arrangements. See **WHiP Issue 24** for background.

DC income drawdown tables

HMRC is changing the tables to be used from 6 April 2011 to calculate the maximum permitted income drawdown levels from DC arrangements. This is to take account of the changes to the current unsecured pension and alternatively secured pension regime (see **WHiP Issue 24**) that will take effect on that date.

HMRC announcement:
http://www.hmrc.gov.uk/pensionschemes/gad-tables.htm

Loss of unreduced pension on transfer: Ombudsman decision overturned

Case report:
http://www.casetrack.com/ct4plc.nsf/items/0-504-3221

In *Cubic (UK) Limited v Weale*, the High Court has overturned a Pensions Ombudsman determination that a member was entitled to an unreduced early retirement pension without consent following a transfer of his benefits.

Under the BTR Scheme, Mr Weale was entitled to an unreduced early retirement pension from age 60 without having to obtain anyone's consent. When that scheme was closed, he agreed to a transfer from the BTR Scheme to the Cubic Scheme, following an announcement which said that the Cubic Scheme would provide *"comparable benefits"* and *"as closely as possible the same main benefits as the BTR Scheme although there are certain changes"*. It also said *"It is the Trust Deed and Rules that will establish your entitlement to benefit"*.

The Cubic Scheme, however, offered unreduced early retirement pensions from age 60 only with trustee and employer consent. When Mr Weale tried to claim an unreduced early retirement pension, it was refused.

The Pensions Ombudsman had found that the employer and trustees could not refuse an unreduced pension. The High Court judge found this *"insupportable in law"*. He found that there was no clear and unambiguous representation to Mr Weale and that he had not relied on any such statement in any event. He also held that there was no contractual term or promise that Mr Weale would be entitled to benefits that were equivalent overall. An objective observer would conclude that the contract was made on the basis that benefits would be determined in accordance with the trust deed and rules of the Cubic Scheme.

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

Hyperlinks in this document can be clicked via an up to date version of Adobe Acrobat Reader. We are not responsible for the contents of external websites to which we provide links.

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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