TRAVERS SMITH

What's happening in Pensions

Issue 26 ***May 2011***

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Tax regime changes: Finance Bill

The new Finance Bill was published on 31 March 2011. It includes the draft clauses previously issued (see **WHiP Issues 24** and **25**) but with some important modifications. The Government also issued a consultation response on annual and lifetime allowance issues and the Registered Pension Schemes Manual has been updated to reflect the changes to the annual allowance regime that are due to apply from 6 April 2011.

The noteworthy changes are as follows.

Annual allowance: pension input periods
For new arrangements only, default PIPs are aligned with the tax year (subject to a drafting error being corrected). There will be more flexibility for trustees to align pension input periods with the tax year or scheme year: the Bill will allow current and future PIPs to be longer than 12 months. Please see our briefing note **"Pension input periods"** for details.

HMRC's Pension Schemes Newsletter 46 outlines how HMRC thinks that valid PIP end date nominations can be made. It says:

"HMRC accepts that a valid nomination for a particular PIP end date is made where the pension scheme administrator provides notice of this in a form that is available to all members. This may be achieved, for example, by setting out the nominated date in the pension scheme rules, in the pension scheme handbook made available to all members, or by a notice placed on the pension scheme's (or in the case of an occupational scheme on the employer's) internet site. Provided the notice is made in this way, there is no requirement to send a letter to each and every member telling them of the nominated date.

It is a matter for schemes to determine whether they have a nominated date and what that nominated date is. If no nomination has been made then the statutory default rules will apply.

Finance Bill:
http://services.parliament.uk/bills/2010-11/financeno3.html

Consultation response:
http://www.hm-treasury.gov.uk/d/pensions_tax_relief_sup_doc_fb2011.pdf

RPSM changes:
http://www.hmrc.gov.uk/manuals/rpsmmanual/updates/rpsmupdate290311.htm

HMRC Newsletter:
http://www.hmrc.gov.uk/pensionschemes/ps-newsletter46.pdf

In some circumstances, a scheme member may nominate their own PIP end date. The member is required to give the scheme notice of this nominated date. As evidence of this, we would expect the scheme to have retained whatever communication the member sent them by way of nomination. If the scheme does not have any, the scheme can assume the scheme PIP applies."

This suggests that HMRC thinks that an "evergreen" PIP end date nomination is effective (ie that a new nomination is not required for each tax year in order to stop members with DC arrangements making their own). It also says that nominations can be notified by simply including them in scheme rules, but we think this is wrong.

Annual allowance: severe ill health pensions
The criteria for qualifying for an annual allowance charge exemption when retiring on grounds of ill health have been relaxed, but only slightly. The difference is that the ill health must now be expected to last until at least state pension age, rather than for ever. There is still a requirement that the member becomes entitled either to a serious ill-health lump sum (i.e. in commutation of the whole pension) or to an early retirement pension:

"in consequence of the scheme administrator having received evidence from a registered medical practitioner that the individual is suffering from ill-health which makes the individual unlikely to be able (otherwise than to an insignificant extent) to undertake gainful work (in any capacity) before reaching pensionable age".

Annual allowance and special annual allowance: refunded contributions
When a member's contributions are refunded so as to avoid the special annual allowance charge, that amount of pension saving is now excluded from the pension input for annual allowance purposes.

Annual allowance: "scheme pays" option for high charges
The "scheme pays" clauses, which will allow members with annual allowance charges over £2,000 to require schemes to pay the charge out of their benefits (see **WHiP Issue 25**), now ensure that members' benefits cannot be reduced below the GMP level (if applicable).

The Government will now have power to increase the £2,000 threshold by regulations.

There will also be a power to make regulations to override scheme rules to allow them to pay AA charges when required by law. Regulations will be issued in due course.

In Pension Schemes Newsletter 46, HMRC has acknowledged that members who retire between 6 April 2011 and the date of Royal Assent (expected to be late June or early July) will not be able to use the "scheme pays" facility.

HMRC Newsletter:
http://www.hmrc.gov.uk/pensionschemes/ps-newsletter46.pdf

Lifetime allowance: fixed protection
The Bill clarifies how pension input under DB and cash balance schemes is to be calculated for members with "fixed protection" (see **WHiP Issue 24**) against the reduced (£1.5 million) lifetime allowance that will apply from 6 April 2012. The consultation response also clarifies that:

- the maximum authorised pension commencement lump sum for members with fixed protection will be 25% of £1.8 million (rather than £1.5 million); and
- members with both enhanced protection and lump sum protection will not see their protected lump sum reduced; but members with primary protection will.

Areas where no help is offered
The consultation response confirms that no further legislative assistance will be given in respect of annual allowance charges:

- triggered by the granting of discretionary benefits;
- in respect of pensions whose value later falls (e.g. after a temporary promotion, reduced pensionable bonuses, or a scheme winding up in deficit);
- due to late retirement uplifts (other than by reference to a percentage specified in the scheme rules as at 14 October 2010, where there is no issue); or
- where there is non-uniform accrual.

It also confirms that, when a bridging pension forms part of the member's entitlements, it must be valued for annual allowance purposes using the standard 16x factor, even though the bridging pension is not payable for life.

Disguised remuneration (EFRBSs)
There are changes to the "disguised remuneration" provisions of the Bill, concerning EFRBSs (and employee benefit trusts, etc). HMRC has updated its FAQs (see **WHiP Issue 25**).

Updated FAQs:
http://www.hmrc.gov.uk/budget-updates/march2011/drl-faq.pdf

Security given to trustees in respect of individual unfunded EFRBSs will be taxed under the disguised remuneration provisions. This will apply regardless of whether the security is intended to be used to provide the benefit. (For most secured unfunded EFRBSs, the employer intends to pay the benefits itself and have the security eventually released.)

New FAQ 34 says that, for a funded DB EFRBS, "*so long as the assets and liabilities of a relevant third person providing defined benefits are both genuinely separate and pooled, then it is probable there would be no earmarking*". In other words, funded DB EFRBSs for more than one member are probably not caught by the disguised remuneration tax charges. (NB funded EFRBSs are generally not tax efficient in any event.)

Although this FAQ is only about funded DB EFRBSs, security provided in respect of unfunded DB arrangements applicable to more than one member may similarly not be caught. This is on the basis that there is no earmarking of any asset in respect of any one member.

Flexible drawdown of pensions

Draft regulations

HMRC has issued three sets of draft regulations on flexible drawdown. These follow the removal of the requirement to annuitise at age 75, allowing a member to take uncapped drawdown of benefits as long as he or she has "relevant income" of at least £20,000 from other sources. The regulations prescribe:

- that the following are not "relevant income":
    - DB and DC scheme pensions where the scheme has fewer than 20 pensioner members (the figure 20 is in square brackets)
    - payments of variable lifetime annuity or dependant's annuity to the extent that they exceed the minimum guaranteed amount
- the information to be provided to HMRC by the scheme administrator in respect of members taking advantage of the flexible drawdown provisions; and
- the information to be included in a valid declaration to the scheme administrator that the member meets the flexible drawdown conditions.

Draft regulations:
http://www.hmrc.gov.uk/budget-updates/march2011/pensions-annuitise.pdf

Draft guidance

Draft guidance on income and lump sum drawdown has been published by HMRC.

Draft guidance:
http://www.hmrc.gov.uk/budget-updates/march2011/pensions-draft-guidance.pdf

Non-residents: changes to extra-statutory concessions

HMRC has issued announcements on two extra-statutory concessions ("ESC"s) in connection with Finance Bill changes.

- ESC A10 broadly gives relief from taxation on lump sums received from an EFRBS or section 615 trust (a scheme for workers living and working overseas) where some or all of it relates to service outside the UK while the individual was not UK resident. HMRC has announced that ESC A10 is withdrawn in respect of lump sums paid by a third party (e.g. a trustee of an EFRBS) within the "disguised remuneration" provisions of the Finance Bill. This will apply only to accrual or earmarking on and after 6 April 2011. ESC A10 will continue to provide relief from taxation for lump sums paid directly by the employer.
- ESC A11 broadly provides that an individual who is resident in the UK for only part of a tax year is chargeable to income tax only by reference to his or her period of UK residence. (Tax legislation does not otherwise recognise residence for part of a tax year.) HMRC has announced that ESC A11 will not apply to uncapped drawdown payments (see above) from 6 April 2011. Otherwise, members could effect the drawdown when not UK resident and avoid UK income tax charges.

HMRC announcement:
http://www.hmrc.gov.uk/budget-updates/march2011/pensions-esc-a10a11.pdf

Early access to pension savings

Following its recent call for evidence (see **WHiP Issue 24**), the Government has decided not to proceed with allowing early access to pension savings. It may, however, revisit this if research shows that people are opting out of automatic enrolment because they do not want to tie up savings in a pension.

Over the coming months, the Government will explore how new savings models, such as feeder funds, could be facilitated within the existing pensions tax framework as a

Press release:
http://www.hm-treasury.gov.uk/press_43_11.htm

means of encouraging saving.

The consultation report recognises that there is widespread support for extending the wider trivial commutation rules that apply to occupational pension schemes to personal pensions. There will be a further announcement in due course.

HMRC regulations: lump sums and minimum pension ages

Regulations:
http://www.legislation.gov.uk/uksi/2011/732/contents/made

http://www.legislation.gov.uk/uksi/2011/733/contents/made

The Government has laid:

- The Taxation of Pension Schemes (Transitional Provisions) (Amendment) Order 2011; and
- The Registered Pension Schemes (Transfer of Sums and Assets) (Amendment) Regulations 2011.

These regulations correct some defects in the tax legislation, particularly to ensure that tax charges do not arise as regards:

- protected pension commencement lump sums of more than 25%:
    - where the member dies between receiving the lump sum and the first pension payment being made; and
    - where the lump sum is payable from different arrangements (eg including AVCs) if the corresponding pensions start within six months of the lump sum being paid (or the member dies during that period)
- the protection of a normal minimum pension age lower than 55:
    - where the benefits come into payment at different times, so long as they all come into payment within a six month period (or the member dies during such period);
    - for members whose pensions started before 6 April 2010 and those who became entitled to a lump sum before 6 April 2010 but were paid it on or after that date; and
    - where the member transfers from one scheme to another or from one annuity provider to another.

State pension reform

DWP consultation:
http://www.dwp.gov.uk/consultations/2011/state-pension-21st-century.shtml

The Government has issued a consultation on reform of the state pension system. The two alternative proposals are summarised as follows.

*"**Option 1: Faster flat rating***

Currently the basic State Pension is a flat-rate payment worth £97.65 a week and the State Second Pension is partly flat rate and partly linked to earnings, such that higher earners receive a higher state pension. Option one would accelerate the pace of existing reforms so that the State Second Pension would became flat rate by 2020 instead of the early 2030's. This would give people a clearer idea of the state pension they would get in retirement as they would receive a set amount of pension for each qualifying year. At the end of transition, all those with a full contribution record, for example 30 qualifying years, would build up the same state pension, currently estimated at around £140 a week, albeit through two tiers.

It would be possible to go further by ensuring all earners built up the same pension, better aligning the detailed rules of entitlement between the basic State Pension and State Second Pension, and using the same uprating for the two pensions when in payment. This would further simplify the system and increase the number of people receiving the full pension. The precise value of this combined, flat-rate pension would need to be set at a level that met the affordability principle."

Under this option, DB contracting-out would continue. There is no detail given as to how NIC rebates and the reference scheme test might be affected.

*"**Option 2: Single tier***

Option 2 would be a more radical approach to state pension reform, combining basic State Pension and State Second Pension into one single-tier state pension. Future pensioners with at least 30 qualifying years would receive the same flat-rate pension currently estimated at £140 a week – with this payment being set above the basic level of support provided by Pension Credit.

Under this option, contracting out for Defined Benefit schemes would end. In itself, this

could ultimately bring simplification of the personal tax system. The complexity associated with contracting out would, however, continue during transition to the single-tier pension."

Although, under this option, DB contracting-out would end, an offset would apply to the single tier state pension to take account of part of the state benefit being paid by the contracted-out pension scheme, ie the part attributable to the period of contracting-out. It is recognised that employee and employer NICs would increase and that employers might face difficulties in reducing scheme benefits to recoup the additional NICs and take account of the higher state pension. No further detail is given.

The consultation paper also proposes two options for determining future increases to state pension age. These are:

- automatically, through a formula linked to life expectancy; or
- following reviews conducted at regular, pre-determined intervals.

Comments are requested by 24 June 2011.

Pensions Regulator

Corporate Plan and Business Plan

Press release:
http://www.thepensionsregulator.gov.uk/press/pn11-09.aspx

The Pensions Regulator has published its Corporate Plan for the next three years, including a more detailed Business Plan for 2011-12. The Regulator's key activities over the next three years will be:

- *"Ensuring employers, intermediaries and advisers have the information needed to understand their new pension duties by publishing a series of guides, as well as simple, web-based tools suitable for smaller employers unfamiliar with pension provision.*
- *Publishing details of our automatic enrolment strategy which will set out how we aim to maximise compliance with the new employer duties, minimising the administration burden on employers whilst ensuring that they understand that they need to comply.*
- *Continuing to raise governance standards, working with administrators, auditors and other service providers to improve standards in record-keeping and wind-ups.*
- *Building on our recent DC discussion paper to ensure that DC schemes are designed to deliver good outcomes for savers.*
- *Revisiting our strategy on DB funding, including assessing how we will treat the increasing number of closed DB schemes that are maturing rapidly.*
- *Considering whether different DB segments may require more tailored approaches, standards or guidance.*
- *Using our resources as efficiently and effectively as possible through closer working with other organisations and regulators.*
- *Continuing to react effectively to market developments, ensuring we direct our resources in the areas of greatest risk to members, educating and enabling the industry to respond to changes and improve, and reducing the risk of calls on the Pension Protection Fund."*

Administration

Press release:
http://www.thepensionsregulator.gov.uk/press/pn11-08.aspx

The Pensions Regulator has published a guide setting out *"Five simple steps to better scheme administration"*.

Pension Protection Fund: strategic plan

Press release:
http://www.pensionprotectionfund.org.uk/news/pages/details.aspx?itemID=219

The PPF has published its 2011 strategic plan, setting out its priorities and objectives for the next three years.

Age discrimination: default retirement age

Regulations:
http://www.legislation.gov.uk/uksi/2011/1069/contents/made

From 6 April 2011, regulations have removed the right of employers to dismiss employees who reach age 65 (or their normal retirement age, if later) on the grounds that they have reached retirement age, without the need for objective justification (see **WHiP Issue 24**).

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

The regulations 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:

- withdrawing a risk benefit at any other age will not qualify for this specific exemption and so would have to be objectively justified; and
- only insurance or "related financial services" (not defined) are covered, so "self-insured" occupational pension schemes would seem not to be specifically protected by the drafting as it stands and might have to rely on objective justification arguments.

Miscellaneous amendment regulations

Regulations:
http://www.legislation.gov.uk/uksi/2011/672/made

Consultation response:
http://www.dwp.gov.uk/docs/occ-pers-pen-amend-regs-2010-response.pdf

Following an earlier consultation (see **WHiP Issue 23**), the Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2011 have been laid. They made the following changes from 6 April 2011.

- An employer 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 schemes in particular.
- The maximum Fraud Compensation Fund levy that may be demanded is increased from 23p to 75p per member. (This is not always levied. It has been levied only in 1997, 2005 and 2010/11 (at 23p). It is levied by the PPF and collected by the Pensions Regulator.)
- Actuarial guidance note GN16 (on bulk transfers) is being withdrawn and replaced by principles-based guidance. The Government is therefore moving requirements for the certification procedure and the form of certificate into regulations. A problem with the original drafting (concerning changes which do not effect benefits made after the certificate but before the transfer) has been addressed.

Proposed changes to the contracting-out regulations concerning the replacement of GN28 with principles-based guidance have been put on hold while the Government considers detailed technical comments.

A consultation response has also been published.

Public service pensions: Hutton report

Report:
http://www.hm-treasury.gov.uk/indreview_johnhutton_pensions.htm

Lord Hutton's Independent Public Services Pension Commission has published its final report, proposing changes to public service pensions. The key proposals, which the Commission suggests should be implemented from 2015 (i.e. before the end of the current Parliament), were as follows.

- Final salary benefits for future service should be replaced by career average (CARE) (with an accrual rate to be determined – but the report gives a steer towards 1/60ths). Revaluation for active members should be by reference to average earnings. There is no recommendation as to the revaluation method for deferred pensions.
- Revaluation and pension increases should continue to be uncapped.
- Past service final salary benefits should retain their salary link (on an individual basis) and the existing normal pension age.
- An individual's normal pension age for the new CARE accrual should be linked to his or her state pension age, but with a normal pension age of 60 for those with one currently lower than that.
- There should be a ceiling on employer contributions of a proportion of pensionable pay.

Budget Report:
http://cdn.hm-treasury.gov.uk/2011budget_complete.pdf

In its March Budget report, the Government accepted the Commission's recommendations as a basis for consultation with public service workers. It will set out its proposals in the autumn. The Chancellor added that there should be no "cherry-picking" by either side.

Employer duty of good faith

Case report:
http://www.bailii.org/ew/cases/EWHC/Ch/2011/960.html

The High Court has ruled, in a case concerning the Prudential Staff Pension Scheme, on the duties of employers in connection with discretionary benefit decisions.

The scheme rules gave Prudential a discretion over non-statutory pension increases. There had been a long history of granting uncapped RPI increases to pensions in payment. In 2005, however, the Prudential announced that it would, from then on, cap increases at 2.5% pa. The trustees asked the High Court to rule on whether this was consistent with the employer's duty of good faith towards its employees and former employees and whether Prudential was estopped (or prevented) from changing its policy as a result of the long history of uncapped increases.

The Court had some sympathy with the members' disappointment but found that Prudential was entitled to change its policy. Its discretion was not subject to any express restriction. The implied duty of good faith did not require Prudential to act "reasonably" or "fairly", and Prudential was entitled to act in its own interests. Prudential had not acted in an irrational or perverse way. There was therefore no breach of the duty of good faith.

The evidence did not reveal any promise, let alone a clear or unequivocal promise, to give uncapped increases: the scheme documentation and communications made it clear that increases were discretionary. For that reason, and because there was no evidence that anyone had relied on receiving uncapped increases, the estoppel arguments failed too.

Case on the rule in Hastings-Bass

Case report:
http://www.bailii.org/ew/cases/EWCA/Civ/2011/197.html

The Court of Appeal has considered the application of the rule in Hastings-Bass in the appeals of *Pitt v Holt* and *Futter v Futter*. It has allowed HMRC's appeals in both cases, declaring first instance decisions in other similar cases to have been wrong.

The Court summarised the so-called rule in Hastings-Bass as follows:

"Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account."

However, it declared this to be an incorrect statement of law. Cases of this kind must, the Court said, be split into two categories:

- Those where, for example because of an inadvertent misunderstanding of the position, an act done by trustees in the exercise of a dispositive discretion is not within the scope of the relevant power. If so, it is automatically void.
- Those where the trustees have acted within the scope of their power. If they have done so in breach of a fiduciary duty (for example they have not taken into account a relevant factor or have taken into account an irrelevant factor) then their disposition is voidable (at the instance of the beneficiary). Otherwise, it stands.

In the Court's view, the rule in Hastings-Bass applies only to the second category. Lloyd LJ said:

"The trustees' duty to take relevant matters into account is a fiduciary duty, so an act done as a result of a breach of that duty is voidable. Fiscal considerations will often be among the relevant matters which ought to be taken into account. However, if the trustees seek advice (in general or in specific terms) from apparently competent advisers as to the implications of the course they are considering taking, and follow the advice so obtained, then, in the absence of any other basis for a challenge, I would hold that the trustees are not in breach of their fiduciary duty for failure to have regard to relevant matters if the failure occurs because it turns out that the advice given to them was materially wrong. Accordingly, in such a case I would not regard the trustees' act, done in reliance on that advice, as being vitiated by the error and therefore voidable."

HMRC's appeals in both cases were allowed.

- In *Futter v Futter*, the trustees had acted entirely properly and sought tax advice. That advice had been wrong. Their resulting decision was not void, because it was within the trustees' powers; and it was not voidable at the instance of a beneficiary because, having taken advice, the trustees had not breached any fiduciary duty.
- In *Pitt v Holt*, again the trustee had acted within the scope of her powers and she had taken advice from various parties, at least one of whom should have identified an inheritance tax issue (but none did). She had not, therefore, acted in breach of her fiduciary duty and so her decision was not voidable.

The Court went on to consider its equitable jurisdiction to set aside a voluntary transaction for mistake. It found that such a transaction may only be set aside for a mistake about the legal effect of the transaction or as to an existing fact which is basic to the transaction. It held that fiscal (including tax) consequences are not effects and are not, therefore, enough to have the disposition set aside. The mistake must also be of sufficient gravity to justify the donor being able to recall his or her gift.

The Court's ruling will make it more difficult for trustees to reverse regretted decisions about the exercise of their discretionary powers (at least, if they took professional advice) and will increase the exposure of negligent professional advisers.

Vesting and other pension qualification periods

ECJ decision:
click here

The European Court has given its decision in *Casteels v British Airways plc*, concerning freedom of movement and pension vesting periods.

Mr Casteels had worked for British Airways in various EU member states since 1974. He had worked for BA in Germany for a little less than three years (November 1988 to October 1991) and then moved to a position with the same company in France and then Belgium and left the German pension scheme. His German occupational pension scheme benefits did not vest because one of the requirements for vesting was three years' membership. He therefore claimed that the vesting rule contravened the EU principle of freedom of movement and that his entire period of continuous employment with the same employer in various member states should count.

The Court ruled that:

- the vesting rule impeded Mr Casteels' freedom of movement and could not be justified; and
- years of service completed by a worker for the same employer in establishments in different EU member states pursuant to the same "coordinating" contract of employment must be taken together when determining entitlement to workplace pension benefits.

Scheme amendment formalities

Case report:
http://www.bailii.org/ew/cases/EWHC/Ch/2011/485.html

In *Capita ATL Pension Trustees Ltd v Gellately*, concerning the Sea Containers pension scheme, equalisation and other changes (including as to the member contribution rate) had purportedly been made by announcements to members, when the scheme documentation required deeds of amendment. The scheme rules' definition of normal retirement date (NRD) set out ages for normal retirement but included the proviso *"except … where otherwise agreed by the Employers and the Trustees"*. The trustees had administered the scheme on the basis of the announcements.

The relevant questions before the High Court were:

- *"whether there was a free-standing power (contained in the definition of NRD) to change NRD by agreement"; and*
- *"whether those members who signed and returned the acknowledgement form annexed to the December 2005 announcement were bound by its terms, either by contract or estoppel".*

It was accepted (and the judge agreed) that the announcements were not adequate to satisfy the requirements of the scheme amendment power and that there were no estoppel or contract-based arguments in respect of members who had not returned acknowledgement forms.

The Court held as follows.

- Following *Capital Cranfield Trustees Ltd v Beck* (see **WHiP Issue 8**), the power to agree a different NRD could not prevail over the formal requirements of the amendment power where the proposed change to NRD was of general application. *"It is inherently most improbable that the parties ever contemplated the possibility of making changes, across the board, to something as basic as NRD for all members, without having to comply with the formalities prescribed in [the amendment power]"*.
- There was no contractual agreement because members would not have understood the announcement to be an offer which would give rise to a concluded contract, binding them to accept its terms, if they signed and returned the attached form. This is because:
    - the announcement said it was "*a brief summary of the changes*" and that presentations would be held to explain the changes fully;

- the statement in the announcement that the scheme's "*formal documents*" would prevail over anything in the announcement indicated that the 1995 announcement was not itself a formal document;
- the announcement asked members to return the form "*as soon as possible*" rather than waiting until after the explanatory presentations;
- it was entirely unclear who the parties to any contract were meant to be: the principal employer issued the announcement and covering letter but many of the members were employed by other participating employers, and the trustees were apparently not involved in the issue of the announcement;
- there was no need for members to consent under the scheme rules and the changes were purportedly implemented even though few of the members had apparently returned the forms; and
- the only consent expressly given by returning the form was to the deduction of higher contributions from pay.

- For the same reasons, there was no estoppel: the only representation that members made by returning the form was that they understood the preliminary information contained in the announcement and that they agreed to the deduction of contributions at the new level if and when the scheme was validly amended. There was no detrimental reliance on statements made by the trustees or principal employer because valid amendments were never in fact made.

Accordingly, the Court found that the changes had not been validly made and therefore there had been no change in NRDs or increase in members' contributions. The Court therefore ruled as follows:

- Members who had overpaid contributions should have the overpayments refunded with compound interest at 5.3% per annum (Bank of England base rate plus 1%) added. The judge was satisfied that this "rough justice" approach was justified by the administrative convenience of applying a single rate regardless of the relevant period. Underpayments of pension should also be corrected, with interest added in the same way.
- The trustees were entitled not to reclaim repayments amounting to no more than £10,200 from three widows, due to the distress it would cause and because it might not be a cost-effective exercise.

Pensions Ombudsman: Compensation for distress and inconvenience

Following the High Court ruling in *City and County of Swansea v Johnson* (1998), the Pensions Ombudsman should award more than £1,000 for distress and inconvenience only in exceptional circumstances. Two recent determinations are illustrations of what the Ombudsman considers to be exceptional.

Mrs Lane worked for Odeon as a general cinema manager. Due to long-term illness she asked that Odeon consider her request for early retirement and an enhanced pension. She was given an incorrect quotation of that benefit and there were failures to respond to requests and to inform her of the error when it was discovered. She ultimately retired on less than half the pension she had been expecting.

Determination:
http://www.pensions-ombudsman.org.uk/determinations/docs/2010/nov/75903.doc

The Trustee considered the scheme administrator to have been at fault and offered to pay £1,000 compensation to Mrs Lane for distress and inconvenience. The Pensions Ombudsman acknowledged that due to her ill health there would not have been other options except early retirement, so she had not relied on the wrong information to her detriment. He felt, however, that Odeon had been equally responsible for providing wrong information and failing to respond to requests: it should therefore also pay her £1,000 to compensate her for her disappointment. This award, effectively of £2,000, reflected "*the unusual and extreme circumstances of this case*".

Mr Lambden, a policeman, was given wrong information about his deferred pension when he rejoined the police force. He applied to link his separate periods of service together but the result was overstated by more than four years. He had planned to move to New Zealand (where his wife had moved already) in his retirement and did so, retiring when he thought he had 25 years' service, which would have qualified him for an unreduced early retirement pension. Over the years, conflicting information was given, some of which Mr Lambden said he did not receive or did not notice.

Determination:
http://www.pensions-ombudsman.org.uk/determinations/docs/2011/feb/74315.doc

When a correct statement of a much lower benefit was sent (without explanation of the discrepancy), he withdrew his retirement notice but was signed off sick by his doctor in

Auckland on grounds of depression and anxiety apparently caused by the realisation that his pension was much lower than expected. The police force withdrew its agreement to the rescission of his retirement notice.

Whilst the Ombudsman had some sympathy with the argument that Mr Lambden could have noticed the mistake, he found that he had not in fact noticed it. However, he also found that, as he had not checked information in a pre-retirement letter that specifically asked him to do so, he could not rely on the incorrect information contained in it. But there was maladministration in (a) providing incorrect information and (b) not softening the blow when it was corrected, and Mr Lambden had relied on incorrect information provided before planning his move to New Zealand.

Since he had made plans to move to New Zealand and had suffered considerable, medically-evidenced distress, the circumstances were highly exceptional. The Ombudsman therefore awarded him £5,000 for distress and inconvenience.

VAT on investment management services

The First Tier Tribunal has referred issues relating to the charging of VAT on investment management services provided to pension schemes to the Court of Justice of the European Union in the case brought by the NAPF and the Wheels Common Investment Fund against HMRC. The parties are formulating the precise questions to be referred. See **WHiP Issues 3** and **9** for background.

Local government outsourcing

Ministerial statement:
http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110323/wmstext/110323m0001.htm

The Government's Code of Practice on Workforce Matters in Local Authority Service Contracts was withdrawn without notice on 23 March 2011. The code required local government bodies, when outsourcing services, to require contractors to offer new employees working alongside transferred staff "no less favourable" terms and conditions of employment. In the pensions context, this meant membership of the Local Government Pension Scheme, a DB scheme, or a DC scheme with matched contributions up to 6%.

The Government will be asking employers and employee representatives "*whether there might be anything, such as a statement of good employment principles in place of the code, that would be helpful for the future*".

The requirements regarding transferred staff are unaffected.

GMP increase order

Order:
http://www.legislation.gov.uk/uksi/2011/801/contents/made

The GMP increase order for 2011 has been laid. The Order specifies 3% as the percentage by which GMPs in payment that are attributable to earnings factors for 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 (ie 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 broadly pays the excess over 3%).

Statutory money purchase illustrations

Press release:
http://www.frc.org.uk/bas/press/pub2564.html

The Board for Actuarial Standards has published a new, shorter draft TM1: Statutory Money Purchase Illustrations, intended for use from 6 April 2012. This makes the mortality assumptions sex-neutral (following the *Test-Achats* case – see **WHiP Issue 25**) and asks whether the maximum permitted investment return assumption of 7% pa is too high. References to contracting out and protected rights are also removed.

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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