TRAVERS SMITH

What's happening in Pensions

Issue 32 *March 2012*

In this issue:

Contracting-out

Equalisation of benefits that include GMPs

As expected (see our briefing note "**Equalisation of benefits that include GMPs**"), the Government has issued a consultation on amending legislation to ensure that a member can make equal pay claims in relation to GMP-related differences in benefits without having to identify an actual comparator. In other words, the member would be able to claim the benefits that would have been payable if he or she had been of the other sex (a notional comparator), even if there was no other member doing the same or similar work. The Government is also consulting on draft guidance on one method of equalising the benefits.

Consultation:
http://www.Government.gov.uk/consultations/2012/pensions-equality.shtml

There has over the years been considerable debate about what the law requires in relation to GMP-related differences in benefits between men and women earned between 17 May 1990 and 5 April 1997. The UK legislation has an exception that normally allows different increases to be applied to the GMP and non-GMP elements of pensions in payment, even when those elements are different for men and women. There is, however, no exception in the UK law for other GMP-related differences in a scheme's total benefits for men and women. It is not clear that European law requires the equalisation of GMP-related inequalities. The Government has declined to sponsor a test case on this question.

The proposed amendments will lend more weight to the view that UK legislation requires equalisation of GMP-related inequalities (whether or not EU law would require this) and will increase the pressure on DB schemes to address the issue.

The draft amendments are silent on the method of equalisation but the Government is also consulting on draft guidance on *"one possible method"* for doing so (and on whether to publish guidance in the first place). Under this method, an equality test is performed every time the benefit is recalculated (ie, normally when the pension comes into payment and every time it is increased) and the pension then payable in respect of contracted-out service between 17 May 1990 and 5 April 1997 is the higher of the male and female amounts. Some commentators have called this "*gold-plating*" but in fairness the Government does say that it is only putting forward the method as:

> "*one way of equalising for the effect of the GMP legislation which the Government believes meets the equalisation obligation derived from EU law, codified in the Equality Act 2010. The Government does not assert this is the only way that equalisation can be achieved.*"

There is no mention of whether the Government thinks that equalisation should be performed for members who have died or transferred out. Nor does the consultation document deal with time limits for claims relating to pensions already in payment.

The Government is also proposing to amend the PPF compensation provisions in the Pensions Act 2004 in a similar way. However, equalisation is simpler for the PPF than for occupational pension schemes. The PPF needs to determine equalised compensation only once and GMPs cease to exist when the PPF takes on the scheme.

The consultation closes on 12 April 2012.

Regulations

The Government has finalised amendments to contracting-out regulations, following an earlier consultation (see **WHiP Issue 28**), as follows.

- The fixed rate GMP revaluation percentage is increased from 4% to 4.75% for members whose contracted-out service ends on or after 6 April 2012.
- Trustees of schemes that are contracted-out on a money purchase basis are given power to amend their scheme rules to remove provisions reflecting protected rights requirements when these are abolished on 6 April 2012. The power will exist until 5 April 2018 and can be exercised with retrospective effect from 6 April 2012.

  The consultation response expresses the Government's view that rule changes made under the statutory power would not be "listed changes" for the purposes of the requirement to consult affected members about proposed amendments.

Regulations:
http://www.legislation.gov.uk/uksi/2012/542/contents/madel

Consultation response:
http://www.Government.gov.uk/consultations/2011/ops-coms-amd-regs-2011.shtml

Pension protection levy

Contingent assets: certification and recertification deadline reminder

The deadline for certifying new contingent assets and recertifying existing contingent assets is 5pm on 30 March 2012.

As previously reported (see **WHiP Issue 31**), there is a new requirement in respect of guarantees: trustees must certify that they know of no reason why the guarantor(s) would not able to able to satisfy their commitment under the guarantee if now called upon to do so. In cases of doubt, this may require investigation into the guarantor's financial position.

Basic guidance on new pension protection levy framework

The PPF has published a short booklet on preparing for changes to the pension protection levy framework for the 2012/13 levy year.

It has also written to:

- trustees of all schemes, to inform them of some of the changes to the levy calculation this year; and
- trustees who certified Type A or Type C contingent assets last year, to inform them of changes affecting recertification this year.

New FAQs

The PPF has been steadily adding FAQs to its website on the new levy framework that applies from 2012/13. Please click the link in the right hand column to see them.

It has also published a note covering issues arising at a seminar on contingent assets for the Association of Pension Lawyers in February 2012.

PPF booklet:
http://www.pensionprotectionfund.org.uk/DocumentLibrary/Documents/new_levy_booklet_1213.pdf

PPF levy documents page:
http://www.pensionprotectionfund.org.uk/newlevyframework/Pages/newlevyframework.aspx

PPF FAQs:
http://www.pensionprotectionfund.org.uk/FAQs/Pages/FAQDisplay.aspx?search=t&subjectid=42

APL seminar note:
http://www.pensionprotectionfund.org.uk/DocumentLibrary/Documents/Contingent_asset_surgery_note_Feb12.pdf

CPI for RPI

New regulations provide that a decision to change pension increase rates and/or deferred pension revaluation rates so that they would be, or would be likely to be, less generous to some or all members will be a "listed change" from 6 April 2012. This means that prior consultation with affected members is required. This is designed to cover decisions to change scheme rules so that CPI, rather than RPI, is the measure of inflation used to determine pension increase and/or revaluation rates.

This will not require consultation with members who were informed of the proposed change before 6 April 2012 and it will not affect schemes that automatically switched to CPI (ie, because of the way their rules were drafted).

Regulations:
http://www.legislation.gov.uk/uksi/2012/692/contents/made

European law

IORP directive review

EIOPA has published 515 pages of advice to the European Commission on the review of the IORP directive (see **WHiP Issue 27**) concerning, among other things, DB scheme funding requirements.

EIOPA web page:
https://eiopa.europa.eu/publications/submissions-to-the-ec/index.html

It recommends the "holistic balance sheet" approach that it previously proposed (see **WHiP Issue 30**) but says that a quantitative impact study is important, to explore the possible impact on scheme funding requirements. It is undertaking such a study and expects to publish results later this year.

The advice also:

- calls for the "*strengthening of fit and proper criteria and for a proportionate … implementation of robust internal and external controls and sound risk management frameworks*"; and
- addresses information provision and member protection in DC schemes and proposes a key information document that is consistent across the EU.

Commissioner's speech:
http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/141&format=HTML&aged=0&language=EN&guiLanguage=enf

Speaking at the start of a public hearing on the directive review on 1 March, the EU Commissioner for the Internal Market said that they would not "*copy and paste*" Solvency II for IORPs but said that the EIOPA recommendations were useful.

Director General's speech:
http://ec.europa.eu/internal_market/pensions/docs/iorp/closing_en.pdf

At the closing of the public hearing, the Director General for Internal Market and Services of the European Commission commented that they will have to find a way of distinguishing between the past and the future and that "*to apply more rigorous funding rules to the back book of the [DB] pension funds*" would be "*financially unsustainable*".

European Commission white paper on pensions

Press release:
http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1194&furtherNews=yes

The European Commission has published a white paper on "*adequate, safe and sustainable pensions*". It proposes to:

- "*Create **better opportunities for older workers** by calling on the social partners to adapt work place and labour market practices and by using the European Social Fund to bring older workers into work;*
- *Develop **complementary private retirement schemes** by encouraging social partners to develop such schemes and encouraging Member States to optimise tax and other incentives;*
- *Enhance the **safety of supplementary pension schemes**, including through a revision of the directive on Institutions for Occupational Retirement Provision (IORP) and better information for consumers;*
- *Make **supplementary pensions compatible with mobility**, through legislation protecting the pension rights of mobile workers and by promoting the establishment of pension tracking services across the EU;*
- *Encourage Member States to **promote longer working lives**, by linking retirement age with life expectancy, restricting access to early retirement and closing the pension gap between men and women;*
- *Continue to monitor the **adequacy, sustainability and safety of pensions** and support pension reforms in the Member States."*

Automatic enrolment

Staging dates

Ministerial statement:
www.parliament.uk/documents/commons-vote-office/4.GOVERNMENT-Changes-to-the-automatic-enrolment-timetable.pdf

The Government has announced some detail of the delayed automatic enrolment staging dates for employers with fewer than 250 people on their largest PAYE payroll.

The impression had previously been given that employers with a largest payroll size of 250 to 2,999 would also have their staging dates delayed but this will not now happen. All employers with 250 or more people on their largest PAYE payroll therefore retain their existing staging dates.

The latest changes are set out in the table below.

Employer size (by largest PAYE scheme size) or other description	Staging date		Former staging date
	From	To	
250 or more members	1 Oct 2012	1 Feb 2014	No change
50 to 249 members	1 Apr 2014	1 Apr 2015	Apr 2014 to July 2014
Test tranche for fewer than 30 members	1 Jun 2015	30 Jun 2015	Aug 2014 to Feb 2016 (generally)
30 to 49 members	1 Aug 2015	1 Oct 2015	
Fewer than 30 members (remainder)	1 Jan 2016	1 Apr 2017	
Employers without PAYE schemes	1 Apr 2017	---	Feb 2016
New employers Apr 2012 to Mar 2013	1 May 2017	---	Mar 2016
New employers Apr 2013 to Mar 2014	1 Jul 2017	---	May 2016 to Sep 2016
New employers Apr 2014 to Mar 2015	1 Aug 2017	---	
New employers Apr 2015 to Dec 2015	1 Oct 2017	---	NB Banding dates are different and new bands have needed to be added because of the delay
New employers Jan 2016 to Sep 2016	1 Nov 2017	---	
New employers Oct 2016 to Jun 2017	1 Jan 2018	---	
New employers Jul 2017 to Sep 2017	1 Feb 2018	---	
New employers Oct 2017 onwards	Immediate duty	---	No change

The phasing-in of DC scheme contribution rate requirements will also be delayed. The first rise will now apply from 1 October 2017 and full contributions will have to be paid from 1 October 2018. (Under existing law they are due to rise on 1 October 2016 and 1 October 2017.)

Full table of staging dates:
http://www.thepensionsregulator.gov.uk/pensions-reform/staging-date-timeline.aspx

The Pensions Regulator subsequently updated its full table of staging dates.

Amendments to the legislation

The Government has issued a consultation response, final draft regulations and final DC certification guidance for automatic enrolment. Please see our briefing note **"New requirement to enrol workers in a pension scheme"**, which already takes account of the changes outlined below, for an overview of all the requirements.

Consultation web page:
http://www.dwp.gov.uk/consultations/2011/workplace-pension-reform-2011.shtml

The following proposed changes are confirmed.

- The "Person A" test (for smoothing spikes in earnings) will not now be included. A spike in earnings in a pay reference period can therefore trigger the enrolment obligation.
- Automatic re-enrolment will be required within a six month window centred on each third anniversary of the employer's staging date.
- The time limits for employers to remit contributions to the scheme will vary depending on whether the scheme makes payments electronically (22^{nd} of the month) or not (19^{th}). This is so that deadlines are aligned with HMRC rules.
- The reference to RPI in the revaluation requirement for career average schemes is changed to CPI.
- The normal retirement age under the "test scheme", against which DB schemes are measured if they are not contracted-out on a salary-related basis, will increase from 65 to 66 from 6 April 2020.

The following new changes have been made.

- The requirements for giving information to members have been rewritten. Regulations now specify which items from an "information menu" are to be given in various circumstances. The Government intends to produce letter templates and other materials to help employers with the information requirements.
- Information notice periods will now generally be one month. The (formerly one week) period for giving notice of postponement of automatic enrolment and the (formerly one week and two month) periods for notifying those already eligible to join a DB scheme about the transitional period will all become one month.
- DC certificates will be valid for up to 18 (formerly 12) months. This is partly to allow employers to align certification dates with re-enrolment dates. As originally proposed, the Regulator will have the power to require the employer to terminate the certificate early, in circumstances where it should not have been given.

- The definition of "basic pay" for DC certification purposes (under which at least basic pay must be pensionable) has been clarified to exclude more elements of earnings. The following are now excluded from "basic pay", in addition to (as in the original draft) "*commission, bonuses, overtime and similar payments*":
    - shift premium pay (which is now defined)
    - any reasonable allowance with respect to:
        - ancillary duties (eg, fire or bomb warden)
        - relocation costs
        - the purchase, lease or maintenance of a vehicle
        - the purchase, lease or maintenance of an item
        - the delivery of a service to a jobholder

  The accompanying guidance says that the following are within these exclusions:
    - clothing allowances
    - meal allowances
    - attendance allowances
    - allowances for health and safety such as first aid and key holder
- Employers with DC schemes that cap pensionable pay increases will be capable of using DC certification, despite the scheme not being within any of the three tiers, if the contributions meet the statutory standard for DC schemes.

These latest regulations do not cover the delayed staging dates and extended transitional period for the phasing in of DC contribution rates. There is to be a further consultation on this (see **WHiP Issue 31**). There is no mention in the consultation response of whether the DB transitional period will be extended too: this should become clear in the forthcoming consultation.

Cross-border European workers
The Government is consulting on draft regulations to exempt employers from automatically enrolling workers who also work in another EEA state to such a degree that they are subject to that state's laws relevant to occupational pensions. If employers were to be required to enrol such persons, the scheme would need to become a cross-border scheme and register as such. The consultation closes on 2 April 2012.

Consultation:
http://www.Government.gov.uk/consultations/2012/auto-enrol-european-employers.shtml

Pensions Regulator guidance
The Pensions Regulator has updated its detailed automatic enrolment guidance. It now covers postponement of automatic enrolment, assessment of whether someone is "ordinarily working" in the UK, the updated staging dates, and a little more on issues arising out of salary sacrifice and flexible benefit arrangements.

Press release:
http://www.thepensionsregulator.gov.uk/press/pn12-04.aspx

Government booklet
The Government has updated its short guide for employers.

DWP web page:
http://www.Government.gov.uk/policy/pensions-reform/workplace-pension-reforms/toolkit/

The Regulator's approach to regulation
The Pensions Regulator has published "*Delivering successful automatic enrolment*", outlining its approach to the regulation of employers and schemes. The points of interest are as follows.

TPR press release:
http://www.thepensionsregulator.gov.uk/press/pn12-06.aspx

- There are six DC principles (as previously announced – see **WHiP Issue 31** for details) that the Regulator will expect DC automatic enrolment schemes to adopt.
- The Regulator will engage directly with larger employers during their implementation processes; smaller employers are expected to use web tools and the customer support service.
- The Regulator will publicise enforcement action, as a deterrent against non-compliance.
- In the context of executive schemes, it is noted that "*there is little role for the regulator where the member is financially literate, engaged and is willing and able to take control of their retirement outcome*".

The Regulator will shortly publish its more detailed "*Compliance and enforcement strategy*" and a consultation on guidelines for ensuring that contributions are paid.

Employer asset-backed pension contributions

HMRC web page:
http://www.hmrc.gov.uk/budget-updates/march2011/index.htm#22Feb12

As previously reported (see **WHiP Issue 31**), the Government intends to legislate in the 2012 Finance Bill to ensure that employer asset-backed pension contributions cannot benefit from double tax relief. There had been concern that companies could obtain tax deductions more than once: up-front on the value of the asset when first pledged and then in relation to each payment of income from the asset to the scheme. The changes are designed to ensure that up-front relief is available only if rules on structured finance arrangements ("SFA"s) apply: these rules preclude further tax relief on income payments. If the SFA rules do not apply then deductions will only be available on payments of income.

The Government has now published amended draft clauses, which ensure that up-front relief can only be obtained in respect of fixed (not variable) payment obligations. Contributions paid between 29 November 2011 and 21 February 2012 will be subject to the terms of the original draft legislation.

Age discrimination: early retirement policy

Case report:
http://www.bailii.org/uk/cases/UKEAT/2012/0197_11_1002.html

In *HM Land Registry v Benson*, the Employment Appeal Tribunal (EAT) had to consider whether a practice of selecting candidates for redundancy on the basis of the cost to the employer of retiring them early was age discrimination that could be objectively justified. In this case, it was justified but this was mainly because the Employment Tribunal (ET) had already decided, as a matter of fact, that there was no other practicable way of making the selection.

HMLR offered employees a voluntary redundancy scheme. It had more applicants than could be accommodated within the available budget. HMLR selected applicants whose early retirement enhancements would be the least expensive, thereby maximising the numbers who could be retired within its budget. The claimants, who were not selected, were aged between 50 and 54. Their redundancies would have been particularly expensive because they would have been entitled to an immediate unreduced pension. They claimed that this amounted to indirect age discrimination.

The ET had accepted that the criterion used was the only practicable one if it was necessary to select candidates for redundancy, but it found that it was affordable for HMLR to make redundant all of those who had applied, albeit that that would have meant spending an additional £19.7 million over its budget of £12 million. It accordingly held that the redundancy selection method, which was discriminatory, was not objectively justified because it was not a proportionate means of achieving the legitimate aim of reducing staff numbers.

Allowing HMLR's appeal, the EAT held that:

- the ET should have proceeded on the basis that HMLR's decision as to what resources to allocate to the exercise, ie, £12 million, constituted part of its aim, and that it was not relevant that it could ultimately have afforded to allocate a larger amount; and
- although the ET was entitled to assess the proportionality of the means chosen to achieve that aim, its finding that there was no other practicable alternative process meant that it had no choice but to hold that the selection method chosen was a proportionate means of achieving that aim.

Compensation in connection with DB termination was taxable

Case report:
http://www.bailii.org/ew/cases/EWCA/Civ/2012/34.html

In *Kuehne & Nagel Drinks Logistics v HMRC*, the Court of Appeal found that cash payments to pension scheme members in connection with the termination of their DB pension entitlement were subject to income tax and NICs. This was on the basis that they were at least as much payments to ensure that employees continued working as they were compensation payments.

Staff had been transferred from Scottish & Newcastle to a joint venture company, KNDL. Their DB pension entitlement was discontinued. Following a threat of industrial action, KNDL agreed to pay compensation of £4,800 each to DB scheme members for their lost pension entitlement.

Compensation payments are not subject to income tax or NICs but HMRC decided that the payments were taxable because they were made primarily to secure continued working.

The Court of Appeal unanimously agreed with HMRC, upholding the decisions of the First Tier and Upper Tribunals. The payments were earnings "*from employment*" (for income tax purposes) and "*deriving from employment*" (for NICs purposes). The three judges expressed their decisions slightly differently but the key point was that the payments were made to avoid industrial action, as a "*reward, inducement or incentive to work willingly for the joint venture company in the future*". It did not matter that there was another substantial factor, ie, that the payments were also made as compensation for pension loss: that did not detract from the overall character of the payments as being in relation to employment services.

Transfer inducements: independent financial advice

Press release:
http://www.fsa.gov.uk/library/communication/pr/2012/019.shtml

The FSA is consulting on changes to its rules and guidance on transfer value analysis in the Conduct of Business sourcebook, concerning the comparison by financial advisers of benefits likely to be paid under a DB scheme with likely benefits under a personal pension. This is done whenever an individual asks a financial adviser about taking a transfer from a DB scheme to a personal pension, notably when a transfer inducement is being offered. The rules do not cover pension increase exchange offers, which are not within the FSA's purview since they relate entirely to rights under an occupational pension scheme.

The proposed changes concern the taking into account of DB scheme pension increase rates and updated mortality assumptions.

The FSA agrees with the Pensions Regulator that "*a transfer offer is likely to be suitable for a minority 'and, very possibly, a small minority' of members*".

Pension liberation

Press release:
http://www.thepensionsregulator.gov.uk/press/pn12-05.aspx

The Pensions Regulator, FSA and HMRC are jointly warning individuals about the risks of pension liberation schemes (ie, offers to turn a pension into a cash lump sum). The risks they mention are significant tax charges and loss of pension altogether.

Financial reporting standards

Press release:
http://www.frc.org.uk/asb/press/pub2702.html

The Accounting Standards Board has published financial reporting exposure drafts 46 to 48, setting out revised proposals for the future of financial reporting in the UK (and Ireland). It proposes replacing all current UK financial reporting standards, including FRS17, with a single standard, FRS102, that is more consistent with international standards, including IAS19. The new standard would apply for accounting periods beginning on or after 1 January 2015.

The new standard may also affect the requirements for pension schemes' reports and accounts. These may need to include more information about assets, liabilities and funding and investment policies.

Comments are requested by 30 April 2012.

WInding-up priorities: DC assets and liabilities

Case not reported

The High Court has given its judgment in *Alexander Forbes Trustees Services Limited v Doe and Roe*. This case concerned the treatment of DC assets and liabilities (not deriving from AVCs) on the winding-up of a non-segregated hybrid DB/DC scheme. This case will be of interest to any trustees or employers with hybrid schemes where the rules do not rank DC liabilities at the top of the winding-up priority order.

The question for the Court was: when legislation takes DC assets and liabilities out of the statutory winding-up priority order for a hybrid scheme, does this mean:

(a) that the DC assets should then be used to meet DC liabilities; or

(b) that the winding-up priority order in the scheme rules then applies to the DC assets? (Here, unusually, DC liabilities were ranked last in the scheme's priority order.)

The judge decided that the legislation was ambiguous and that the drafter of the legislation must have intended that (a) would apply. He said that he would need clear language in the legislation in order to be able to conclude that the DB members would be entitled to have their benefits secured using the DC pots.

Pensions Regulator

FSD against ITV companies

The determinations panel of the Pensions Regulator has decided to issue a financial support direction to five ITV group companies, including ITV plc, in relation to a pension scheme set up in 2001 by a company that was a joint venture with Thorn, and has published its reasons.

TPR press release:
http://www.thepensionsregulator.gov.uk/press/pn12-02.aspx

The facts are very complicated. The Regulator's press notice summarises the case as follows.

The [Panel] found that it was reasonable for Granada UK Rental & Retail Limited, Granada Media Limited, Granada Group Limited, Granada Limited and ITV plc to provide financial support for the Box Clever Group Pension Scheme. The Box Clever group become insolvent in 2003 leaving the pension scheme with a deficit of approximately £62m at the end of 2009, on the section 75 'buy-out' basis.

The Panel found that the target companies received valuable financial benefits from the creation and structure of the Box Clever joint venture. A highly leveraged structure was used, leaving the sponsoring employers in a weak position.

The Panel concluded that the scheme's principal employer, Box Clever Technology Ltd ('BCT'), was set up by the Granada and Thorn groups as part of a highly leveraged transaction that effectively extracted value from the consumer rentals businesses of those groups, whilst leaving the possibility for Granada and Thorn to share in any future profit of BCT. A requirement of the transaction was that a pension scheme was set up for transferring employees.

The ITV group received cash proceeds of approximately £500m as a result of the Box Clever transaction, which was paid from total debt of £860m raised by the BCT group. That borrowing was secured on all the assets of BCT and the other sponsoring employers of the scheme, but not the Granada or Thorn group companies, thereby insulating them from any downside. The burden of servicing this debt was a major factor in the insolvency of BCT group, including the sponsoring employers of the scheme, in 2003.

Ten pages of the reasons document are taken up by the issue of whether the targets had enough time to respond to the case and a late change, after the warning notice, in the Regulator's assertions about how the targets were associated with scheme employers. The warning notice was served on 30 September 2011 and the panel reached its determination on 31 December 2011, the last day on which it could do so under the law applicable at the time. The panel concluded that it could determine the changed case and that the targets did have enough time to respond, "*albeit by a narrow margin*".

The ITV companies have appealed to the Upper Tribunal.

Plans for 2012

The Pensions Regulator intends to issue a statement in April 2012, and in subsequent years, to help trustees dealing with the actuarial valuation and recovery plan process. The statement will set out the Regulator's expectations in the light of prevailing economic conditions.

Press release:
http://www.thepensionsregulator.gov.uk/press/pn12-01.aspx

Also in April, the Regulator will consult on the procedures that its case teams follow when they bring a case to the Determinations Panel, and the Panel will consult on an update to its procedures.

Later in the year, the Regulator will "*set out its strategic view on how it will regulate the DB landscape in the future*".

RPSM updates

Updated RPSM pages:
http://www.hmrc.gov.uk/manuals/rpsmmanual/updates/rpsmupdate090112.htm

HMRC has published a large number of updated RPSM pages on aspects of the Finance Act 2011 regime concerning the reduced annual allowance, fixed protection against the reduced lifetime allowance, and flexible drawdown. The significant changes reflect matters we have reported in previous issues of WHiP.

Pensions Ombudsman determinations

Inadequate investigations concerning lump sum death benefit beneficiaries

Determination:
http://www.pensions-ombudsman.org.uk/determinations/docs/2012/jan/76674.doc

The Pensions Ombudsman has found against the trustee of the Michelin pension scheme for a second time in the same case. It concerned the exercise of the trustee's discretion as to payment of a lump sum death benefit. The Ombudsman found, for a second time, that inadequate investigations about the potential beneficiaries had been carried out.

Mr Earle died in 2006, leaving a widow and two daughters from his previous marriage. He had notified the trustee of his wish that the lump sum death benefit be paid to his daughters. The scheme administrator reported to the trustee's secretary that there was a widow and that the member had nominated his two daughters. The report did not, however, mention that the nomination was made before Mr Earle had met his second wife, nor that the daughters were children of the first marriage.

The secretary, who had delegated authority to determine straightforward cases, decided to pay the lump sum to the two daughters. The widow was paid a spouse's pension in accordance with the rules. She challenged the decision about the lump sum but it was confirmed by the trustee, again without all the relevant information.

The Ombudsman determined in 2009 that there had been maladministration and that the secretary had acted outside his delegated authority because he did not know if the case was straightforward or not and in fact it was not. The trustee was directed to assemble all the evidence that would have been material at the time of the original decision and to consider it afresh.

The trustee reconsidered the matter and reached the same conclusion, deciding that Mr and Mrs Earle would have been interdependent and that Mr Earle "*most likely*" intended to provide an inheritance for his children in the knowledge that Mrs Earle would receive a spouse's pension and his estate. The trustee also decided not to investigate the financial circumstances of the potential beneficiaries to avoid invading their privacy.

Mrs Earle complained again and the Ombudsman made the same direction again but this time specifically requiring the trustee to investigate the financial positions of Mrs Earle and the two daughters. He found that it was wrong for the trustee to guess Mr Earle's intentions and to treat those supposed intentions as determinative of who should receive the benefit: *"It is one thing to give potentially relevant facts no weight once aware of them. It is another to decide in advance that as yet unknown information will be ignored, when it could make a difference"*.

Incorrect benefit overstatement leading member to take redundancy

The Pensions Ombudsman has ordered trustees of a pension scheme to compensate a member for lost salary and pension accrual after he took voluntary redundancy at age 62 after receiving an incorrect benefit statement upon which (the Pensions Ombudsman found) he reasonably relied.

Determination: http://www.pensions-ombudsman.org.uk/determinations/docs/2011/dec/82840.doc

Although a pensions professional would have seen that there must have been a mistake in the benefit statement, the Ombudsman said that the member did not know the basis of calculating redundancy pensions and should have been entitled to rely on the statement given for the specific purposes of enabling him to consider taking voluntary redundancy. He also found that the benefit statement could have set out the calculations more clearly.

The compensation ordered included a payment for lost salary (less the redundancy payment), additional pension accrual calculated as if the member had worked until age 65, and £500 for distress and inconvenience. The Ombudsman decided that the member had attempted to mitigate his loss by looking for work.

Widow could rely on statement given to member

The Pensions Ombudsman found that a member, Dr Wheeldon, had reasonably relied on an incorrect spouse's pension statement given 14 years earlier by the NHS Pension Scheme when making his Will. He found that the member would have left more to his widow if he had known the true position. The administrator (NHSBSA) was ordered to pay £35,000 to his widow, plus £2,000 for delayed receipt.

Determination: http://www.pensions-ombudsman.org.uk/determinations/docs/2012/jan/81348.doc

Concerning the fact that the incorrect information had been given to the deceased member, not the claimant – his widow – who was seeking to rely on it, the Ombudsman said:

"In providing information to Dr Wheeldon about the spouse's pension I do not think that there is any doubt that he was owed a duty of care by NHSBSA. I also consider that Mrs Wheeldon was owed a duty of care. She was a contingent member (sic) of the Scheme and the information given to Dr Wheeldon concerned her directly. It is of course true that it was Dr Wheeldon who acted on the information and Mrs Wheeldon who claims to have suffered. But in effect this was information given to them jointly (it was not information that could only have been for Dr Wheeldon's use) and they were each owed a duty of care as member and contingent member (sic) respectively. It would be a highly unattractive interpretation of the position if after Dr Wheeldon's death it no longer mattered whether information given to him while alive about matters following his death was reliable or not. In any event, a complaint about the ordering of the Will could have been brought by Mrs Wheeldon as legal personal representative, with the same consequences."

Over the counter derivatives

Press release:
http://www.europarl.europa.eu/news/en/pressroom/content/20120209IPR37742/html/EP-Council-deal-on-rules-for-a-safe-and-transparent-derivatives-market

In February, a compromise deal was struck between representatives of the Council and European Parliament on the EC Regulation on over the counter ("OTC") derivatives, central counterparties and trade repositories (commonly referred to as the "European Market Infrastructure Regulation", or even more commonly as "EMIR"). The Regulation now requires final approval from the Parliament as a whole (a vote is scheduled for 29 March 2012), following which the Council will need to formally adopt it. It will enter into force 20 days after its publication in the Official Journal. The aim is that the new requirements should be fully in force (ie, applicable to relevant firms) by the end of this year.

Under EMIR, financial counterparties (and non-financial counterparties who exceed a certain "clearing threshold") will be subject to a clearing obligation. That obligation will be to ensure that all OTC derivatives of a class deemed to be sufficiently "standardised" must be cleared through a central counterparty (CCP). Under the legislative proposal, UK Occupational Pension Scheme trustees will fall within the definition of "financial counterparty" and therefore, on the face of it, will be subject to the mandatory clearing obligation in relation to relevant OTC derivatives. However, during negotiations concerns were raised by industry participants that pension funds would face significant difficulties in meeting the margin requirements of CCPs, which, as regards variation margin at least, tend to require the posting of cash. (There are also issues with regard to the amount of margin that pension funds would be required to post.) Unless and until the CCPs are geared up to accept alternative collateral (such as government bonds), pension funds would have to hold significant amounts of cash in order to meet their margin requirements to CCPs. In the light of this problem, a temporary "stay of execution" has been won for the pension fund sector: broadly, the clearing obligation will not apply for three years after the Regulation enters into force. Subject to the outcome of a report which the Commission will conduct over the next couple of years into the development of a solution to address the specific requirements of pension funds, the transitional relief may be extended for a further two years.

Despite the postponement of the clearing obligation, pension funds will nonetheless be subject from the outset to EMIR's other requirements on financial counterparties: they will have to have appropriate risk mitigation techniques for their non-centrally cleared OTC derivatives (including procedures in relation to the exchange of collateral) and they will be required to report the details of *any* derivative contract to a "trade repository" (a commercial central data firm which collects derivatives trade details).

Personal pensions: commutation of small pensions

Regulations:
http://www.legislation.gov.uk/uksi/2012/522/contents/made

New regulations confirm that total commutation of small personal pension pots (worth £2,000 or less) will be permitted for members aged at least 60 and over from 6 April 2012. (See **WHiP Issue 31** for the proposal.) The provisions differ from the similar rules for occupational pensions: the regulations provide that the member may take advantage of this new facility only twice in his or her lifetime. This is to avoid abuse of the tax relief system by members taking out a succession of personal pensions.

The Finance Act 2004 rules on trivial commutation lump sums (which are authorised payments if the member's aggregated pensions are worth less than 1% of the lifetime allowance, or £18,000 from 6 April 2012) are unaffected.

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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.

Travers Smith LLP
10 Snow Hill
London EC1A 2AL
T: +44 (0)20 7297 3000
F: +44 (0)20 7295 3500

www.traverssmith.com