TRAVERS SMITH

What's happening in
Pensions

Issue 33 *May 2012*

In this issue:

Pensions Regulator: scheme funding statement
CPI and RPI
Contracting-out
HMRC announcements
Pensions Ombudsman: "non-pensionable" bonus was pensionable
Hedging agreements: events of default
Age discrimination cases
Automatic enrolment
Pensions and bankruptcy
Bridging pensions
Equal civil marriages
Transfer inducements

Pensions Regulator: scheme funding statement

Statement:
http://www.thepensionsregulator.gov.uk/docs/pension-scheme-funding-in-the-current-environment-statement-april-2012.pdf

The Pensions Regulator has published guidance on how DB pension scheme valuations should be approached in the current economic environment. It is aimed particularly, but not exclusively, at schemes with valuation dates between September 2011 and September 2012.

The Regulator notes that long-dated index-linked gilt yields are at an all time low and that many schemes carrying out valuations now may find that their funding position has not improved, or has deteriorated, despite deficit repair contributions over the last three years. The Regulator says that there is no certainty that gilt yields will return to "*normal*" levels, or what "*normal*" might be in future, and that trustees must calculated technical provisions on a mark-to-market basis using prudent assumptions, irrespective of the deficit this may reveal.

Any increase in assumed asset outperformance against a "*near-risk free return*" from a substantially hedged investment strategy, to reflect perceived market conditions, will be viewed by the Regulator as an increase in reliance upon the employer's covenant. Any "*strongly held views about future financial market conditions*" should be accommodated in the recovery plan, rather than technical provisions, and viable contingency plans should be documented in case those views turn out to be false.

The Regulator confirms that in its view recovery plans should usually be based on what is reasonably affordable without compromising the employer's long-term ability to support the scheme and that recovery plans can be extended in appropriate circumstances for this reason. The Regulator recognises that it may be appropriate for the employer to service other debts and incur capital expenditure but it says that, if cash is being used within the business at the expense of what would otherwise have been affordable pension contributions, the effect should be to improve the employer's covenant rather than to favour other stakeholders. If there is a substantial risk that benefits might not be delivered, any dividend payments should be questioned.

Finally, the Regulator says that all parties should by now be familiar with the scheme funding process and so "*we do not expect late valuations or issues with governance*".

CPI and RPI

Case report:
http://www.bailii.org/ew/cases/EWCA/Civ/2012/332.html

Trade unions' challenge fails

Public sector trade unions have failed in their appeal against the High Court's decision (see **WHiP Issue 31**) to uphold the Government's decision to switch from RPI to CPI for revaluing and increasing public service pensions.

The Court of Appeal held that:

- the Secretary of State was entitled to choose CPI as the relevant index under the terms of the statute, provided that he acted rationally and took into account all appropriate (and no inappropriate) matters; and
- the impact of the decision on the national economy could not legitimately be the only consideration but it was a relevant consideration.

Amending scheme rules to use CPI

In *Danks v QinetiQ Holdings Limited*, the High Court ruled that the trustees of the QinetiQ pension scheme could, subject to their fiduciary duties, exercise a power in the scheme rules to change the index they use for revaluation and pension increases from RPI to CPI. Moreover, they could do this in relation to the whole of members' benefits, not just future service benefits, without infringing section 67.

Case report:
http://www.bailii.org/ew/cases/EWHC/Ch/2012/570.html

The scheme rules required an early leaver's deferred pension to be revalued when it came into payment by reference to the increase in "*the Index*" over the period of deferment. The rules required pensions in payment to be increased annually by reference to the increase in "*the Index*". The rules defined "*Index*" as:

> "*the Index of Retail Prices published by the Office of National Statistics or any other suitable cost-of-living index selected by the Trustees*".

The main question for the Court was whether an exercise of this power to change the Index from RPI to CPI in relation to benefits accrued by past pensionable service would be voidable under section 67 of the Pensions Act 1995 because it would or might adversely affect subsisting rights.

The Court held that, because of the flexibility in the definition of "*Index*" in the scheme rules, a pensioner did not have a right or entitlement to have future increases calculated by reference to RPI: the right to future increases was subject to the trustees' power to decide which index to use. Therefore the trustees could switch from RPI to CPI for future increases without any breach of section 67.

The Court also held that, on the wording of these particular scheme rules, revaluation of a deferred pension happened only once, when the pension came into payment, and section 67 did not prevent the trustees from using CPI instead of RPI to revalue a deferred pension for the whole period of deferment, even for an existing deferred pension that has already been in deferment for some time.

In fact, the QinetiQ trustees did not want to switch from RPI to CPI for all purposes; they wanted to continue using RPI for some purposes and switch to CPI for others. The Court held that they were able to do so because the definition of Index should be interpreted as including the plural ("*indices*") and because that definition should be given a meaning consistent with business common sense.

The Court noted that, when deciding whether or not and if so how to change the Index for any period or purpose, the trustees should act in accordance with their fiduciary duties. There was no discussion about how those duties might affect the trustees' decision but it was noted that the trustees wished to use their power to switch from RPI to CPI in order to reduce the scheme's "*substantial deficit*".

The Court's decision in the QinetiQ case turned on the particular wording of the scheme rules. Many schemes similarly make provision for RPI to be replaced by another index when calculating benefits. In some cases, such a provision may have the same meaning and effect as in the QinetiQ case. In others, it may not (for example, because the change can be made only if the RPI is no longer published).

It should also be noted that the wording of the QinetiQ scheme rules dealing with revaluation of deferred pensions made provision for one increase at the end of the period of deferment (in much the same way as the statutory revaluation requirements). Some schemes make provision for annual increases during deferment, in which case it may not be possible to switch from RPI to CPI using a power like the one in the QinetiQ scheme except for future increases.

Please see our briefing note **Use of CPI instead of RPI: latest developments** for more detail on the issues that arise in this context.

Contracting-out

Implications of state pension reform

The Government will reform the three elements of the state pension (basic pension, state second pension and pension credit) into a single tier pension for future pensioners. This was one of the options previously proposed: see **WHiP Issues 26** and **28**. The new combined state pension will be set at a level above the means-tested

Budget report:
http://cdn.hm-treasury.gov.uk/budget2012_chapter2.pdf

standard guarantee credit (currently £142.70 per week) and periods of contracting-out will be taken into account. It will cost no more than the current state pension. A white paper will be published "*in the Spring*".

The Government had previously indicated that contracting-out would end altogether if this option were to be selected. The Government is reportedly considering giving employers with contracted-out DB schemes a unilateral power to reduce future service accrual rates when contracting-out is abolished.

State pension age will be increased to keep pace with longevity improvements. Proposals will be published in due course.

Short service refunds from formerly contracted-out DC schemes
HMRC has published an announcement on short service refunds paid to members of formerly contracted-out DC schemes following the abolition of protected rights on 6 April 2012. HMRC's Countdown Bulletin 6 also addresses this issue (in questions 15 and 16).

HMRC announcement:
http://www.hmrc.gov.uk/pensionschemes/lump-sums-news-mar2012.htm

Countdown Bulletin 6:
www.hmrc.gov.uk/nic/countdown-bulletin6.pdf

Under the Finance Act 2004, in order to be an authorised member payment, a short service refund lump sum has to extinguish the member's whole entitlement to benefits under the scheme, except where legislation prevents it. Before 6 April 2012, protected rights legislation prevented the extinction of all the member's benefits because protected rights pensions still had to be provided. Since this legislation was repealed on 6 April, short service refunds must now include protected rights contributions (insofar as they are member contributions – see below) or the payment will be unauthorised.

Scheme rules drafted to reflect protected rights rules may require the protected rights contributions to be retained in the scheme to provide benefits (and not refunded) even after 5 April 2012 (this will depend upon the drafting). Such schemes' rules may be capable of amendment to resolve the problem. HMRC will be consulting on regulations to allow schemes to pay partial short service refund lump sums in these circumstances for a transitional period until the scheme has amended its rules. These regulations will not be in force until the summer and HMRC says that they cannot be made retrospective because they will increase scheme administrator liabilities. HMRC suggests that trustees delay refund payments while they amend their scheme rules or until the transitional regulations take effect.

Schemes which have previously paid a short service refund lump sum but which have retained protected rights may pay a second short service refund lump sum, if their rules allow it.

The question of whether protected rights contributions are member contributions has become important. In Countdown Bulletin 6, HMRC says that:

> *"The minimum payments from the employer to the scheme relating to the employee contribution are member contributions as is any employer contribution that is recovered from the employee together with the HMRC rebate. Any employer contribution not recovered from the employee would not be a member contribution for our purposes."*

It is debateable whether HMRC is right about its age-related rebates being member contributions. Trustees of affected schemes will need to establish what they should include in their short service refunds because they will be making an unauthorised member payment if they refund any of the protected rights contributions that are not member contributions.

HMRC announcements

Fixed protection and death benefits
An issue has arisen and broadly been resolved relating to contributions towards certain death benefits for members who have registered for fixed protection against the reduced lifetime allowance. The issue relates to death benefits that are categorised as "*money purchase*". They may include defined benefit lump sums that are limited, for example, by reference to insurance policy proceeds.

HMRC announcement:
http://www.hmrc.gov.uk/pensionschemes/fixed-protection-300312.htm

The issue was broadly resolved by an HMRC announcement on 30 March 2012 but it is still the case that the following arrangements under a registered pension scheme after 5 April 2012 cause fixed protection to be lost:

- Paying contributions for life cover where the death benefits are clearly "*money purchase*" in nature, such as where scheme rules say simply that the death benefit is whatever a policy of insurance may provide. This is very unusual, however.
- Paying contributions for life cover where the death benefits are the greater of a defined benefit and whatever a policy of insurance provides. Again, this is very

unusual.

- Providing any life assurance benefits for a new joiner who has registered for fixed protection.

If members with fixed protection are to pay contributions after 5 April 2012, and these may be refunded on death, please seek further advice. HMRC's position is that generally such refunds are defined benefits but this will in some cases be open to doubt.

We issued briefing notes on these issues on 29 and 30 March 2012.

Finance Bill
Following the March Budget, the Finance Bill has been issued.

The Bill contains provisions relating to employer asset-backed pension contributions. They include further changes were announced in the Budget, in addition to those announced on 22 February 2012 (see **WHiP Issue 32**).

Further Finance Bill provisions will be introduced to strengthen reporting requirements and powers of exclusion relating to the QROPS regime. They will support the changes in secondary legislation published for consultation in December 2011 (see **WHiP Issue 31**).

"Scheme pays": ACA/HMRC correspondence
The Association of Consulting Actuaries (ACA) has corresponded with HMRC over the application of the "scheme pays" legislation in respect of annual allowance charges arising for the tax year in which benefits come into payment, where some very difficult technical questions arise.

HMRC Newsletter 53
In addition to matters previously covered in WHiP, HMRC's Newsletter 53 indicates the following future changes to legislation.

- Statutory revaluation of defined benefit pensions can result in the loss of fixed protection in some circumstances. A new statutory power to be added to the Finance Bill will allow this and other fixed protection issues to be corrected by regulations, with the potential for these to be retrospective to April 2012 if no tax liability is thereby increased.
- Draft regulations will be published for consultation in the autumn relating to annual allowance issues, including aspects of the "scheme pays" legislation raised by the ACA (see above). For example, the annual allowance charge can arise in the tax year after the tax year in which benefits come into payment (because pension input periods do not have to align with the tax year). The Finance Act 2004, however, requires the member to give the "scheme pays" notice before becoming entitled to all his or her benefits. Retrospective regulations will address this issue.

Finance Bill:
http://services.parliament.uk/bills/2010-12/financeno4.html

Budget announcement:
http://www.hmrc.gov.uk/budget2012/emp-asset-pens-cont.htm

QROPS announcement:
http://www.hmrc.gov.uk/budget2012/qrops.htm

ACA correspondence
http://www.aca.org.uk/files/Annual_Allowance_and_Scheme_Pays_(introduction_to_web_entry_below_dated_15_March_2012)_-16_March_2012-20120316150237.pdf

http://www.aca.org.uk/files/AA_and_Scheme_Pays_-_letter_to_HMRC-15_March_2012-20120316150336.pdf

HMRC Newsletter 53
http://www.hmrc.gov.uk/pensionschemes/newsletter53.pdf

Pensions Ombudsman: "non-pensionable" bonus was pensionable

The Pensions Ombudsman has found that bonuses were pensionable despite being declared non-pensionable when they were given.

The rules of the WBB Minerals Final Salary Pension Scheme provided that bonuses were pensionable unless agreed by the member and the employer. Ms C was paid bonuses between 2002 and 2008 that were (in all but one year) expressed as being non-pensionable. When she left service in 2008 and her deferred pension was calculated on that basis, she complained that this was contrary to the rules because she had not agreed that the bonuses were non-pensionable.

The member contribution rule used the same definition of pay and Ms C had not been required to pay pension contributions on her bonuses.

The Ombudsman determined that:

- Ms C's silence could not be taken as her agreement to the bonuses being non-pensionable. An employee can only be taken as having impliedly agreed to a contractual variation where it has immediate practical implications and the employee continues working without objection.
- Ms C's failure to object to member contributions not being deductible from her bonuses made no difference to this.
- Ms C was not estopped (ie, prevented) from claiming that her bonuses were pensionable. For an estoppel, there had to be more than passive acceptance.
- If payment of the bonuses had been made subject to an express condition that a

Determination:
http://www.pensions-ombudsman.org.uk/determinations/docs/2012/mar/82933.doc

term of the pension scheme would be varied, she might not have been able to argue that the variation was ineffective. However, all that had happened was that she was told that the bonuses were non-pensionable, as if that were the correct position under the scheme rules.

- The *South West Trains* and *IMG* (see **WHiP Issue 15**) cases are authority for contractual agreements outside the pension scheme binding members notwithstanding more generous provisions in a pension scheme's rules. They were of no assistance here, however, because in this case there was no express agreement and those cases are not authority for implying an agreement.

The Ombudsman ordered the trustee to revise Ms C's benefits upon receipt of the outstanding member contributions.

Hedging agreements: events of default

The Court of Appeal has provided guidance on the interpretation of section 2(a)(iii) of the ISDA Master Agreement, which applies to most hedging agreements. In particular, it has been clarified that a party's payment obligations are suspended (and not extinguished) if the other party is subject to an "*Event of Default*", and will be revived if the Event of Default is cured.

For more information, please see our briefing note **ISDA Events of Default…to infinity and beyond?.**

Age discrimination cases

Case report:
http://www.bailii.org/uk/cases/UKSC/2012/16.html

Default retirement age
The age discrimination legislation that came into force in 2006 originally allowed employers to operate a default retirement age of at least age 65. That exception did not apply to partners in firms. Now that the exception has been phased out altogether, the case of *Seldon v Clarkson Wright & Jakes* (see **WHiP Issue 20** for background), involving the compulsory retirement of a partner in a law firm, will have wider relevance.

In this case, the Supreme Court has now confirmed that a law firm could seek to justify a provision in its partnership agreement requiring Mr Seldon, a partner, to retire from the partnership after reaching age 65. It is, however, up to the Employment Tribunal (ET) to decide whether or not justification was made out on the facts of this particular case.

The ET had previously held that the following aims (but not some others) were legitimate aims of the firm's retirement policy:

- *"ensuring that associates are given the opportunity of partnership after a reasonable period as an associate, thereby ensuring that associates do not leave the firm;*
- *facilitating the planning of the partnership and workforce across individual departments by having a realistic long term expectation as to when vacancies will arise; and*
- *limiting the need to expel partners by way of performance management, thus contributing to a congenial and supportive culture in the Respondent firm".*

The ET had also held that compulsory retirement was an appropriate means of achieving these aims. The first two aims could not be achieved in any other way so there was no non-discriminatory alternative to the third.

The Supreme Court was asked to rule on the following issues.

- **Could any or all of the above three aims be legitimate aims for the purposes of justifying direct age discrimination?**

  When seeking to justify direct (as distinct from indirect) age discrimination the aims of the measure must be social policy objectives of a public interest nature (see the *Age Concern* and *Fuchs* cases in **WHiP Issues 5**/**9** and **28** respectively).

  The UK Government seems to have chosen to give employers and partnerships the flexibility to choose which objectives to pursue provided that:

  - they are legitimate objectives of a public interest nature within the meaning of the EU directive;
  - they are consistent with the policy aims of the state; and
  - the means used are proportionate ie, both appropriate to the aim and reasonably necessary to achieve it.

The European Court has identified "*inter-generational fairness*" (ie, retiring people to enable promotions) and "*dignity*" (ie, avoiding unseemly discussions about age-related performance) as legitimate social policy based objectives. The three aims under consideration in this case accorded with those objectives and were legitimate.

There can be "*ex post facto rationalisation*" of objectives. In other words, the business need not have actively thought about or communicated the aims at the time it implemented the policy.

- **Must the firm justify only the retirement clause generally or also the particular application of it in Mr Seldon's case?**

  Where it is justified to have a single rule, the existence of that rule will usually justify the treatment which results from it. It is relevant that a claimant has benefited at an earlier time from the rule in question and that partners have renegotiated the rule relatively recently.

- **Was the reliance on the clause a proportionate means of achieving the three aims?**

  It had not been shown that age 65, and not any other age, was an appropriate means of achieving the third aim: there was a difference between justifying *a* retirement age and justifying *this* retirement age. The question had already been referred back to the ET whether the first two aims were sufficient in themselves and the Supreme Court supported this. As part of this, the Court said, the ET is free to consider whether the first two aims justified the particular retirement age of 65.

  Lady Hale added: "*I would emphasise, however, that they are considering the circumstances as they were in 2006, when there was a designated retirement age of 65 for employees, and not as they are now.*" The implication is clearly that such treatment is more difficult to justify now that there is no default retirement age under legislation.

Dismissal due to age?
The Court of Appeal has upheld the decisions of the Employment Tribunal (ET) (see **WHiP Issue 14**) and the EAT (see **WHiP Issue 23**) in *Woodcock v Cumbria Primary Care Trust*. This case concerns the use of cost as a factor in objectively justifying an act that is discriminatory on grounds of age.

Case report:
http://www.bailii.org/ew/cases/EWCA/Civ/2012/330.html

The European Court has held in other cases that saving cost cannot of itself be a legitimate aim justifying a discriminatory act. If, however, there is another legitimate aim then saving cost can legitimately be a part of that aim. This is referred to as the "*cost-plus*" approach.

Mr Woodcock was dismissed on grounds of redundancy. The dismissal was conceded to be automatically unfair because the statutory procedure had not been followed. He claimed that he had been dismissed on grounds of his age, so as to avoid liability for an enhanced pension payable under the NHS pension scheme to those made redundant aged 50 or over.

Efforts had been made, over a period of about a year, to find him suitable alternative employment. This had been unsuccessful because he was only interested in a high level position and none was vacant. He was ultimately given his 12 month notice entitlement, expiring less than a month before his 50th birthday.

The Employment Tribunal (ET) had found as follows:

- The evidence showed that Mr Woodcock's age was a significant factor in the ultimate decision to issue the redundancy notice when it was issued. He had therefore been dismissed because of his specific age ie, his impending 49th birthday.

- Although the avoidance of costs is not in itself a legitimate aim for the purposes of objective justification, a "*discriminatory act to avoid an employee receiving a windfall can be a legitimate aim*". The ET had considered that there would have been a windfall because he could have been lawfully dismissed for redundancy well before his 49th birthday.

- The way of achieving this aim was proportionate because efforts were made to find him alternative employment at a level that he would accept. In the meantime, the redundancy notice was not served, resulting in an extra year's employment in addition to the 12 month notice period.

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

The Court of Appeal found that there was a degree of artificiality in the "*cost plus*" approach in that almost every employer decision will have regard to cost. Here, there was not just the aim of giving Mr Woodcock his notice before his 49th birthday in order to save money: there was also the genuine aim of giving effect to the decision to make him redundant. Dismissing an employee whose position has become redundant is a legitimate aim and it was a legitimate part of that aim to ensure that an additional element of cost was saved.

The fact that the employer had cut a procedural corner in order to serve the notice in time went only to the question of proportionality. In the "*very particular*" circumstances of the case, that consideration did not undermine the proportionality of the NHS Trust's actions. Those circumstances included that the redundancy had been delayed, to Mr Woodcock's benefit, for far longer than Mr Woodcock was entitled to expect.

Automatic enrolment

Staging dates and transitional arrangements

The Government has been consulting on draft regulations reflecting its recent announcement (see **WHiP Issue 32**) on automatic enrolment staging dates and transitional periods. The following changes are proposed.

Consultation:
http://www.dwp.gov.uk/consultations/2012/wpr-rev-implementation.shtml

- As previously announced, the two "step-up" dates for the phasing-in of minimum contribution rates to DC schemes are both put back by a year, to 1 October 2017 and 1 October 2018.
- As expected, but not previously announced, the transitional period for DB and hybrid schemes (ie, the date on which workers who have been eligible to join a DB automatic enrolment scheme must be enrolled in it) is extended to 30 September 2017 rather than 30 September 2016.
- Employers of fewer than 50 workers who share a PAYE payroll with other employers or who include pensioners in their payroll will have a new, later staging date. This will be between 1 August 2015 and 1 April 2017. Their new staging date will be determined by reference to their otherwise applicable staging date. For example, small employers with current staging dates of 1 October 2012 and 1 November 2012 will have a new staging date of 1 August 2015. Such employers cannot be separately identified by the Pensions Regulator but they will not have to apply to change their staging date.

Please see our briefing note **New requirement to enrol workers in a pension scheme** for more detail of the automatic enrolment requirements.

Bringing forward staging dates

The Pensions Regulator's website now includes an online guide for employers wanting to bring forward their staging date.

TPR web page:
http://www.thepensionsregulator.gov.uk/pensions-reform/bringing-staging-date-forward.aspx

Earnings trigger and qualifying earnings band

The Government has published its response to the consultation (see **WHiP Issue 31**) on how the automatic enrolment earnings trigger and qualifying earnings band figures will be increased to bring them up to date for 2012/13.

Consultation response:
http://www.dwp.gov.uk/consultations/2011/auto-enrolment-revaluation.shtml

The Government will align the earnings trigger with the income tax personal allowance (ie, £8,105 for 2012/13) and the qualifying earnings band with the National Insurance lower and upper earnings limits (ie, £5,564 to £42,475 for 2012/13). The upper threshold is about £2,500 higher (for 2012/13) than originally proposed: the originally proposed upper threshold (£39,853) was not aligned with any existing figure.

It had earlier been announced in the Budget that the income tax personal allowance will rise to £9,205 for 2013/14 (with the intention that it will be £10,000 before the next general election) – a rise of 13.6% in one year. If this rise is mirrored by the earnings trigger, more workers will be ineligible for automatic enrolment than previously expected. The consultation response does not address this.

Disclosure of information

The Government is consulting on draft regulations amending the disclosure regulations to change the time limit for giving basic scheme information to workers who are eligible to be automatically enrolled or enrolled after opting in.

Consultation:
http://www.dwp.gov.uk/consultations/2012/pen-scheme-disclosure-reg-2012.shtml

It would change from two months from the start of membership, as it is at present, to one month from the date the scheme receives jobholder information (as defined in the main automatic enrolment regulations) about such workers. The intention is that most such workers will receive the basic scheme information while their opt-out period is still running.

The regulations would also amend the "basic scheme information" requirement, which is usually satisfied by the scheme booklet so that it includes:

> *"How persons who are eligible to be members of the scheme are admitted to it, including whether they are subject to automatic enrolment, or can join on their own application."*

The consultation closes on 22 May 2012.

CARE schemes
The Government is consulting on a tweak to the qualifying scheme criteria for career average ("CARE") schemes.

Consultation:
http://www.dwp.gov.uk/consultations/2012/auto-enrol-career-ave-qual-sch.shtml

Under the existing legislation, a CARE scheme can be a qualifying scheme for automatic enrolment proposes if it gives either:

(a) guaranteed revaluation of at least the annual CPI increase up to 2.5%; or

(b) discretionary revaluation, whilst funding for at least the level described in (a) and including this in its statement of funding principles.

The intention is now to allow CARE schemes to qualify if they have a combination of:

- guaranteed revaluation below the level described in (a) above; and
- a discretionary power to give additional revaluation, provided that the revaluation is funded for and mentioned in the statement of funding principles.

The consultation closes on 11 June 2012.

HMRC salary sacrifice guidance
For a salary sacrifice to be effective, there must be an irrevocable contractual variation so that the employee's salary entitlement is reduced for at least a 12 month period. The only exception to this is if the individual experiences what HMRC calls a "*lifetime event*", eg, marriage or divorce. In those circumstances, HMRC accepts that the variation can be reversed without rendering the original sacrifice ineffective.

HMRC will reportedly be amending its pensions salary sacrifice guidance to say that if a contractual variation will be reversed when a member opts out following automatic enrolment, this does not mean that the sacrifice was ineffective. Without this concession, it was very strongly arguable that any such provision would render the entire sacrifice ineffective, including for members who did not opt out.

The scope of what precisely HMRC will say is not yet clear. For example, will it also cover non-automatic enrolment opt-outs and will this be classified as a "*lifetime event*" or dealt with in some other way?

Employer communication materials
The Government and the Pensions Regulator have issued materials to help employers communicate generically with their staff about automatic enrolment. The website includes an FAQs document for workers and suggested language to include in communications.

Communication materials:
http://www.thepensionsregulator.gov.uk/workplacepensions.html

Pensions and bankruptcy

Two recent cases have indicated that the pension protections available to bankrupt individuals are weaker than they might have expected. Pension rights are excluded by statute from bankrupts' estates but benefit payments made during the bankruptcy can be claimed by the trustee in bankruptcy for the benefit of creditors. In these cases, the High Court had to consider whether (a) a pension not yet in payment could be accessed by the trustee in bankruptcy and (b) a member could be required to take a pension commencement lump sum, in order to increase the sums available to creditors.

Accessing a pension not yet in payment
In *Raithatha v Williamson*, the High Court held that a trustee in bankruptcy could obtain an income payments order ("IPO") in respect of the bankrupt's pension despite it not yet being in payment.

Section 310 of the Insolvency Act 1986 provides that a court may make an IPO in respect of the income of the bankrupt during the bankruptcy. For this purpose the bankrupt's income "*comprises every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled …*", including most payments from a pension scheme.

The scheme in question appears to be an occupational pension scheme, though this is not clear from the judgment. The bankrupt, being over age 55, was entitled to take his pension under the scheme rules, apparently without the need for trustee consent, but he said that he was still working and had no intention of drawing his pension.

The Court held that:

- "*a bankrupt does have an entitlement to a payment under a pension scheme not merely where the scheme is in payment of benefit but also where, under the rules of the scheme, he would be entitled to payment merely by asking for payment*" and so an IPO could be made in these circumstances; and
- a pension commencement lump sum, as well as regular payments of pension, was a payment in the nature of income within the meaning of section 310.

The decision has been appealed.

Requiring the bankrupt member to take his lump sum
In *Blight v Brewster*, the High Court used a general power under the Senior Courts Act 1981 to require a bankrupt to take his pension commencement lump sum so that his creditors could benefit from it. The relevant section says:

> *"The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."*

Case report:
http://www.bailii.org/ew/cases/EWHC/Ch/2012/165.html

The order made was that the bankrupt must sign an election letter drafted by the claimants' lawyers, failing which they could write to the pension provider in the bankrupt's name making the election for the lump sum. A third party debt order (an alternative to an IPO) was made to ensure that the monies then benefited the creditors.

The judge said:

> *"There appears to me to be a strong principle and policy of justice to the effect that debtors should not be allowed to hide their assets in pension funds when they had a right to withdraw monies needed to pay their creditors."*

Bridging pensions

Paying bridging pensions after age 65
The Government is proposing to align the tax rules on the payment of bridging pensions with changes to the state pension age. At present, bridging pensions cannot be terminated after age 65 without making an unauthorised payment. The proposed changes should allow pensions in payment to be reduced when state pension comes into payment after age 65.

Budget report:
http://cdn.hm-treasury.gov.uk/budget2012_chapter2.pdf

Proposed power to amend rules
The Pensions Minister has announced that trustees will be given a limited power to amend scheme rules on bridging pensions to reflect changes to state pension ages. Details are awaited.

Hansard extract (see Columns 99WS and 100WS:
http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120326/wmstext/120326m0001.htm

Equal civil marriages

The Government has published a consultation on the implications of allowing same-sex marriages. In the pensions context, it is considering requiring equal rights to spouses' pensions, perhaps in respect of past service benefits as well as for future accrual. The law already gives equal rights to civil partners but only in respect of accrual from 5 December 2005 and contracted-out rights accrued since 6 April 1988.

The consultation closes on 14 June 2012.

Consultation:
http://www.homeoffice.gov.uk/publications/about-us/consultations/equal-civil-marriage/

Transfer inducements

The FSA has confirmed changes to the rules and guidance to be applied by financial advisers when advising on transfers from DB schemes to personal pensions, including cases 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.

Press release:
http://www.fsa.gov.uk/library/communication/pr/2012/043.shtml

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

The press release comments that:

> "*In the vast majority of cases someone in a defined benefit pension scheme will not be better off transferring to a personal pension. The new assumptions will make it tougher for advisers to make the case for a transfer. As a result of these new rules, we would expect the number of pension transfers to decrease, leaving pension scheme members better off.*"

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

If you do not already subscribe to WHiP and would like to do so, please email pensions@traverssmith.com.

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 and Philip Stear.

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

www.traverssmith.com

Travers Smith LLP is a limited liability partnership registered in England and Wales under number OC 336962 and is regulated by the Solicitors Regulation Authority (the independent regulatory body of the Law Society of England and Wales). The word "partner" is used to refer to a member of Travers Smith LLP. A list of the members of Travers Smith LLP is open to inspection at our registered office and principal place of business: 10 Snow Hill, London, EC1A 2AL. We are not authorised under the Financial Services and Markets Act 2000 but we are able, in certain circumstances, to offer a limited range of investment services to clients because we are members of the Law Society of England and Wales and regulated by the Solicitors Regulation Authority. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide. The information in this document is intended to be of a general nature and is not a substitute for detailed legal advice.