



What's happening in *Pensions*

Issue 6

November 2008

The Pensions Regulator's anti-avoidance powers

The Government has proposed amendments to the Pensions Bill widening the Pensions Regulator's powers to issue contribution notices. The Regulator has published draft text for its Code of Practice indicating how it proposes to use its new powers.

We issued an e-mail alert about this on 29 October. Please let us know if you did not receive it.

Pensions Bill

The Pensions Bill has completed its second House of Lords report stage and a new draft of the Bill has been published. Points to note from this stage are as follows.

- The Government's proposed widening of the Pensions Regulator's powers was passed but with opposition Lords reserving the right to discuss Government responses with their advisers before the next stage.

As regards the due diligence required for the statutory defence to a contribution notice issued under the new "material detriment" test, Lord McKenzie said on behalf of the Government:

"The Government intend that the person should undertake a before-and-after comparison of the effect of the act on their pension scheme. We do not intend that the material detriment test and the defence which relates to it should necessitate a broad assessment of almost any adverse possibilities that could befall an employer and their pension scheme over a future period. The defence has been framed to require the employer to make a proportionate consideration of the effect of their act or failure to act."

- The Bill still contains provisions relaxing the statutory requirement to revalue DB deferred pensions in respect of pensionable service from a date to be specified (1 January 2009, we had expected, but this may well change). We issued an e-mail alert about this on 4 November 2008. Please let us know if you did not receive it.
- Opposition proposals to defer the latest age at which annuities must be taken (currently age 75) were defeated.
- The Government has issued a press release, with Bill amendments to follow, to announce that employers will be able to "self-certify" annually that their DC schemes meet the quality standard that exempts them from contributing to Personal Accounts, based on the expected value of contributions to be made over the course of the coming year (regardless of the formula by which they are calculated).
- People retiring before April 2015 will be able to top up their state pension by buying up to six additional years of class 3 National Insurance Contributions. They must already have at least 20 years of NICs (including those attributable to home responsibilities protection). 110,000 people (mainly women and carers) are expected to be able to benefit.

The Bill will be reconsidered by the House of Lords on 19 November, before returning to the House of Commons. It is due to receive Royal Assent before the end of the year.

Allied Domecq case: employer contribution rule

The Court of Appeal has upheld the High Court's decision in this case about the interpretation of an employer contribution rule in a DB scheme.

DWP press release:

<http://www.dwp.gov.uk/mediacentre/pressreleases/2008/oct/pens085-201008.asp>

Pensions Regulator press release:

<http://www.thepensionsregulator.gov.uk/whatsNew/pn08-25.aspx>

Parliament website Bill page:

<http://services.parliament.uk/bills/2007-08/pensions.html>

Case report:

<http://www.bailii.org/ew/cases/EWCA/Civ/2008/1084.html>

The rules required participating employers to pay ordinary contributions determined by the actuary and deficiency contributions as follows:

"The Participating Companies shall collectively pay such an amount by lump sum and/or periodic payments (to be certified by the Actuary) as will in the opinion of the Actuary restore the solvency of the Fund; such amount to be paid by the Participating Companies in such proportions as the Actuary shall certify and within such period as the Trustees may, on the advice of the Actuary, agree with the Principal Company".

The Court of Appeal agreed with the High Court that this rule required the rate of deficiency contributions to be determined by the actuary alone. Therefore, in accordance with the 2005 Scheme Funding Regulations, the schedule of contributions agreed between the trustees and the employer must specify rates of employers' contributions no lower than those which the actuary would have required if the decision had been for him or her to make.

The decision is very scheme-specific but there is a worrying aspect, concerning the approach taken by the Court of Appeal when interpreting the relevant scheme provisions.

The rule quoted above was contained in a consolidated version of the scheme rules executed in 2005. The Court of Appeal (unlike the High Court) said that it must therefore be interpreted in the context of the MFR legislation in force at that time. The Court made no enquiry into the previous history of the rules to see whether the relevant wording was changed in the 2005 consolidation.

This approach seems to run contrary to Arden LJ (also Court of Appeal) in *Stevens v Bell (British Airways)* (2002): *"the meaning of a clause in the scheme must be ascertained by examining the deed as it stood at the time the clause was first introduced"*.

This case therefore raises doubts about whether the meaning of a rule can change if there is a fresh consolidation of the rules after a change in the law, even if the wording of the rule stays the same.

Pensions Regulator statement to trustees on current market conditions

The Pensions Regulator issued a statement to trustees of all work-based pension schemes on 24 October 2008, *"setting out its general position in relation to current market conditions"*.

The press release says that *"The statement highlights that:*

- *recent developments in the financial markets will be of great concern to pension scheme trustees, sponsoring employers and scheme members;*
- *trustees need to remain vigilant and to keep the position of their schemes under review;*
- *the regulator's current codes and guidance cover the relevant issues and allow sufficient flexibility for trustees;*
- *trustees should continue to focus on making sound decisions in the long term interests of scheme members."*

The statement also says:

- *"Where an employer believes that an existing recovery plan is at serious risk of jeopardising the company's future development or solvency that will be a matter for discussion with the trustees. The trustee board will wish to consider carefully any proposal for change taking into account among other things plans for payments to other creditors and dividends to shareholders."*
- *"Trustees of DC schemes may want to give careful consideration to their member communications at this time – ensuring that members have full knowledge of their options, are prompted to review their position in light of their circumstances and are directed to seek advice where appropriate. The Pensions Advisory Service (TPAS) exists to provide advice and information. Trustees may also want to review the position of member segments that may be at particular risk due to current economic conditions. Identification of these segments will depend on the scheme rules and investment options members have open to them."*

Press release:

<http://www.thepensionsregulator.gov.uk/whatsNew/pn08-26.aspx>

Age discrimination: objective justification

In *Rolls Royce plc v Unite*, Rolls Royce and the trade union Unite had entered into collective agreements relating to redundancy. Selection for redundancy was under a points system, part of which was based on years of continuous service. Unusually, Rolls Royce wanted the arrangement declared as unlawfully age discriminatory and Unite defended it. They asked the High Court (rather than an employment tribunal, which the judge did not like) to decide whether or not the redundancy selection scheme was lawful.

The High Court held as follows.

- The length of service criterion was indirect age discrimination but was objectively justified. There was a legitimate aim of carrying out redundancies in a way that was perceived to be fair and could be carried out "peaceably". Also, the criterion recognised and rewarded loyalty and experience and protected older employees against the difficulties of finding new work.
- A "last in, first out" redundancy selection scheme "might be objectionable", but that was not what this was.
- In any event, the exemption for benefits based on length of service in the Age Regulations applied: avoidance of selection for redundancy was a "benefit" in its natural sense.
- Where the employee has more than five years' service the discriminatory treatment must, under the exemption for benefits based on length of service, reasonably fulfil a business need. This would probably be the case where the redundancy scheme was agreed with a trade union and length of service was only used as part of the equation, as was the case here.

Amendment of pension rights by collective bargaining

A recent Pensions Ombudsman determination (Mr G E Peck) concerns collective bargaining and its impact on a member whose DB pension rights were reduced by collective agreement.

Mr Peck was not a trade union member and his terms of employment did not expressly permit amendment by collective bargaining. In 2005 his employer, FirstGroup plc, introduced a "Total Rewards" package which was agreed by collective bargaining following a ballot of union members. This included a pay rise (which increased members' contributions) but provided that any salary increase above RPI from April 2006 would not be pensionable. The trustees agreed to amend the scheme rules to reflect this.

The employer argued that it was entitled to change Mr Peck's employment terms by collective bargaining. The trustees argued that (in accordance with *South West Trains v Wightman* (1997)) they were able properly to agree to the scheme amendments.

The Pensions Ombudsman determined as follows.

- In *South West Trains*, the Court had accepted that alterations to the pension scheme could be matters which it was appropriate to decide by collective bargaining so as to be binding contractually on individual employees.
- Union involvement in a pension scheme (as a third party) is not of itself inappropriate.
- In contrast to the situation in *South West Trains*, Mr Peck's contract of employment did not provide expressly for variation by collective bargaining. However, there could be an implied term on the basis of previous dealings between the parties. Collective bargaining had been in place since Mr Peck's employment commenced (in 1970) and Mr Peck had not previously objected to changes introduced following collective bargaining. He had also continued in employment and benefited from the agreed pay rise. By his conduct, he had accepted the Total Rewards package.
- The contract of employment had, therefore, been effectively varied and the trustees had acted properly in agreeing rule amendments to reflect the changes.

Sex equality: comparators and disparate impact

The Employment Appeals Tribunal, in *Pike v Somerset City Council*, has considered the appropriate test for comparators in a case of equal access to a pension scheme for part-time employees returning to work after retirement.

Case report:

<http://www.bailii.org/ew/cases/EWHC/QB/2008/2420.html>

Determination:

<http://www.pensions-ombudsman.org.uk/determinations/docs/2008/oct/s00537.doc>

Case report:

http://www.bailii.org/uk/cases/UKCAT/2008/0046_08_0310.html

The Teachers Pension Scheme rules provided that retired teachers who returned to employment could re-join the scheme if they returned full-time but not if they returned part-time. Mrs Pike claimed that this rule indirectly discriminated against women. The main question under consideration was who comprised the relevant pool of comparators.

The EAT held that the Employment Tribunal had been wrong in deciding that the relevant pool was all teachers who were members of the scheme. The EAT held, following *Secretary of State for Trade and Industry v Rutherford No 2* (2006) and *Grundy v British Airways plc* (see below), that the correct pool comprised members of the scheme who had returned to work after retirement. The correct group for comparison is made up of those with an interest in the rule in question and who may be advantaged or disadvantaged by the operation of that rule. Here, the pool was those returning to work, who would all presumably want to rejoin the scheme. The evidence showed that the numbers of men and women within that pool were very similar.

Within the pool, the advantaged group were full-timers and the disadvantaged were part-timers. 42.45% of the disadvantaged group (part-timers returning to work after retirement) were men and 57.55% were women. This 15% disparity in the disadvantaged group and, moreover, a 38.8% disparity in the advantaged group amounted to a disparate adverse impact on women. The case was therefore referred back to the ET to hear a defence of objective justification.

Background: The most recent authority in this area is *Grundy v British Airways plc* (2007), in which the Court of Appeal held that Employment Tribunals have a wide scope in determining the most appropriate pool for comparison in sex discrimination cases. There is not always only one suitable pool for every case.

Grundy v British Airways plc:

<http://www.bailii.org/ew/cases/EWCA/Civ/2008/875.html>

NAPF best practice principles on investment advice

The NAPF has published best practice principles for consultants providing investment advice to pension funds. Twelve major consultancies have endorsed the principles. There are 16 principles: please see the press release for details.

Press release:

[Link to NAPF press release](#)

Trustee knowledge and understanding

The Pensions Regulator has published a draft revised code of practice and scope guidance for consultation in relation to the trustee knowledge and understanding (TKU) framework. The consultation closes on 31 December 2008.

The guidance on the scope of the TKU requirements is split into three parts, for trustees of:

- DB schemes (including those with a DC element);
- DC schemes (with no DB element); and
- small, fully insured DC schemes.

Changes reflect:

- *"the importance of good administration;*
- *the forthcoming introduction of registration and auto-enrolment requirements;*
- *emerging buyout issues, including abandonment and inducement; and*
- *pension scheme wind-up and appropriate preparatory steps".*

Press release:

<http://www.thepensionsregulator.gov.uk/whatsNew/pn08-24.aspx>

HMRC registered pension schemes manual

HMRC has issued a number of updates to its online Registered Pension Schemes Manual. Most concern changes introduced by Finance Act 2008 (see WHiP Issue 4) or are corrections or clarifications.

Details of updated pages:

<http://www.hmrc.gov.uk/manuals/rpsmmanual/updates/rpsmupdate221008.htm>

Pension Protection Fund – Annual report 2007/08

The Pension Protection Fund (PPF) has issued its 2007/08 annual report and accounts.

Press release:

<http://www.pensionprotectionfund.org.uk/news-details.htm?id=6786>

This and previous issues of WHiP can be found on our website: please click [here](#).

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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 and Philip Stear.

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