



# *What's happening in Pensions*

Issue 8

February 2009

## **Automatic enrolment: start date**

The Personal Accounts Delivery Authority (PADA) has launched its tender process for an administrator to run the Personal Accounts scheme. The prospectus issued by PADA indicates that the automatic enrolment obligation under the Pensions Act 2008 is likely to commence in October 2012. No month had previously been announced by the Government but it had been widely assumed that April 2012 would be the start date. The obligation may be phased in, with larger employers subject to it earlier than smaller ones. Further details are awaited.

### **PADA documents:**

<http://www.padeliveryauthority.org.uk/documents/press-release-01-2009.pdf>

<http://www.padeliveryauthority.org.uk/expressing-an-interest.asp>

## **Commencement of Pensions Act 2008 provisions**

Two commencement orders have been made, bringing into force certain provisions of the Pensions Act 2008 (see WHiP Issue 7). The following points are of particular interest

### **Commencement orders:**

[http://www.opsi.gov.uk/si/si2008/uksi\\_20083241\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20083241_en_1)

[http://www.opsi.gov.uk/si/si2009/uksi\\_20090082\\_en\\_1](http://www.opsi.gov.uk/si/si2009/uksi_20090082_en_1)

## **Revaluation of deferred pensions**

It is confirmed that the new cap of 2.5% pa (instead of 5%) will apply to statutory revaluation of deferred pensions accruing after 5 April 2009 (see our Briefing Notes of November and December 2008).

## **Pensions Regulator's power to intervene over actuarial assumptions**

From 26 January 2009, the Pensions Regulator has a clear power to intervene if it considers that a scheme's technical provisions (its funding target) do not comply with the statutory requirements because, for example, their actuarial assumptions are not prudent enough.

## **Appointment of an independent trustee by the Pensions Regulator**

Also from 26 January 2009, the Regulator may appoint an independent trustee to a scheme where it considers it "reasonable" to do so (rather than "necessary" as previously).

## **Contracting-out: abolition of "safeguarded rights"**

It is confirmed that safeguarded rights (i.e. the contracted-out "protected rights" element of shared rights following a divorce) will be abolished from 6 April 2009. This means that ex-spouses with pension credit benefit in a scheme may begin to draw all their pension from age 50 (age 55 from 6 April 2010) and may commute up to 25% of it for a lump sum.

## **NAPF report: "Pension Provision and the Economic Crisis"**

The NAPF has published a widely reported survey on the impact of the current economic crisis on workplace pension provision. It indicates that 24% of larger employers expect to terminate final salary accruals (though over what timescale is not indicated). This figure was up from only 2% from a similar survey in July 2008.

The NAPF makes the following recommendations to the Government:

- DB schemes should not face unlimited pension protection levy demands. The Government should give a clear assurance that it will act as the guarantor of last resort for the PPF.
- Rebuilding employee confidence in pensions by communications that emphasise the long-term nature of pensions.

### **NAPF Survey:**

[http://www.napf.co.uk/DocumentArchive/Press%20Releases/01\\_2009/20090123\\_23-01-2009%20-%20%20Economic%20Crisis%20Leads%20To%20Need%20For%20Radical%20Action%20To%20Help%20UK%20Pension%20Schemes.pdf](http://www.napf.co.uk/DocumentArchive/Press%20Releases/01_2009/20090123_23-01-2009%20-%20%20Economic%20Crisis%20Leads%20To%20Need%20For%20Radical%20Action%20To%20Help%20UK%20Pension%20Schemes.pdf)

- Facilitating the consolidation (i.e. merger) of smaller schemes.
- The issue of gilts should be skewed towards long-dated, both fixed and index-linked.
- Risk-sharing should be facilitated by:
  - removing entirely the requirement to increase pensions in payment. (This was recently rejected by the Government following its risk-sharing consultation (see WHiP Issue 7).) However, scheme members should have the option to buy inflation-proofing; and
  - giving DB schemes the same flexibility as the State to manage longevity risk, by giving them the ability to increase retirement ages even for past service. To protect members, increases should be limited to correspond to expected longevity improvements and workers near to retirement should be excluded.
- The Pensions Regulator should give further assistance to employers by allowing recovery plans to extend over 15 years, rather than 10, before further investigation by the Regulator is triggered, in appropriate circumstances.

### Flexible retirement: new consultation

The DWP has published a response to its October 2007 consultation on flexible retirement and age discrimination. The response consists of a further consultation on two alternative sets of regulations that would add an additional pensions exception to the Age Regulations. The consultation closes on 10 March 2009.

Comments are requested on whether to introduce a wide exception (allowing the cessation of accrual and other entitlements to benefits during a flexible retirement period) or a narrower exception (allowing employers to stop providing death in service benefits for members in a flexible retirement period, but to treat them as pensioners instead). Under either option, a flexible retirement period would have a limited meaning. It would be a period during which a member is aged 65 or over when his or her employment grade or working hours are reduced after becoming entitled to pension under an occupational pension scheme. The exemption would not apply to members already in such a period.

Whatever course is settled on, the Government intends to produce guidance on flexible retirement.

#### Consultation paper:

<http://www.dwp.gov.uk/consultations/2008/flexible-retirement-next-steps.pdf>

### Conversion of GMPs

HMRC's National Insurance Services to Pensions Industry's (NISPI) December 2008 newsletter includes a section on the conversion of GMPs into standard scheme benefits from April 2009 (see WHiP Issue 5). It says that "*NISPI calculation services are available if, as part of the conversion exercise, schemes need to reconcile their GMP records with ours. There is no need to wait until April to request GMP calculations*".

There will be a new notification process so that trustees can tell NISPI when they have converted GMP rights: it should be available from March 2009.

#### NISPI newsletter:

<http://www.hmrc.gov.uk/nic/newsletter35.pdf>

### Equalisation by announcement

In *Capital Cranfield Trustees Ltd v. Beck (AC Skelton Pension & Life Assurance Scheme)*, the trustees of a scheme in a PPF assessment period asked the High Court to determine whether an announcement had equalised normal retirement dates ("NRDs") at age 65. It was agreed that the scheme's amendment power did not allow amendment by announcement as it required amendments to be made "under hand" (i.e. by signed document). It was argued, however, that the definition of NRD in the scheme rules allowed it to be changed by announcement and that the announcement had been an effective exercise of that power. The definition provided that a member's NRD was (broadly) 60 for women, 65 for men, or "*such day as the Employers shall determine in any particular case and notify in writing to the Member concerned*".

The High Court held that the announcement here was intended to make an amendment to the scheme rules, not to determine NRDs in numerous "particular cases". The scheme rules made provision for how and in what circumstances they could be amended, and contained several safeguards that did not appear in the definition of NRD. The intended amendment fell squarely within the scope of the amendment power and did not fall squarely within the scope of the limited power in the definition. The announcement had not, therefore, altered any members' NRDs.

#### Case report:

<http://www.bailii.org/ew/cases/EWHC/C/h/2008/3181.html>

The judge also made the following observations.

- The argument that the power to determine an alternative NRD was only available at the commencement of a member's pensionable service was "*a strong and persuasive one*".
- The announcement was not in the form of a "*determination*" (as required by the definition of NRD) but could be read as such as it referred to a decision having been made.
- However, it was not a determination "*by the Employers*" as the announcement was not made by all participating employers, only by one, and was expressly made by "*the Company as sole Trustee*".

### Part-timer claims: assessing if the claimant would have joined the scheme

In *Lavety v Lanarkshire Health Board*, Ms Lavety was a part-time employee of the NHS in Scotland who was unlawfully denied access to the Scottish NHS pension scheme from 1983 to 1991 because she worked fewer than 24 hours per week. She had not, however, joined the scheme when first allowed to do so in 1991 and did not join until 1996. She argued that this was because she could not afford to do so, as she was contributing to private pension policies and would have suffered a penalty had she stopped.

The Employment Tribunal had found that her five and a half year delay in joining the scheme created a rebuttable presumption that she would not have joined in 1983 had she been allowed to do so. (It therefore struck the claim out, as having no reasonable chance of success.) The EAT held that this was the wrong approach: rather, the Tribunal must consider "*the whole facts and circumstances*". Here, there was enough evidence that she would have joined because she had instead taken out and continued contributing to private policies and had asked at interview if she would be able to join the scheme. The claim was therefore referred back to the Employment Tribunal to consider in the light of the EAT's findings.

### Pensions Regulator: reminder about duty to consult

Following the Government's consultation on proposals for the Pensions Regulator to issue fines for breaches of the employer's duty to consult over listed changes (see WHiP Issue 7), the Regulator has issued a reminder to employers about this duty.

The Regulator expects employers to comply in full with the requirements, except where this is not practical ("*for example where restructuring is taking place and employees' jobs are at risk if the process is delayed*"). In those exceptional cases, the Regulator expects employers to provide as much information to employees as possible, even if only on a confidential or restricted basis, and apply the longest possible timescale before the changes are implemented.

### Pensions Regulator: clearance and abandonment guidance

The Pensions Regulator has made minor amendments to its guidance on clearance and abandonment, reflecting changes to its powers introduced by Pensions Act 2008 (see WHiP Issue 7). The changes do not cover the "material detriment" test, as that part of the Act is not yet in force (although it will be retrospective when it comes into force). The Regulator also says that "*No significant change will be made to the definition of type A event in the clearance guidance*".

Further guidance is planned to address the statutory defence to the material detriment test and to give practical guidance about transactions that might give rise to contribution notices now that it is no longer necessary for the Regulator to establish that avoidance of a section 75 debt was "*otherwise than in good faith*".

### Lifetime allowance: Enhanced and primary protection

HMRC issued a guidance note on 9 January 2009 concerning the notification of lifetime allowance protection (enhanced or primary protection), the deadline for which is 5 April 2009. The relevant form (APSS200) has been updated and the new version must now be used.

#### Case report:

[http://www.employmentappeals.gov.uk/Public/Upload/EATS.0033\\_08.doc](http://www.employmentappeals.gov.uk/Public/Upload/EATS.0033_08.doc)

#### Press release:

<http://www.thepensionsregulator.gov.uk/whatsNew/pn08-29.aspx>

#### TPR guidance:

<http://www.thepensionsregulator.gov.uk/guidance/clearance/index.aspx>  
<http://www.thepensionsregulator.gov.uk/guidance/abandonment/index.aspx>

#### HMRC guidance:

<http://www.hmrc.gov.uk/pensionscheme/s/life-allow-pn.htm>

## Deductibility of pension contributions: companies with investment business

HMRC has updated its Company Taxation Manual by adding pages to cover the tax deductibility of pension scheme contributions by companies with an investment business (as opposed to trading companies). A common example of a company with investment business is a group holding company. Contributions to registered pension schemes are generally deductible as expenses of management of the investment business.

The guidance is very similar to that for trading companies. One difference worth noting is that there is no "*wholly and exclusively for the purposes of the company's trade*" test; instead, contributions must be made "*in respect of the investment business*".

## Deductibility of cross-border pension contributions

The European Commission has formally requested the UK government to amend legislation which can, in some circumstances, deny tax relief to UK based workers contributing to pension funds elsewhere in the European Union or European Economic Area. Those circumstances include where the scheme does not supply certain information to HMRC. The matter may be referred to the European Court of Justice if the UK does not respond satisfactorily within two months (from 27 November 2008).

## Lump sums paid by non-UK schemes

HMRC has issued draft regulations to ensure that lump sums paid by non-UK pension schemes out of UK tax-relieved funds are taxed in the same way as the equivalent payments made by registered pension schemes. Draft amendments to HMRC's Registered Pension Schemes Manual have also been published.

## HMRC Pension Schemes Newsletters 35 and 36

HMRC has published its 35<sup>th</sup> and 36<sup>th</sup> Pension Schemes Newsletters. The 35<sup>th</sup> reminds readers of HMRC filing deadlines for items such as pension scheme returns, event reports and self-assessment tax returns.

The 36<sup>th</sup> relates exclusively to transfers of UK tax-relieved funds to Australian qualifying recognised overseas pension schemes.

## Pensions Ombudsman determinations

### Mr N Cobbold: trustees and third party claims

The Pensions Ombudsman has found maladministration against the trustee of a SIPP for failing to consider whether a third party investment manager, which was outside the Ombudsman's jurisdiction, was liable to the trustee for a loss to the funds held in respect of the complainant member due to a fall in the value of sterling against the dollar during a period of delay in realising investments. The member was compensated £200 for distress and inconvenience and the trustee was directed to consider a claim against the manager "*as if the trust funds were their own personally*".

### Mrs J M Quest: delayed transfer

Mrs Quest complained that her incoming transfer had been improperly delayed by Dorset County Council (as a manager of the Local Government Pension Scheme) and that she had suffered financial loss as a result. The Pensions Ombudsman found maladministration and dismissed the argument that because the Council had operated within statutory time limits it had not acted improperly. The delays had nonetheless been maladministration.

### Prof H Fraser: advice by trustees and employees

This determination concerns the giving of advice by scheme trustees/administrators and by employers. Professor Fraser complained that her late husband had been given out of date information about children's pensions under the Teachers Pension Scheme, following which he had made different inheritance and divorce (from his previous wife) arrangements than he would have done if he had been given accurate information. The Deputy Pensions Ombudsman upheld the complaint against the administrators as it was clearly maladministration for them not to be giving up to date, accurate information about scheme benefits. There was also clear evidence that the member had made arrangements in reliance on the incorrect information.

### Company Taxation Manual:

<http://www.hmrc.gov.uk/manuals/ctmanual/CTM08340.htm>

### EC press notice:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1816&type=HTML>

### Draft regulations and RPSM pages:

<http://www.hmrc.gov.uk/pensionschemes/rnuk.htm>

### Newsletter 35:

<http://www.hmrc.gov.uk/pensionschemes/pen-newsletter35.htm>

### Newsletter 36:

<http://www.hmrc.gov.uk/pensionschemes/ps-newsletter36.htm>

### Determination:

<http://www.pensions-ombudsman.org.uk/determinations/docs/2008/nov/27252.doc>

### Determination:

<http://www.pensions-ombudsman.org.uk/determinations/docs/2008/dec/s00483.doc>

### Determination:

<http://www.pensions-ombudsman.org.uk/determinations/docs/2008/sep/s00009.doc>

The Deputy Ombudsman rejected a separate complaint against the employer for failing to tell Professor Fraser's husband about a change in the scheme rules to the definition of "child". He noted that there was no strict obligation on employers to advise employees of their pension scheme rights, but that this did not rule out a finding of maladministration. However, in this case sufficient steps had been taken by the employer (for example, dissemination of information via the University website, emails and briefing sessions) to draw members' attention to the amendments. Accordingly, even though the member had been on long-term sick leave at the relevant time and may not have seen this information, there was no maladministration by the employer.

### **Mr T I Jones: ill health pension evidence**

Mr Jones, a teacher, complained that his application for an ill health pension was improperly refused despite evidence from a specialist. The Deputy Pensions Ombudsman found that there had been maladministration in that the specialist's evidence had been discounted because it did not give reasons for its conclusions or consider whether Mr Jones would be capable of performing other forms of teaching (as required by the scheme regulations). The Department should have sought clarification. It was maladministration not to have taken into account all the available evidence. The Department was therefore required to reconsider the application.

### **Mr J Murphy: trustee liability for securing benefits**

Mr Murphy's deferred benefits had (or should have) been transferred, over the years, from scheme to scheme as a result of various scheme mergers. He brought a complaint to the Pensions Ombudsman against his employer and the Krug pension scheme's administrator. The Ombudsman found, as a matter of fact, that Mr Murphy's benefits were a liability of the Krug pension scheme but had not been bought out when that scheme was wound up. It could not be established why this was the case and there was no evidence to indicate that the Krug scheme administrator was to blame.

The Ombudsman found that the trustees of the Krug scheme were ultimately responsible for ensuring that Mr Murphy's benefits were paid. Their failure to maintain records and pay benefits would constitute maladministration, but no complaint had been made against them. Even if they could be traced, there was no longer any scheme fund and there would need to be a finding of personal dishonesty for the trustees to be personally liable. There was no evidence to suggest this. The Ombudsman therefore regretfully found that there was no one who could be blamed for Mr Murphy's loss.

### **Statutory money purchase illustrations**

The Board for Actuarial Standards (BAS) has updated TM1 on statutory money purchase illustrations (SMPIs). The changes reflect the forthcoming abolition of money purchase contracting-out (and so the NIC rebates that contracted-out DC schemes receive) (from 6 April 2012, we expect) and the changed methods for calculating NIC contracting-out rebates following the introduction of the Upper Accrual point for the State Second Pension from 6 April 2009.

New TM1 applies to all SMPIs issued from 1 September 2009, but BAS is encouraging early adoption, for SMPIs with effective dates on or after 6 April 2009.

### **Pension Protection Fund: revised factors**

The PPF published revised commutation, compensation cap and early retirement factors on 9 January 2009. The new factors will be used for all calculations with an effective date on or after 1 January 2009.

### **Financial Reporting Council: 2009/10 levies**

The Financial Reporting Council (FRC) is consulting on its proposed 2009/10 levies, including the levy on pension schemes. The 2009/10 levy is intended to be £3.10 per 100 members (for schemes with 1,000 or more members), up from £2.90 in 2008/9. The figures will be finalised in April 2009.

#### **Determination:**

<http://www.pensions-ombudsman.org.uk/determinations/docs/2008/nov/73299.doc>

#### **Determination:**

<http://www.pensions-ombudsman.org.uk/determinations/docs/2008/nov/23490.doc>

#### **BAS press release:**

<http://www.frc.org.uk/bas/press/pub1870.html>

#### **PPF guidance:**

[http://www.pensionprotectionfund.org.uk/index/other\\_guidance.htm](http://www.pensionprotectionfund.org.uk/index/other_guidance.htm)

#### **FRC consultation:**

[http://www.frc.org.uk/documents/pagemanager/frc/Draft\\_plan\\_200910\\_December\\_2008/Draft%20One%20Year%20Plan%20Final%20-%20Short.pdf](http://www.frc.org.uk/documents/pagemanager/frc/Draft_plan_200910_December_2008/Draft%20One%20Year%20Plan%20Final%20-%20Short.pdf)

## New "Purple Book"

The Pensions Regulator and PPF have published the third "Purple Book", looking at the risks faced by UK defined benefit schemes.

### Press release:

<http://www.thepensionsregulator.gov.uk/whatsNew/pn08-30.aspx>

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

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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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