

C/M/S/ Cameron McKenna



Pensions

Update

Issue 21 - January 2005

Contents

Editorial	3
Nigel Moore	
Acts	5
Stephen Goldsmith	
Statutory instruments	9
Keith Webster	
Inland Revenue	11
Kevin Pither	
Opra	12
Simon Pilcher	
Cases	15
Mark Kowalik	
Ombudsman determinations	20
Mark Grant	
European developments	24
Daniel Shaw	
Miscellaneous	26
Mark Atkinson	
The year ahead	29
Peter Coyne	

Editorial

In our editorial last year, we said that 2004 promised to be the most important year for occupational pension schemes for some time with further developments expected in relation to tax simplification and the new Pensions Bill. Well, so it has proved. The Finance Act 2004 does, indeed, introduce a whole raft of new measures which are designed to simplify pensions.

It is fair to say, however, that one thing the Finance Act is not is 'simple'. Further, whatever be the government's aims, it would appear that the legislation actually enacted does not always deliver on these. As a result, we understand there are likely to be provisions in the Finance Act 2005 correcting or changing some of the pensions simplification measures in the Finance Act 2004.

The Pensions Bill has also made its way onto the statute book, eventually receiving Royal Assent on 18 November 2004. The Act itself is extremely long, with 322 sections and 13 schedules. Further, during 2005, we are promised approximately 100 sets of Regulations and there will then be a number of Codes of Practice to be issued by the new Pensions Regulator.

The Act will introduce some fundamental reforms to our pensions system, notably the Pension Protection Fund and the new Pensions Regulator, both of which will take effect from April 2005. The funding costs of the PPF are to be met by a levy on occupational defined benefit schemes.

Although the levy in the first year of operation is going to be 'scheme-based' (taking into account basic factors such as the number of members, their earnings and scheme liabilities), following an amendment made in the House of Lords, from the second year of the fund's operation, 80% of the levy is due to be risk based. Whilst this may be good news for the larger and better funded schemes, for the smaller schemes, there seems a risk that scarce resources will be spent on paying an insurance premium, rather than increasing the value of assets actually in the underlying scheme.

The Act also introduces a wider range of new so-called 'moral hazard' provisions. These are designed to ensure that, where an employer in a pension scheme is a service company or is otherwise 'inadequately resourced', resources can be made available from other companies within the group and also associated or connected persons. The potential net of this legislation is extremely wide and therefore it will be very interesting to see how the Regulator applies these new powers.

The government has also announced the introduction of a new Financial Assistance Scheme. At present, however, details of how this scheme will operate are scant. Again, it is to be hoped the position will become clear in the first half of next year.

Whilst a number of the structural changes to the pensions landscape will take effect from April 2005, many of the other provisions in the Act are now scheduled to take effect in April 2006. From the perspective of trustees, the key change will be the new requirement that trustees should be conversant with their trust deed and rules and familiar with the principles underlying pensions law and scheme investment and funding. The Pensions Regulator is due to issue a Code of Practice indicating exactly how it will interpret this test. However, on any basis, it is widely expected that this will 'raise the bar'. Their new standards are not expected to apply until April 2006 at the earliest.

In the meantime, immediately upon taking office as the new pensions minister, Alan Johnson, announced the government's intention to move from the initial requirement in



Nigel Moore

the new Act to have at least one third of the trustees nominated by members to one half. Many schemes already find it very difficult to find one third member representation. It hardly seems likely that with the new obligations being imposed on trustees it will be any easier to increase the complement.

On the wider stage, 2004 saw the publication of the first report by the Pensions Commission chaired by Adair Turner. Although it was only an initial report, its findings make stark reading. Its final report will be published in the autumn of 2005, after the next General Election. Whether the government of the day will be prepared to grasp the nettle and both re-vitalise the voluntary system and, more particularly, make significant changes to the state system as Turner suggests are vital, remains to be seen.

For the pensions team, it has been another busy year. We are delighted to say that during the year, we appointed a fifth pensions partner to our practice, namely Keith Webster. We also received a further accolade this year. Following the award of 'Pension Lawyers of the Year' in the 2003 UK Pensions Awards, this year we were the commended pensions law firm in Pensions Management magazine's 2004 Provider Awards.

In addition, we were delighted to learn this year that not only had one of our solicitors, Shamim Akhtar, passed the necessary exams to become an Associate of the Pensions Management Institute (the fourth member of the team to achieve this qualification), but that she had also won the award for best performance in the Management Paper. Well done Shamim!

During the year, we produced our unique Plain English Guide to the Pensions Bill and, latterly, to the Act itself. This is a free online guide and therefore will be updated regularly to take account of new developments. Further details of the guide are set out in the 'Acts' section of this update.

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Acts

Pensions Act 2004

We have produced a web-based plain English guide to this Act, which is regularly updated to reflect new Regulations and Codes of Practice. It is available for free for subscribers to our Law-Now service. To register, simply go to www.law-now.com/law-now/registerpensions and follow the registration instructions.



Stephen Goldsmith

Finance Act 2004

The Finance Act 2004 was passed on 22 July 2004. From April 2006, the eight existing tax regimes will be replaced by a single one. The new regime contains two key controls on pension contributions and benefits, to be called the 'lifetime allowance', and the 'annual allowance'. Another important change is that members may draw retirement benefits while continuing to work for the same employer. The main changes are as follows:

Benefits – the lifetime allowance

- ✔ Maximum benefits will be determined by the lifetime allowance - a limit on the amount of pension savings that can benefit from tax relief. The value of the lifetime allowance is set at £1.5 million on introduction in 2006, increasing to £1.6 million in 2007, £1.65 million in 2008, £1.75 million in 2009 and £1.8 million in 2010. After 2010, the lifetime allowance will then be reviewed every five years. To calculate whether an individual's maximum allowance has been reached, the annual amount of a final salary pension will be capitalised at 20:1. Individuals receiving payment of a pension at 5 April 2006 will be treated as having used up part of their lifetime allowance if, after 5 April 2006, they receive payment of a new benefit. These pensions will be capitalised at 25:1, which reflects the fact that such people will generally have taken tax-free cash. Where a person has acquired pension credits from a pension sharing order on divorce before 6 April 2006, the lifetime allowance is enhanced, provided that the person gives notice to the Inland Revenue.
- ✔ There will be a tax charge of 25% on funds in excess of the lifetime allowance. These funds may be taken as a lump sum, in which case the lifetime allowance charge will be at a rate of 55%.
- ✔ Transitional arrangements are in place for members who wish to protect pension rights built up before 6 April 2006. There will also be protection for rights to lump sum payments that exist at 6 April 2006. There will be two options for transitional protection from the lifetime allowance charge:
 - Primary protection which will be given to the value of pre-April 2006 pension rights in excess of £1.5 million, where the Revenue has been notified
 - Enhanced protection which will be given to individuals who cease active membership of schemes by 6 April 2006. If they do not resume active membership in any registered scheme, all benefits coming into payment after 5 April 2006 will be exempt from the charge irrespective of their value. The Revenue must be notified of a member's option by 6 April 2009.

Member contributions – the annual allowance

- ✔ Member contributions will no longer be limited to a fraction of annual earnings. This will instead be governed by an annual allowance. For money purchase schemes this will simply mean the contributions paid by the member and the employer in the

relevant tax year. For final salary schemes, it is based on increases in the value of accrued benefits in that tax year. The annual allowance will be set initially at £215,000, increasing steadily each year to £255,000 by 2010. Subsequently, the level will be reviewed every five years.

- ✔ There will be an annual allowance charge of 40% on contributions or increases in value in excess of the annual allowance. A valuation factor of 10:1 will be used to measure the annual increase in value for the purpose of the annual allowance.

Early retirement

- ✔ The minimum age at which a pension may be drawn (except an ill-health pension) will rise from 50 to 55 by 2010. Existing rights to retire before age 55 can be protected if:
 - a member has an actual or prospective right to do so before 6 April 2006
 - that right was contained in the scheme rules on 10 December 2003. This protection will also apply to people that join schemes until 5 April 2006.
- ✔ The protection applies only where employer or trustee consent is not required, and this protection does not seem to apply to contractual rights that are not reflected in scheme rules.

Unapproved schemes

- ✔ Where a funded unapproved scheme existed before 6 April 2006:
 - the member is taxed on contributions paid into it
 - the scheme is taxed on its investment returns
 - the emerging benefit remains untaxed provided no new contributions are paid after 5 April 2006.
- ✔ Where an employer makes a contribution to a registered scheme between 6 April 2006 and 7 July 2006 to cover a pension promise arising before 6 April 2006 under an unfunded scheme, the contribution does not count against the annual input limit.

New revenue powers

In addition to the self-assessment return, the Inland Revenue will now have the power to:

- ✔ issue notices requesting the completion of an annual return by the scheme administrator giving details of assets, liabilities and income
- ✔ request quarterly returns reporting tax liabilities, with appropriate payments being made within 45 days of the end of that quarter
- ✔ require certain information to be reported to it without notice, and to obtain further information and documentation from schemes and third parties
- ✔ penalise pension schemes and administrators in a number of circumstances. These include imposing penalties for false statements, or where there has been fraudulent or negligent non-compliance in relation to the lifetime allowance.

Commutation

- ✔ Trivial commutation will be significantly different to the current regime. A member's rights must be commuted within a 12 month period. If a member commutes for triviality from one scheme, he cannot take commutation from another scheme more than twelve months later. The member must be between 60 and 75. The new limit is less than 1% of the standard lifetime allowance (£15,000 in 2006). For example, a member who gets £5,000 from one scheme can commute benefits from a second scheme in the same 12 months provided the value is no more than £10,000.
- ✔ The current right to obtain a retirement lump sum at normal retirement date in advance of actual retirement for pre-1 June 1989 entrants (and all members of schemes approved by the Revenue before 27 July 1989) seems to have been lost.

Some other changes to note

- ✔ Refunds of contributions (and the member's share of their pension account in money purchase schemes) – are to be taxed at 20% up to £10,800 and 40% on the excess.

- ✔ Defined benefit schemes with less than 50 members will be required to buy out pensions in payment with an insurance company.
- ✔ Defined contribution schemes must offer members the option of a lifetime annuity before a pension can be paid. Such schemes may only make payments before age 75 by way of pension, lifetime annuity or income drawdown. If defined contribution scheme members have reached age 75, they may have payments made to them by way of pension, annuity, or 'alternatively secured' pension.
- ✔ Income drawdown – greater flexibility introduced, with a higher maximum income and no minimum income level.
- ✔ Children's pensions – a pension can be paid to a child to age 23 even if they are not in full-time education, and there is no provision to resume payment of a pension following a gap year.
- ✔ Investment – there will be one set of investment rules for all schemes, which will also be allowed to invest in residential property and personal chattels, although a 'market rental' must be paid for any personal use of such property.
- ✔ Annuities – the need to buy an insured annuity from age 75 will be removed, although income must commence by age 75 and no lump sum death benefits will be allowed.
- ✔ Transfers – there will be no restrictions on transfers after normal retirement date.

Gender Recognition Act 2004

- ✔ The Gender Recognition Act was passed on 1 July 2004 and is expected to come into force in early 2005. It introduces a process by which individuals can make an application for a gender recognition certificate (GRC), if they are living in a different gender or have changed gender under the law of another country.
- ✔ A woman by birth who is receiving a state pension or a Guaranteed Minimum Pension (GMP) where a man would not (i.e. between 60 and 65) who receives a GRC will lose that pension until reaching age 65.

Likewise, a man by birth who receives a GRC between 60 and 65 will become entitled to a state pension or GMP.

- ✔ If, immediately before the GRC is issued, the person is receiving a state widow's pension, that person is not entitled to the pension after the issue of the certificate. It is unclear at present whether a person who is not in receipt of a state widower's pension can become entitled to one following the issue of a GRC.
- ✔ The actual amount of GMP will not be affected by the issue of a GRC and will continue to be based on the person's birth gender. A person's entitlement to a GMP has already accrued in the past and it is a general principle of the Act that the issue of a GRC should not affect events that occurred before its issue. The exception to this is that any increases in the GMP derived from revaluation will be calculated by reference to a person's GMP pensionable age after the issuing of the GRC.
- ✔ In respect of 'equivalent pension benefits' (which are accrued state entitlements based on earnings between April 1961 and April 1975) the different amounts applicable for men and women at present may be changed by regulations to take account of a person changing gender under this Act.
- ✔ It is unclear whether annuity rates which are applicable to a person's birth gender can be used after a GRC has been issued, although it seems more likely (and a more consistent reading of the Act) that a person's gender should be treated as their acquired gender for actuarial purposes. This position may be clarified by regulations in future.

Civil Partnership Act 2004

- ✔ The Civil Partnership Act was passed on 19 November 2004 and is expected to come into force within about 12 months after that. The Act creates an entirely new legal status of 'civil partner', giving same-sex couples in the UK the opportunity of gaining a legal status for their relationship very similar (but not identical in some respects) to marriage.

- ✔ Individuals who choose to enter into a registered civil partnership will gain new rights and responsibilities relating to such matters as pension and employment benefits, life assurance, maintenance for civil partners and children, and recognition under intestacy rules.
- ✔ Pension sharing orders will be available when a civil partnership is dissolved or annulled.
- ✔ The Act contains a wide Regulation-making power so that surviving civil partners may be given survivor benefits following the death of a member in a civil partnership. It is expected that contracted-out pension schemes will in due course be required to provide survivor pensions for civil partners in respect of contracted-out rights accrued from 6 April 1988 (regardless of whether there was any financial dependency).

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Statutory instruments



Keith Webster

The Social Security (Contributions) (Amendment No 2) Regulations 2004 SI 220

- ✔ Effective 6 April 2004.
- ✔ Specify, for the purposes of Class 1 National Insurance Contributions, the lower earnings limit of £79 and the upper earnings limit of £610 per week for the tax year 2004/2005. The thresholds for primary and secondary Class 1 National Insurance Contributions for the tax year 2004/2005 are specified as £91.

The Social Security Revaluation of Earnings Factors Order 2004 SI 262

- ✔ Effective 6 April 2004.
- ✔ Contains the percentage increase in the earnings factors for the years 1978/1979 to 2003/2004.

The Social Security Pensions (Low Earnings Threshold) Order 2004 SI 263

- ✔ Effective 6 April 2004.
- ✔ Sets the low earnings threshold for the tax years following 2003/2004 at £11,600.

The Occupational Pension Schemes (Winding Up and Deficiency on Winding Up etc) (Amendment) Regulations 2004 SI 403

- ✔ Effective 15 March 2004.
- ✔ Amend the Occupational Pension Schemes (Winding up) Regulations 1996 and the Occupational Pension Schemes (Deficiency on Winding up etc) Regulations 1996. Where an occupational pension scheme winding up commences on or after 11 June 2003 and the employer is not in liquidation, a scheme's liabilities when calculating the employer's debt under Section 75 of the Pensions Act 1995 are calculated on the buy-out cost of annuities for all vested benefits.

The Guaranteed Minimum Pensions Increase Order 2004 SI 537

- ✔ Effective 6 April 2004.
- ✔ Specifies a 2.8% increase for post 1988 GMP.

The State Pension Credit (Miscellaneous Amendments) Regulations 2004 SI 647

- ✔ Effective 5 April 2004.
- ✔ Make minor amendments to the operation of the State Pension Credit.

The Pensions Increase (Review) Order 2004 SI 758

- ✔ Effective 12 April 2004.
- ✔ Sets out the increase in the rates of certain public sector pensions.

The Retirement Benefits Scheme (Indexation of Earnings Cap) Order 2004 SI 773

- ✔ Effective 6 April 2004.
- ✔ Sets the earnings cap for the tax year 2004/2005 at £102,000.

The Paternity and Adoption Leave (Amendment) Regulations 2004 SI 923

- ✔ Amend the Paternity and Adoption Leave Regulations 2002 to provide that all terms and conditions of employment (including pension rights) for an employee returning to work from adoption leave must be no less favourable than those which would have applied if the employee had not been absent.

The Occupational Pension Schemes (Winding Up) (Amendment) Regulations 2004 SI 1140

- ✔ Effective 10 May 2004.
- ✔ Amend the Occupational Pension Schemes (Winding Up) Regulations 1996 to change the priority order in which assets of a final salary scheme are shared when it enters winding up.
- ✔ When a scheme commences winding up after 10 May 2004, increases on pensions in payment now rank after deferred members' scale pensions (i.e. without pension increases) have been provided. Deferred members' contracted-out rights no longer have priority over deferred members' other rights.

The Occupational Pensions (Revaluation) Order 2004 SI 2948

- ✔ Effective 1 January 2005.
- ✔ Contains the revaluation percentages for the years 1986 to 2004.

The Occupational Pension Schemes (Winding Up, Deficiency on Winding Up and Transfer Values) (Amendment) Regulations 2004

- ✔ Effective early 2005.
- ✔ Complement the Occupational Pension Schemes (Winding Up and Deficiency on Winding Up etc) (Amendment) Regulations 2004 (see above) by extending the requirement to value all liabilities on an annuity buy-out basis to wind-ups where the employer is in liquidation.

The Pensions Schemes (Prescribed Information Requirements for Qualifying Schemes) Regulations 2004

- ✔ Effective in early 2005.
- ✔ Provide a framework for members of an overseas pension scheme to be entitled to claim migrant member relief under Schedule 33 Finance Act 2004. To qualify, and to retain qualification, a scheme must undertake to comply with prescribed benefit crystallisation requirements set out in the Regulations. The scheme must give details of the payment and the member and other evidence as to its qualification as a recognised overseas pension scheme if required by the Inland Revenue.

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Inland Revenue

Update No 146

17 February 2004

Reminds personal pension scheme providers that they need to make sure that their scheme rules are fully compatible with the Personal Pension Schemes (Restriction on Discretion to Approve) (Permitted Investments) Regulations 2001. If the scheme is not compliant, approval will cease from 6 April 2004.



Kevin Pither

Update No 147

9 June 2004

Reminds practitioners that the guidance contained in paragraphs 16.17 to 16.23 of the Practice Notes (IR12 (2001)) in relation to lump sum certification is still appropriate. In the case of fragmented transfers in relation to 'regulated individuals' (broadly controlling directors or individuals aged over 45 with remuneration in excess of the earnings cap) the lump sum rights must be strictly apportioned between the receiving schemes and certified by the transferring scheme.

Update No 148

22 September 2004

Announces that the 10 year limit on the period of service abroad contained in Part 15 of the Practice Notes (IR12 (2001)) in respect of employees temporarily working abroad for an overseas employer shall be removed. From the date of the update such employees may retain membership in a UK scheme even if they have passed the 10 year limit or will have exceeded it before 6 April 2006. It should be noted that the remaining conditions set out in Part 15 still need to be met.

Update No 149

30 November 2004

Confirms that a scheme administrator of a personal pension scheme must notify the Inland Revenue whenever a lump sum is paid which is chargeable to tax under Section 684B of the Income and Corporation Taxes Act 1988. Such payments relate to the death of either a scheme member to whom income withdrawals have been paid or a survivor of a member, where income withdrawals have been paid to the survivor in relation to an arrangement where the member had reached pension date. The scheme administrator is obliged to report the payment of the lump sum on Form 3(SF). The tax due under Section 648B should be sent to the Revenue. Interest will be applied from 31 January 2005 following the tax year in which the lump sum is paid.

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Simon Pilcher

Opra

Annual Report

- ✔ Covers the period from 1 April 2003 to 31 March 2004. It is probably the penultimate report, with the final one in 2005 after the new Pensions Regulator has been established.
- ✔ As well as outlining its objectives for 2003/04 (which were: to secure the best achievable protection for members of work-based pension schemes; promote high standards in the running of work-based pension schemes; improve understanding of key regulatory issues and contribute to the development and validation of a new regulatory approach targeting effort on reducing serious risks to pension scheme members) it contains a review of what Opra has done.
- ✔ Opra received a total of 160,100 reports and made 6,600 regulatory enquiries, 56% of which related to payments. The majority of reports were filed by trustees (35%) with administrators, actuaries, auditors, employees/members and insurance companies as the remaining reporting parties.
- ✔ A total of 89 cases were referred to the Opra board for determination. During the 12 months, Opra disqualified 8 trustees, levied fines totalling £123,500 and appointed trustees to 14 schemes where Opra considered it necessary to protect members' interests.

Bulletins

Bulletin 30, February 2004

- ✔ Contains a preview of Opra's new guidelines for non-statutory whistleblowers and the new guidelines on trustees reporting late payment of contributions.

Bulletin 31, May 2004

- ✔ Looks at the new Pensions Regulator; scheme funding requirements; effective risk management for trustees; role of the committee of European Insurance and Occupational Pensions and guidance on identifying suspected pension liberation transfers.
- ✔ The new Pensions Regulator's powers will have four main strands: diagnostic, monitoring, preventative and remedial.

Bulletin 32, September 2004

- ✔ Looks at scheme funding and the role of the new Regulator, the role of trustees in compromise deals and applying to Opra for additional time to pay transfer values.

Notes

Note 6 (revised): The power to report problems to Opra, May 2004

- ✔ Sets out Opra's new risk based approach to reports.
- ✔ For the majority of breaches that occur, Opra believes that providing assistance and guidance to trustees and others will be sufficient to achieve compliance and no punitive action will be taken.
- ✔ When Opra considers that there is, or could be, a significant risk to the security of scheme assets or where members' benefits could be detrimentally affected, Opra will use its powers to protect the members' interests. In these situations, Opra expects a report under section 48(4) of the Pensions Act 1995 where a breach could immediately or potentially pose a significant risk to members' interests. These are breaches that:
 - could result in delaying, preventing access to or reducing members' benefits;
 - carry a criminal penalty;
 - indicate potential dishonesty or misuse of assets or contributions; and

- strongly indicate a poor standard of stewardship by trustees.
- ✔ Provides guidance on when a report to Opra should be made and an explanation of the ‘traffic light’ approach to considering breaches.

Guides

Guide to paying pension contributions on time, May 2004

- ✔ Explains the requirements for when contributions to schemes must be paid and Opra’s approach to the reporting of late payments. Opra states that its expectations are as follows:
 - any contributions paid late but received within 90 days of the due date do not need to be reported unless the trustees are concerned that there are underlying serious or widespread problems relating to the scheme; trustees must report all contributions still outstanding at the end of the 90-day period to Opra immediately;
 - trustees should confirm when reporting that they have notified members of the late payment of the contributions; and
 - if trustees receive any contributions after the 90-day period but before they make their report to Opra, this should be noted in the report.
- ✔ If trustees decide not to report the late payment of contributions in line with this guidance, they should keep a record of their actions including details of the late payment and the reasons why a report to Opra has not been made. The trustees would then have this information readily available should Opra request more information at a later date.

Updates

Update 5 – Contributions: when Opra expects trustees to report late payment of contributions, January 2004

- ✔ From January 2004 Opra stated that it only expected trustees to file a report when contributions remain outstanding 90 days or more after their due date.
- ✔ Opra does expect trustees to comply with the legal requirement to notify scheme members when contributions are paid

- 60 days or more late. Trustees should do this within 90 days of the due date.
- ✔ Opra will not normally expect to receive reports from trustees regarding late payment of contributions where a scheme has only one or two members as, in Opra’s experience, there is a high correlation between membership of very small schemes and ownership of the business. In these situations the members are likely to be actively involved in what is happening to their contributions, however, for multi-employer schemes, the ‘two-member scheme’ test applies to the scheme as a whole, not to each employer’s section within the scheme.

Update 6 – Contributions: guidance for personal pension providers, March 2004

- ✔ Opra will focus its attention on areas it believes are critical to the protection of members’ interests. Consequently, Opra does not expect to receive reports of isolated late payments of contributions where the matter has been put right or short periods of lateness of contributions resulting from, for example, members leaving or new members joining, which require an amendment to the record of direct payment arrangements.

Update 7 – Compromising an employer’s debt: actions that Opra expects trustees to take, May 2004

- ✔ Opra noted that it is aware of an increasing number of compromise agreements being entered into. Opra is concerned that trustees may enter into poor compromise agreements with the employer – to the detriment of scheme members.
- ✔ In the event of a potential compromise, Opra expects trustees to take the following steps:
 - avoid conflicts of interest;
 - consider all the options open to them;
 - obtain appropriate advice;
 - be assertive in negotiations;
 - consider obtaining additional contributions from other employers in a group;
 - apply the same diligence to compromises where the scheme is to wind up and where it is to be ongoing; and

- not to assume that members will receive Pension Protection Fund (PPF) protection.
- Guidance is also given on when a report should be made to Opra. In particular Opra considers it unlikely that a report will be needed where a Court has considered the compromise.

Update 8 – Preventing transfers to pension liberation schemes – further guidance, July 2004

- ✔ Aims to help trustees and managers of transferring schemes to identify liberation schemes by clearly setting out some of their characteristics. It also suggests what action trustees, managers and administrators can take if they suspect that a requested transfer is to a liberation scheme.

Update 9 – The Financial Assistance Scheme and completing scheme wind ups, August 2004

- ✔ Aims to provide guidance for trustees on how to act in the interim period before the financial assistance scheme (FAS) established by the Pensions Act 2004 is in place. It covers issues such as:
 - the need to actively continue wind ups already underway;
 - the buying-out of benefits and completion of wind up in relation to FAS eligibility (the DWP has said that members will not be excluded from FAS because they complete winding up or buy out members' benefits); informed decision making by employers and trustees when considering putting schemes into wind up – trustees should consider the available information on eligibility for FAS and PPF and not assume that a particular scheme will receive either FAS assistance or PPF protection;
 - the importance of keeping member records for as long as is needed to make a claim for FAS assistance; and
 - employer and trustee responsibilities towards scheme members.

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Cases



Mark Kowalik

Durrant v Financial Services Authority (Court of Appeal)

8 December 2003

The purpose of a data subject access request under the Data Protection Act 1998 is to allow an individual access to their 'personal data' to check that there has not been an unlawful invasion of privacy. A data subject access request is not intended to provide automatic access to any information in which the individual may be simply named or involved. Mere mention of an individual's name in a document does not make the information in that document 'personal data'. For the disclosure obligation to arise, the information should be biographical in a significant sense and have the individual as its focus.

In addition, an individual only has the right to access their personal data held in paper-form if it is part of a relevant filing system. A relevant filing system is one where the information is structured by reference to that individual. If the filing system is not structured by reference to personal data, the disclosure provisions of the Act do not apply.

East Sussex County Council v Jacobs (High Court)

16 December 2003

A member received incorrect details of her deferred benefits prior to her retirement. When the mistake was discovered her pension and lump sum were reduced. The Pensions Ombudsman found that the incorrect statement of pension benefits constituted an act of maladministration or mistake of law for which the Council was responsible and that she had retired earlier than she would otherwise have done. He ordered the enhanced, incorrect, pension quotation to be honoured. His directions had the effect of putting the claimant in a better position financially than if no mistake had been made and she had continued in employment until normal retirement age. The Council challenged the correctness of the directions.

The Court held that the awards went beyond what it was open to the Ombudsman in law to direct. He could not order the Council to pay a level of pension benefit which exceeded that permitted by the scheme. He had no jurisdiction to put a member in a more favourable position than if she had successfully complained of breach of contract or of a negligent misstatement. Payment of the level of benefits required by law could not constitute maladministration.

Preston v Wolverhampton NHS Trust (No. 3) (Employment Appeal Tribunal)

19 December 2003

The Equal Pay Act 1970 provides that men and women should receive equal pay for equal work and prevents certain related discriminatory practices. Pension benefits are included in the Act's definition of pay.

Where pension scheme membership was compulsory for full-time employees but part-time employees were excluded from the scheme without justification, the Act is breached. However, the Act would not be breached by making membership of the pension scheme compulsory for full-time employees but optional for part-time employees.

Failing to inform staff that a previous barrier to entry to a scheme (e.g. full-time employment) has been lifted was not a breach of the Act unless the employer had a policy of failing to inform and that policy had a discriminatory effect.

KB v NHS (European Court of Justice)

7 January 2004

A female member of the NHS Scheme was in a long-term relationship with a female to male transsexual. The scheme provided for a survivor's pension to be payable to a member's surviving spouse. 'Spouse' under the scheme rules was defined as a person to whom the member has been married.

The Court confirmed that national legislation which prevents marriage (and hence the enjoyment of certain pension benefits) to individuals who have undergone a sex change is a breach of EU law. The case was referred back to the UK Court of Appeal. (The Gender Recognition Act 2004, summarised earlier in this Update, dealing with such matters has now been passed).

Spreadborough v Pensions Ombudsman (High Court)

21 January 2004

The claimant was entitled to early payment of preserved benefits if he became incapacitated by reason of permanent ill-health. He resigned in 1990 and in 1994 he made an application for an ill-health pension. He was seen by the Council's doctor who concluded that there was insufficient evidence that the claimant was permanently unfit. In 1998 the claimant obtained further medical evidence. The claimant was then awarded an ill-health pension, but he wanted payment backdated to 1995. The Pensions Ombudsman rejected his complaint in March 2003. The claimant appealed.

The Court remitted the matter back to the Ombudsman. It held that a member

"may be entitled to revive an earlier failed claim on new evidence in exceptional circumstances where justice so requires. Justice may so require when important new evidence comes to light or a relevant development has taken place in medical knowledge or understanding."

It seems therefore that a decision on ill-health may be revisited where there is

a development in medical knowledge as opposed to a development in the condition from which the member suffers. In this case, Mr Spreadborough was suffering from chronic fatigue syndrome (ME) and advances in the diagnosis and understanding of that disease were clearly taken into account by the Court in coming to its judgment.

Pitmans Trustees v The Telecommunications Group (High Court)

10 February 2004

The BETEC Plan provided final salary benefits for the employees of Clayhithe Group. Clayhithe was acquired by Roxspur, whose employees were members of the Roxspur money purchase scheme. The assets and liabilities of the Roxspur scheme were transferred to the BETEC Plan. Subsequently, Roxspur gave notice to terminate the BETEC Plan with immediate effect. The trustees resolved that it should be wound up. The assets were insufficient to provide for all the benefits due.

The trustees decided to adopt a 'gilts matching policy', meaning that they would invest all scheme assets in gilts. To have such a policy they first had to amend their statement of investment principles (SIP). To amend the SIP, the trustees were required under the Pensions Act 1995 to 'consult' with the scheme's employer.

The Court held that the time allowed by the trustees for the employer to respond to consultation on the SIP - two working days immediately after a Bank Holiday weekend - was wholly inadequate to enable the employer to obtain and consider advice to enable it to comment on the proposal. There was no 'consultation' as required by the legislation as there was no 'genuine invitation to give advice nor a receptive mind to receive it'. The effect of the failure to consult was that the new SIP had not been properly adopted and was invalid.

A question also arose about the extent to which Roxspur could be held liable for the debt as the deficiency arose from the final salary element of the scheme, not the money purchase element and it was

claimed the money purchase section should be treated as a separate scheme.

The Court held that the scheme was a single occupational pension scheme with both final salary and money purchase benefits – there was no provision that the assets should be kept separate and no separate winding up provisions; therefore the trustees were entitled to claim the whole of the deficit arising under the plan from Roxspur even though Roxspur employees were only money purchase members.

Greenwood v Newman (High Court)

12 February 2004

The Chairman of the employer, and a trustee of the scheme, told a member that under the scheme rules he was entitled to take early retirement from a specific date. The Ombudsman concluded that although he may not have realised it, as he was the Chairman of the employer and a trustee, he had given consent for the member to take a pension from the end of his contract, and that he had ostensible authority to give such consent. The trustees appealed against this determination.

The Court said that under the trust deed, the decision whether or not to grant a member an early retirement pension was a matter to be determined by the trustees by majority vote at a trustees' meeting or by a resolution in writing signed by all the trustees or by a committee of two or more individuals to whom the power to make the decision was properly delegated. It held that there was no evidence that such a trustee decision had been made.

The Ombudsman did not give reasons for the conclusion that the Chairman had ostensible authority to give such consent on behalf of the trustees. The trustees had not made any express or explicit representation that he had authority to act on behalf of the trustees as a body in granting consent to early retirement, either generally or in this specific case. On this basis the determination was set aside.

Crossley v Faithful & Gould Holdings (Court of Appeal)

16 March 2004

Payments from a permanent health insurance (PHI) scheme were only guaranteed while the member was an employee. The employee's managing director drafted the employee's letter of resignation, at the employee's request, knowing that the employee would potentially lose out on PHI benefits if he resigned as those benefits would become discretionary rather than guaranteed.

The Court held that there was no general duty upon an employer to look after an employee's economic welfare. The employee, given his position as a longstanding employee and director of the employer, could reasonably be expected to have known about the effect of resignation on his PHI benefits.

Re T & N Ltd (T&N No. 1) (High Court)

13 July 2004

The insolvency practitioner who was the administrator the company would be acting in accordance with his duties and in good faith by giving notice to the pension scheme trustees of the withdrawal of employer companies from the scheme, even though this meant that only MFR-assessed Section 75 Pensions Act exit debts would arise on these companies, rather than the £875 million buy-out debt which would arise under Section 75 if the scheme were wound up.

Under the 'moral hazard' provisions of the Pensions Bill 2004 (now an Act), the new Pensions Regulator could impose a contribution notice on persons if the main purpose or one of the main purposes of an action was to prevent a Section 75 debt becoming due 'otherwise than in good faith'. The administrator was an associated person. However, the judge was satisfied that the administrator's various duties to

other creditors made it possible to characterise his action as being in good faith, even though its effect would be to reduce dramatically the exit debt payable to the trustees of the scheme.

Since this case, and after much lobbying of the government, insolvency practitioners have been expressly excluded from the operation of contribution notices under the Pensions Act 2004.

Aon Trust Corporation v KPMG (High Court)

29 July 2004

The Court held that the KPMG pension scheme was not a money purchase scheme (as previously assumed by KPMG) as the benefits under its rules were calculated by reference to average earnings, not purely on contributions to the scheme.

Clause 8.5 of the rules gave the trustees the power to reduce pensions in payment. The Court considered whether Section 67 Pensions Act 1995 applied to any adjustments made under this clause. The Court concluded that the word 'modify' in Section 67 covered adjustments to benefits in payment even if, because they were made under clause 8.5, there was no alteration needed to the documents constituting the scheme.

The decision is being appealed.

Rutherford v Secretary of State for Trade and Industry (Court of Appeal)

3 September 2004

Employees were made redundant when they were over 65 and so were not eligible for compensation for unfair dismissal or redundancy. An employment tribunal found that the imposition of an upper age limit had a greater adverse impact on men than women (because more men than women were in work at that age), and was indirectly discriminatory and not objectively justifiable.

On appeal to the Court of Appeal it was held that the tribunal had selected the wrong pool for comparison in deciding indirect discrimination between men and women. The whole workforce is the correct pool, not merely the over-65s or disadvantaged group.

Powerhouse Retail v Burroughs (Court of Appeal)

7 October 2004

The Equal Pay Act 1970 provides that contracts of employment are deemed to include an equality clause which should allow a group of largely female part-time employees to bring a claim for access to a pension scheme. However, Section 2(4) of the Act requires claims to be brought within six months of the end of employment.

Where employees are transferred from one employer to another on a transfer of a business under the TUPE Regulations, the six month period runs from the date the TUPE transfer occurred, not the subsequent date of leaving continuous employment. Therefore employees wrongly excluded from access to pension schemes are in a worse position if their employment has transferred under TUPE than if they had remained with the same employer throughout.

Re K & J Holdings (High Court)

10 December 2004

Under the scheme rules, the employer was required to pay such contributions as were determined by the trustees, having taken advice from the actuary. The employer gave notice under the scheme rules in October 1997 that it intended to cease contributions with effect from 31 March 1998 and also wanted the scheme to be wound up with effect from that date. However, the trustees had power to run the scheme as a closed scheme rather than wind up immediately which they did, only finally deciding to wind up on 11 April

2003. On 15 April 2003 the employer went into members voluntary liquidation.

The trustees claimed the full buy-out deficit for the scheme at that time on the basis that the trustees could claim this sum under the ordinary contribution rule, this being a sum determined by the trustees on actuarial advice. They also started an action against the trustees' solicitors for negligence in failing to advise earlier of their ability to claim a buy-out calculated contribution.

The Court held that the trustees could have required a lump sum payment to meet the buy-out deficit before the employer's notice in October 1997. The ordinary contribution rule did not limit contributions to normal monthly ongoing payments. Furthermore, and of relevance to the negligence claim, the trustees could still have claimed a contribution calculated on a buy-out basis between October 1997 and 31 March 1998, i.e. before the notice of termination of contributions was effective, but not after that date.

In addition, the trustee power to demand such a contribution still existed even though the exact amount of the necessary contribution could not be ascertained at the time. An actuary should be able to say that a contribution to meet a buy-out debt of not less than a particular amount was 'appropriate' and the employer could be required to pay the contribution calculated on that basis.

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Ombudsman determinations

Bedlow (M00819)

Whether member was coerced into agreeing to a rule amendment

The scheme had funding problems and the employer could not afford to pay the contribution rate needed to make good the deficit. In 2000, the trustees and early retirement employer asked members to give up a right in the rules to an unreduced pension at age 60. All active members, including the complainant, agreed.

The complainant argued that she had been coerced into giving up her right to an unreduced pension because the trustees had stated that the only alternative would be to discontinue the scheme altogether.

The Ombudsman concluded that the agreement was enforceable. He said that the trustees had merely been giving a realistic assessment of the state of affairs. The scheme could not continue to provide benefits, discretionary or otherwise, at the previous level.

Jukes (M00788)

Withdrawal of ill-health pension – use of surveillance report

The member was told by the trustees that they had awarded him an ill-health pension and asked him to contact the Human Resources Manager to arrange a mutually convenient leaving day. The member did not reply, but indicated that he wished to return to work. The trustees therefore withdrew the grant of the ill-health pension and the member appealed this decision. In order to assess his health, the trustees commissioned a surveillance report from a private investigator.

On the basis of that report, which revealed the member was driving a minibus for a local firm, the trustees were not satisfied that his account of ill-health was an honest and true one and so were not satisfied that he was entitled to benefit under the scheme rules.

The Ombudsman concluded that the trustees were entitled to reassess the award of the pension, but the conclusion they had come to was perverse. The trustees should also have invited the member to see a video of the surveillance report and comment on it.

Hughes (L00713)

Distribution of death in service lump sum – meaning of ‘maintain’

The sons of a deceased member challenged the distribution of a death in service lump sum to themselves, their two siblings and the deceased’s girlfriend. They claimed that no award should have been made to the girlfriend, who, unlike the brothers and their two siblings, was not a beneficiary under the will. The definition of ‘beneficiary’ under the will included anyone who the trustees considered the member was helping to maintain. The trustees had argued that a couple living together (where both are earning) must be maintaining their lifestyle by virtue of their joint earnings and, to that extent, are helping to maintain each other.

The Ombudsman held that the trustees' interpretation was wrong. Inadequate enquiries had been made to establish whether the girlfriend was someone the deceased 'was helping to maintain' and noted that the trustees had declined to award her a dependant's pension 'on the basis of financial interdependency'. He therefore remitted the decision back to the trustees.

Noakes (M00851)

How to ask for repayment of sum paid in error

The complainant became aware from articles in the press that the 6% increases on his pension were likely to be in excess of Inland Revenue Limits. He wrote to the manager of the scheme alerting them of the issue. After three months the scheme manager told the complainant that he had been overpaid his pension and so he would have to be paid a reduced pension over a twelve month period. Despite a request for a full breakdown of how the overpayment occurred, recovery started before this information was fully supplied and without prior warning.

The Ombudsman found that the scheme managers were entitled to ask for the overpaid money back, but that there was maladministration in their manner of dealing with the member and awarded him £400 as compensation for distress and inconvenience.

Landgrebe (M01003)

Independent trustee fees assessed

The scheme was in wind-up and the complainant raised a number of issues including the level of fees of the independent trustee. The Ombudsman considered the fees and assessed a random sample for a period of three months. In this case he commented that given the work done, the time spent and the hourly rates (between £50 and £200) were not excessive. However, it is interesting that the Ombudsman assessed the fees in some detail.

Trustees of BETEC Retirement Benefits Plan (M00101)

Meaning of employer contribution rule – taking into account discretionary increases

The trustees complained that the employer had wrongly failed to agree that members of the scheme were entitled to guaranteed pension increases under the scheme and to discuss the funding position of the scheme in good faith before determining it. The contribution rule of the scheme stated:

"Each employer must contribute to the Plan in respect of Members who are or have been employed by it at such rate as shall be agreed between the Trustees and the Principal Employer in accordance with actuarial advice obtained by the Trustees."

When the employer announced its intention of dissolving the group in early 2001, the trustees instructed an actuary to review the funding position of the scheme as at 30 September 2001. The trustees found a shortfall of £9 million on a buy-out basis and accordingly demanded that the employer pay £3 million per month in view of the shortened life expectancy of the scheme. This amount included provision for the pension increases which the trustees claimed to be guaranteed. The employer replied that it could see no basis for making contributions as the pension increases had been discretionary. The trustees argued that, even if the principal employer was not obliged to provide funding to that extent, it was obliged to fund a shortfall of £2.7 million excluding the cost of the increases.

The Ombudsman concluded that the contribution rule meant that any agreement between the employer and the trustees could not be inconsistent with the actuarial advice obtained by the trustees. He found that it was not enough for the two parties to have regard to actuarial advice and decide to do something different.

In addition, although he found that the increases were not guaranteed, he did not agree that the increases could simply be ignored because they were discretionary. He stated that good administration dictated that the employer discuss with the trustees their proposal in accordance with actuarial advice.

The employer was directed to engage in a dialogue with the Trustees about the scheme's underfunding.

Miller (N01112)

'Ex gratia' pension – onus on employer to prove no ongoing commitment to pay

The complainant was paid a monthly sum by his employer since his retirement in 1977. The respondent wrote to the complainant stating that the payments were inconsistent with company policy and that they had concluded that the payments were ex gratia.

The Ombudsman found that it was for the company to prove that the pension was ex gratia, given that the only written evidence in relation to the pension was a letter to the complainant at the time of his retirement referring to his 'pension from the company'.

Gabbitas (N00224)

Taking scheme funding problems into account when making discretionary decisions

The complainant had made a complaint to the previous Ombudsman because he had been refused an ill-health pension. He then approached the trustees to ask them to reconsider his case and was refused.

One of the reasons the trustees and employer gave for the refusal was that awarding an ill-health pension would cost over £250,000 and the scheme was underfunded. In addition, awarding such a pension would increase the expectations of other members.

The Ombudsman stated that he had no quarrel with an employer or trustee having

some consideration for the financial circumstances of a scheme when exercising a discretion, but commented that in this instance where the £250,000 represented only a 0.3% increase in scheme liabilities, it was not a significant increase in liabilities. He also commented that the granting of an ill-health pension cannot create a precedent because by its very nature each ill-health case is different.

Curzon (N00227)

Ill-health pension – meaning of 'ordinary work'

The member's application for an ill-health pension had been declined by his employer. To qualify under the rules, a member's ill-health must be likely to incapacitate him permanently from doing his 'ordinary work'. The Ombudsman did not accept the trustee's argument that ordinary work meant work of a similar grade, status and salary including, for example, supervisory or clerical work. He said this seeks to place far too wide a meaning on the phrase ordinary work. He made the point that the person was employed as a process operator which involved lifting heavy weights. He was not persuaded that a supervisory or clerical job could be described as the same or similar employment to a process operator.

The Ombudsman also considered the fact that the member's incapacity was partly caused by his obesity. Although the trustees insisted that they only took this into account as far as it impacted on the permanence of his condition (there was a suggestion that if he lost weight, surgery might then help him), he said there was no evidence that they explored the feasibility of the member losing weight.

This case indicates that the Ombudsman interprets the phrase 'ordinary work' narrowly to mean the same kind of work on a physical basis. Where a member is suffering from a condition which his lifestyle may have contributed to, unless the rules say otherwise there is no reason why this should prevent the member receiving an ill-health pension.

Rawlings (N00099)

Independent Financial Adviser (IFA) expenses

The member had used an IFA to establish his claim that he should have been offered a greater tax-free cash sum. He applied to take his benefit. The Ombudsman found that the costs of paying for the IFA were incurred as a necessary part of the member's application and so directed that the respondent should reimburse him these costs.

This determination indicates that in certain circumstances the Ombudsman is willing to award costs orders in relation to advisory fees run up by the member. Employers and trustees should therefore factor this into consideration of possible settlements with members where it is known that an IFA (or, indeed, any other adviser) is helping the member.

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European developments

Pensions Directive – government response to consultation paper

June 2004

- ✔ Provides a summary of the government's views on the Pensions Directive in light of views received in response to the public consultation exercise held towards the end of 2003.
- ✔ Confirms that the definitions in the Directive are broadly compatible with existing terms in domestic legislation, and that definitions to be introduced by the Pensions Act 2004 are compliant with the Directive.
- ✔ Confirms that the new Pensions Regulator will have the power to perform the general functions of supervision set out in the Directive.
- ✔ Says that the Pensions Regulator will 'authorise' schemes for the purposes of the Directive before the commencement of cross-border activity.
- ✔ Says that the government is considering the most appropriate way in which to take advantage of the exemptions within the Directive for schemes that have fewer than 100 members.
- ✔ Says that the government will take advantage of derogations to delay implementation of provisions in the Directive until 2010 where the government remains of the opinion that such requirements will have no significant impact on UK schemes.

NOTE: The Pensions Act 2004 will implement the majority of the Directive requirements in April 2005. The DWP has reported that other Directive related provisions will come into force by September 2005.

Commission press release: Commission opens infringement procedures against Ireland and the UK

July 2004

- ✔ Infringement proceedings were launched against Ireland and the UK in July 2003 in respect of the incompatibility with EU law of UK and Irish tax legislation regarding pension contributions.
- ✔ In July 2004, the Commission sent a formal request by means of a Reasoned Opinion (the second stage of the infringement procedure) to the UK to amend its legislation. If the UK did not provide a satisfactory response, the Commission may have referred the case to the European Court of Justice.
- ✔ In particular, the UK was asked to amend its pension scheme legislation by extending the favourable tax treatment to contributions paid to schemes not fulfilling UK-specific national requirements (i.e. a pension arrangement must be in the form of a trust and there must be a representative in the UK to fulfil the administrative duties of a scheme).

NOTE: The Pensions Act 2004 now contains provisions intended to deal with this issue.

Commission recommendation: directors' remuneration

October 2004

- ✔ Provides non-binding recommendations for direct use by listed companies as part of the Commission's objective to promote greater convergence within the EU, towards best practice on directors' remuneration.
- ✔ Member states may decide if they wish to introduce this recommendation into their national framework, and are invited to inform the Commission by mid-2006 what they are doing to promote its application.
- ✔ Suggests that listed companies disclose statements of remuneration policy, which should contain a description of the main characteristics of supplementary pension or early retirement schemes for directors.
- ✔ In supplementary defined benefit schemes, information should be given on changes in accrued benefits under the scheme during the previous financial year. In defined contribution schemes, details should be given of contributions paid or payable during the previous financial year in respect of directors.

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Miscellaneous

NAPF Corporate Governance Policy

December 2003

- ✔ Updates NAPF policies in the light of the Higgs review and the Combined Code.
- ✔ Sets out the NAPF's views on the rights and responsibilities of shareholders and of the directors of companies in which they invest. Confirms that the NAPF will engage with companies on both routine and more serious matters, providing confidential 'Case Committees' if members wish to express concerns about particular issues.
- ✔ A copy can be found at www.napf.co.uk/Download/CGA5_Summary.pdf

GN28 (Adequacy of Benefits for Contracting-Out)

January 2004

- ✔ In force from 1 March 2004.
- ✔ Reflects the removal of the requirement to obtain a fresh Reference Scheme Test certificate every three years, but the requirements for ongoing supervision remain. Clarifies the requirements in relation to widows' and widowers' pensions.
- ✔ A copy can be found at www.actuaries.org.uk/files/pdf/pensions/GN28V1-3cl.pdf

Funded Unapproved Retirement Benefits Schemes

April 2004

- ✔ On 6 April 2004, Capital Gains Tax for FURBS increased from 34% to 40%, although taper relief and an annual exemption of half of the exemption available to individuals continue to apply.

GN19 (Retirement Benefit Schemes – Winding-up and Scheme Asset Deficiency)

May 2004

- ✔ Applies to schemes that start to wind-up after 10 May 2004.
- ✔ Amends the guidance for actuaries determining the assets available to each priority liability class in a winding-up. Reflects the Occupational Pension Scheme (Winding-Up and Deficiency etc) (Amendment) Regulations 2004 (see the Statutory Instruments part of this Update). Potentially relevant to those schemes where transfer values are reduced to reflect the funding coverage of member benefits.
- ✔ A copy can be found at www.actuaries.org.uk/files/pdf/pensions/GN19V4-4cl.pdf

Accounting Standards Board – UITF Draft Abstract

July 2004

- ✔ Proposed guidance on how to apply FRS17 to pension schemes that promise a specified return on contributions. Confirms that such schemes should be treated as defined benefit schemes.
- ✔ A copy can be found at www.frc.org.uk/images/uploaded/documents/ACF1FAC.pdf

Independent Pension Trustee Group – Code of Guidance

July 2004

- ✔ Sets out the Independent Pension Trustee Group's Code of Guidance for Independent Pension Trustees, which is intended to cover individual members of trustee teams and sole trustees. Emphasises the importance of familiarity with developments in law and practice, scheme documentation and the extent of trustee powers. Includes information that new and established trustees should receive.

- ✔ The Pensions Ombudsman approves of the Code, and will take account of it when considering future complaints. Opra welcomes the Code as achieving consensus on some key items of trustee knowledge and understanding.
- ✔ A copy can be found at www.pensions-pmi.org.uk/iptg/codeofguidance.pdf

Disability Rights Commission Codes of Practice

October 2004

- ✔ Codes of Practice have been produced, supplementing the Disability Discrimination Act 1995. Although not definitive statements of law, Courts and tribunals must take them into account.
- ✔ The Employment and Occupation Code of Practice considers the duty of employers to make 'reasonable adjustments' to the manner in which pensions are made available to disabled employees (e.g. making reasonable adjustments in sending documentation and organising meetings).
- ✔ The Disability Discrimination Act's non-discrimination rule applies to rights accrued and benefits payable in respect of service after 1 October 2004. Where a conflict exists between the non-discrimination rule and the pension scheme's rules, the non-discrimination rule prevails.
- ✔ A copy can be found at www.drcgb.org/uploaded_files/documents/4008_323_employment_occupation_pdf.pdf

Turner Report Pension Commission

October 2004

- ✔ The Turner Commission reported on how to avert a 'pensions black hole'. It concluded that higher tax, more savings and higher retirement ages were needed. Means-tested state benefits currently make saving ineffective for some.
- ✔ A copy can be found at www.pensionscommission.org.uk/publications/2004/annrep/index.asp

Amendments to Regulations on 'Stakeholder' Products

November 2004

- ✔ Effective April 2005.
- ✔ The government has set out its final position for 'stakeholder' cash deposit and medium term stakeholder products. Products bought after 5 April 2005 may carry an annual 1.5% charge, falling to 1% ten years after the first contribution is paid. However, charges on stakeholders taken out before 6 April 2005 will remain capped at 1% a year. Clarification is also provided on what costs fall outside the cap. Stakeholder products will also have to apply lifestyling unless the member opts otherwise.
- ✔ A copy can be found at www.hm-treasury.gov.uk/media/3C3/A4/stakeholder__conduc_nov04.pdf

Review of timetable for consultation on draft age discrimination regulations

November/December 2004

- ✔ Sets out the Government's proposals to outlaw age discrimination in the UK from 2006. Consultation on draft regulations expected summer 2005.
- ✔ Proposes allowing compulsory retirement at age 65 without the employer having to justify its decision, although an employee's request to continue working must be considered.
- ✔ Proposals to allow employers to justify direct discrimination where pay and non-pay benefits are based on length of service and experience remain live, and the grounds upon which this should be permitted remain subject to consultation.
- ✔ A copy can be found at www.dti.gov.uk/consultations/files/publication-1272.pdf

FRS 17 and amendments to IAS 19

December 2004

- ✔ UK listed companies must use IAS 19 (rather than FRS 17) for accounting periods beginning on or after 1 January 2005. All other entities remain subject to UK GAAP, including FRS 17. Full implementation of FRS 17 is required from the same date for all companies except small entities using FRSSSE.
- ✔ Amendments to IAS 19 (effective for accounting periods beginning on or after 1 January 2006) issued in December 2004, allow recognition of actuarial gains and losses in full in the period when they arise, additional disclosure requirements on assets and liabilities of defined benefit plans and an extension of multi-employer plan accounting to certain entities within a consolidated group.

Amendments to FSMA Regulations

December 2004

- ✔ The Government announced the outcome of a review of the Financial Services and Markets Act 2000 (FSMA). Legislative changes needed to implement reforms are anticipated for Spring 2005.
- ✔ Employers will be given an exemption under the FSMA financial promotion regime to increase employees' understanding and uptake of pensions, using FSA-authorized persons where necessary. Trustees will have greater freedom of investment without requiring FSA authorisation, and will be able to question the advice that they are given.
- ✔ A copy can be found at www.hm-treasury.gov.uk/media/510/35/fin_ser_mark_act_gov_resp_nov04.pdf

Employer Taskforce on Pensions: report on work and pensions and good practice guide

December 2004

The Employer Taskforce on Pensions issued a report on increasing voluntary pensions saving, as an alternative to compulsory occupational pensions. Recommendations were made to employers, employees, unions, the financial services industry and the Government, including:

- ✔ Employers should "recognise they have a responsibility" and fund employees' pensions, aiming for combined contributions of 10-15%, employers ideally providing 2/3 of this.
- ✔ Employers should increase awareness of importance and benefits of saving for retirement (a theme in the new Pensions Act).
- ✔ Government should provide stable, long-term pensions framework, stability for medium/large employers, and incentives for smaller businesses to contribute.
- ✔ Employees taking responsibility for pensions, contributing, and recognising employer contributions as a key benefit.
- ✔ Unions should encourage employees to join schemes and to contribute.
- ✔ Financial services industry should provide better service to small business and (working with government), review the annuities market.
- ✔ A good practice guide with case studies has also been produced.
- ✔ Copies can be found at www.employertaskforce.org.uk/publications/report-2004/etfreport04.pdf and www.employertaskforce.org.uk/publications/report-2004/goodpracticeguide04.pdf

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The year ahead

2005 promises to be one of the busiest ever years for new developments in pensions law. Some of the main ones are expected to be:

- ✔ some key parts of the Pensions Act 2004 coming into force, including:
 - the Pension Regulator and the Pensions Protection Fund going live in April 2005
 - scheme specific funding for final salary schemes by September 2005
 - new winding up priority order to tie in with PPF benefits
- ✔ consultation on many sets of draft Regulations and Codes of Practice relating to the Pensions Act 2004
- ✔ a Finance Act 2005 that will tidy up various pensions-related parts of the Finance Act 2004
- ✔ civil partnerships and Gender Recognition Certificates possibly appearing, with potential effects on pension rights
- ✔ proposals on age discrimination
- ✔ consultation and development of the Financial Assistance Scheme (to help members who lost benefits when their employer became insolvent but who miss out on the PPF)
- ✔ more pensions litigation, especially concerning scheme deficits
- ✔ pension scheme trustees, administrators, employers and advisers will need to begin planning now so that they will be able to cope with the significant changes in 2005 (and 2006).



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Pension Lawyers
of the Year

The Pensions team is part of the CMS Cameron McKenna HR group and advises employers and trustees of schemes varying in size from a few million pounds to several billion pounds. Additionally, we act for some of the largest firms of administrators, actuaries, consultants, brokers and professional trustees.

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Get to grips with the new Pensions Bill by viewing our on-line **plain English guide to the Pensions Bill**. You will need to be a subscriber to our Law-Now website (which is free) to access this guide. Register at www.law-now.com/law-now/registerpensions

If you are interested in the Pensions Ombudsman's activities, visit our website www.law-now.com/po-info. This site also has links to around 70 useful pensions websites.

This bulletin is intended for clients and professional contacts of CMS Cameron McKenna. It is not an exhaustive review of recent developments and must not be relied upon as giving definitive advice. The bulletin is intended to simplify and summarise the issues which it covers.

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