Sackers extra

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Abbreviations commonly used in 7 Days

Alert/News: Sackers Extra publications (available from the client area of our website or from your usual contact)
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
ECJ: European Court of Justice
FAS: Financial Assistance Scheme
HMRC: HM Revenue & Customs
NEST: National Employment Savings Trust
PPF: Pension Protection Fund
TPR: The Pensions Regulator

LEGISLATION

Coalition Government Finance Bill 2010

In the wake of the June 2010 Budget, the latest Finance Bill was published on 1 July 2010. The Bill is designed "to enact the key tax measures at the heart of the Emergency Budget package, to cut the unprecedented deficit, deliver fairness and promote enterprise".

In terms of pensions, the Bill provides:

- a power for HM Treasury to make an order repealing the tax relief restrictions provisions contained in the Finance Act 2010, which were introduced by the previous administration and which had been due to come into force in April 2011; and
- transitional provisions on compulsory annuitisation. The Government plans to scrap compulsory annuitisation from April 2011. The transitional measures allow anyone reaching age 75 on or after 22 June 2010 (the date of the Budget) to delay annuity purchase until age 77.

In addition, HMRC has published technical guidance which explains how the interim measures will apply to members of registered pension schemes who reach age 75 on or after 22 June 2010.

The Government is planning a further finance bill for the autumn, to introduce minor, technical measures announced by the previous Government. A draft is expected to be published later this month.

HM Treasury Press Release

Finance Bill - Explanatory Notes

For more information on the pensions aspect of the Coalition Government's first Budget, please see our Alert: Coalition Budget 2010: Final economic remedies from Gladstone's Bag.

DEPARTMENT FOR WORK AND PENSIONS

Freedom Bill

Deputy Prime Minister Nick Clegg has launched the 'Your Freedom website. He has called on the public to suggest which regulations should be cut to make it simpler to run a business.

The website provides an opportunity for anyone to suggest ideas to:

- restore civil liberties
- cut business and charity regulations
- repeal unnecessary law.

HM REVENUE & CUSTOMS

Pension transfers for people aged 50 to 55

The Government intends to bring forward regulations to remove the unauthorised payments tax charge where an individual aged 50 and over but under 55 transfers their pension in payment to another pension provider. The Government intends to backdate the regulations to cover transfers made on or after 6 April 2010.

The normal minimum pension age increased from age 50 to 55 from 6 April 2010. Since then, people can normally start receiving their pension payments without paying the unauthorised payment charge only once they have reached 55. Someone aged 50 and over but under 55 who started drawing their pension before 6 April 2010 can normally continue to draw it without paying the charge, even when they are not yet 55. However, unintentionally the legislation imposes the charge if such an individual transfers their pension before age 55 to a new provider.

Provided certain conditions apply, the regulations will ensure that there will be no unauthorised payment tax charge on these sums and assets and any payments of pension after the transfer.

Press release

FINANCIAL REPORTING COUNCIL (FRC)

First UK Stewardship Code published

On 2 July 2010, the FRC published the first Stewardship Code for institutional investors. This follows the publication in May of the updated UK Corporate Governance Code (see 7 Days dated 31 May 2010).

The Code includes principles on:-

- The monitoring of investee companies;
- The escalation of activities taken to protect or enhance shareholder value;
- Collective engagement;
- Voting policy;
- Managing conflicts of interest; and
- Public reporting and reporting to clients.

The purpose of the Code is to improve the quality of corporate governance through promoting better dialogue between shareholders and company boards, and more transparency about the way in which investors oversee the companies they own.

Commenting on the publication of the Code, Business Minister, Edward Davey said: “More effective shareholder engagement is central to rebuilding trust in the corporate sector following the global financial crisis. The new Stewardship Code shows the UK leading the way in this area. It is the first of its kind in the world and a major step forward - I want to see fund managers and shareholders of UK companies adhere to its best practice principles.”

FRC Press Release

NEST CORPORATION

NEST Corporation established 5 July 2010

Even though a review of NEST has been announced (see 7 Days dated 28 June 2010), NEST Corporation formally took over from the Personal Accounts Delivery Authority (PADA) on 5 July 2010. PADA was always only set up on a time-limited basis to assist and advise in setting up the new Scheme.

Lawrence Churchill is the NEST Corporation's first Chairman. Although Jennie Drake was previously announced as the Deputy Chair designate, she will not take up this role as she has been appointed a Labour Peer in the House of Lords.

THE PENSIONS REGULATOR

Regulator announces determination on first Contribution Notice

A determination to issue a £5m Contribution Notice (CN), in relation to the Bonas Group Pension Scheme, has been published by TPR.

The decision, published today on the regulator's website, is the regulator's first CN determination.

The Pensions Regulator's Determinations Panel found that Michel Van De Wiele N.V. ('VDW') – the parent company of textile machinery business Bonas - had retained the Bonas business while avoiding the pension liability, by placing Bonas into a pre-pack insolvency, and had not engaged openly with pension trustees or the regulator. VDW has appealed the decision.

The regulator previously used its anti-avoidance powers in the Sea Containers case in 2007.

Press Release

Consultation on employer departures from multi-employer schemes

Understanding the support employers provide in multi-employer schemes and how to manage employer departures is the focus of new guidance published for consultation by TPR.

Defined benefit multi-employer schemes and employers departures: guidance for trustees is accompanied by two new e-learning modules which can be accessed on the regulator's website.

Bill Galvin, the regulator's acting chief executive, said:

"The support of the employer standing behind the scheme is central in securing members' benefits. This is just as important in a multi-employer scheme.

It is of course crucial that trustees understand their duties when an employer departs the scheme. But our draft guidance also reinforces the importance of ensuring that the strength of the employer covenant is regularly reviewed and maintained throughout the scheme's life."

The consultation closes on 23 September 2010. Sackers will be issuing an Alert shortly.

CASES

Christine Timbrell v Secretary of State for Work and Pensions (CA)

The Court of Appeal has ruled that a person who had undergone sex change operation to become a woman, before the Gender Recognition Act 2004 (GRA) came into force, was entitled to a state pension from the age of 60.

Background

The GRA came into force on 1 July 2004. Under this Act, a person over the age of 18, of either gender, can apply for a gender recognition certificate on the basis of living in the other gender. Applications are dealt with by the Gender Recognition Panel (the Panel). The circumstances which must be taken into account by the Panel, as well as the evidence needed to accompany an application, are set out in the GRA.

If the application is successful and the applicant is not married, the Panel will grant a full Gender Recognition Certificate (Certificate). If, however, the applicant is married, the Panel can only grant an interim Certificate. In the latter case, a full Certificate will only be granted once a court has granted a decree of nullity on the ground that an interim Certificate has been issued to a party to the marriage.

Following the issue of a full Certificate, a person will be treated for pension purposes as though their gender had always been the acquired gender.

Facts

Ms Timbrell was born a male on 17 July 1941. She married in her twenties and had two children. In October 2000, with the full knowledge and consent of her wife Joy, Ms Timbrell underwent gender reassignment surgery. Joy and Ms Timbrell decided to continue to live together as a married couple and remain so.

In August 2002, just over a year after turning 60, Ms Timbrell applied for her state pension, which she asked to be backdated to her 60th birthday. This application was made on the basis that entitlement to the state pension for a woman born before 6 April 1950 arises when she attains the age of 60.

As Ms Timbrell was born before 6 April 1950, there were two possible pension ages for her - either 65 or 60, depending which gender is assigned to her at the relevant time. The CA therefore had to decide which of these was the relevant pension age when Ms Timbrell applied for her state pension, given that the GRA was not then in force.

Decision

The CA had to consider three questions:

- whether Ms Timbrell's rights should be considered without recourse to the GRA;
- the effect of the EU Equal Treatment Directive[1] (the Directive) in the light of the 2006 ECJ decision in *Richards*[2]; and
- the consequence of a conclusion that English legislation and law prior to the GRA was discriminatory with regard to acquired gender and pension entitlement for the purposes of Ms Timbrell's claim.

[1] Council Directive of 19 December 1978 (79/7/EEC) on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security
[2] *Richards v Secretary of State for Work and Pensions* (Case C-423/04; [2006] ECR 1-3585)

Question 1

The CA held that Ms Timbrell's rights had to be assessed on the basis of the law in force at the time (the GRA was not in force at that time).

Question 2

In *Richards*, it was held that the Directive precludes legislation which denies a person who has (legally) undergone gender re-assignment surgery from entitlement to a retirement pension because she has not reached the age of 65, when that person (who had become a woman by the gender re-assignment surgery) would have been entitled to a pension from age of 60, had had she been held to be a woman as a matter of national law.

In *Richards*, it was "effectively held that a total lack of any kind of legislative or legal framework in UK law to enable acquired gender to be recognised so as to enable a person who has acquired a new gender to exercise the rights to obtain a retirement pension according to existing legislation constituted discrimination" within the meaning of the Directive.

Question 3

In relation to acquired gender and rights to pensions, the UK had failed to implement the Directive within the time permitted.

Ms Timbrell was therefore entitled to invoke the provisions of the Directive, and the Secretary of State for Work and Pensions could not rely on the law in force at the time to deny her the right to the state pension from age 60. The Secretary of State was obliged to recognise Ms Timbrell had a right, by virtue of her acquired gender, to a retirement pension from her 60th birthday.

Comment

This case concerns the rights afforded to transsexuals before the GRA came into force. The court held, in effect, that the Directive had not been implemented properly (although it now has, by the GRA). No doubt the court's decision was coloured by the fact that it was the Government who failed to implement the Directive properly and then used this to try and refuse to pay a State pension at 60. But it is uncertain if this decision would be the same if the complaint was about payment of a pension from an occupational pension scheme.