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Pensions law – the week in review

12 January 2009

AT A GLANCE

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1 FINANCIAL REPORTING COUNCIL (FRC)

1.1 FRC publishes Actuarial Quality Framework

The FRC has published its Actuarial Quality Framework (the Framework), which was prepared following consultation on the FRC's discussion paper "Promoting Actuarial Quality" issued in May 2008.[1]

The aims of the Framework are to assist:

- actuaries - in seeking to provide high quality actuarial work;
- trustees and employers of occupational pension schemes, as well as their representatives and advisers - in evaluating the quality of the actuarial information and advice they receive and making appropriate decisions based on it;
- all stakeholders including end-users and their representatives - in evaluating the effectiveness with which actuarial quality is being promoted and achieved on their behalf; and
- regulators, including professional bodies - in undertaking and reporting on the regulation of actuaries and the entities they inform and advise.

To view the FRC's press release and the Framework document, please click on the links below:

http://www.frc.org.uk/about/actuarialregulation.cfm

http://www.frc.org.uk/documents/pagemanager/frc/Actuarial_regulation/ActuarialqualityframeworkJan09.pdf

[1] See 7 Days dated 27 May 2008

2 HM REVENUE & CUSTOMS (HMRC)

2.1 Lifetime Allowance protection - notification guidance

On 9 January 2009, HMRC published guidance on notification for Lifetime Allowance (LA) protection purposes, together with an amended version of the relevant form (APSS200) and related completion notes.

The guidance is aimed at assisting those who are seeking LA protection (either primary or enhanced) in the run up to the 5 April 2009 deadline for registering for protection. It explains what LA protection is, as well has how to make an acceptable notification. It also gives examples of some common errors made in notifications.

The guidance also notes that if the 5 April 2009 deadline is missed without reasonable excuse, an individual will not be able to benefit from protection against the LA charge. In practice, this means that any benefits which are taken (or deemed to be taken under the tax legislation) which are worth more than the LA (£1,650,000 in the present tax year and rising to £1,750,000 for the tax year 2009/10) will be liable to the LA charge. The tax charge for any excess over the LA which is taken as a lump sum is 55%, or 25% if taken as a pension.

To view the LA protection notification guidance, please click on the link below:

http://www.hmrc.gov.uk/pensionschemes/life-allow-pn.htm

2.2 Company Taxation Manual - deductibility of pension contributions

HMRC has recently published amendments to its company taxation manual. This includes new guidance on the deductibility of pension contributions as management expenses.

The Finance Act 2004 sets out how an employer, former employer or other party which is a trading company is entitled to relief for contributions to a registered pension scheme. As the manual explains, broadly similar treatment will apply to companies with investment business to give relief as expenses of management.

The guidance in the company taxation manual repeats some of the guidance in the business income manual, as some issues are common to both trading companies and companies with investment business.

To view the updated company taxation manual, please click on the link below:

http://www.hmrc.gov.uk/manuals/ctmanual/updates/ctmupdate121208.htm

3 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

3.1 Ageing and the payout phase of pensions, annuities and financial markets - working paper No.29

The latest working paper to be published by the OECD reviews the impact of ageing on private pensions, looking in particular at the payout phase and assessing the part that annuities can play in financing retirement.

To view the paper by Pablo Antolin, which was published in December 2008, please click on the link below:

http://www.oecd.org/dataoecd/48/54/41935201.pdf

4 THE PENSION PROTECTION FUND (PPF)

4.1 Revised Commutation Factors, Compensation Cap Factors and Early Retirement Factors

The PPF has revised commutation, compensation cap and early retirement factors. These factors have been revised to reflect changes in market yields and, following a consultation with the Actuarial profession, the changes in the methodology used to set the valuation assumptions.

The new factors should be used for all calculations with an effective date on or after 1 January 2009.

For more information, the relevant pages of the PPF's website can be accessed by clicking on the links below:

http://www.pensionprotectionfund.org.uk/index/other_guidance/compensation_cap_factors.htm

http://www.pensionprotectionfund.org.uk/index/other_guidance/commutation_factors.htm

http://www.pensionprotectionfund.org.uk/index/other_guidance/early_retirement_factors.htm

5 THE PENSIONS REGULATOR (TPR)

5.1 Clearance and abandonment guidance updated

TPR has made some minor amendments to its guidance on clearance and on the abandonment of defined benefit pension schemes, to ensure that they reflect changes made by the Pensions Act 2008 (which received Royal Assent on 26 November 2008)[2].

Clearance Guidance

While there have been no changes to the actual clearance process, minor changes have been made to the guidance "for accuracy". TPR says that the changes should be noted when using the guidance.

The changes are intended to reflect the following:

- the factors for TPR to consider where relevant when deciding whether a contribution notice would be reasonable;
- the additional mandatory requirement for TPR to consider the reasonableness of a party's actions in the circumstances when deciding whether a contribution notice would be reasonable;
- the removal of the good faith escape clause applicable to contribution notices;

[2] See our Alert: "Pensions Act 2008 - The Road to 2012" dated 5 December 2008

- the clarification that a series of acts and failures can be considered for a contribution notice;
- that contribution notices and financial support directions can require support for other schemes that members have transferred to;
- the "insufficiently resourced" test for financial support directions can also take into account aggregate resources of associated persons; and
- the date when the various changes take effect.

Abandonment

A single reference to the good faith exemption has been removed.

General comments

It should be noted that the above changes do not address the material detriment test for imposing contribution notices or the associated statutory defence, as those amendments in the Pensions Act 2008 have not yet commenced. TPR says that it plans to produce additional guidance materials to cover these issues.

TPR also says that no significant change is intended to be made to the definition of "type A event" in the clearance guidance.

To view the updated guidance on clearance and abandonment, please click on the links below:

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

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

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5.2 Record Keeping - final guidance published

On 9 January 2009, TPR published its final guidance on record keeping. This followed a consultation (to which Sackers responded) which took place over a 12 week period between July and October 2008.[3]

The guidance encourages those who are responsible for record keeping and administration to put in place good practices for measuring the presence of member data, and gives advice on assessing the risks of incomplete or inaccurate data.

The guidance has changed, in part, following the consultation. The draft guidance proposed dividing data into "core" and "additional" categories. A number of respondents questioned this terminology and the final guidance now uses "common" and "conditional" data, as these "more closely reflect the differences in scheme types".

Common data is data which applies to all schemes, for example members' names, addresses and dates of birth, as well as start dates of pensionable service and expected retirement dates. Conditional data, on the other hand, is data which is required for the effective administration of a scheme and will vary from scheme to scheme, depending on scheme design and benefit structure. Examples of conditional data could include salary and details of investments.

To view the final record keeping guidance, please click on the links below:

http://www.thepensionsregulator.gov.uk/pdf/RecordKeepingPDF.pdf

http://www.thepensionsregulator.gov.uk/mediaCentre/pressReleases/pn09-01.aspx

[3] A copy of Sackers' response is available on the client area of our website

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6 CASE

6.1 Capital Cranfield Trustees Limited v Beck and Tabor

The scheme at the heart of this case was in an assessment period for Pension Protection Fund (PPF) purposes. This case was brought following a request from the PPF that the claimant obtain confirmation as to whether or not the normal retirement date (NRD) under the scheme had been equalised effectively.

Background

The A. C. Skelton Pension & Life Assurance Scheme ("the Scheme") was a defined benefit occupational pension scheme established in December 1974 by an interim trust deed. A.C. Skelton & Sons Limited (Skelton) was the principal employer of the Scheme (the Principal Company). In 1976, under powers in the interim deed, Skelton appointed itself as the new trustee of the Scheme and at the same time adopted definitive rules for the Scheme. These rules defined NRD as "the day before a 65th birthday for male members and the day before a 60th birthday for female members".

New rules (the Rules) were adopted in October 1993, which were stated to take effect from 1 February 1978. The Rules defined NRD as:

"(i) (a) in relation to a female Member who joined the Scheme before the 30th day of September 1992 the day next preceding the 60th anniversary of birth and (b) in relation to any other member the day next preceding the 65th anniversary of birth or

(ii) *such day as the Employers shall determine in any particular case and notify in writing to the member concerned*."

The Rules also contained an amendment power which provided for alteration of the Rules by the Trustees "with the consent of the Principal Company [...] by any deed or deeds executed by the Trustees and the Principal Company or by *any writing effected under hand* by the Trustees and the Principal Company". The exercise of this power was subject to a number of safeguards including, for example, prevention of the variation of benefits earned before the amendment was introduced. Prior notice of any amendment also needed to be given to every affected member.

The announcement

In the case of *Barber*[4], the ECJ found that pensions provided under an occupational pension scheme constitute "pay" for the purposes of Article 119 (now article 141) of the EC Treaty and, as such, need to conform with the principle of equal treatment. Following *Barber*, an announcement was issued to members of the Scheme in October 1994 (addressed to those who had joined the Scheme before 30 September 1992) stating that:

- NRD would be equalised at age 64 for both men and women;
- women would still be able to retire at age 60 without any reduction in their pension accrued up to 16 November 1994; and
- men and women would also be able to retire at age 60 without any reduction in their pension accrued between 17 May 1990 and 16 November 1994.

Subsequent developments

Skelton went into administration in March 2007, as did the other participating employer in the scheme (an associated employer) in July 2007. In between times, Capital Cranfield Trustees Limited (CCTL), a professional independent trustee (the claimant in this case) was appointed as the sole trustee of the Scheme.

By the time the case was brought, the Scheme was "significantly in deficit" and, as noted above, it was in a PPF assessment period. Because the exact extent of the deficit would depend on whether the Scheme had been validly equalised in 1994, the PPF asked CCTL to obtain confirmation as to whether or not the Scheme's NRD had been validly equalised.

[4] Barber v Guardian Royal Exchange Assurance Group [1991] QB 3440

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Decision

In his judgement, Mr Justice Morgan considered developments in equalisation case law since *Barber*, up to and including the most recent decision in the case of *Foster Wheeler Limited v Hanley & Ors.*[5]

The judge noted that the parties had considered whether the 1994 announcement was effective to equalise NRD for the purposes of the Scheme's amendment rule, and that they had concluded that it was not. This was because the announcement was unsigned and, following *Dubery,*[6] it was clear that the announcement could not be considered an amendment in writing effected "under hand".

The judge therefore had to consider whether limb (ii) of the definition of NRD under the Rules (set out above) was flexible enough to allow the amendment sought under the announcement. In particular, whether the power for employers to determine a particular NRD applied only in individual cases or whether it could also apply to "a defined group of Members, the group being defined as e.g. all male Members, or all Members who became Members before, or after, a specified date?" If so, could the power also operate “in relation to all Members”?

The judge concluded that the words "in any particular case" in limb (ii) should be contrasted with the wording in the first part of the definition, which referred to "any other member". In his view, the second part of the definition suggested "an important limitation on the type of case which will fall within the power" thereby confining its use to a particular case (or particular cases) only. As the announcement sought to alter the Scheme Rules in general (rather than in a particular case), it was not effective in equalising NRD.

The judge also noted that if the power in the definition of NRD were to be extended more widely, this would attempt to create a new amendment power, but one without any of the safeguards which were expressly provided for in the Scheme's amendment power.

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[5] See 7 Days dated 8 December 2008 for a summary of the *Foster Wheeler* decision, and also our Sackers Extra News: “All things being equal” (dated December 2008) for general background on equalisation

[6] *Cripps v Trustee Solutions Ltd & Dubery* - see 7 Days dated 30 July 2007

Comment

This is latest in a line of recent cases to look back at a Scheme's attempts to equalise benefits following *Barber*. With more schemes likely to be seeking entry to the PPF in the current economic climate, it is unlikely to be the last.

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