

Pensions law – the week in review

14 September 2009

AT A GLANCE

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1 LEGISLATION

1.1 The National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2009

These regulations, which will come into force on 1 October 2009, amend four statutory instruments relating to pensions and benefits provided to National Health Service staff.

The main purpose of the regulations is to allow eligible members of the 1995 Section of the Scheme (those with a protected Normal Pension Age (NPA) of 60 or 55) to choose whether to transfer all their service to the 2008 Section or to remain members of the 1995 Section of the NHS Pension Scheme (NHSPS). Members of the 1995 Section accrue pension at a rate of $1/80^{\text{th}}$ of final salary for each year of membership or 1.4% of career average earnings for self-employed general medical or dental practitioners.

The 2008 Section of the NHSPS was introduced for new NHS staff with effect from 1 April 2008. NPA under this section is 65 and pension is accrued at a rate of $1/60^{\text{th}}$ of final salary for each year of membership, or 1.87% of career average earnings for self-employed general medical and dental practitioners.

The regulations also:

- introduce a refinement to the calculation of benefits where a practitioner is entitled to both career average and final salary benefits;
- make various miscellaneous amendments to clarify the working of certain regulations; and
- make technical changes to terminology to clarify that there is one NHSPS comprised of two sections.

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The regulations and accompanying explanatory memorandum can be accessed by clicking on the links below:

http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092446_en.pdf

http://www.opsi.gov.uk/si/si2009/em/uksiem_20092446_en.pdf

2 FINANCIAL SERVICES AUTHORITY (FSA)

2.1 Pension calculator launched

The FSA, in conjunction with the Association of British Insurers, has launched a pension calculator which is designed to help people gauge how much they will have to live on in retirement.

The calculator can be accessed on the FSA's "Moneymadeclear" website and is intended to allow anyone, whether they have a pension from a previous employer, a new pension scheme or are without any existing pension at all, to calculate their potential retirement income based on regular payments.

The FSA's press release and the pension calculator can be accessed by clicking on the links below:

<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/119.shtml>

http://www.moneymadeclear.fsa.gov.uk/tools/pension_calculator.html

3 PENSIONS POLICY INSTITUTE (PPI)

3.1 Briefing Note 52: How could changes to life expectancy affect spending on pensions?

The PPI's latest Briefing Note looks at the potential impact of increasing life expectancy on spending on pensions. In particular, the PPI is exploring the impact that uncertainty in future longevity may have.

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The Briefing Note considers:

- the expected increase in spending on state pensions, which is estimated (using principal projections) to increase as a percentage of Gross Domestic Product (GDP) from 4.4% to 5.7% between 2012 and 2032. This figure could increase to 6.2% when the “very high population projection” is used; and
- the possible offsetting of increases in state spending by the higher state pension age (SPA), which will increase incrementally for men and women from age 65, until it reaches 68 in 2046.

One suggestion to address increases in life expectancy is to bring forward the planned increase in the SPA, so that the SPA is 67 for all by 2026 instead of by 2034 as currently intended.

Briefing Note 52 can be accessed by clicking on the link below:

http://www.pensionspolicyinstitute.org.uk/uploadeddocuments/Briefing%20Notes/PPI_Briefing_Note_52.pdf

4 THE PENSIONS REGULATOR

4.1 Consultation on proposed change to the Pensions Regulator Tribunal (PRT)

The Tribunals Service is consulting on amendments to the Tribunal Procedure Rules to accommodate the transfer of the PRT to the new “two tier” tribunal system in early 2010.

The PRT was established under the Pensions Act 2004 to hear references arising from certain determinations issued by the Pensions Regulator. Subject to Parliamentary approval, the Government intends that the jurisdiction of the Tribunal for England, Scotland and Wales will become part of the jurisdiction of the First-tier and Upper Tribunals in early 2010. On transfer, the PRT’s current jurisdiction will be dealt with by the Tax and Chancery Chamber (Upper Tribunal). An Upper Tribunal has been chosen because of the complex nature of the cases that the PRT deals with. As at present, onward appeals will be to the Court of Appeal.

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As with all tribunals moving into the new structure, existing rules will be revoked and replaced by chamber-specific rules. Each chamber in the First-tier Tribunal has its own set of rules, which are supported by Practice Directions and Statements. There is a single set of Rules that apply to the chambers in the Upper Tribunal.

This consultation seeks views on whether amendments to the existing rules for the Upper Tribunal will be required in order to incorporate the jurisdiction of the PRT into the Upper Tribunal.

The consultation closes on 23 November 2009.

The consultation document can be accessed by clicking on the link below:

<http://www.tribunals.gov.uk/Tribunals/Documents/Rules/PRTconsults.pdf>

5 PERSONAL ACCOUNTS DELIVERY AUTHORITY (PADA)

5.1 Initial comments on investment discussion paper

PADA's consultation on "Designing an investment approach" closed on 7 August 2009. The aim of the discussion paper was to draw on good practice and expertise from across the pension and investment industries, with a view to devising recommendations on the most appropriate investment approach for the trustee corporation of the personal accounts scheme which is due to be up and running in 2012.

More than 60 responses were received to the discussion paper. These have been complemented by a series of roundtable events held by PADA to discuss key issues in more depth.

PADA notes that themes emerging from both the written responses to the consultation and the roundtable discussions include "recognition that the membership of personal accounts will require an approach to investment that is tightly focused on their characteristics, and that a target date fund approach could be an effective mechanism for ensuring that individual's investments are managed appropriately throughout their working lives."

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PADA is intending to publish a summary of the responses to the consultation (together with summaries of the round table discussions) in November 2009.

PADA's press release can be accessed by clicking on the link below:

<http://www.padeliveryauthority.org.uk/documents/press-release-10-09-2009.pdf>

6 CASES

6.1 Aegon UK Corp Services Ltd v Roberts

This case confirms that when employment tribunals are assessing compensation for unfair dismissal, tribunals should treat a final salary pension as part of an individual's overall remuneration package, rather than treating it as a "unique type of benefit".

Background

In January 2007, Ms Roberts was dismissed for redundancy by her employer, Aegon, and was paid an enhanced redundancy payment. The employment tribunal found her dismissal to have been unfair and she was awarded compensation.

Ms Roberts immediately commenced employment with another company, Just Retirement Limited. The total remuneration in her new employment, including salary and other benefits such as the value of a car and car insurance and permanent health insurance (but not taking account of the loss of pension benefits) meant that she received £136 per week net more than she did from her package with Aegon. Even when pension benefits were taken into account, the overall package with Just Retirement was more favourable.

At Aegon, Ms Roberts had been a member of a final salary pension scheme, but on joining Just Retirement she became a member of a money purchase scheme which the judgment describes as "significantly less favourable".

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Before the employment tribunal considered its remedies award for the unfair dismissal by Aegon, Ms Roberts lost her job with Just Retirement. She brought a grievance against that company for constructive dismissal and disability discrimination. This was compromised in October 2007.

Employment Tribunal and Employment Appeals Tribunal (EAT)

There are two elements in the calculation of an unfair dismissal compensation:

- a basic award (which in this case was met by the statutory redundancy payment); and
- a compensatory award.

The value of a compensatory award is required to be “just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.”¹

The judgment in this case cites *Dench v Flynn and Partners*², in which the Court of Appeal noted that future loss does not automatically cease when a person obtains new permanent employment on the same or more favourable terms. It is for a tribunal to establish on the facts of each case whether the new employment breaks the chain of causation or not.

In this case, the tribunal found that Ms Roberts’ employment with Just Retirement did break the chain of causation. However, while she was not entitled receive compensation from Aegon for loss of earnings following her dismissal by Just Retirement, the tribunal considered that it was appropriate to distinguish between pension loss and loss of earnings, on the basis that a final salary scheme provides a “unique type of benefit”.

¹ S.123(1) Employment Rights Act 1996

² 1998 IRLR 653

The EAT supported this conclusion, finding that the tribunal was entitled to form the view that the final salary scheme benefits could be treated differently from the overall remuneration package in assessing the award for unfair dismissal.

Court of Appeal (CA) decision

The CA also considered the *Dench* case and agreed that the employment with Just Retirement had broken the chain of causation. Aegon's liability for all aspects of remuneration (other than pensions) was therefore crystallised when Ms Roberts began her new employment.

The CA did not, however, agree with the finding that pensions have special status in the calculation of an award for unfair dismissal. It considered that "the pension is simply part of the overall remuneration package - in essence deferred remuneration - albeit an important part, and must be assessed accordingly." Although the difficulties encountered in putting a value on the loss of final salary benefits were acknowledged, the CA concluded that they do not justify any difference in treatment.

Therefore, because Ms Roberts had commenced new employment immediately following the termination of her employment with Aegon, and her overall remuneration package was more favourable than it had been with Aegon (with the final salary benefit "more than offset by the other more favourable remuneration terms"), the only compensation payable to Ms Roberts was £300 for loss of statutory rights.

Comment

Although Aegon's appeal was successful in this case, it demonstrates that the courts are alive to the significant benefit provided by final salary schemes and the potential loss for employees who are forced to leave such a scheme. Despite the court's decision in this case, if the facts of the situation were to permit it, an award in respect of the loss of a final salary scheme benefit could still be considerable. Employers therefore need to be aware of this issue, particularly given the continuing trend of final salary scheme closures.



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