Sackers extra

16 August 2010

At a glance

DEPARTMENT FOR WORK AND PENSIONS

- Consultation on draft regulations: The Financial Assistance Scheme and Pension Protection Fund (Valuation, Revaluation and Indexation Amendments) Regulations 2011
- DWP research report: Preparing for pension reform - the information needs of small and micro employers at auto-enrolment

THE PENSIONS REGULATOR

- Statement on regulated apportionment arrangements and employer insolvency

CASES

- Seldon v Clarkson Wright & Jakes (Court of Appeal)

SO7

Abbreviations commonly used in 7 Days

Alert/News: Sackers Extra publications (available from the client area of our website or from your usual contact)
CPI: Consumer Prices Index
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
ECJ: European Court of Justice
HMRC: HM Revenue & Customs
RPI: Retail Prices Index
TPR: The Pensions Regulator

DEPARTMENT FOR WORK AND PENSIONS

Consultation on draft regulations: The Financial Assistance Scheme and Pension Protection Fund (Valuation, Revaluation and Indexation Amendments) Regulations 2011

In the Budget on 22 June 2010,[1] the Government announced that CPI, rather than RPI, will be used to assess increases (both in deferment and for pensions in payment) to public sector pensions from April 2011.[2] On 8 July 2010, the Pensions Minister, Steve Webb, announced that this change would be extended to private sector occupational pension schemes (a press release on 12 July 2010 gave more details), and that CPI would also be used for determining payments made by the Pension Protection Fund (PPF) and the Financial Assistance Scheme (FAS).

On 12 August 2010, the DWP published a consultation on the draft Financial Assistance Scheme and Pension Protection Fund (Valuation, Revaluation and Indexation Amendments) Regulations 2011. These regulations are intended to deliver most of the CPI changes for the PPF and the FAS.

Changes are proposed in the draft regulations to:

- the PPF and FAS rules so that accrued pensions will be revalued by reference to RPI for periods before 31 March 2011 and by reference to CPI after that date. Relevant caps to revaluation increases will continue to apply as they do under the current rules;
- the FAS cap so that CPI is used for the annual increase that will be made in April 2011 and in subsequent years; and
- the section 143 funding test (applied by the PPF to relevant schemes when determining whether the Board of the PPF should assume responsibility for a scheme).

It is intended that these changes will come into force on 31 March 2011.

The consultation also proposes changes to the indexation of relevant FAS compensation so that such increases are in line with CPI. These changes are due to come into force on 31 December 2011 so that the FAS and PPF changes (which require primary legislation) can be aligned.

In addition, the consultation discusses the synthetic buy-out bases used by the PPF and the FAS which seek to estimate the costs of securing bulk annuities.

The consultation will close on 3 November 2010.

PPF Press Release

[1] Please see our Alert: "Coalition Budget 2010: Final economic remedies from Gladstone's Bag" dated 23 June 2010

[2] Please see our Alert: "Pension Increases - the change from RPI to CPI" dated 13 July 2010

DWP research report: Preparing for pension reform - the information needs of small and micro employers at auto-enrolment

The DWP has published Research Report 676 which looks at the information needs of small and micro employers in the run-up to the introduction of the employer duty to enrol staff automatically into a qualifying pension arrangement which is due to commence in October 2012. (The duty is, however, subject to a review, as the Government is currently evaluating the pension 2012 reforms introduced by the former Labour administration and is due to publish its conclusions and recommendations on the reforms by 30 September 2010.)

The report identifies where small and micro employers look for relevant financial information, the type of information sought, and how these may influence their business decision making ahead of the forthcoming pension reforms.

Key findings from the research were that:

- accountants were a key source of information for employers as they were seen as both knowledgeable and professionally independent;
- informal networks (including family, friends and clients) were regarded as a starting point for bringing information to the attention of employers;
- employers were not generally proactive in communicating with their staff about pensions; and
- small and micro employers use the same sources for pensions information as they do for general financial information.

DWP Press Release

THE PENSIONS REGULATOR

Statement on regulated apportionment arrangements (RAAs) and employer insolvency

An RAA is an arrangement, available to a multi-employer DB scheme, which apportions some or all of a departing employer's "liability share" to the remaining employers, as an alternative to paying an employer debt. To make use of an RAA, the scheme must be in a PPF assessment period, or the trustees must agree to the arrangement and the trustees must be of the opinion that the scheme is likely to be in an assessment period in the next 12 months.

Whilst TPR believes that the best form of support for a pension scheme is that of an ongoing sponsoring employer, it recognises that in some situations this may no longer be available where the sponsoring employer is at serious risk of insolvency. TPR has therefore published (on 12 August 2010) a statement outlining the process to be followed for RAA applications.

Key points raised by TPR in this statement include:

- TPR expects RAA applications to be accompanied by a clearance application (and that TPR should already have been involved in earlier discussions around the possible options);
- any proposal should be discussed in detail with the trustees;
- the trustees should address any possible conflicts of interest or duty and seek advice where appropriate; and

- TPR will consider the relevant circumstances, which, among other things, may include:
  - whether the insolvency of the employer would otherwise be inevitable or whether there could be other solutions which would avoid insolvency;
  - whether the scheme might receive more from an insolvency; and
  - the position of the rest of the employer group.

Both TPR and the PPF have statutory functions as part of the RAA process: an RAA must be approved by TPR and the PPF must confirm that they do not object to the RAA.

TPR notes that other types of arrangements may produce a similar outcome to RAAs, with or without PPF entry, and that similar principles are likely to apply in those situations.

CASES

Seldon v Clarkson Wright & Jakes (Court of Appeal)

This case concerned a partnership's ability to justify its use of compulsory retirement at age 65.

Background

Mr Seldon (S) was an equity partner in a firm of solicitors, Clarkson Wright & Jakes (CWJ). He was a signatory to a partnership deed (dated 19 March 1992) which provided that each equity partner who had attained the age of 65 was to retire on the 31 December following.

A new partnership deed was signed on 31 December 2005. It was similar to the 1992 deed in most respects but permitted an equity partner to remain after the age of 65 with the consent of the other partners.

During 2006, S proposed that he continue to work part-time as a consultant and also stated that he wished to carry on working full-time. However, CWJ did not offer him any post-retirement position.

On 31 December 2006, S ceased to be an equity partner and subsequently brought proceedings before the Employment Tribunal (the Tribunal).

The Tribunal was satisfied that the compulsory retirement provision was a proportionate means of achieving a legitimate aim. Whilst the Employment Appeal Tribunal (EAT) reached a similar conclusion, S's case was sent back to the Tribunal for a fresh decision as there was no evidence to support one of the assumptions in the case - that performance would decline at age 65.

However, S appealed to the Court of Appeal. The arguments focused on whether an employer can justify age discrimination using its own objectives, or whether, following the ECJ[3] and High Court's[4] decisions in *Heyday*, it must have social policy objectives

The Court of Appeal's decision

The Court of Appeal concluded that the need for a social aim in order to justify discriminatory action related only to the UK Government and the age discrimination legislation enacted by it, and not to a private employer. It is therefore sufficient for an employer's aims to be consistent with the Government's social and labour policy.

The Court of Appeal was satisfied that CWJ's aims - for example, of providing employment prospects for young people and producing a "happy work place" (having a retirement age

[3] *R v Age Concern England v Secretary of State for Business Enterprise and Regulatory Reform* [2009] ICR 1080

[4] R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills [2009] WLR (D) 291

removed the need to use performance assessment) - met this requirement. However, those aims have to be "consciously recognised", either when the compulsory retirement provision was introduced or when the decision was made to confirm it. (ECJ case law demonstrates that a legitimate aim may change with time, so that a discriminatory measure may be justified by a legitimate aim other than that which applied when the measure was introduced.)

On the issue of S having agreed to accept the retirement clause when he signed the partnership deed, it was noted that this is a legitimate consideration for a tribunal or court to take into account.

The Court of Appeal also considered the choice of age 65 as the age for compulsory retirement. It discussed how the choice of any age would, necessarily, be more discriminatory to people of that age. To make such a rule unlawful for that reason would make it impossible to justify a retirement age. Furthermore, the EC Directive contemplated the legitimacy of a retirement age. Finally, set against the backdrop of the UK's default retirement age (DRA), which permits dismissal of employees from age 65 by reason of retirement, age 65 was seen as an appropriate choice.

The Appeal was dismissed and the case will now be sent back to the original Tribunal for a fresh decision to be taken.

Comment

This decision demonstrates that it is possible for partnerships (and employers) to objectively justify the use of a compulsory retirement age. However, the decision was made against the backdrop of the UK's DRA. Since this case was decided, the Government has published a consultation on phasing out the DRA; it is due to be removed from legislation on 6 April 2011. This change is likely to make it more difficult to justify the use of age 65 for compulsory retirement but, following the above reasoning, should not remove the possibility of justifying compulsory retirement entirely.