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S07

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
HMRC: HM Revenue & Customs
NEST: National Employment Savings Trust
PPF: Pension Protection Fund
TPR: The Pensions Regulator

LEGISLATION

Pensions Bill 2011

The Pensions Bill 2011 received its first reading in the House of Lords on 12 January 2011. The Bill, which implements (among other things) recommendations from an independent review conducted during the summer of 2010 into the forthcoming workplace pension reforms ("Making automatic enrolment work")[1], is described as "the next step in helping millions save for their retirement in a workplace pension".

Key measures in the Bill include:

- *State Pension Age (SPA)*

  The Bill brings forward the increase in SPA for both men and women. SPA will begin to rise from 65 in December 2018 and will reach 66 by April 2020. As a result, the timetable for equalising women's SPA with men's will also be accelerated, so that women's SPA will reach 65 by November 2018.

- *Workplace pension reforms*

  Changes to the regulatory framework for the duty on employers to enrol eligible workers automatically into a qualifying pension scheme and to contribute to the scheme include:

  - the introduction of an optional waiting period of up to three months before employees need to be automatically enrolled;
  - simplification of the certification process by which employers will be able to demonstrate that their money purchase scheme meets the requirements for automatic enrolment; and
  - alignment of the earnings threshold for automatic enrolment with the personal allowance for income tax.

- *The switch from RPI to CPI*

  The Bill incorporates provisions relating to the switch from the Retail Prices Index (RPI) to the Consumer Prices Index (CPI) for calculating increases to pensions in payment and in deferment.[2]

[1] For more information, please see our Alert: "NEST comes home to roost!" dated 28 October 2010

[2] For more information on the current consultation, please see our Alert: "The switch from RPI to CPI – consultation published" dated 9 December 2010

- *Preserving powers to refund surplus*

  As announced by the DWP in October 2010[3], the Bill amends section 251 of the Pensions Act 2004. Section 251 provided trustees with a transitional power to confirm or amend powers in scheme rules to make payments to the employer after A-Day (6 April 2006). The Bill provides for the extension of the deadline by which trustees need to take action to preserve such powers, to April 2016.

  The Bill also carves out a number payments from section 251, including: compensation payments; authorised employer loans; and scheme administration employer payments. However, the Bill does not specifically exclude powers to pay surplus on winding-up, but aims to do so by implication.

- *Pension Protection Fund*

  The Bill also makes a number of amendments in relation to the PPF, including the removal of the requirement (in section 172 of the Pensions Act 2004) that an assessment period for the PPF must last for a minimum of 12 months. The PPF Board will therefore be able to transfer some schemes into the PPF earlier.

Further information can be found in the explanatory notes which accompany the Bill.

DWP Press Release

DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS

Government confirms removal of the Default Retirement Age (DRA)

The Government has confirmed that the DRA will be phased out between 6 April and 1 October 2011.

On 13 January 2011, the Government published its response to the recent consultation on the removal of the DRA[3], alongside guidance for employers from Acas (the Advisory, Conciliation and Arbitration Service) on "Working without the DRA".

Currently employers can require staff to retire at 65. However, from 6 April 2011, the DRA will be removed from legislation, meaning that employers will need to objectively justify having a compulsory retirement age for their workforce. Transitional provisions will cover retirements which are in train, but retirements using the DRA will cease completely from 1 October 2011.

One issue raised in the consultation was the possibility of unintended consequences for group risk benefits, such as life assurance, as a result of the removal of the DRA. Concerns were raised that removal of the DRA could lead to increased costs and uncertainty for businesses by removing, in effect, the cut-off point beyond which such benefits are currently no longer offered. The Government therefore plans to introduce an exception to the principle of equal treatment on the grounds of age for group risk insured benefits provided by employers.

In terms of pension provision, the Government states that "the removal of the DRA does not affect occupational pension schemes" as the absence of a DRA does not affect the setting of a normal retirement age for the purposes of the scheme. However, this fails to address the potential problem of discrimination, which may arise where individuals working beyond the age at which benefits become payable are prevented from accruing benefits.

Full details are due to be set out in regulations which will come into force on 6 April 2011.

[3] For more information, please see our Alert: "Preserving powers to refund surplus: DWP clarification" dated 19 October 2010

For more information, please see our Alert: "The bell tolls for the default retirement age" dated 17 January 2011.

Further background information and research together with updated DWP guidance for employers on workforce management without a fixed retirement age is available at: Business Link - Managing without a fixed retirement age.

BIS Press Release

Acas Press Release

NATIONAL EMPLOYMENT SAVINGS TRUST

NEST publishes pensions phrasebook

On 12 January 2011, NEST Corporation published the results of its initial research into the understanding of current pensions terms amongst its target audience. In the light of this, it has developed a phrasebook of key terms, phrases and principles, which are aimed at helping future NEST members gain a better understanding of pensions.

NEST has also established a plain-speaking forum and published an interactive game "to encourage people to carry on the conversation about pension terms".

NEST Press Release

THE PENSIONS REGULATOR

TPR publishes updated information for employers

TPR has announced that it will be publishing new information for employers during 2011 to help them get to grips with their new duties in relation to automatic enrolment.

So far in 2011, it has published a new version of its leaflet for employers, "An introduction to work-based pension changes" (first published in April 2010). The leaflet has been updated to reflect the outcome of the independent review "Making Auto Enrolment Work" (see also Legislation section above).

A set of detailed guides which are aimed at professional advisers, intermediaries and large employers is due to be published in spring 2011. These guides will cover the details underpinning the legislation and the new employer duties. Additional guidance for small and micro employers is expected to be published in the summer.

TPR Press Release

Galvin appointed as new chief executive

TPR has today confirmed the appointment of Bill Galvin as its new chief executive.

Mr Galvin had been acting chief executive of TPR since May 2010, following the departure of Tony Hobman to the Consumer Financial Education Body. In October 2008 Mr Galvin was appointed executive director for strategic development at TPR. Prior to that, he worked at the DWP, where he led on pension protection policy. Since August 2010, Mr Galvin has also been a non-executive director for TPAS (The Pensions Advisory Service).

TPR Press Release

CASES

Capita ATL Pension Trustees Limited v Zurkinskas (High Court)

The Chancellor of the High Court (Sir Andrew Morritt) has approved a compromise of equalisation claim in what is thought to be the first case of its kind. Sackers acted for the Trustees.

Background

The Sea Containers 1983 Pension Scheme (the Scheme) was set up under an interim trust deed, with effect from 1 September 1983. A definitive deed and rules were adopted in September 1988 and were operative until new rules (dated 16 December 2005) were adopted with effect from 1 July 2004.

The Scheme had pre-equalisation normal retirement ages (NRA) of 65 for men and 60 for women. Following the ECJ decision in *Barber*[4] the Scheme made a number of attempts to equalise NRA at age 65 for both men and women, and to change the Scheme's accrual rate. It was common ground that attempts in 1993 and 2004 to equalise benefits were both ineffective (to differing degrees), leaving attempts in 1994 and 2002 which may or may not have been fully effective.

High Court Decision

The Court was asked to approve a compromise as to the members' rights to benefits in the Scheme (following the attempts at equalisation). There were three key issues: representation orders; the impact on the PPF; and the "percentage method" for determining compensation.

- *Representation orders*

  The Civil Procedure Rules permit the Court to make an order appointing a representative beneficiary to represent a class of member, but in this case the representation was split in favour of those members whose interests were to argue against each question – commonly known as "issues based" representation.

- *The Pension Protection Fund*

  The Chancellor was concerned about two issues relating to the impact of the compromise on the PPF:

  - Legitimate interest of the PPF: as the Scheme is not in a PPF assessment period, the PPF does not have a statutory power to intervene. Indeed, it confirmed its approach is not to participate in any litigation, unless the matter is of general application (as was the case in *ITS v Hope*[5]).

  - Three-year look back provisions: the PPF has a statutory right to look back at (and, if appropriate, nullify) trustee decisions taken in the three years before any Scheme enters an assessment period. But in this case, the PPF agreed to be bound by the High Court decision on this compromise, thus giving all the parties to the compromise comfort on this point.

- *The percentage method*

It is standard practice for a percentage likelihood of success to be attributed to any claim (or class of beneficiary). But what was unusual here was that these percentages were used by the Scheme Actuary to establish the liability (or the likely compensation to be paid). This was referred to in the case as the "percentage method".

[4] *Barber v Guardian Royal Exchange* (ECJ 17 May 1990

[5] [2009] 2818 Ch

The Chancellor noted that in cases such as this "a small percentage of success may be translated into a substantial sum when, in truth, the prospects of success are illusory. In ordinary litigation that may be acceptable because of the benefit of certainty and paying to get rid of the nuisance value of the claim". Given that in this case no issue was more likely to succeed than another, the Chancellor considered that the details needed "to be scrutinised in considerable and more than usual detail."

Decision

The compromise was approved for a number of reasons, including:

- a benefit could be shown to accrue to each of the members and each of the employers;
- approval of the compromise would avoid the costs and relative uncertainty which a full trial would bring;
- it was preferable to achieve certainty now, rather than in the event the PPF were to take over the Scheme, in which case the costs would be payable out of the assets of the PPF "to the detriment of all with an interest in them"; and
- the compromise would simplify the administration of the Scheme going forwards.

Comment

The proposed compromise agreed in this case is thought to be the first of its kind because of the fact that the Scheme did not have a sponsoring employer (but was nevertheless not in the PPF). The Chancellor noted that this form of compromise may become a model for resolving, by agreement, similar issues in relation to pension schemes, in particular given the time and cost savings to be made.