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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)

BIS: Department for Business

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

ECJ: European Court of Justice

FAS: Financial Assistance Scheme

GMP: Guaranteed Minimum Pension

HMRC: HM Revenue & Customs

NEST: National Employment Savings Trust

PPF: Pension Protection Fund

TPR: The Pensions Regulator

LEGISLATION

Pensions Increase (Review) Order 2012

This [Order](#), which will come into force on 9 April 2012, makes provision for the annual increase of many public sector pensions, including ministerial and parliamentary pensions, the pensions of civil servants, teachers, and NHS workers.

The Order provides for an increase of 5.2% from 9 April 2012 for all “official pensions”, except for those which have been in payment for less than a year (which will receive a pro-rata increase). The increase is equal to the percentage increase in the Consumer Prices Index (CPI) in the twelve months to the preceding September.

Since 1987, the increase of official pensions has taken effect from the first Monday of the tax year.

Further information can be found in the [Explanatory Memorandum](#) which accompanies the Order.

DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS

Consultation on enhanced shareholder voting rights

In January 2012, the Secretary of State for Business announced a package of measures which are designed to address failings in the corporate governance framework for executive remuneration.

Subsequently on 14 March 2012, BIS published a [consultation](#) which provides more details on a new model for shareholder voting. The main features of this model are:

- an annual binding vote on future remuneration policy;
 - increasing the level of support required on votes on future remuneration policy;
 - an annual advisory vote on how remuneration policy has been implemented in the previous year; and
 - a binding vote on exit payments over one year's salary.
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The aim of the consultation is to seek evidence on the impact, costs, benefits and likely behavioural effects of the proposals. The Government hopes to confirm the precise measures to be taken forward "early this summer".

[Written Ministerial Statement](#)

[BIS Press Release](#)

GOVERNMENT EQUALITIES OFFICE (GEO)

Consultation on equal civil marriage

On 15 March 2012, the GEO issued a [consultation](#) on the Government's proposals to enable same-sex couples to have a civil marriage.

The aim of the consultation is to enable civil marriage for same-sex couples, through civil ceremonies in a register office or other approved premises. Civil partnerships would be retained for same-sex couples with the possibility of converting existing civil partnerships into a marriage.

No changes are proposed to religious marriages, which will continue to only be legally possible between a man and a woman.

In addition, if the proposals are adopted, individuals will be able change their gender legally, without having to end their marriage.

The consultation closes on 14 June 2012.

[GEO Press Release](#)

HM REVENUE & CUSTOMS

New guidance on the Annual Allowance

HMRC published [additional guidance](#) on 15 March 2012, on the annual allowance in the following circumstances:

- DB and cash balance valuation assumptions for schemes still using pre-6 April 2006 Inland Revenue maximum limits;
- 'Scheme Pays' for a tax year in which a member becomes entitled to all benefits under the scheme, or BCE 5, 5A or 5B occurs.

HMRC has also updated its [guidance](#) on the 'carve out' for deferred members, under which they are treated as having no pension input amount (pensions saving) provided certain conditions are met.

HMRC intends to update the relevant pages of the Registered Pension Schemes Manual as soon as possible.

THE PENSIONS REGULATOR

Trustee toolkit updated

TPR's "refreshed" [Trustee toolkit](#) went live on 14 March 2012. Updates to the toolkit include:

- downloadable resources, including PDF versions of the case studies, to aid offline working;
- more choices relating to scheme size and type when registering so that every learner benefits from a more tailored programme;
- clearer navigation and an overview of the user's progress towards receiving the certificate of completion;
- increased screen size and a refreshed look and feel;
- a simplified registration process so that it is easier to set up an account.

[TPR Press Release](#)

Desmond and others v TPR and Garvin Trustees Ltd

On 13 March 2012, TPR published a [determination and reasons](#) of the Determinations Panel (the Panel) relating to the Desmond and Sons Limited 1975 Pension and Life Assurance Scheme (the Scheme).

In May 2010, the Panel decided that it would be reasonable to issue contribution notices (CNs) to two shareholders of the Scheme's sole participating employer. Following this, a preliminary application by the shareholders was heard by the Upper Tribunal in February 2011.

Publication of the determination notice had been withheld while an embargo was in place relating to the [decision](#) of the Upper Tribunal.

Background

The Scheme is an occupational DB pension scheme which was established in 1969. The only participating employer was Desmond & Sons Limited (Desmonds), a healthy and solvent company. However, after its sole client Marks & Spencer plc (M&S) terminated their business relationship, Desmonds entered into a Members' Voluntary Liquidation (MVL) in June 2004.

The MVL at the heart of this case was referred to as a "loophole" which allowed Desmonds to be treated as an insolvent company for the purposes of calculating its debt to the Scheme under Article 75 of the Pensions (Northern Ireland) Order 1995 (equivalent to section 75 of the Pensions Act 1995). The net effect of the MVL was that the Scheme's liabilities were calculated by reference to the former Minimum Funding Requirement (MFR), rather than the more expensive buyout valuation of the Scheme's liabilities (representing a possible saving to Desmonds of around £14 million).

Contribution Notices: TPR's powers

TPR can issue a CN (provided it is reasonable to do so) where, in the preceding six years:

- there has been an act or deliberate failure to act, on or after 27 April 2004, which was designed to avoid or reduce a debt that would otherwise have fallen due from a company to a pension scheme; or
- with effect from 14 April 2008, an act or failure to act has detrimentally affected, in a material way, the likelihood of a scheme being able to pay a members' benefits.

Decision of the Determinations Panel

At a hearing in April 2010, the Panel found that the act of placing Desmonds into the MVL was a "relevant act" for the purpose of anti-avoidance legislation introduced by the Pensions (Northern Ireland) Order 2005 (the 2005 Order) (equivalent to the powers under the Pensions Act 2004).

There was clear evidence that the act of placing Desmonds into the MVL had prevented the recovery of "the whole or part of a debt which was or might become due". Desmonds had, following advice, been deliberately placed into the MVL at short notice, ahead of the change in the law which closed the MVL loophole, so that the debt arising on the insolvency event was the MFR debt. In this way, the Scheme was prevented from recovering the buyout debt which would otherwise have become due.

Although the shareholders argued that the MVL was an inevitable consequence of the decision by M&S to sever its links with the company, the Panel found that one of the main purposes of the MVL had been to avoid the buyout cost.

The Panel therefore decided that it would be reasonable to issue CNs to two shareholders Mr Desmond and Mr Gordon, for £900,000 and £100,000 respectively. While two other shareholders had also been party to the MVL, the Panel considered "that their degree of involvement in the MVL was so minimal that it would not be reasonable to impose any liability on them in all the circumstances".

Central to the Panel's decision on the reasonableness of the amount of the CNs was the failure to of the shareholders inform the trustees of the decision by M&S to terminate its relationship with Desmonds – an event of material significance to the Scheme. The Panel believed that, had the trustees known the true position, they would have been able to take a number of steps to maximise contributions to the Scheme.

Referral to the Upper Tribunal

Messrs Desmond and Gordon referred the case to the Upper Tribunal, contending that the Panel should not have decided to issue a CN against either of them or that, if issued, the amounts specified should have been zero. A preliminary application to strike out the Panel's determination was heard by the Tribunal in February 2011.

The trustees also referred the matter to the Tribunal, asserting that:

- the CNs should have been issued for the whole buyout debt (and in any event for a far greater proportion of the debt than the £1m actually sought);

- a CN should also have been issued against Mrs Annick Desmond (a former shareholder of Desmonds); and
- a finding should have been made by the panel that Messrs Desmond and Gordon and Mrs Desmond acted otherwise than in good faith.

TPR submitted a Statement of Case, also contending (among other things) that the CNs should have been issued for the entire shortfall and that they should have been issued jointly and severally against all three applicants.

Upper Tribunal decision

The applications against Mrs Desmond were struck out. TPR was out of time to issue a CN against her, the six year limitation period having passed.

The remaining strike-out applications were dismissed. Among the reasons given by Sir Stephen Oliver QC are that:

- the Tribunal was permitted to take account of evidence not put before the Panel as it was required to "take a full, all round and up to date view of the circumstances". However, the Tribunal shared Warren J's view in the *Bonas*¹ case that it was "potentially impermissible" for TPR to rely on an argument that raises "a completely new case which is entirely outside the scope of the Warning Notice";
- TPR was entitled to argue for a different determination from that reached by the Panel;
- a CN can relate to a series of acts, rather than a single act. There had been a series of events which culminated in the MVL, which could collectively be viewed as the act for the purposes of the anti-avoidance legislation; and
- TPR was also entitled to request that the amounts of the CNs be increased. Matters of quantum would be for the Tribunal to determine at the final hearing.

Comment

Although the MVL was entered into while the anti-avoidance legislation in the Pensions Bill was still being considered by Parliament, it was widely known that the provisions would have retrospective effect to 27 April 2004.

The substantive issues in this case will now be considered before a full hearing of the Upper Tribunal.

[TPR Press Release](#)

¹ See 7 Days dated [13 June 2011](#)