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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)

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

DEPARTMENT FOR WORK AND PENSIONS

The Financial Assistance Scheme Regulations 2012 (originally 2011) – consultation response

This consultation document sought views on the draft Financial Assistance Scheme Regulations 2012 (originally 2011). These draft regulations contained an addition to the qualification provisions and some revisions to the payment provisions for FAS. The draft regulations also contained textual changes intended to provide clarification in respect of the existing regulations. The [response](#) was published on 28 May 2012.

FINANCIAL REPORTING COUNCIL (FRC)

Priorities and funding for 2012/13

On 21 May 2012, the FRC published its [priorities and funding plans](#) for 2012/13. In the next year, the FRC intends to focus on four broad objectives:

- monitoring the health of corporate governance and reporting in the UK and making sure that its codes and standards remain fit for purpose and that planned changes are introduced at the right time;
- making sure that the UK's approach to corporate governance and reporting is properly understood and appreciated in the EU and internationally. Working with the Department for Business, the FRC will press for the policies of the EU on governance and audit to serve the interests of investors;
- focussing on the effectiveness of its monitoring, oversight and disciplinary work, ensuring that the FRC is responsive to emerging risks, joined up, transparent and proportionate. The FRC will review further the scope of its conduct work and seek to enhance the speed and effectiveness of its disciplinary work, including its sanctions; and
- following Government approval and subject to Parliamentary debate, the FRC will ensure that the final decisions on the reform of the FRC are introduced effectively.

The FRC's overall budget for 2012/13 at £22.4m, and the budget for core operating costs at £14.6m, are 2% lower than for 2011/12. There will be no increase in the average levy charged to publicly traded companies, insurance companies and pension schemes.

HM TREASURY

Finance Bill 2012: Asset-backed contributions (ABCs)

The Treasury has announced amendments to the provisions of the Finance Bill 2012 which deal with ABCs.

The new legislation on employer ABCs is aimed at ensuring that employers who make ABCs can no longer benefit from unintended, excess tax relief. However, it came to HMRC's attention that some pre-existing arrangements, where the contribution was paid before 22 February 2012, may be affected in unintended ways by the transitional provisions in the legislation. The amendments remove these unintended consequences with the aim of ensuring that the relief given to the employer under such an arrangement accurately reflects, but does not exceed, payments made to the registered pension scheme.

NATIONAL EMPLOYMENT SAVINGS TRUST (NEST)

Golden rules of communication

On 22 May 2012, NEST launched eight "golden rules" for talking about pensions in the context of automatic enrolment. These rules were developed following four years of research among people who will be affected by the reforms.

NEST's golden rules are:

- Keep it real: Use examples people can relate to and avoid abstract concepts.
- Rights not responsibility: Tell people what they're entitled to not what they should be doing.
- Out with the old: Make pensions relevant to their lives now and don't focus on the details of retirement.
- One for all: Make it clear automatic enrolment is happening to most workers, not just them.
- Tell it like it is: Present the facts and avoid 'spin'- people want to make up their own minds.
- Give people control (even if they don't use it): Tell people about their choices and not that everything's done for them.
- Take people as you find them: Give people access to information that matches their knowledge and interest.
- Be constructive: Tell people about solutions, not problems or scare-stories.

[Full report](#)

PENSION PROTECTION FUND

Webcast introducing the role of the Scheme Delivery Consultant to trustees and administrators

The PPF has published a new [webcast](#) for trustees and scheme administrators who are involved with pension schemes in the PPF assessment period or pension schemes going through the process of transferring to the FAS.

The webcast focuses on the role and responsibilities of the Scheme Delivery Consultants and what they can do to help make the job of trustees and administrators easier.

[Press release](#)

THE PENSIONS REGULATOR

Scheme record keeping report 2012

TPR has published a [report](#) detailing the key findings of its third record keeping survey. The survey was conducted among a representative sample of trust and contract-based pension schemes with two or more members. It was designed to assess the extent to which accurate and appropriate record keeping is being undertaken across the pensions industry, reviewing progress on the take-up of TPR's guidance and its effectiveness in addressing problems identified in the inaugural survey.

Findings include:

- awareness of TPR's guidance has remained very high and in line with last year;
- the proportion of administrators attending trustee meetings on a regular basis has increased but with small schemes showing a lower frequency of administrator attendance at trustee meetings; and
- more trustees are being alerted to data problems by their scheme administrators.

[Press release](#)

Corporate Plan 2012-2015

TPR has set out its key areas of strategic focus for the next three years in its sixth [Corporate Plan](#).

Priorities include helping employers prepare for automatic enrolment, working with the pensions industry in the DC market to deliver good outcomes for members, and helping sponsoring employers and trustees of DB schemes to work through the particular challenges their schemes face in the current economic climate.

[Press release](#)

CASES

Bradbury v British Broadcasting Corporation

This decision confirms that, subject to the employer's implied duty of good faith, an agreement by a member to accept a pay rise on the basis that only part of it will be pensionable is binding on the member and will override the pension scheme's rules if necessary.

Background

Mr Bradbury is employed by the BBC as a member of its Philharmonic Orchestra. He is a member of the BBC Pension Scheme (the "Scheme").

Until 2011 the Scheme had three sections.

- Old Benefits section – final salary benefits;
- New Benefits section – final salary benefits;
- CAB 2006 section – career average benefits; and

As part of the proposal described below, a new CAB 2011 section was added. It provides career average benefits.

Mr Bradbury was a member of the New Benefits section.

Faced with a need to reduce its pension liabilities, the BBC decided to introduce a 1% cap on increases in pensionable pay for the remaining active members of the Old Benefits, the New Benefits section and CAB 2006 section. This would mean that, whatever pay increase a member of those sections received, the increase in pensionable pay would be limited to 1% in each year.

The proposal

Following a consultation with members and trade unions, members were offered a number of options:

- a) to remain in their current section but with any future pay awards limited to 1% for pension purposes;
- b) to opt out of their current section and for future service join the CAB 2011 section in which any future pay awards would not be subject to the 1% cap; or
- c) to opt out of the Scheme altogether and to join the BBC Life Plan, a DC arrangement.

Option (a) was not reflected in any amendment to the trust deed and rules. The BBC concluded that no amendment was necessary for two reasons:

- the definition of "Basic Salary" in the rules gave the BBC the power to determine what part of a member's remuneration was pensionable; and
- the BBC decided that any increase in pay would be offered on the basis that the increase would, for pension purposes, be limited to 1%. If a member did not agree

to those terms he would not get a pay increase (at least not one above 1%). If he did agree then the agreement would be binding so that the Scheme's trustees should give effect to it.

Pensions Ombudsman (PO)

In January 2011, Mr Bradbury brought a complaint to the PO that, among other matters, following the proposed change his pensionable salary would cease to reflect the whole of his basic pay. The PO dismissed his complaint, concluding that the BBC could make acceptance of a pay rise subject to a cap for pension purposes.

Mr Bradbury appealed the determination.

High Court

Mr Justice Warren was not persuaded that the BBC had sufficient power to make the change through its purported control over the constitution of a member's "Basic Salary" (which in turn determined "Pensionable Salary").

However, provided this agreement was not obtained in breach of the implied duty of trust and confidence¹, he was satisfied that the cap could be properly implemented via an agreement with members. Warren J rejected Mr Bradbury's arguments that section 91 Pensions Act 1995 and the *IMG case*² made an agreement that only part of a forthcoming pay rise would be pensionable unenforceable. He felt the BBC's case was much closer to *South West Trains*³ and therefore "The BBC's conduct was not contrary to the deed and rules in the sense that an agreement to impose the 1% cap by agreement would be effective notwithstanding the provisions of the [deed and rules]".

Warren J was also asked whether BBC's action amounted to a breach of its implied duty of trust and confidence to its employees. However, this issue had only been raised for the first time on appeal and the BBC had not had the opportunity to present evidence. For this reason, Warren J drew no conclusions on this point. He has asked the parties to reach an agreement on the question of breach of the implied duty of trust and confidence and present it for his approval.

Comment

Following the earlier cases of *South West Trains* and *NUS*⁴, *BBC v Bradbury* confirms that an employer may reach a binding agreement with employees regarding pension provision outside the pension scheme. It helpfully clarifies the limited effect of the *IMG case* and Section 91 on such circumstances, but reminds us that any such agreement must be subject to the *Imperial Tobacco* duty of trust and confidence.

¹*Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589

²*IMG Pension Plan; HR Trustees Ltd v German and International Management Group (UK) Ltd* [2009] EWHC 2785

³*South West Trains v Wightman* [1998] PLR 183

⁴*NUS Officials and Employees Superannuation Fund v Pensions Ombudsman* [2002] PLR 93