

## **FLEXIBLE RETIREMENT AND PENSION PROVISION**

### **RESPONSE TO CONSULTATION**

The comments set out below form the formal response (“Response”) of Sacker & Partners LLP (“Sackers”) to the consultation by the Department for Work and Pensions (DWP) on the alternative options for a further exemption to the Employment Equality (Age) Regulations 2006 (“the Age Regulations”) which are discussed in the consultation document published on 16 December 2008 (“the Consultation”).

Sackers is a firm of solicitors specialising in pensions law. The views expressed in this Response have been collated following discussions with a representative group of the firm’s solicitors.

#### **Background**

1. We note that the DWP is seeking views on two alternative proposals, which are intended as additional exemptions to the Age Regulations. The first (“Option 1”), would permit schemes to stop accrual of further pensionable service and the provision of death benefits in respect of members working under a “flexible retirement arrangement”<sup>1</sup>. The second (“Option 2”), would add a new exemption in relation to death in service benefits, so that any member who dies during a period of flexible retirement can be treated as a pensioner, rather than as an active member for death benefit purposes.

#### **General Comments**

2. While some of our clients have chosen to await developments / further guidance in this area, many have already put flexible retirement arrangements in place. As currently drafted, neither option will apply to members already working under flexible retirement arrangements. There is therefore a danger that the two options will be of limited use.
3. The options themselves are restrictive in scope. This creates a risk that they will be seen as the only lawful options for flexible retirement provision and, contrary to the

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<sup>1</sup> Defined at 4.3 of the Consultation as “an arrangement between a member and the employer under which the member either: reduces hours worked; or grade held; after becoming eligible to receive all or part of the age-related benefits under an occupational pension scheme”

Government's stated objective of improved flexibility in retirement<sup>2</sup>, employers may be discouraged from putting in place alternative forms of flexible retirement.

4. This may be the case even where employers have already put in place flexible retirement arrangements which are structured around the Age Regulations as they currently stand (and have the option to objectively justify other practices which might otherwise constitute direct or indirect age discrimination). On this basis, if either of the proposed exemptions were adopted, we consider there to be a real risk that employers will move away from their pre-existing flexible retirement arrangements. In order to preserve a wide range of flexibility, the DWP (if it concluded that there is merit in having an exemption dealing with flexible retirement arrangements at all) may therefore wish to consider broadening the permitted exemptions under the Age Regulations.
5. In this context, it is worth noting that in the recent *Heyday*<sup>3</sup> decision, the European Court of Justice (ECJ) indicated that an exemption introduced by an EU Member State at a national level can be flexible in its operation. The ECJ distinguished objective justification at a national level by an EU Member State, which may be based on social policy objectives (such as "those related to employment policy, the labour market or vocational training"), from objective justification by individual employers which must, by definition, relate only to that employer's situation (for example "cost reduction or improving competitiveness"). Specifically, the ECJ stated that "a national rule may recognise... a certain degree of flexibility for employers."<sup>4</sup>

### **Defining flexible retirement arrangements**

6. In our experience, limiting the definition of a "flexible retirement arrangement" to arrangements under which a member reduces either the hours they work or their grade is unlikely to be widely relevant outside the public sector. While some members of private pension arrangements will work fewer hours under a flexible retirement arrangement or change their role, there are likely to be many more instances of members working flexibly whilst continuing in the same role and maintaining their original working hours. This applies to both members who will

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<sup>2</sup> Simplicity, security and choice: Working and saving for retirement - Action on occupational pensions (DWP, June 2003)

<sup>3</sup> *The Incorporated Trustees of the National Council of Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform (Case C-388/07)*

<sup>4</sup> Para. 46

simply continue in their existing role beyond their normal retirement date, and to those who elect to draw part or all of their benefits before normal retirement date but who carry on working for their employers.

### **Minimum age**

7. Both options under the consultation are stated to take effect from state pension age, or normal pension age under the scheme if higher. In practice, employers wishing to offer flexible retirement arrangements are commonly doing so from an earlier age, for example the age at which early retirement is permitted (generally, currently age 50 or age 55 from 2010). The DWP may therefore wish to take this into account in any exemptions to the Age Regulations which are introduced.

### **Cash equivalent transfer values (CETVs)**

8. An additional aspect which it may be useful for the DWP to consider is the impact of flexible retirement policies (such as those envisaged under 7 above which take place before normal pension age) on CETVs. It is not clear whether there is a statutory right to payment of a CETV where part of the pension is in payment under an occupational pension scheme (although this may be permitted under individual scheme rules).
9. In particular, it would be helpful to have clarification as to whether:
  - under existing legislation an occupational pension scheme member has a statutory right to a transfer where part of the pension is in payment;
  - if such a right does exist, whether it applies to the whole benefit or only the part which is not in payment; and
  - how any such transfer value should be calculated.
10. Section 98(5) of the Pension Schemes Act 1993 provides that, where part of a benefit under a personal pension scheme has come into payment, the cash equivalent right applies only to the remainder of the benefit. However, the only equivalent provision in relation to occupational pension schemes is in section 92(2)(aa). This states that regulations may provide for a CETV to be reduced to take account of an entitlement to pension which has already arisen. However, we are not aware of any such regulations having been introduced. It would therefore be very



helpful to have clarification of the way in which CETVs should be dealt with for flexible retirement purposes.

**Sacker & Partners LLP**  
**10 March 2009**