SACKER & PARTNERS

sackers extra

THE QUARTERLY

DECEMBER 2008

Introduction

Welcome to our Sackers Extra "Quarterly", designed to highlight significant developments in pensions law over the last quarter. The Quarterly is published in March, June, September and December. Each edition covers key areas such as pensions reform, regulatory developments, new legislation and cases.

Copies of our Sackers Extra publications and responses to consultation referred to in this "Quarterly" are available from the client area of our website www.sackers.com or from your usual contact.

In this issue

Pensions Reform 2

- Pensions Bill 2007/08 2
- Personal Accounts 2
- Pension Sharing on Divorce 3
- GMP Conversion 3
- Financial Assistance Scheme 3

Regulatory 4

- HMRC 4
- HM Treasury 4
- NAPF 4
- PPF 5
- TPR 6

Cases 8

- Heyday 8
- Smithson v Hamilton 8
- Allied Domecq (Holdings) Ltd v Allied Domecq First Pension Trust Ltd 9
- Went v Trustees of the Asheridge Limited Discretionary Pension Scheme 9

In the pipeline 10

PENSIONS REFORM

Pensions Bill 2007/08

New version published

A fifth version of the Pensions Bill was published on 30 October 2008 following the close of the "Report Stage" discussions in the House of Lords. The Bill is still subject to Parliamentary scrutiny, but is expected to receive Royal Assent later this month.

New anti-avoidance powers

Key amendments agreed during this parliamentary phase include new anti-avoidance powers for the Pensions Regulator. Originally intended to be implemented by regulations (with only a general enabling power in the Bill), in light of industry concerns that this approach would create a lack of certainty, the detail of the new powers will now be set out in the primary legislation.

Among other changes to the Regulator's powers, the Bill now sets out an alternative test for imposing contribution notices based on "material detriment". In tandem, the Regulator has published a draft list of circumstances in which it expects to issue contribution notices using the material detriment test. This list is intended to form the basis of a new statutory code of practice.[1]

Other amendments to the Bill include changes to:

- the rules on buying back into the State Pension by allowing people retiring before April 2015 to buy back six additional years of state pension entitlement if they already have 20 qualifying years on their National Insurance record; and

Qualifying earnings and DC schemes

- the proposed pay reference period for "qualifying earnings" and defined contribution (DC) schemes for the purposes of the Personal Accounts regime. This will enable employers to assess the flow of contributions made over a 12 month period, therefore avoiding any irregularities which could arise if the assessment were carried out monthly (for example, resulting from the payment of bonuses in a particular month).

Personal Accounts

Quality Requirement

Self certification of quality requirement

The Department for Work & Pensions (DWP) has announced that when the new personal accounts regime comes into force (scheduled for 2012), employers whose employees already have access to a registered occupational or personal pension arrangement which satisfies the "quality requirement" will be able to "self certify" that their scheme meets this standard.

For a contracted-out defined benefit (DB) scheme, the quality requirement means the reference scheme test, while contracted-in DB schemes will be pitched against a "test scheme" (using a 1/120th accrual rate over a maximum of 40 years). For a DC or personal pension scheme, each member must receive pension contributions of at least 8% of qualifying earnings or equivalent, of which 3% must be paid by the employer.

---

[1] For more information about the proposed new powers, please see our Alert: "Anti-avoidance powers - update" dated 22 October 2008

Pension Sharing on Divorce

Response to consultation published

The DWP has published its response to the consultation on amendments to The Pension Sharing (Pension Credit Benefit) (Amendment) Regulations 2008.

Early payment of pension credit benefits

The Draft Regulations are designed to permit the early payment of pension credit benefits. However, there will remain two circumstances in which the rights of pension credit members differ from the rights of other members. Former spouses/civil partners will still be prevented from:

- taking a tax-free pension commencement lump sum where the member's right to receive payment of their pension exists before the pension sharing order is made; and
- receiving an ill-health early retirement pension if they have not had an "occupation". This is because the ill-health condition in the Finance Act 2004 requires members to be incapable of carrying out their "occupation" because of physical or mental impairment and to have ceased to carry it out.

The Draft Regulations are expected to come into force in April 2009, to coincide with the abolition of legislative requirements which apply to safeguarded rights (to be implemented under the Pensions Bill 2007/08).

CETV methodology applied to pension credits

In addition, in a follow-up to the consultation on transfer values, the DWP has confirmed that the methodology used for calculating cash equivalent transfer values (CETVs) is the most appropriate method for valuing pension rights for pension sharing purposes. It considers that there would be a risk, in using a different methodology for pension sharing, that some former spouses would be treated more favourably than scheme members who choose to transfer out their pension rights.

GMP Conversion

Consultation on draft regulations

Amendments made to the Pension Schemes Act 1993 by the Pensions Act 2007, included a facility to allow contracted-out occupational pension schemes to convert members' Guaranteed Minimum Pensions (GMPs) into ordinary scheme benefits.

On 2 September 2008, following a commitment made in Parliament to consult before bringing the facility into force, draft amending regulations were published for consultation by the DWP. Sackers responded to the consultation which closed on 28 October 2008.[2]

Financial Assistance Scheme (FAS)

Expedited payments for the terminally ill

Early access to assistance

Qualifying members over the age of 55 (whether within five years of their normal retirement age or not) will be able to access FAS assistance early, without actuarial reduction, where they have a serious illness which significantly reduces their life expectancy. To this end, the DWP has announced a consultation on the draft Financial Assistance Scheme and Incapacity Benefit

[2] For more information, please see our Alert: "GMP Conversion – the facts" dated 9 September 2008, together with our response to consultation

SACKER & PARTNERS

(Miscellaneous Amendments) Regulations 2009.

The consultation will close on Wednesday 3 December 2008.

REGULATORY

HM Revenue & Customs (HMRC)

Registered Pension Schemes Manual (RPSM)

Finance Act 2008 updates to RPSM

HMRC has published a large number of updates to its RPSM, the majority of which have been made to deal with changes arising from the enactment of the Finance Act 2008. These include:

- the "permitted maximum" figure for 2008/09 (i.e. the notional earnings cap);
- further explanation of the application of Benefit Crystallisation Event 3 to pension increases (including the widening of the circumstances in which schemes are exempt from this test);
- changes to the transitional protection for pension commencement lump sums; and
- additional explanatory guidance in relation to recognised transfers from Qualifying Recognised Overseas Pension Schemes.

HM Treasury

Updating the Myners Principles: Response to Consultation

The Government has published its response to consultation on proposals to update the Myners principles. The key conclusions it has reached are that:

New high level Myners principles

- there will be a smaller number of simplified, higher-level principles;
- these principles will be linked to a body of higher quality, more selective and accessible guidance and trustee tools;
- there will be greater industry ownership of the principles, guidance and trustee tools through the establishment of a joint Government-industry Investment Governance Group; and
- there will be a more robust approach to disclosure and industry debate, within a voluntary "comply or explain" approach.

The original consultation, which closed in June 2008, was based on a study commissioned by the Government and carried out by the National Association of Pension Funds.[3]

National Association of Pension Funds (NAPF)

NAPF launches Pension Quality Mark

Schemes must meet three core tests

The NAPF has announced that, from 2009, it will start awarding a "Pension Quality Mark" (PQM) to employers whose DC pension arrangements meet three core tests:

- **Contributions:** contributions of 10% must be available, with at least 5% paid by the employer. Schemes which provide for contributions of

[3] A copy of Sackers' response to this consultation is available from the client area of our website

SACKER & PARTNERS

15% (with at least 10% from the employer) can apply for a "Pension Quality Mark Plus".

- **Governance:** arrangements must be in place to ensure that a scheme is operating in the best interests of members. This could take a variety of forms including "trust boards, management committees or an annual scheme review".
- **Communications:** a scheme must provide clear and simple information to members when they join the scheme and thereafter.

The PQM is intended to be a benchmark for employers to demonstrate the value of their pension to current and prospective employees. The schemes which will be eligible include occupational DC schemes, group personal pensions, group stakeholder pensions and, from 2012, Personal Accounts.

Best practice principles for investment advice

Evaluating investment advisers – guidance for trustees

The NAPF has also published the final version of its "best practice principles" on investment advice to pension funds.

The principles (endorsed by 12 major consultancies) are a key part of the NAPF's "Assessing Investment Consultants Performance toolkit" (launched in March 2008), which is designed to help pension fund trustees evaluate and compare investment consultancies on a more consistent basis. The principles cover:

- investment advice;
- technical competence;
- communication;
- team working and dispute resolution; and
- education, training, fees and administration.

Pension Protection Fund (PPF)

Levy proposals

The PPF has made three key announcements as part of its consultation on the 2009/10 pension protection levy:

- it has confirmed its commitment, made in August 2007, generally to set a levy estimate of £675 million for the next three years, indexed to wages, by proposing a levy estimate for 2009/10 of £700 million;
- a levy scaling factor (which schemes can use to calculate their individual levy bills) of 2.22 has been proposed in advance of the 2009/10 levy year. This figure is subject to consultation, however, the PPF has said that it "does not expect it to change when it is confirmed in November"; and
- Dun & Bradstreet has been appointed as its insolvency risk provider for another three years, subject to contract.

Levy scaling factor for 2009/10

Long-term proposals

The PPF has also signposted its proposals for the long-term future of the pension protection levy, indicating that it will:

- continue to recognise the short-term risks that schemes pose to the PPF, with the aim of being able to meet the claims that the PPF

SACKER & PARTNERS

expects to face at any one time;

- add a component to the risk-based element of the levy to reflect a scheme's contribution to the long-term risks that the PPF faces, even from well-funded schemes, which will include taking into account a scheme's investment strategy and credit risk over time;

Investment strategy and credit risk

- provide the potential to reduce the scheme-based element of the levy; and
- offer greater year-on-year stability for individual bills as the levy becomes less sensitive to short-term changes in insolvency ratings and levels of underfunding.

The PPF's formal proposals on the long-term future of the levy are awaited – these will be subject to a three month consultation.

The Pensions Regulator (TPR)

New guidance: Member communications

TPR has issued guidance on "Effective member communications", which contains principles and guidelines on good practice in written communications to members.

Effective communication

The guidance makes clear that a communication plan is important, as is following up with members after a communication exercise to see how successful it has been. TPR suggests that anyone putting together a communication plan should:

- identify their objectives and have a clear communications plan;
- identify the best ways to communicate;
- tailor communications to the audience;
- remember the needs of all groups, not just active members;
- be open and honest;
- avoid jargon; and
- choose a good time and try to get members to engage.

Pension fund choices

TPR's new investment guide entitled: "Making pension fund choices - think before you choose", can be provided to members by employers or trustees.

New investment guide for members

The guide is designed to help members understand the DC fund choices available to them and to help give them adequate support in an area which affects the level of their benefits directly.

Good practice in selecting mortality assumptions

The response to TPR's February 2008 consultation on good practice in selecting mortality assumptions for DB pension schemes has been published.

Responding to feedback from the industry, TPR announced on 21 July that it was deferring the introduction of its new approach. The response:

- confirms that mortality assumptions will only be scrutinised where a

scheme is flagged up by an existing funding trigger[4];

- reiterates that TPR's approach will not be based on any one approach, with a range of different measures able to achieve equivalent outcomes;
- highlights that recovery plans are governed by payments that are reasonably affordable;
- is accompanied by guidance for trustees on the process for determining mortality assumptions; and
- restates that the changes will apply to valuations due from September 2008 (as announced on 21 July).

Applies to valuations from September 2008

Conflicts of interest - final guidance published

Five high level principles

Following consultation, TPR has published its final conflicts of interest guidance for trustees. The final version bears a striking resemblance to the draft guidance, with the five high level principles for analysing conflicts all surviving the consultation process.

The guidance makes it clear that management of conflicts is crucial to good scheme governance. The guidance, with its emphasis on education and support, is therefore essential reading for all occupational pension scheme trustees.[5]

Trustee Knowledge and Understanding (TKU) – revised code of practice

TPR has published a draft revised code of practice and scope guidance for consultation on the TKU framework "to reflect changes in regulation, legislation, the market place and the focus of the regulator".[6]

Practical TKU guidance

The revised code of practice sets out practical guidance for trustees in relation to the TKU regime, while the scope guidance provides trustees with a checklist of topics of which they need to have knowledge and understanding.

Proposed changes to the code reflect:

- the importance of good administration;
- the forthcoming introduction of Personal Accounts;
- emerging buy-out issues, including abandonment and inducement; and
- pension scheme wind-up and appropriate preparatory steps for trustees.

TPR issues statement to trustees about current financial pressures

How to deal with the credit crunch

Trustees of all work-based pension schemes should receive a statement from TPR setting out its general position in relation to current market conditions.

Noting that recent developments in the financial markets will be of great concern to pension scheme trustees, sponsoring employers and scheme members, the statement highlights that:

- trustees need to remain vigilant and to keep the position of their schemes under review;
- TPR believes that its current codes and guidance cover the relevant

[4] For more information, please see our Newsletter: "Trigger Happy TPR?" dated May 2006

[5] For more information, please see our Alert: "Conflicts Guidance - the High Five Survives" dated 2 October 2008

[6] For more information, please see our Alert: "TKU – updating the knowledge" dated 15 October 2008

issues and allow sufficient flexibility for trustees;

- trustees should continue to focus on making sound decisions in the long-term interests of scheme members.

CASES

European Court of Justice

Heyday (The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform)

Opinion of the Advocate General

The Advocate General (AG) of the European Court of Justice (ECJ) has delivered his opinion – the first stage towards a judgment in the highly anticipated Heyday case.

The case challenges provisions under the Age Regulations[7] which allow employers to dismiss workers aged 65 or over, provided the reason for dismissal is retirement and is not otherwise discriminatory. The arguments centre on whether the UK has properly implemented the age discrimination requirements of the European Framework Directive[8] (Directive), and whether the so-called default retirement age of 65 is, of itself, discriminatory.

The AG indicated that the UK's default retirement age could "in principle" be objectively justified as a matter of national law. However, in line with the Directive, this will need to be supported "by a legitimate aim relating to employment policy and the labour market", and the means used for achieving that aim must not be "inappropriate and unnecessary for the purpose".[9]

Court of Appeal

Smithson v Hamilton

The Court of Appeal (CA) has approved a compromise in this case, which was brought in connection with an error made in the pension scheme's documentation.

Deferred members of the Siemens Fire Safety and Security (PFP) Pension Scheme (the Scheme) aged 60 and over had a right to an immediate pension without consent and with no actuarial reduction, whereas active members' benefits were reduced in these circumstances. Asked to declare the rule void on the basis that there had been a mistake in the drafting, the High Court refused, on the basis that to grant such relief would amount to "rectification by the back door" (a potential Court remedy which was not requested).

An appeal had been scheduled for July 2008 but the parties settled and entered into a compromise. Details of the compromise were not covered in the judgment as this part was heard in private.

Approval of a compromise

The CA decision therefore mainly discusses the effect of the compromise on representation orders (which apply to claims about trust property and involve selected individuals representing a wider class of beneficiaries where it would be impracticable to have all members represented). The purpose of representation orders is to bring finality to a dispute before the court or where it

---

[7] The Employment Equality (Age) Regulations 2006

[8] The European Framework Directive on Equal Treatment in Employment and Occupation (2000/78/EC)

[9] For more information on this case, please see our Alert: "Default Retirement Age – Here to Stay?" dated 26 September 2008

has been compromised.

Having formally approved the compromise, the court included in its order provision for the terms of the compromise to be binding on all parties, effective 28 days after dispatch of a letter by the trustees to members of the scheme affected by the compromise.

Allied Domecq (Holdings) Ltd v Allied Domecq First Pension Trust Ltd

The CA has upheld the High Court's decision[10] on the question as to whether, under the Scheme rules, the rates of contributions payable by the employer were determined by the actuary (or on the advice of the actuary) without the agreement of the employer.

High Court decision upheld

Under the rules, when an actuarial valuation disclosed a deficiency in the fund, the participating companies were required to "collectively pay such an amount as the Actuary may consider appropriate". The Court found that while the Trustees and the Company were responsible for apportioning collective contribution rates between the various participating employers, neither had any role in ascertaining the overall amount required to be paid.

As noted in the judgment, statutory provisions do not displace the contractual provisions of an occupational pension scheme, except where those provisions conflict with the law. It is therefore always important to consider the interplay between statutory requirements and a scheme's rules.

Pensions Ombudsman (PO)

Went v Trustees of the Asheridge Limited Discretionary Pension Scheme

The trustees were held to be personally liable for financial loss to the scheme because they had not properly carried out their duties. As they had knowingly committed breaches of trust, they were also unable to rely on the exoneration provision in the scheme's rules.

Trustees liable for financial loss

The trustees had made a series of loans to the scheme employer which, at their peak, represented 70% of the total scheme assets - significantly in excess of the 5% limit on self investment.[11] In addition, scheme monies were invested in a property in Florida, in the hope that it would be a valuable asset to the scheme, providing capital growth and rental income. However, little rent was collected and, in some years, none at all. Although the property was eventually sold to realise assets for the scheme, the trustees subsequently purchased a second property in Florida.

The Deputy Pensions Ombudsman (DPO) found the loans to have been "driven by the company's requirements rather than the interests of the scheme and its members". He also concluded that "no trustee acting reasonably and with regard to the interests of the members of the scheme would have made such an investment".

While the purchase of the first Florida property was not, of itself, a breach of trust or maladministration, the failure by the trustees to collect rental income, and the receipt of rental income well below average rates, was maladministration. The purchase of the second property was also maladministration as the trustees had taken into account improper factors when deciding to purchase the property (for example, it was not even registered in either the scheme's or the trustees' names).

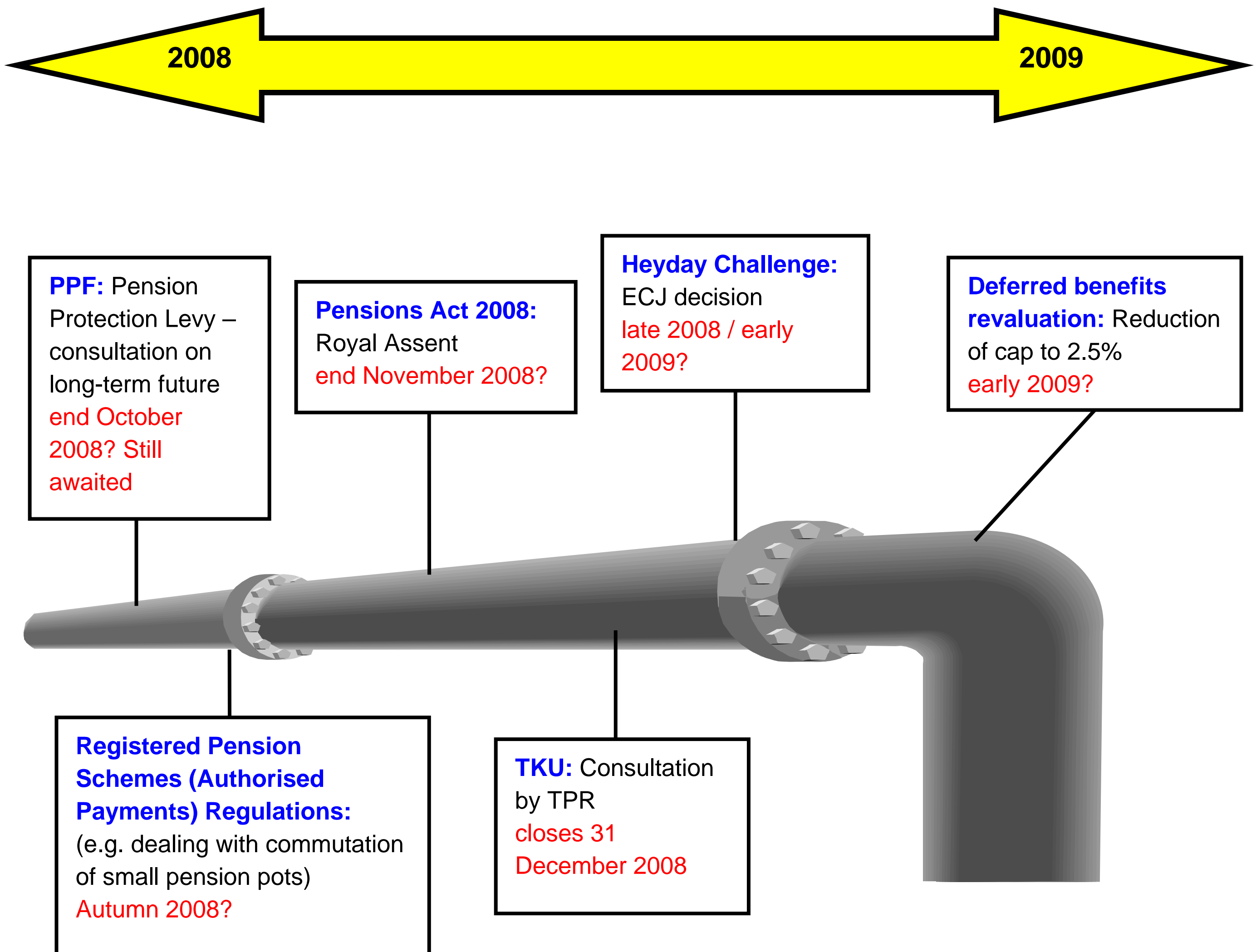
---

[10] Reported in the Quarterly in March 2008

[11] This was the limit which applied under the Social Security Act 1990

Only one of the trustees was able to rely on an exoneration and indemnity provision in the scheme rules as she was distanced from the management of the scheme employer. The other three (all also directors of the scheme employer) were held to have knowingly committed breaches of trust and could not therefore rely on it.

IN THE PIPELINE



Nothing stated in this document should be treated as an authoritative statement of the law on any particular aspect or in any specific case. Action should not be taken on the basis of this document alone. For specific advice on any particular aspect you should consult the usual Solicitor with whom you deal. © Sacker & Partners LLP November 2008

SACKER & PARTNERS

Solicitors specialising in pensions law

29 Ludgate Hill
London EC4M 7NX
Tel 020 7329 6699
Fax 020 7248 0552

enquiries@sackers.com
www.sackers.com

Sacker & Partners LLP is a limited liability partnership