

## The Quarterly December 2009

Highlighting significant developments in pensions law, covering key areas such as pensions reform, regulatory developments, new legislation and cases.





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### In the pipeline

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#### Abbreviations commonly used in the Quarterly:

**Alert/News:** Sackers Extra publications (available from the client area of our website or your usual contact)

**DB:** Defined benefit

**DC:** Defined contribution

**DWP:** Department for Work and Pensions

**FAS:** Financial Assistance Scheme

**FSA:** Financial Services Authority

**GAD:** Government Actuary's Department

**HMRC:** HM Revenue & Customs

**PPF:** Pension Protection Fund

**PADA:** Personal Accounts Delivery Authority

**TPR:** The Pensions Regulator



# Pensions Reform

Consultation on easements to employer debt

## Employer Debt

### Consultation on Employer Debt regulations

The DWP has published a consultation on draft regulations to amend the Occupational Pension Schemes (Employer Debt) Regulations 2005 (the Employer Debt regulations). They propose the introduction of two easements where businesses undergo an internal reorganisation. If certain conditions are met, such an event will not trigger an employment-cessation event and therefore no debt will arise. Certain additional technical amendments are also set out in the consultation.

The consultation (to which Sackers will be responding) closes on 19 November 2009.<sup>1</sup>

Automatic Enrolment – changes to timescales will be made

## Personal Accounts

Progress towards achieving the Government's 2012 reforms continues. The DWP has now published three main consultations on Personal Accounts. In a busy quarter, we have seen the Government's response to the first two consultations, as well as the third and final consultation published for comment.

### First Consultation – Response published

In March 2009, the DWP consulted on the Pensions (Automatic Enrolment) Regulations 2009. This set out the practical arrangements for automatic enrolment of eligible employees (defined as "jobholders" under the Act) into qualifying pension arrangements, including the procedure for opting out.

A summary of responses<sup>2</sup> was published in September 2009, in which the DWP acknowledged that the regulations were "too prescriptive and burdensome and the timescales too short". The automatic enrolment timescales have since been altered, including:

- extending the joining window from 14 days to one month (and the window within which information must be provided to active members, from 30 days to two months) for both trust- and contract-based schemes;
- limiting the information requirement so that information provided by employers will focus on scheme benefits; and
- changing the opt-out period from 30 days to one month to ensure consistency in the way time periods are defined.

Scheme order and rules – only minor amendments

### Second Consultation – Response published

The draft scheme order and rules – the trust deed and rules which will govern the new scheme of Personal Accounts – was published for consultation in April 2009. The scheme order establishes the scheme, appoints the trustees and sets out the criteria for eligibility, and member/employer participation. The rules deal with more of the detail, including administrative provisions, and the requirements for member and employer contributions.

The DWP's summary of responses was published in October 2009<sup>3</sup> and some minor amendments will be made to clarify understanding.

<sup>1</sup> See our Alert dated 23 September 2009

<sup>2</sup> Published on 24 September 2009 – see 7 Days dated 28 September 2009

<sup>3</sup> For more information on the consultation, see Sackers' response to the consultation

## Pension Reform (continued)

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Employer compliance with Personal Accounts – consultation issued

### Third Consultation – Comments requested

Finally, on 24 September the third main consultation was published. This covers six sets of regulations which deal with the remaining aspects of the employer compliance regime. These include:

- arrangements for implementing the reforms, such as allowing employers to phase in contributions gradually over time;
- elements of the employer duty requirements not covered in the March 2009 consultation, for example, re-enrolment of eligible individuals and changes to the so-called “19 day rule”<sup>4</sup>;
- the quality requirements for pension schemes, including self-certification for DC schemes; and
- TPR’s powers to enforce compliance.

Compliance will be phased in – with larger employers first

The current DWP proposal is that the reforms will be implemented in stages, splitting employers into 25-30 groups according to their size and requiring each group to start automatic enrolment on an assigned date over the three year period from October 2012 to October 2015. Generally, larger employers will be expected to start automatically enrolling their employees before smaller ones.

This consultation will close on 5 November 2009, the DWP setting a short consultation period (6 weeks instead of the usual 12) to give stakeholders “early certainty”.

### Guidance for Employers

Alongside the three main consultations, a further consultation is in progress on draft guidance for employers. The guidance covers the use of default options in workplace personal pensions<sup>5</sup> and the use of group Self Invested Personal Pensions for automatic enrolment. This consultation closes on 17 December 2009.

## Miscellaneous

New “listed change” proposed

### Consultation requirements – Consultation

As currently drafted, the draft Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2010 will introduce a new circumstance (a “listed change”) in which employers making future changes to their pension scheme will need to consult affected members. If implemented, this new listed change will apply where the definition of “pensionable earnings” is being changed in the scheme rules.

The consultation will close on 18 December 2009.

Final FAS Regulations

### Financial Assistance Scheme

The draft Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2010 are intended to deliver the remaining changes to the FAS (first announced back in December 2007), including:

- the transfer of residual FAS scheme assets to government; and
- enabling the FAS to make payments to members similar to those which scheme trustees could make (for example, a tax-free lump sum on retirement).

<sup>4</sup> The prescribed period in which an employer must pass on any employee contributions to a scheme’s trustees

<sup>5</sup> The consultation uses workplace personal pensions as an umbrella term which includes group personal pensions, group self-invested personal pensions and stakeholder pensions



# Legislation

Entire Act now  
in force

## Companies Act 2006

The Companies Act 2006<sup>6</sup> came into full force on 1 October 2009. The Act is aimed at simplifying and consolidating company law, drawing together existing requirements relating to the operation of companies, and introducing some new ones.

Changes now in force which are relevant to pension scheme trustee companies include:

- a new style memorandum;
- unlimited objects for new companies established on or after 1 October 2009; and
- default model articles for new companies.

DWP catches up with  
HMRC changes

## The Registered Pension Schemes (Authorised Payments) Regulations 2009

The DWP has published regulations proposing minor amendments to DWP legislation following changes (such as alterations to the trivial commutation rules) made earlier this year to the tax rules for registered pension schemes under the Registered Pension Schemes (Authorised Payments) Regulations 2009.<sup>7</sup>

The regulations are aimed at ensuring that the administrative easements contained in the tax regulations are reflected in DWP legislation (with the same effective date of 1 December 2009).

<sup>6</sup> For more information, please see our News dated September 2009

<sup>7</sup> For more information, please see our Alert dated 18 May 2009



# Regulatory

## Actuarial Profession

### New ethical code for actuaries

#### New code of ethical principles

A new code setting out the ethical principles which all actuaries will be expected to follow came into effect on 1 October 2009.

Breach of the code "will not inevitably constitute misconduct". However, where an actuary's conduct is called into question, the code will be taken into account in any determination of whether there has been misconduct within the terms of the Profession's disciplinary scheme.

### First principles-based actuarial standard issued

#### New actuarial reporting standard - final version published

The Board for Actuarial Standards (BAS) has issued its standard on reporting actuarial information (which will be known as "TAS R"), the first in a series of new principles-based standards. TAS R will take effect in April 2010.

The new standard includes disclosure requirements for assumptions, methodologies, calculations, risks and uncertainties. Other principles-based standards which will follow include generic standards on actuarial data and modelling, as well as targeted standards on actuarial work for pensions and insurance.

### Information for accounts

#### Consultation paper on actuarial information for accounts

BAS is consulting on proposals for a technical standard on actuarial information used for accounts and other financial documents, including the actuarial information used in the reporting of pension scheme costs.

One of the key consultation objectives is for those with responsibility for preparing accounts to have confidence in the actuarial information they receive, including information on risk and cash flows. Following the consultation, BAS will issue an exposure draft of a principles-based standard that will apply to this type of actuarial work.

The consultation will close on 8 January 2010.

## HM Revenue & Customs

### Technical guidance now available on SAA

#### Guidance on Special Annual Allowance

From 6 April 2011, the Government will place a restriction on higher rate tax relief on pension contributions for individuals with an annual income of £150,000 or more. In anticipation of this change, a special annual allowance (SAA) will apply from 22 April 2009 to individuals who make extraordinary contributions in the interim.<sup>8</sup>

HMRC has now produced technical guidance on the SAA (which was first announced in this year's Budget) which is available in the Registered Pension Schemes Manual.

<sup>8</sup> For more information on the SAA, see our Alert dated 24 July 2009

## Regulatory (continued)

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### Pension Protection Fund

GMP equalisation  
for the PPF only

#### PPF Approves GMP Equalisation Solution

Following a consultation back in April 2008, the Board of the PPF has finally outlined how it intends to equalise compensation between men and women, to address any inequalities arising from their entitlement to guaranteed minimum pensions (GMPs).<sup>9</sup>

The method for calculating GMPs is set out in legislation and is different for men and women because GMPs are based on unequal state pension ages (60 for women, 65 for men).

However, under section 171 of the Pensions Act 2004, the PPF is required to pay compensation on a basis that is no more or less favourable to a woman (or man) than it would be to a comparable man (or woman) in respect of service on or after 17 May 1990<sup>10</sup>. In meeting the Pensions Act 2004 requirement, the PPF Board has received legal advice that it must take into account any differences in scheme benefits between men and women arising from GMPs.

The PPF Board has confirmed that it will adapt its preferred solution so that when a scheme with GMPs enters a PPF assessment period, benefits for men and women will be compared. Members will then receive the higher overall level of pension of the two. Further work will be undertaken by the PPF Board to determine how GMP equalisation will be implemented in practice.

The PPF announcement does not impose any new obligations on trustees of ongoing schemes but may be another relevant factor to take into account when considering equalising GMPs.<sup>11</sup>

PPF Levy for 2010/11  
will be £720m

#### 2010/11 Levy package announced

The PPF's consultation document and draft determination on the 2010/11 pension protection levy was published on 30 September 2009. This consultation reaffirmed the PPF's commitment to keep the pension protection levy stable for three years. The 2010/11 levy will remain at £700 million, indexed to wages (£720 million).

The PPF also announced plans to:

- reduce the cap on its risk-based pension protection levy to 0.5%, in a bid to "further ease the burden on more hard-pressed schemes" (estimating that this will help protect 10% of schemes, doubling the number protected under the previous 1% cap); and
- in the light of the decline in scheme funding, reduce the levy scaling factor to 1.64 (down from 2.22 for 2009/10). The final scaling factor will be confirmed later this year.

Drafts of standard  
forms for 2010/11  
available

Alongside the consultation and draft determination, the PPF published updated drafts of each of the standard form contingent asset agreements, including those for group company guarantees, security over real estate and letters of credit / bank guarantees.

The consultation on the PPF's proposals closed on 11 November 2009.

<sup>9</sup> Published on 29 October 2009, the PPF's response to its April 2008 consultation can be accessed here: [www.pensionprotectionfund.org.uk/documentlibrary/documents/GMP\\_oct2009.pdf](http://www.pensionprotectionfund.org.uk/documentlibrary/documents/GMP_oct2009.pdf)

<sup>10</sup> The date of the judgement in *Barber v Guardian Royal Exchange* (ECJ Case C-262/88) which established that occupational pensions were pay and therefore pension scheme trustees had to ensure that benefits accrued after that date did so on an equal basis for comparable men and women

<sup>11</sup> For more information, see our Alert dated 5 November 2009

## Regulatory (continued)

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### Insolvency risk

#### Levy Consultation: Insolvency Risk

The PPF has published proposals for the 2011/12 levy year designed to improve the way in which it assesses the insolvency risk for sponsoring employers.

Key changes outlined by the PPF include:

- a new feature known as “nationwide” will be introduced for businesses with three or more branches in different UK regions, which will mean they are assessed as a national rather than a regional employer;
- PPF compliant contingent assets will be excluded by Dun & Bradstreet (D&B) in their scores as they reflect the financial position of the pension scheme and not the employer; and
- when measuring the failure score of a subsidiary whose parent company is at substantial risk of becoming insolvent, the score of the subsidiary will be that of the parent.

The PPF notes that the proposals reflect industry feedback, and a review of methodology and insolvency probabilities carried out by D&B which continues to measure insolvency risk for the PPF.

The consultation will close on 14 December 2009.

### PPF valuation assumptions updated

#### Valuation assumption guidance updated

Following a consultation which began in July 2009, the PPF has published updated assumptions for valuations under both:

- section 143 of the Pensions Act 2004 – which are used to determine whether the PPF should assume responsibility for a scheme; and
- section 179 of the Pensions Act 2004 – which are taken into account when calculating a scheme’s risk-based levy.<sup>12</sup>

## The Pensions Regulator

### Effective communication

#### Guide for employers on effective pensions communications

In conjunction with the FSA, TPR has produced a guide for employers on “Talking to your employees about pensions”.

The leaflet sets out questions that employers may be asked by their employees about pensions, and suggests answers and other sources of information that employees can refer to. It forms part of TPR’s ongoing campaign to address the risks facing DC scheme members, but it will also be relevant to employers with DB schemes.

### Recovery plans – new form

#### New form for capturing recovery plan data

TPR has amended the valuation summary form, which is sent to TPR alongside a recovery plan. The new form is available on TPR’s website for use from 12 October 2009 but, broadly, for scheme funding valuations with an effective date before 22 September 2008 schemes should continue to use the original form.

<sup>12</sup> For more details, see Sackers Extra 7 Days dated 12 October 2009





# Cases

Default retirement age survives court challenge

## High Court

### R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills (Heyday)

The High Court's decision in the highly anticipated Heyday case was published on 25 September 2009. It confirms that the default retirement age of 65 is here to stay - for now.

#### Background

The case hinged on Heyday's challenge to the legality of the so-called default retirement age in the Employment Equality (Age) Regulations 2006 which allows employers to dismiss employees aged 65 or over by reason of retirement. The arguments centred on whether this is contrary to European law on age discrimination.<sup>13</sup>

In March 2009, the European Court of Justice concluded that the Directive gives Member States the option to permit such differences in treatment under national legislation provided that they are "objectively and reasonably justified by a legitimate aim, such as employment policy, or [the] labour market". It therefore fell to the High Court to decide whether these tests were met.

#### Decision

Mr Justice Blake concluded that adopting a default retirement age was permissible as it was not "a disproportionate way of giving effect to the social aim of labour market confidence". However, the Government had already announced<sup>14</sup> that it is bringing forward the promised review of the default retirement age by a year, to 2010.<sup>15</sup>

This review is now underway as the DWP has published an announcement calling for evidence on the default retirement age.<sup>16</sup> Evidence must be submitted by 1 February 2010.

Government will review default retirement age in 2010

The Equitable Life story continues

### Equitable Members Action Group, R (on the application of) v Her Majesty's Treasury

On 15 October 2009 the High Court published its decision in relation to judicial review proceedings brought by the Equitable Members' Action Group (EMAG) (a group of around 21,000 current and former policyholders with The Equitable Life Assurance Society (Equitable Life)).

#### Background

In July 2008, the Parliamentary Ombudsman, Ann Abraham, published a report on the regulation of Equitable Life between 1990 and 2001.<sup>17</sup> In her report, the Ombudsman made ten determinations of maladministration and injustice against the former Department of Trade and Industry, GAD and the FSA, in relation to their regulation of Equitable Life during that period.

While the Government accepted some of the findings of maladministration and injustice, it rejected others, in particular the recommendation for a compensation scheme. But it did agree to make some ex-gratia payments, and appointed Sir John Chadwick to conduct a review. Nonetheless, EMAG brought judicial review proceedings.

<sup>13</sup> Council Directive of 27 November 2000 (2000/78/EC) establishing a general framework for equal treatment in employment and occupation (the Directive)

<sup>14</sup> Announced in the DWP's consultation "Building a society for all ages", published on 13 July 2009. For more information please see 7 Days dated 20 July 2009

<sup>15</sup> For more information, please see our Alert dated 30 September 2009

<sup>16</sup> For more information see 7 days dated 2 November 2009

<sup>17</sup> The report can be accessed via the Ombudsman's website: [www.ombudsman.org.uk/improving\\_services/special\\_reports/pca/equitable\\_life/index.html](http://www.ombudsman.org.uk/improving_services/special_reports/pca/equitable_life/index.html)

## Cases (continued)

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EMAG's challenge to Government upheld on some grounds – but not on Government decision not to offer full compensation scheme

### Decision

The High Court upheld EMAG's challenge in relation to three of the findings of maladministration against GAD including:

- GAD's failure to resolve questions relating to the valuation rate of interest used to discount Equitable Life's liabilities and the affordability and sustainability of its bonus declarations; and
- its failure to ask for the required information to ensure that Equitable Life's valuation in 1995 was at least as strong as the minimum required by the applicable regulations, and to pursue missing information that led to users of Equitable Life's regulatory returns to misconstrue its financial strength.

These claims were upheld on the basis that the Government had not provided cogent reasons for rejecting the Ombudsman's findings, and the Government was given 21 days to inform the court and EMAG how it proposes to respond.

However, the remaining challenges including the Government's decision to set up an ex-gratia payment scheme rather than a full compensation scheme, were rejected.

Government has accepted Court's decision

### Government Response

On 20 October 2009, the Government issued a statement in which it accepted, "in the interests of speed and their wish to act fairly for policyholders", the findings of maladministration and injustice which were confirmed by the Court.

## Independent Trustee Services Limited v Hope

The Trustee of the Ilford Pension Scheme (the Scheme) asked the High Court whether it was permissible to buy annuities for certain members of the Scheme before the Scheme entered the PPF. But the High Court concluded that the Scheme was not permitted to "select against" the PPF by buying annuities only for certain members - relying on the PPF to pick up the cost of providing a larger proportion of benefits for the rest of the members.

Trustees applied to court for directions

### Background

A group of former senior managers took early retirement from the Scheme before their employer (the Ilford group of companies) went into administrative receivership. Given a substantial deficit in the Scheme, it is inevitable that the Scheme will be wound up shortly with the result that it will enter the PPF. The senior managers will have their pensions cut when the Scheme enters the PPF. This is because PPF compensation is only 90% of a capped amount,<sup>18</sup> not the full value of any pension (excluding future increases) unless the member has reached the pension scheme's normal retirement age. The other members will be better off when the Scheme enters the PPF.

Trustee proposal

### The Proposal

The Trustees were asked to consider purchasing annuities for this group (and top-ups for other members affected by the compensation cap) outside the Scheme, using the bulk of the Scheme's assets. Combined with the compensation that the PPF would pay, if it assumed responsibility for the Scheme, the proposal was that members will receive benefits equal to those that they would receive under the Scheme, if it were fully funded. But as Henderson J said in summing up, "the vice of the present proposal ... is that the bulk of the Scheme's assets will be spent in the purchase of annuities, but there will not be a corresponding reduction in the Scheme's liabilities", meaning the PPF would end up footing a much larger bill for compensation.

Therefore, the question for the court was whether the Trustees were permitted to take into account the existence of the PPF when making the decision to purchase annuities.

<sup>18</sup> For 2009/10 the cap is £31,936.32

## Cases (continued)

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### Decision

The judge concluded that the Trustee should not be allowed to purchase the annuities for two main reasons:

Improper purpose

- the proposed purchase of the annuities would be an “improper use” of the power contained in the Scheme’s Trust Deed and Rules to buy-out benefits, because it ignored the limitation implicit within the power that the benefits purchased would be a fair share of the assets of the Scheme; and

Public policy

- the floodgates argument put forward by the PPF and the Pensions Regulator, that approval of the present proposal would in all probability soon lead to a proliferation of schemes designed to take advantage of or “game” the PPF.

Therefore, the Trustees’ application to allow the proposal to purchase benefits for certain members before the Scheme enters the PPF was rejected.

## Pensions Ombudsman

### Mr P J Anderson v The Trustees of the Yell Pension Plan

In a recent case the Deputy Pensions Ombudsman (DPO) has upheld a complaint against the Trustees of the Yell Pension Plan (the Plan) for failing to give a proper explanation of the grounds on which they concluded the member had left service (which affected whether he was entitled to an unreduced early retirement pension).

Trustees did not look behind reason given by company for Mr A leaving service

### Background

In September 2005, Mr Anderson (Mr A) was told that the company wished to terminate his employment by reason of “redundancy”. Under the Plan rules no actuarial reduction is applied for early retirement on a wide number of grounds, including redundancy.

A compromise agreement was agreed which stated that his employment was being terminated “by reason of re-organisation” not redundancy. The Trustees stated that his pension would be actuarially reduced as they were only able to provide an unreduced early retirement quotation in circumstances where the company had first advised that a member had been made redundant. Mr A complained under the Plan’s internal dispute resolution procedure.

In relation to the Trustees’ decision not to permit early payment of an unreduced pension, the DPO decided that it was proper for the Trustees to look into the factual circumstances behind the termination of Mr A’s employment in order to satisfy themselves whether the conditions under the Plan rules had been met.

But, in the DPO’s view, the eligibility conditions for an unreduced early retirement pension were so wide that only clear and demonstrable personal underperformance was excluded. The Trustees therefore needed to establish, and explain clearly and logically, why the termination of Mr A’s employment did not entitle him to an unreduced early retirement pension.

Trustees must reconsider decision – and give reasons

### Decision

The Trustees failed to give proper reasons for their decision and this amounted to maladministration. The DPO therefore directed the Trustees to reconsider the circumstances underlying the termination of Mr A’s employment within 56 days (and to explain their conclusions fully).



# In the pipeline

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Still awaited Flexible retirement: Response to DWP's latest consultation

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Still awaited Trustee knowledge and understanding: Revised code of practice and scope guidance

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Still awaited Personal Accounts: Revised regulations from the first and second consultations

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In force  
1 December 2009 Authorised payments: New trivial commutation rules come into force

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In force  
6 April 2010 Disclosure: Following consultation on the adoption of a principles-based approach, consultation on regulations due "later this year"

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From 6 April 2010 Normal minimum pension age: Increases from 50 to 55

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From Autumn 2010 Equality Bill: Expected to be in force in Autumn 2010 – designed to harmonise discrimination law

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Sacker & Partners LLP  
29 Ludgate Hill  
London EC4M 7NX  
**T** +44 (0)20 7329 6699  
**F** +44 (0)20 7248 0552  
**E** [enquiries@sackers.com](mailto:enquiries@sackers.com)  
[www.sackers.com](http://www.sackers.com)

**Sackers**

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