Sackers

The Quarterly

June 2013

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

The Quarterly June 2013

In this issue

On the front cover this quarter: Peter Docking (Partner) and Georgina Jones (Associate)

Abbreviations commonly used in the Quarterly:

AA: Annual Allowance

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

CARE: Career Average Revalued Earnings

CJEU: Court of Justice of the European Union

CN: Contribution Notice

DB: Defined Benefit

DC: Defined Contribution

D&B: Dun & Bradstreet

DWP: Department for Work & Pensions

EEA: European Economic Area

FSD: Financial Support Direction

GAD: Government Actuary's Department

GMP: Guaranteed Minimum Pension

HMRC: HM Revenue & Customs

LEL: Lower Earnings Limit

LGPS: Local Government Pension Scheme

LTA: Lifetime Allowance

NAPF: National Association of Pension Funds

NI: National Insurance

NICs: National Insurance Contributions

PAYE: Pay As You Earn

PPF: Pension Protection Fund

PPFO: Pension Protection Fund Ombudsman

S2P: State Second Pension

SERPS: State Earnings Related Pension

SPA: State Pension Age

TPR: The Pensions Regulator

TUPE: The Transfer of Undertakings (Protection of Employment) Regulations 2006

UEL: Upper Earnings Limit

VAT: Value Added Tax

Current Legal Agenda

More detail can be found on page 8

DB scheme funding

TPR published its annual funding statement on 8 May 2013.[1] Essential reading for DB schemes with a valuation date between September 2012 and September 2013, this year's statement focuses on the flexibilities within the current system and looks forward to the introduction of a new statutory affordability objective for TPR.

Meanwhile, the EU Commission continues its quest to impose Solvency II style rules on DB pension schemes. As early results[2] indicate that for the UK there would be a shortfall of £450 billion, the DWP has issued a statement[3] urging the EU to drop its plans.

Pension liberation

There has been growing evidence of a rise in pension liberation schemes and the systematic targeting of vulnerable members. Liberation schemes promise the early release of savings that are locked into pension schemes and are not normally accessible before a member reaches age 55 without tax consequences.

Concerned about the potential loss of pension savings, TPR and HMRC have begun a campaign aimed at ensuring that such transfers are prevented. See our checklist for trustees[4] for more information.

For the latest developments, see page 4

Automatic enrolment

Since its introduction in October 2012, automatic enrolment has been continuing to keep employers and schemes busy. 2013 is proving to be a big year for many, with employers who have 500 or more people in their PAYE scheme coming within scope by the end of the year.

GMP equalisation: Still waiting…

Back in January 2012, the DWP consulted on draft regulations to require schemes to equalise GMPs.[5] In its April 2013 interim response[6] to that consultation the DWP explains that, despite receiving numerous objections from the pensions industry, it still intends to legislate to equalise GMPs. We continue to monitor developments and will let you know when further information becomes available.

Investment matters

A key area of focus for pension schemes as investors is the European Market Infrastructure Regulations, which set out measures designed to reduce risk in the over the counter derivatives markets by the introduction of central clearing.

Also, the CJEU has concluded in the Wheels case that the VAT exemption, for "special investment funds" does not extend to UK DB schemes or to common investment funds.[7]

For more details of these and other issues affecting pension scheme investors, please see the latest edition of our **Investment Briefing**, which will be available in June 2013.

1 Please see our Alert: "TPR's 2013 scheme funding statement" (9 May 2013)

2 QIS on IORPs: Preliminary Results for the European Commission (9 April 2013)

3 Published on 9 April 2013

4 Please see our Alert: "Pension Liberation - what trustees need to know" (19 April 2013)

5 Please see our Alert: "GMP Equalisation: The DWP calls time" (24 January 2012) and our response to the consultation

6 Published on 5 April 2013

7 Please see our Alert: "No VAT exemption for workplace pensions" (11 March 2013)

Pensions Reform

State pension reforms

A new flat rate state pension

Back in January, the Government announced[8] that it will replace the current system of state pension provision[9] with a flat rate benefit. But in this year's Budget,[10] the Chancellor confirmed that this change is to be introduced from 2016, rather than 2017 as previously indicated. Provisions to implement this change are included in the Pensions Bill 2013.[11]

Impact for DB schemes

Abolition of DB contracting-out

A key consequence of the single tier state pension for occupational pension schemes is the abolition of DB contracting-out. Currently members and employers of occupational pension schemes that are contracted-out on a DB basis benefit from reduced NICs. The rebate is 4.8% of earnings between the UEL and the LEL: 3.4% for employers and 1.4% for scheme members. The Pensions Bill provides that private sector employers will be able to adjust their schemes to take account of the cost of losing the employers' rebate.

Pensions tax relief

Reduction in the Annual and Lifetime Allowances confirmed

The Finance (No.2) Bill 2013 is before Parliament

The Finance Bill (No.2) 2013 includes a number of changes to pensions tax relief that were originally announced in the 2012 Autumn Statement.[12] From 6 April 2014:

- the LTA (the total amount of tax relieved pension savings that an individual can build up over their lifetime in a registered pension scheme) will be reduced to £1.25 million;[13] and
- the AA (which limits the amount of tax relieved pension savings an individual can make in any given tax year in a registered pension scheme) will be reduced to £40,000.

Transitional protection from the new LTA will be available in the form of "fixed protection 2014", based on the fixed protection regime introduced from April 2012 when the LTA was reduced to £1.5 million.[14]

Further details awaited of personalised protection

Personalised Protection Regime

The Government is also planning to offer an individual protection regime for those with pension rights above £1.25 million when the standard LTA is reduced in 2014.[15] While full details are awaited, it is intended that this personalised protection would entitle individuals to an LTA of the greater of the value of their pension rights on 5 April 2014 (up to an overall maximum of £1.5 million) or the standard LTA. But "individuals with personalised protection would not be subject to any restrictions on future contributions or accruing further benefits".

8 Please see our Alert: "Pensions White Paper" (15 January 2013)

9 Comprising the Basic State Pension, the additional state pension (currently S2P but formerly SERPS) which is linked to earnings, and the pension credit (a means tested benefit)

10 Please see our Alert: "Budget 2013 heralds a new objective for TPR" (21 March 2013).

11 Published on 10 May 2013

12 Please see our Alert: "Autumn Statement 2012" (6 December 2012)

13 Members with a protected LTA (under either enhanced or fixed protection) will be unaffected by this change

14 Please see our Alert: "Fixed Protection: the deadline approaches" (27 February 2012)

15 Please see our Alert: "Finance Bill 2013" (13 December 2012)

Changes to enhanced and primary protection[16]

The current Finance Bill also includes amendments designed to ensure that:

- individuals with existing A-day primary or enhanced protection but who do not have lump sum protection will retain a right to a lump sum of up to 25 per cent of £1.5 million;
- individuals who have not yet taken any pension benefits will still have their personal LTA calculated by reference to a standard LTA of £1.8m (i.e. they will not be affected by the downward movement of the LTA); and
- individuals who have had a benefit crystallisation event (BCE), and have drawn pension benefits will, on a subsequent BCE, have the benefits they have already taken revalued to ensure they will be no better or worse off than they currently are in terms of the amount of the personal LTA they still have available.

A new statutory objective for TPR

Long-term affordability of deficit recovery plans[17]

TPR has five statutory objectives, including an objective to protect members' benefits and to reduce the risk of situations arising which may lead to compensation being payable from the PPF. The Government will add a new objective for TPR to "support scheme funding arrangements that are compatible with sustainable growth for the sponsoring employer and fully consistent with the 2004 funding legislation".

Scheme funding Code to be updated

Legislation to implement the new objective is awaited. TPR will also revise its scheme funding Code as soon as possible, to reflect the forthcoming new objective.

Easing the administration burden

The Government's Red Tape Challenge

Ongoing work on shared risk arrangements

As part of this cross-Government exercise, the DWP has examined the regulations covering private pensions. Many projects identified are already in train, including simplification of the disclosure regulations, the new statutory objective for TPR and technical employer debt changes. New announcements[18] include a commitment to consider whether to make indexation for future accruals discretionary, as part of ongoing work to encourage risk sharing through new "Defined Ambition" pensions.

16 Please see our Alert: "Finance (No.2) Bill is Published" (2 April 2013)

17 Please see our Alert: "Budget 2013 heralds a new objective for TPR" (21 March 2013)

18 Contained in a press release dated 25 April 2013

Automatic Enrolment

New thresholds in force

New thresholds for automatic enrolment came into force on 6 April 2013:

- £9,440 for the automatic enrolment trigger, to tie in with the PAYE personal allowance. This is the minimum level of earnings payable for an individual to qualify as an "eligible jobholder"; and
- the qualifying earnings band (on which contributions are payable to eligible jobholders) is now £5,668 - £41,450 (the LEL and UEL respectively).

Consultation on technical changes[19]

Simplification of the automatic enrolment process

Responding to concerns about some aspects of the automatic enrolment process, the Government has been consulting on proposals to make operating automatic enrolment easier for employers and pension providers. Changes in the pipeline include:

- alignment of pay reference periods with tax periods (to run alongside existing provisions, at least for a transitional period), to avoid the difficulties experienced in assessing earnings to determine who is eligible for auto-enrolment, where payroll systems are set up to work in line with PAYE and NICs;
- extension of the joining window to achieve automatic enrolment, from four to six weeks from the automatic enrolment date;
- the potential simplification or removal of the test scheme standard used to assess whether a DB scheme is a qualifying scheme;
- removal of the need to automatically enrol members with tax protections, who may otherwise lose their protection if they do not opt out in the joining window.

Automatic Enrolment and TUPE

The DWP has also been consulting on possible changes to the regulations governing the requirements for pension contributions following a TUPE transfer.[20]

The proposed changes aim to make it clear that, following a TUPE transfer, an employee will be able to choose the level of their pension contributions (subject to any minimum specified by the scheme's trust deed and rules). However, so that a buyer is not compelled to pay contributions in excess of those required under the automatic enrolment regime, it will be allowed to match the level of pension contributions paid by the seller prior to the transfer.

If adopted, the changes are due to come into force on 1 October 2013.

19 Please see our Alert: "Technical Changes to Automatic Enrolment" (28 March 2013)

20 Please see our Alert: "Consultation re: Pension Contributions After a TUPE Transfer" (28 February 2013)

Government plans for ‘pot follows member’

Automatic transfers

As the introduction of automatic enrolment is expected to lead to the proliferation of dormant, often small, DC pension pots, the Government plans to address this with a system of automatic transfers to a new employer's scheme.[21] A Command Paper[22] explains that:

- initially, automatic transfers will take place in respect of “pure” DC benefits;
- pots of up to £10,000 will be eligible for transfer;
- the Government is inclined towards a periodic approach, meaning that automatic transfers would take place in bulk at regular intervals; and
- short service refunds from occupational DC schemes will be withdrawn in 2014.

Pension scheme disclosure

Consolidation of the requirements for occupational and personal pension schemes

Harmonisation of the requirements for occupational and personal pensions[23]

Revisiting aspects of disclosure consultations from 2005 and 2009, the DWP's latest consultation seeks to consolidate the requirements for occupational and personal pension schemes. It is also intended that the regulations will be restructured, by grouping related information requirements together where possible, so they are clearer and easier to use.

There will also be a new requirement to include an explanation of lifestyle and similar strategy funds within the basic scheme information and when a member's fund is subject to lifestyling. These changes are due to be implemented in October 2013.[24]

Employer debt

Consultation on amendment regulations

The DWP is consulting on draft regulations to deal with “defective drafting” in amendments to the Employer Debt Regulations.[25]

In 2010, provisions were introduced which were designed to provide that where an organisation was merely changing its status, the “receiving employer” could be the new legal status of the exiting employer (for example, where an organisation restructured, changing from an unincorporated charity to an incorporated company), without triggering an employment cessation event. However, there are concerns that this provision did not meet the policy intention, with organisations reportedly finding it difficult or impossible to use, making it of limited value in practice.

Further amendments in 2011 introduced an additional way for an employer in a multi-employer occupational pension scheme to apportion its liabilities to another employer on leaving the scheme (flexible apportionment arrangements or “FAAs”). From informal discussions with stakeholders, the DWP believes that employers are relying on the FAA provisions rather than the more complicated restructuring provisions. It therefore proposes to clarify the definition of “receiving employer” to match the original policy intent.

If adopted, the changes are expected to come into force on 1 October 2013.

21 Please see our Alert: “Automatic Transfers for DC Pension Pots” (25 April 2013)

22 Published on 23 April 2013

23 Please see our Alert: “Disclosure Consultation 2013 - Third time lucky?” (20 February 2013)

24 Please see our response to the consultation (12 April 2013)

25 The Occupational Pension Schemes (Employer Debt) Regulations 2005

Public Sector

Changes to public sector pensions

Public Service Pensions Act 2013

This Act received Royal Assent on 25 April 2013 and provides for changes to be made to public sector pension scheme benefit structures – to increase normal retirement age and contribution levels and to switch from final salary to a CARE structure. These changes were recommended by the Hutton Report[26] and were the subject of lengthy negotiations between the Government, Trade Unions and industry bodies.

Employee contributions

Increase in employee contribution rates

GAD has published an update note[27] explaining the effect of the changes in employee contribution rates from April 2013 for various public sector pension schemes. Contractors may apply for an addendum to an existing GAD broad comparability passport certificate to incorporate the revised contribution rates, or make allowance for the new rates in their proposals for providing a broadly comparable pension scheme under the Fair Deal Policy.

LGPS Investment strategy

Regulations governing investments made by the LGPS set out prescribed limits on different investment products so that local authority pension funds can spread risk across a number of different types of investment.

Limit on investment in partnerships increased

The prescribed limit on investing in partnerships had been set at 5% for a single partnership and overall no more than 15% of the capital value in each LGPS Fund in England and Wales. However, following consultation, the Government has decided to allow a local authority pension fund to invest in partnerships up to a limit of 30% of the fund.

Regulations in force from 1 April 2013[28] implemented this change.

Consultation on access to the LGPS for Councillors

The Department for Communities and Local Government is consulting on proposals to limit access by councillors and other elected local office holders to the LGPS in England from 1 April 2014. The consultation also covers the contribution rates that should apply to any such persons who remain active members of the LGPS.

26 Please see our Alert: "Hutton recommends new career average scheme" (10 March 2011)

27 Published on 9 April 2013

28 The Local Government Pension Scheme (Management and Investment of Funds) (Amendment) Regulations 2013

Benefit Design

Further consultation awaited

Keep current practice under review

Bridging pensions

Impact of the changes to State Pension Age

Some DB schemes pay members who retire before SPA a higher pension at the outset, which is reduced at SPA to take account of the state pension coming into payment. The aim is to allow the member to receive a similar overall level of income in retirement, regardless of when state pension actually starts.

As restrictions in scheme rules may prevent changes being made to bridging pensions, the DWP considered providing trustees with a limited power to modify the terms of any bridging pension offered to people who have not yet retired. The Government is still considering the issue raised in consultation and intends to introduce a provision in regulations, after a further, informal, consultation.[29]

The Finance No.2 Bill 2013 is set to align the tax rules with the changes to SPA, with the result that reducing a bridging pension after age 65 will no longer be an unauthorised payment. Until the Finance Act comes into force (expected to be July 2013), schemes in which unauthorised payments are payable at the trustees' discretion have a window of opportunity to amend their rules so that bridging pensions cease at a specific age, rather than SPA.

Civil partners

Survivors' benefits[30]

The Equality Act 2010 permits pension schemes to restrict the survivors' benefits payable to civil partners.

Schemes can currently restrict survivors' entitlements for civil partners to benefits relating to service on or after 5 December 2005 in respect of main scheme benefits and post-1988 GMPs. This may mean that a civil partner is entitled to a much lower pension than they would have been, had they been married to a person of the opposite sex. The same restriction is due to apply to same sex marriages when the Marriage (Same Sex Couples) Bill becomes law.

In the recent decision of *Walker v Innospec,*[31] the Employment Tribunal concluded that such a restriction in the context of a civil partnership was contrary to European law. In this case, the fact that Mr Walker was married to a man, not a woman, made a dramatic difference to the pension his partner was entitled to. Had he been married to a woman, that woman would have been paid a pension of £41,000 a year but as he was in a civil partnership, his partner was only entitled to £500.

We understand this case is being appealed, so no action is needed for the time being to change scheme rules. However, it is an area we are keeping under review. Trustees and employers may wish to consider their current practice in relation to civil partners with their advisers and be prepared to answer questions from members and/or deal with potential claims.

29 Please see our Alert: "Miscellaneous Amendment Regulations - The Government Responds" (15 March 2013)

30 Please see our Alert: "Survivors' Benefits and Same Sex Partners" (1 March 2013)

31 *Walker v Innospec Limited* (Case No. 2411316/2011), Manchester Employment Tribunal, October 2011

Regulatory

The Pensions Regulator

Annual Funding statement

TPR has published its annual funding statement for 2013.[32] While the statement is relevant for trustees and employers of all DB schemes, it is aimed primarily at those who are undertaking valuations with effective dates in the period 22 September 2012 to 21 September 2013.

TPR emphasises flexibilities within the existing system

Significantly, the tone of the statement is softer than last year's, with TPR placing greater emphasis on the flexibilities within the existing system and specifically recognising that a "strong and ongoing employer" is the best support for a DB scheme.

The statement also looks forward to the introduction of TPR's new statutory affordability objective and explains that TPR will consult on a new code of practice for scheme funding in the autumn.

Record keeping review

In 2010, TPR set targets for schemes to achieve in respect of their "common data" standards (including name, date of birth and NI number).

TPR is now embarking on a series of checks to establish whether schemes have met these targets and how they have addressed TPR's record keeping guidance. Around 250 schemes are expected to be selected for review, covering a range of DC, DB, hybrid, trust and contract based arrangements.

TPR is also due to update its record keeping guidance to reflect the main findings of its review and an increasing focus on "conditional data" (additional, more detailed data such as the member's employing company or the date of a member leaving the scheme).

The Takeover Panel

New rights for pension scheme trustees[33]

Changes to the Takeover Code confer new rights on trustees of funded, occupational DB pension schemes, whose sponsors are public companies, with effect from 20 May 2013.

Trustees will have a right to have their opinion on an offer made available to shareholders. To ensure trustees have sufficient information to consider issuing an opinion, the Code will require that they are provided with:

DB scheme trustees – right to have opinion made available to shareholders

- financial information on the bidder;
- details of how the offer is being financed;
- appropriate disclosures of the bidder's intentions with regard to the Scheme; and
- copies of certain of the documents relating to the offer.

While the changes to the Takeover Code are intended to give trustees a voice and ensure that the effect of an offer on the Scheme can be discussed at an early stage in the process, the ability of trustees to influence the outcome of a transaction will continue, to a large extent, to depend upon the specific powers they have in their pension scheme documentation.

32 On 8 May 2013

33 Please see our News: "Takeover Code gives new rights to trustees" (30 April 2013)

Cases

Coming up

A number of important pensions cases are currently in the pipeline:

Cases in the pipeline

- in May 2013, the Court of Appeal heard the appeal from *Bloom and others v The Pensions Regulator,*[34] concerning the ranking of liabilities under FSDs and CNs in the Nortel and Lehman administrations; and
- judgment is awaited in the latest instalment of the IBM Case which finished in February.[35]

Supreme Court

Futter v Futter and Pitt v Holt

The Supreme Court in *Futter v Futter* and *Pitt v Holt*[36] has approved the 2011 decision of the Court of Appeal in relation to the rule in Hastings-Bass. This means that the line of cases following Mr Justice Warner's interpretation of the rule in *Mettoy*[37] have been held to be incorrectly decided. In future, a decision made by trustees acting within the scope of their powers is voidable only if the trustees have acted in breach of trust and that trustees are not in breach of trust if they act on appropriate professional advice.

However, the Court allowed the appeal in *Pitt v Holt* on the ground of mistake. The Court held that the true test in order to put aside a decision on the ground of mistake is simply for there to be a causative mistake of sufficient gravity. The test will normally be satisfied only when there is a mistake, either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The court held that mistake must be distinguished from mere ignorance, inadvertence and misprediction. Forgetfulness, inadvertence or ignorance is not, as such, a mistake, but it can lead to a false belief or assumption which the law will recognise as a mistake. Mere ignorance of the law, even if causative, is insufficient.

Pension Protection Fund Ombudsman

PPF ordered to contribute to trustees' legal costs

Two recent PPFO determinations have hit the headlines:

- In relation to the Ibstock Pension Scheme, the PPF failed to exercise its discretion to accept a deficit reduction certificate despite it containing an incorrect date reference, resulting in the scheme levy being around £140,000 higher. The PPF was directed to reconsider its decision after the PPFO concluded that the Reconsideration Committee had taken irrelevant factors into account.
- In a Marine Pilots' scheme,[38] following a complaint regarding the calculation of the risk based levy, the PPF has been ordered to contribute £10,000 towards the trustees' legal costs. The failure score of the scheme's Luxembourg registered employer did not take account of the company's financial statements, which had only been filed at the Luxembourg companies' registry and not sent to D&B in Luxembourg (as, unlike in the UK, this is not an automatic process). The trustees could not "reasonably be penalised because they failed to guess that D&B operates differently […] for the PPF in different countries".

34 [2011] EWCA Civ 1124

35 [2012] EWHC 125 (Ch) and [2012] EWHC 2766 (Ch). Please see our case reports in the March 2013 and December 2012 Quarterly Newsletters

36 [2011] EWCA Civ 197

37 [1991] 2 All ER 513

38 West of England Ship Owners Insurance Services Limited Retirement Benefit Scheme

Sackers Extra Briefings:

Dates for your diary

Sackers Extra Briefing presents seminar and workshop style briefings addressing topical issues of current interest and relevance.

Automatic Enrolment seminar	09/07/13	**Breakfast seminar (9:00am-10:30am)** A practical look at automatic enrolment to date and changes afoot
Quarterly Legal Update	18/07/13	**Breakfast seminar (9:00am-10:30am)** The latest legal and regulatory developments in the pensions world
Employment issues workshop	25/09/13	**Evening seminar (5:00pm-6:30pm)** The latest employment related developments affecting the pensions world
Quarterly Legal Update	14/11/13	**Breakfast seminar (9:00am-10:30am)** The latest legal and regulatory developments in the pensions world

If you would like to attend any of our seminars, please contact our marketing team at marketing@sackers.com.

Our programme of regular seminars brings together pensions professionals to share and discuss knowledge and best-practice. Part of this rolling programme is our "Quarterly" seminar, which focuses on the latest legal and regulatory developments in the pensions world. Our Quarterly video distils content from this seminar into a bite size chunk, highlighting some of the current key issues. You can access the Quarterly video and our "In focus" series of spotlights on specific pensions issues, by scanning the code below with your smartphone or tablet.

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