



What's happening in Pensions

Issue 18

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Accounting for pensions

The International Accounting Standards Board (IASB) has issued an exposure draft proposing amendments to IAS 19 (Employee Benefits) which would change the way defined benefit pension liabilities are reported in employers' accounts.

The IASB has said that the changes are designed to increase transparency. However, concerns have been raised that the changes will in many cases increase the amount of reported pension liabilities.

The exposure draft is open for comment until 6 September.

Budget and Finance Act 2010

As usual, there were several pensions aspects to the Budget delivered on 24 March 2010 and the new Finance Act 2010.

The Finance Act includes:

- an extension of the special annual allowance charge to those earning £130,000 or more from 9 December 2009 (see **WHIP Issue 17**);
- high income excess relief charge (HIERC) provisions (with more to follow) effective from 6 April 2011 – see below; and
- anti-avoidance provisions which address situations where:
 - an individual's income or pension savings are reduced; and
 - income or pension savings are increased in another tax year, or non-pension benefits are provided instead.

Special annual allowance charge

HMRC has published new Registered Pension Schemes Manual pages relating to the special annual allowance.

Tax relief changes from 6 April 2011

Some of the detail of the HIERC now appears in the Finance Act 2010, reflecting the following decisions.

- The tapering of relief from 50% down to 20% for those earning between £150,000 and £180,000 will be 1% per £1,000 of gross earnings.
- There will be no relief when redundancy payments bring people within the high earners regime.
- There will be exemptions for contributions made in the tax year during which a member dies or takes a serious ill health lump sum (but not for those who start to draw an ill health pension).
- Age-related factors (based on age and normal pension age) will be used to value DB accrual for the purposes of calculating the pension input. Particularly generous pension increases will be given an additional value. Schemes will be required to make the calculation for affected individuals who ask.
- Individuals with HIERCs of £15,000 or more will be able to require their schemes to pay the charge (and adjust benefits correspondingly). This will apply to DB and DC schemes.

Press release:

<http://www.iasb.org/News/Press+Releases/defined+benefit+pensions+accounting.htm>

Budget web pages:

<http://www.hm-treasury.gov.uk/budget2010.htm>
<http://www.hmrc.gov.uk/budget2010/index.htm>

Finance Act 2010:

http://www.opsi.gov.uk/acts/acts2010/ukpga_20100013_en_1

RPSM pages:

<http://www.hmrc.gov.uk/manuals/rpsmmanual/rpsm15200000.htmf>

Consultation response:

http://www.hm-treasury.gov.uk/budget2010_pensionstaxrelief_responses.htm

Draft technical guidance on the HIERC, reflecting the above, has been published.

Included in the Budget report was the following statement:

"The Government also announces future action to tackle the use of arrangements to reward employees through the use of trusts or other intermediaries, with the purpose of avoiding, deferring or reducing liabilities to income tax and NICs or avoiding restrictions on pensions tax relief. The Government will consider options for tackling these avoidance arrangements with the intention of introducing any necessary legislation to take effect from April 2011."

Employer financed retirement benefit schemes (EFRBSs) have been suggested as a way of rewarding high earners from April 2011, when the HIERC will restrict tax relief on their pension contributions and tax their employer-funded pension provision. This statement could be read as an intention to change the tax regimes that apply to EFRBSs (and employee benefit trusts (EBTs)). It is not yet clear exactly what is intended but the anti-avoidance provisions in the Finance Act seem to be wide enough to achieve this.

Trivial commutation

The Government remains open to proposals for further simplification of the rules allowing pension rights to be cashed out in lump sum payments, provided the simplification would not increase costs to HMRC or the Exchequer and would not be open to manipulation. It is particularly interested in proposals about extending rights to commute personal pension funds worth up to £2,000 and allowing couples to pool small pension pots in order to buy joint life annuities.

HMRC: Registered pension schemes

RPSM updates

Amendments have been made to a number of pages of the Registered Pension Schemes Manual. There is a new overview of "the international pensions regime", covering migrant member relief, transitional corresponding relief, double taxation agreement relief and relief restrictions and procedures.

Scheme sanction charge

HMRC's 40th Pension Schemes Newsletter covers new processes for:

- making it easier to obtain a deduction against the scheme sanction charge; and
- collecting the scheme sanction charge for 2006/7 to 2009/10 inclusive.

HMRC: General

New forms

Several new reporting forms have been issued. These are:

- APSS155A: Election to surrender/Request to cancel a contracting-out or appropriate scheme certificate (plus notes)
- APSS155B: Election to vary a contracting-out or appropriate scheme certificate (plus notes)
- APSS303: Unauthorised borrowing report (see **WHIP Issue 17**)
- APSS146: Registration for income tax repayments (and two associated forms)

Factsheets

HMRC has published the following factsheets.

- Pension tax relief and you
<http://www.hmrc.gov.uk/pensionschemes/pensions-individuals.pdf>
- Pension tax relief and individuals with international interests
<http://www.hmrc.gov.uk/pensionschemes/pensions-international.pdf>
- Pension tax relief and employers
<http://www.hmrc.gov.uk/pensionschemes/pensions-employers.pdf>
- Role of a scheme administrator – key facts
http://www.hmrc.gov.uk/pensionschemes/pensions-sch_admins.pdf

Technical guidance:

<http://www.hmrc.gov.uk/finance-bill2010/pens-high-inc-relief.pdf>

RPSM updates:

<http://www.hmrc.gov.uk/manuals/rpsmmanual/updates/rpsmupdate070410.htm>

<http://www.hmrc.gov.uk/pensionschemes/ps-newsletter40.htm>

Forms:

<http://www.hmrc.gov.uk/pensionschemes/returns-and-reports.htm>

Equality Act 2010

The Equality Act 2010 has received Royal Assent and is due to come into force in October 2010. Much of the detail on pensions will be in regulations which we have not yet seen. The Act is designed to consolidate and replace existing equality legislation of all kinds and is not intended to change the law. However, there has been a good deal of rewriting so it is possible that subtle changes will be found.

Age discrimination

Regulations will exempt some age discrimination practices in relation to occupational pension schemes. The current Age Regulations, which include pensions exemptions, will be replaced.

The Act also includes power to make regulations regarding contributions to personal pensions. As noted above, the current Age Regulations will be replaced.

Sex equality and maternity

The concept of an implied "equal treatment rule" for occupational pension schemes will no longer exist: there will now be implied "equality rules" for sex equality and maternity.

The Act details two exceptions to the sex equality rule: discrimination due to different state retirement benefits and actuarial factors. These are the same exceptions as appear in the Pensions Act 1995, though not word for word. The Act includes a power to add further exemptions by regulations. We expect that regulations will cover at least the same exemptions that currently appear in the 1995 Equal Treatment Regulations.

The new maternity equality provisions do not make it any clearer whether or not, for a DC scheme, the employer must make up the unpaid member contributions by reference to pay that would have been received but for absence on maternity leave. We therefore expect that employers will see no need to change their current practice.

Automatic enrolment and NEST

Automatic enrolment

Automatic Enrolment Regulations have been approved by Parliament (in the form reported on in **WHIP Issue 16**). They set out the bulk of the requirements for employers to enrol jobholders automatically in a pension scheme, starting for the largest employers in October 2012.

The DWP has published a table of automatic enrolment "staging dates" from October 2012 to September 2016, an information note and case studies. These are to help employers work out when the requirement will apply to them.

The Pensions Regulator has published a (rather rough) guide for employers on the automatic enrolment requirement.

The Regulator's website also includes other automatic enrolment materials, including FAQs (which are of a better quality). The most interesting point is the Regulator's confirmation that flexible benefit plans which offer alternatives to pension may amount to an unlawful inducement to opt out of an automatic enrolment scheme.

Default investment options

Automatic enrolment schemes may not require a member to make any choice (including an investment choice) before being admitted, so default investment options will take on greater significance.

The DWP has published its response to the September 2009 consultation (see **WHIP Issue 13**) on draft guidance covering:

- the use of default options in workplace personal pensions; and
- the use of group self-invested personal pensions for automatic enrolment.

The forthcoming guidance will now also cover default options in occupational pension schemes.

NEST

The National Employment Savings Trust Order 2010 has been laid. It establishes NEST on 5 July 2010 and makes various provisions in relation to it.

The NEST rules have also been published by the DWP, with an accompanying note.

Equality Act 2010:

http://www.opsi.gov.uk/acts/acts2010/ukpga_20100015_en_1

Regulations:

http://www.opsi.gov.uk/si/si2010/ukSI_20100772_en_1

DWP web page:

<http://www.dwp.gov.uk/policy/pensions-reform/workplace-pension-reforms/>

<http://www.thepensionsregulator.gov.uk/docs/intro-to-work-based-pension-changes.pdf>

Pensions Regulator FAQs:

<http://www.thepensionsregulator.gov.uk/pensions-reform/pensions-reform-faqs.aspx>

Consultation response:

<http://www.dwp.gov.uk/docs/wpr-default-options-govt-res.pdf>

NEST Order:

http://www.opsi.gov.uk/si/si2010/ukSI_20100917_en_1

NEST rules and note:

<http://www.dwp.gov.uk/docs/rules-of-nest.pdf>

<http://www.dwp.gov.uk/docs/note-to-rules-of-nest.pdf>

NEST members will pay an anticipated 0.3% annual management charge over the long-term. To meet the costs of establishing the scheme, there will be an additional charge on contributions of around 2% for an unspecified period. This makes the charges higher than expected.

Case reports

"Section 27" advertisements for unknown beneficiaries

The Court of Appeal has ruled that trustees cannot use "section 27" advertisements to protect themselves against the claims of known members whom they have overlooked.

The Court upheld the decision of the High Court in *MCP Pension Trustees Limited v Aon Pension Trustees Limited* (see **WHIP Issue 11**). In short, the trustee did have "notice" of overlooked beneficiaries because it had known about them previously. Forgetting about beneficiaries did not mean that it did not have notice of their claims because notice, once given, cannot later lapse. Therefore, the trustee's section 27 advertisement, designed to protect it against the claims of unknown scheme beneficiaries, did not protect it against known members whom it had overlooked.

Construction of equalisation amendments

The High Court has ruled in *Independent Trustee Services Ltd v Knell* on the construction of amendments to equalise men's and women's pension ages at 65.

There was an announcement to members on 14 April 1992 that "*The Company and the Trustee have now decided to use the alteration powers under the Rules of the Scheme and intend to introduce on 1 July 1992 a common normal pension age of 65 for all existing members*". The changes were also announced, more definitively and in more detail, in a May 1992 newsletter.

A deed of variation dated 25 November 1993 (pre-dating the 1994 *Coloroll* decision that clarified what the 1990 *Barber* decision meant) amended the definition of "Normal retiring date" in the scheme rules to read "(a) in relation to a female Member before 1 July 1992, her 60th birthday, and (b) in relation to any other Member his or her 65th birthday". The Court was asked to decide what this meant. The definition was altered to remove ambiguity with effect from December 1995.

The judge looked at amendments that had been made to the eligibility rule and early retirement rule at the same time. He held that the latter did not make sense unless one reads all the amendments as splitting periods of pensionable service, rather than splitting out a category of female members who were members before 1 July 1992. The definition therefore meant "(a) in relation to the Pensionable Service of a female Member before 1 July 1992, her 60th birthday, and (b) in relation to any other Member or Service [sic] his or her 65th birthday". Men's pensionable service between 17 May 1990 and the date of equalisation was not addressed, presumably because the required treatment was clear.

The parties accepted that the deed of variation could not retrospectively amend the rules, so the amendments were in fact effective from 25 November 1993, not 1 July 1992 as intended.

The judge was also asked to decide if the announcements had amended the rules. They had not – the amendment power required a deed and the discretionary benefits rule could not be used to amend normal or early retirement pensions.

Equalisation formalities under Scottish law

In contrast to the above case, *Low and Bonar plc v Mercer* highlights a peculiarity of Scottish law that might help employers of schemes with trust deeds governed by Scottish law.

The Low & Bonar scheme required amendments to be made by the employer by deed with the trustees' consent. Normal pension ages were equalised in July 1991 by agreement of the employer and the trustees. However, the agreement was evidenced only by resolutions, not by an executed deed.

In England, the absence of an executed deed of amendment would have been fatal. In Scotland, however, "deed" does not have any technical meaning and the Court of Session was able to conclude that the employer's resolution amounted to a deed (and that the trustees' resolution represented their consent). All that was required for the existence of a deed in Scotland was a degree of formality and an intention to create legal relations, both of which were present here.

Minister's statement:

http://www.publications.parliament.uk/pa/cm/cmtoday/cmwwms/archive/100316.htm#hddr_15

Case report:

<http://www.bailii.org/ew/cases/EWHC/Ch/2010/650.html>

Case report:

<http://www.bailii.org/ew/cases/EWCA/Civ/2010/377.html>

Case report:

<http://www.scotcourts.gov.uk/opinions/2010csoh47.html>

Trust distribution deeds declared void

In *Futter v Futter*, the High Court declared deeds distributing assets under non-pension trusts void, using the principle in *Hastings-Bass*. This principle says, broadly, that trustees can undo an exercise of discretion if there are unintended effects.

The trustees of two life interest settlements had distributed trust assets after taking tax advice from a firm of solicitors that was incorrect. They argued that they would not have made the distributions if they had taken account of the actual tax consequences. HMRC argued that the effects of the deeds were exactly as intended, namely the distribution of trust assets. The tax treatment was a consequence, not an effect.

The Court disagreed with HMRC: there was no distinction between effects and consequences and there are numerous authorities where a tax consequence had been sufficient to invoke the principle in *Hastings-Bass*. The Court therefore declared the deeds void. This was interesting because previously it was not clear whether the effect of the rule in *Hastings-Bass* was to make the exercise of discretion void (i.e. as if it had not happened) or voidable (i.e. the trustees could choose whether or not to undo their decision).

DWP risk sharing guide

The DWP has published "*Risk Sharing: information for employers considering making changes to Defined Benefit pension schemes – an information note with case studies*". It gives examples of six ways of risk or cost sharing:

- longevity adjustments to DB pensions
- hybrid scheme
- cash balance scheme
- career average scheme
- increasing retirement age and member contributions
- cost sharing/cost capping

Interesting outlines are included of the risk sharing changes made by Barclays Bank, Morrisons, John Lewis and BT, and of those proposed for the Civil Service.

The note also has a section on the potential legal hurdles involved (consultation, restrictive amendment powers, section 67 and employment contracts).

There are several other points of interest:

- The DWP plans to review the requirement for cash balance members to buy annuities with mandatory indexation.
- The Government is considering the issues raised by the Court of Appeal's decision in *Houldsworth v Bridge Trustees Ltd* (see **WHiP Issue 17**) and is seeking leave to appeal to the Supreme Court. It is particularly concerned that cash balance schemes and self-annuitising DC schemes appear to be "money purchase schemes" (i.e. schemes providing only money purchase benefits) unless the decision is overturned.
- The Government's view is that, depending on the detail of the scheme design, "*it is probable that the practice of making equal contributions to a cash balance scheme would not be discriminatory*" on grounds of age. But the Government says that scheme trustees should seek their own legal advice.

Pensions Regulator: Corporate Plan 2010-2013

The Pensions Regulator has published its Corporate Plan for 2010 to 2013. During this period, the Regulator will:

- "*Continue to emphasise to trustees the importance of setting prudent funding targets and agreeing with employers that any resulting deficit is filled as quickly as possible.*"
- "*Support employers to get to grips with their new duties to auto-enrol staff into workplace pension schemes, and the regulator will design and build an effective compliance regime.*"
- "*Focus on standards of delivery of DC schemes - looking to trustees and providers to ensure they are effectively run and suited to members' needs.*"

Case report:

<http://www.bailii.org/ew/cases/EWHC/Ch/2010/449.html>

<http://www.dwp.gov.uk/docs/risk-sharing-db-pension-schemes.pdf>

Press release:

<http://www.thepensionsregulator.gov.uk/press/pn10-05.aspx>

- *Improve standards of administration across the industry.*
- *Continue to raise standards of governance by trustees, ensuring governance of DC issues receives appropriate attention.*
- *Continue to monitor transfers of pensions risk away from employers to ensure that, where such practices occur, members' benefits are protected.*
- *With an increasing workload and in an environment of constrained public expenditure, continue to direct its resources in the areas of greatest risk to members, educate and enable the industry to respond, and reduce the risk of calls on the Pension Protection Fund (PPF)."*

The press release adds:

"A leaflet will be published in coming weeks to inform employers of their new workplace pensions reform duties, followed by further web content later in the year. The regulator will also be consulting on its enforcement strategy for the new employer duties to auto-enrol employees into pension schemes from 2012."

Pensions Ombudsman determinations

Uninsured death benefits

Mrs D H Chapman claimed against the trustees of the DHL pension scheme for failure to pay death benefits on the death of her husband. Mr Chapman had been suffering from cancer when he joined the scheme, which he did not do at his first opportunity. It was normal practice for the trustees to issue a medical questionnaire to late joiners but it was not clear if this had been done.

The scheme rules:

- said that the trustees "may require a Member ... to undergo a medical examination"; and
- allowed the trustees to refuse payment of death benefits if the examination "shows that he does not have the normal expectancy of life", or if the member "refuses or fails to undergo a medical examination".

The trustees did not ask the member to undergo a medical examination. The Deputy Pensions Ombudsman found that the mere absence of a medical examination meant that the member had failed to undergo one within the meaning of the rule. We do not believe this to be the correct interpretation of this rule.

There was, however, another reason for finding against Mrs Chapman. Another rule said that lump sum death benefits "shall be payable only to the extent that the Trustees have effected insurance cover indemnifying them in respect of such risk". The Deputy Ombudsman found that this meant that where the death was not covered by the insurance policy held by the trustees, there was no requirement to pay the death benefit.

Although Mr Chapman had been led to believe he had been covered, there was no claim because, had he known that he was not covered, he would not have been able to buy his own insurance anyway, given his serious medical condition.

Member could not argue change of position over a 64% overpayment

Professor B Kenny's pension was overpaid by 64% and the Teachers' Pension Scheme reclaimed the overpayments. The Pensions Ombudsman found that the member could not raise a defence of change of position (i.e. that he had irreversibly spent money, relying in good faith on receiving the overpaid pension) in order to retain the overpayments. Because the overpayment was so great and he had earlier received benefit quotations, he should have realised that there had been an error.

Workplace financial promotions

The rules on financial promotion to employees have been eased as follows, in circumstances where there is "no direct financial benefit".

- The exemption for employers promoting group personal pensions and stakeholder schemes to staff is extended to third party administrators.
- The exemption is also extended to cover the promotion of work-related insurance products (e.g. life assurance, PHI, private medical insurance) and staff mortgages.

See **WHIP Issue 5** for background.

Determination:

<http://www.pensions-ombudsman.org.uk/determinations/docs/2010/mar/76152.doc>

Determination:

<http://www.pensions-ombudsman.org.uk/determinations/docs/2010/feb/28034.doc>

http://www.opsi.gov.uk/si/si2010/uksi_20100905_en_1

Actuarial matters

Statutory money purchase illustrations: TM1

The Board for Actuarial Standards (BAS) is consulting on possible changes to pension projection calculations in statutory money purchase illustrations, bearing in mind the introduction of automatic enrolment and NEST in 2012. The consultation closes on 4 June 2010.

Press release:

<http://www.frc.org.uk/bas/press/pub2264.html>

Actuarial standards

The Board for Actuarial Standards has issued its technical standard on actuarial modelling ("TAS M"), to take effect from April 2011. It sits alongside "TAS R" (reporting actuarial information) and "TAS D" (data used in actuarial work) and completes the set of generic standards. Targeted standards on actuarial work for insurance and pensions will follow.

Press release:

<http://www.frc.org.uk/bas/press/pub2245.html>

Actuarial information for accounts

In October 2009, BAS published a consultation paper setting out proposals for a technical actuarial standard on actuarial information used for accounts (e.g. pension scheme costs) and other financial documents. It has now decided not to proceed with this standard.

Press release:

<http://www.frc.org.uk/bas/press/pub2258.html>

This and previous issues of WHiP can be found on our website: www.traverssmith.com/?pid=24&level=2&eid=17

Hyperlinks in this document can be clicked via an up to date version of Adobe Acrobat Reader. We are not responsible for the contents of external websites to which we provide links.

If you wish to discuss any points arising from this note, please speak to your usual contact in the Travers Smith Pensions team or to one of the Pensions partners: Paul Stannard, Peter Esam, Philip Stear and Andrew Block.

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