

Pension Monthly Update - Keeping you on track July 2011

HIGHLIGHTS

Hogan Lovells pension group is delighted to send you our news **Alerter** for July, setting out developments over the past month.

Our Pension Planner gives a comprehensive overview of legal developments in the previous 12 months and expected future changes. For the July issue, please click on the link in the email alerter.

Recent publications

We are pleased to send you our latest briefing note on the impact on the abolition of the default retirement age which is attached to the email alerter.

Dates for your diary

9 September 2011 - Trustee training day

A full day seminar aimed at new or inexperienced trustees, or those who would like a refresher, covering all legal aspects of the Pension Regulator's trustee knowledge and understanding syllabus. For an invitation or to pre-book a place, please click on the links in the email alerter.

29 September 2011 - Investment and pensions

A breakfast seminar aimed at trustees and employers interested in the legal aspects of the investment of pension scheme assets. Speakers from our pension group will be joined by the Hogan Lovells financial institutions team to help trustees understand the legal issues to be considered before entering into investments. For an invitation or to pre-book a place, please click on the links in the email alerter.

12 October 2011 - Pensions and auto-enrolment

In this breakfast seminar, members of our pensions and employment teams will look in detail at the auto-enrolment obligations that will start to apply to employers from October 2012. They will examine what needs to be done to make existing pension arrangements meet the quality requirements for use as auto-enrolment schemes. To book a place, please click on the link on the email alerter.

For training events later in the year, please see our training programme attached to the email alerter.



FROM THE DWP

Section 75 debts

The DWP has issued draft regulations for consultation. Key features are:

Flexible Apportionment Arrangement

A new option, the "Flexible Apportionment Arrangement" (FAA) will be available when an employer ceases to participate in a multi-employer scheme. Under the FAA, liabilities (rather than an amount of debt) will be apportioned to one or more employers remaining in the scheme ("staying employers"). The intention is that an employer debt need not be calculated each time a restructuring takes place.

For an FAA to be available all the pension liabilities of the leaving employer (including any liabilities the employer assumed under a previous scheme apportionment arrangement, restructuring or FAA or for which the employer is guarantor under a withdrawal arrangement) must be reapportioned to the staying employer(s).

Period of grace

The period in which an employer who would otherwise be subject to an employment-cessation event may give notice to the trustees that he intends to employ an active member of the scheme within 12 months will be extended from one month to two months.

As previously proposed, trustees will be able to extend the grace period from 12 months to up to 36 months.

The scheme funding regulations will be amended to make clear that an employer in a grace period is still an employer for scheme funding purposes.

Technical amendments

The Government is not planning to amend the definition of "active member", despite requests from practitioners to clarify whether death in service members or members with a final salary link are active members.

Consideration of how to calculate a section 75 debt where a scheme has an underpin is deferred pending the outcome of

the *Bridge Trustees* case (heard on 20 June 2011 in the Supreme Court).

CPI/RPI switch

The DWP has issued a response to its consultation on the impact of using CPI as the measure of price inflation on private sector occupational pension schemes. Key points include:

- The Government does not intend to override scheme rules to impose CPI as the measure of price inflation.
- The Government has also rejected calls to introduce a modification power to make it simpler for schemes to adopt CPI as the relevant index.
- The Government is considering removing the requirement for a CPI underpin where:
 - a scheme revalues benefits by reference to RPI; or
 - members whose pensions have been increased by reference to RPI since January 2011 are transferred as part of a bulk transfer to another scheme.
- The employer consultation regulations will be amended so that changing scheme rules on indexation or revaluation will require consultation with affected members.

FROM THE TAXMAN

Flexible drawdown

HMRC has published three further sets of regulations making consequential amendments following the introduction of the drawdown pension regime under the Finance (No. 3) Bill 2011.

PIPs

HMRC Newsletter 47 includes examples of how to calculate a member's pension input amount in various circumstances and confirms that a pension input period (PIP) may be changed retrospectively, provided the change is made before the Finance Bill 2011 receives Royal Assent.

Overseas pensions

HMRC has confirmed that the Finance (No 3) Bill will close a loophole that currently allows some UK residents who transfer rights in a UK scheme to an overseas scheme to receive payments from the overseas scheme tax free under the terms of a current double taxation agreement.

FROM THE PENSIONS REGULATOR

Auto-enrolment checklist

The Pensions Regulator has published a five step action checklist for trustees to prepare for auto-enrolment if the employer wishes to use its existing scheme to meet its auto-enrolment requirements.

Appropriate level of contribution notice

The Pensions Regulator has settled its dispute with Van de Wiele ("VdeW") in relation to the Bonas Group Pension Scheme.

The Pensions Regulator first issued a contribution notice ("CN") of £5 m to VdeW in April 2010 following the pre-pack administration sale of the employer, Bonas. VdeW appealed unsuccessfully to the Upper Tribunal to have the determination struck out. Although the application was

unsuccessful, Warren J commented obiter dicta that the amount of the CN was excessive. The level of a CN should simply compensate for the loss suffered following the act or omission which prevented recovery of an employer debt.

The Pensions Regulator has now issued a CN of £60,000, but has largely rejected the Upper Tribunal's comments on the calculation of CNs. According to the Pensions Regulator, the Upper Tribunal's comments only applied to the particular facts of this case and were not intended to restrict the Regulator's approach on other current or future cases. (*Pensions Regulator v Van de Wiele*)

Scheme governance

The Pensions Regulator has issued its fifth scheme governance survey. The survey finds that communications to members remains a key area for potential improvement.

FROM THE PPF

The PPF has issued guidance for trustees of closed schemes (schemes that are more than 100% funded on the PPF basis and so are ineligible for PPF entry but which cannot arrange a bulk buyout on winding up). Key points include:

- A scheme authorised to be run as a closed scheme must be wound up, with the winding up taken as beginning immediately before the PPF assessment period during which it was decided that the scheme was not eligible to be taken over by the PPF.
- The PPF may give directions to trustees to ensure that the scheme's PPF liabilities do not exceed its assets or that the excess is kept to a minimum

OTHER DEVELOPMENTS

IAS 19

The International Accounting Standards Board has issued an amended version of IAS 19 "Employee Benefits". The amendments include:

- the elimination of the option to defer the recognition of gains and losses (the "corridor method");
- enhancing the disclosure requirements for defined benefit schemes.

FROM THE PENSIONS OMBUDSMAN

Removal of redundancy pension rights following TUPE transfer

The Pensions Ombudsman has rejected a complaint that the removal of a member's right to an unreduced pension on redundancy, made following a TUPE transfer, was invalid. Mr Duffy did not meet the criteria for a redundancy pension at the time the change was made so the removal of the right was not prevented by section 67 Pensions Act 1995. Although the scheme amendment power protected benefits secured by past service this did not include a right to an unreduced payment on redundancy. In addition, neither TUPE nor subsequent ECJ cases precluded amendments to scheme rules following a TUPE transfer where this was allowed under national legislation. (*Duffy*)

Maladministration not to provide information following scheme alterations

In a case concerning a survivor's pension, the Pension Ombudsman has held that it was maladministration for the administering council not to inform a member of alterations made to the scheme. It was not enough that reasonable

steps had been taken to provide information to the members: the information must, in fact, have been provided. Failure to do so in an individual case amounted to maladministration. Had the member known about the death in service pension and that a nomination form was required it was more likely than not that she would have nominated her long term partner.

As no nomination had been completed, a survivor's pension was not payable under the rules. Instead, the council was ordered to pay the survivor's pension at its own expense. (*Halford*)

Failure to act on investment instruction

The Pensions Ombudsman has held that the scheme administrator's failure to act on an investment instruction was maladministration and that the administrator should compensate the scheme for the resultant loss. The Ombudsman rejected the administrator's argument that the investment advisor was jointly liable as it had not chased the

administrator for proof that the instruction had been carried out. The error had been noticed by the advisors at their annual review, which was the earliest opportunity they could reasonably be expected to have discovered the mistake. Having sent a clear instruction in the proper manner, the trustees were entitled to presume that it had been carried out. (*Hoyle*)

Ill health pension - conflicting medical opinions

The Deputy Pensions Ombudsman has held that when considering an application for an ill health pension, although the decision maker could prefer one doctor's opinion over another it should have critically considered the advice it received and decided if it could reasonably be relied on or whether further probing was needed. In this case, there was a clear conflict between two experts and the decision maker should have made further enquiries. (*Hughes*)

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

KEY HOGAN LOVELLS CONTACTS

Jane Samsworth	(Partner)	+44 20 7296 2974	jane.samsworth@hoganlovells.com
Katie Banks	(Partner)	+44 20 7296 2545	katie.banks@hoganlovells.com
Duncan Buchanan	(Partner)	+44 20 7296 2323	duncan.buchanan@hoganlovells.com
Claire Southern	(Partner)	+44 20 7296 5316	claire.southern@hoganlovells.com

www.hoganlovells.com

Hogan Lovells International LLP is a limited liability partnership registered in England and Wales with registered number OC323639 and is regulated by the Solicitors Regulation Authority of England and Wales. Registered office and principal place of business: Atlantic House, Holborn Viaduct, London EC1A 2FG. The word "partner" is used to refer to a member of Hogan Lovells International LLP, or an employee or consultant with equivalent standing and qualifications. New York State Notice: Attorney Advertising.

© Copyright Hogan Lovells 2010. All rights reserved. Doc #2723899