

## Pensions monthly update – keeping you on track

February 2014

Pension briefing

### HIGHLIGHTS

Hogan Lovells pension group is delighted to send you our news Alerter for February setting out developments over the last two months.

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

### DATES FOR YOUR DIARY

#### 25 February 2014 – Seminar on retirement issues

An afternoon seminar aimed at employers and trustees. Speakers from the Hogan Lovells pension and employment teams will consider a variety of recent and forthcoming issues, including the proposed extension in April 2014 of the right to request flexible working to all employees and the practical implications of the abolition of the default retirement age. For an invitation and to book a place, please click on the links in the email alerter.

#### 7 March 2014 – Recent developments in pensions

Our regular informal breakfast seminar aimed at trustees and sponsors of occupational pension schemes and their advisers. Speakers from the Hogan Lovells pension team will review legal developments over the past few months and will explain the practical implications for pension schemes. For an invitation and to book a place, please click on the links in the email alerter.

#### 14 May 2014 – Defined contribution (DC) half-day workshop

Using interactive case studies and small group discussion, Hogan Lovells speakers and facilitators will focus on dealing with the legal issues faced by those responsible for DC schemes. To pre-book a place, please click on the link in the email alerter.



### FROM THE PENSION PROTECTION FUND

#### Deadline and levy determination 2014/15

The PPF has issued its 2014/14 levy determination and has confirmed that the pension protection levy estimate for 2014/15 will be £695m. The levy scaling factor will remain unchanged from the previous year at 0.73

The PPF has also confirmed the following deadlines:

- certifying / re-certifying contingent assets - 5pm on 31 March 2014;
- certifying deficit reduction contributions made on or before 31 March 2013 – 5pm on 30 April 2014;
- certifying block transfers on or before 31 March 2014 – 5pm on 30 June 2014.

#### Restructuring and insolvency

The PPF has issued a guide to its approach to restructuring and insolvency, setting out the main principles the PPF will apply when deciding whether to agree to a restructuring or rescue of a distressed employer:

- The employer's insolvency must be inevitable.
- The pension scheme would receive money or assets under the restructuring arrangement that are significantly better than the amount it would have recovered through the employer's insolvency.

- What is offered to the pension scheme trustees is fair compared to what other creditors and shareholders will receive under the restructuring.
- The pension scheme must be given "anti-embarrassment protection" of 10% equity in the new company if the future shareholders are not currently involved in the company, or 33% if the parties are currently involved.
- The pension scheme would not be better off if the Pensions Regulator issued a contribution or financial support direction.

### FROM THE TAX MAN

#### Reduction in the lifetime allowance: individual protection 2014

A guidance\_note on individual protection 2014 ("IP14") and draft clauses for the 2014 Finance Bill have been issued. Following consultation, it has been decided that individuals with enhanced protection will be allowed to take out IP14 in addition, provided that they do not also have primary protection.

The Government has also decided against reducing an individual's IP14 protected amount if his/her benefits are reduced as a result of the scheme paying an annual allowance charge on the individual's behalf.

### Scottish rate of income tax

HMRC has issued a statement on the application of tax relief on pension contributions paid by Scottish taxpayers following the implementation of a Scottish rate of income tax.

A technical note issued in May 2012 clarified that Scottish taxpayers should receive tax relief on pension contributions at the Scottish rates. Members contributing under net pay arrangements will automatically receive tax relief at the appropriate rate.

The Government has decided that relief at source (RAS) will also be paid at Scottish rates. Administrators will need to differentiate between Scottish taxpayers and those from the rest of the UK. However, in response to industry concerns, for a transitional period from April 2016 to April 2018 administrators may claim RAS for all members at UK rates. HMRC will identify Scottish taxpayers and make appropriate adjustments through self-assessment or PAYE coding in respect of contributions paid in the transitional period.

### FROM THE PENSIONS REGULATOR

#### Changes to scheme returns

The Regulator has issued a guide to changes made to the scheme return to be completed by trustees or managers of defined benefit and hybrid schemes. Areas about which additional information will have to be provided include: hybrid schemes, including in relation to any underpin; the scheme's membership; asset-backed contribution arrangements; and incentive exercises carried out or notified to members in the previous 12 months.

#### Identifying the statutory employer

The Regulator has updated its statement for trustees on identifying the statutory employer(s) for their scheme, in the light of the *Olympic Airlines* case. In that case, the trustees were not permitted to commence secondary insolvency proceedings in the UK against the overseas employer, meaning that the scheme was not eligible to enter the Pension Protection Fund (PPF).

The Regulator has emphasised that, where a scheme has an overseas employer:

- Trustees should be mindful of the fact that any assets located in the UK will be available to a wider group of creditors and may be moved offshore without or at short notice.
- Trustees should be vigilant as to the extent of the employer's economic activity in the UK, as this may affect the possibility of commencing a UK process and therefore the scheme's ability to enter the PPF.
- Trustees should be ready to act quickly to protect the scheme's interests if overseas insolvency proceedings are brought against the employer. This may involve petitioning for winding up of the employer in the UK or applying to commence secondary insolvency proceedings.

### AUTO-ENROLMENT

#### Quality test for defined benefit (DB) schemes

The Pensions Bill has been amended to introduce alternative quality tests for DB schemes. Regulations may allow a UK DB scheme to meet the quality requirement if:

- it meets the quality test applicable to money purchase schemes;

- the cost of providing the benefits would require contributions (employer and/or member contributions) of at least a prescribed percentage of the members' "relevant earnings"; or
- for at least 90% of members, the cost of providing future benefits would require contributions (employer and/or member contributions) of at least a prescribed percentage of the member's relevant earnings.

The prescribed percentage for the second and third test must be at least 8%.

#### 2014/15 thresholds

The DWP has published the proposed levels of auto-enrolment thresholds for 2014/15:

- auto-enrolment earning trigger - £10,000;
- lower limit of qualifying earnings band - £5,772; and
- upper limit of qualifying earnings band - £41,865.

### MARRIAGE (SAME SEX COUPLES) ACT 2013

#### Consequential provisions

An Order has been issued, to make various consequential amendments to secondary legislation following the introduction on 13 March 2014 of same sex marriage, including in relation to compensation from the Pension Protection Fund and Financial Assistance Scheme. The Order will also amend the modification regulations to:

- disapply the subsisting rights provisions of section 67 Pensions Act 2014 where a scheme is amended to treat a same sex surviving spouse in the same way as an opposite sex surviving spouse; and
- give trustees power to amend schemes by resolution to treat same sex surviving spouses in the same way as opposite sex surviving spouses (although amendments which go further than the minimum required under the Equality Act 2010 may not be made without the employer's consent).

Without these modifications, amending schemes to provide death benefits to same sex surviving spouses could arguably offend section 67, or some scheme amendment powers, if the changes might adversely affect the benefits payable to other beneficiaries, such as children.

### OTHER DEVELOPMENTS

#### Defined contribution (DC) charges cap - delay

The DWP has announced that any cap on DC charges will not be introduced before April 2015. The Pensions Minister has stressed that the Government remains strongly minded to cap charges applicable to auto-enrolment default funds.

#### Transfers: TUPE - guidance

The Department for Business, Innovation & Skills (BIS) has reissued a guide to TUPE transfers, updated to take account of changes made by amendment regulations in force on 31 January 2014.

The guidance has an expanded section on the pension obligations of the transferee employer following a TUPE transfer, including in relation to auto-enrolment.

#### Accounting: classifying pension liabilities as equity

The Financial Reporting Council (FRC) has warned company boards against entering into alternative arrangements for

funding pension schemes (often using a Scottish limited partnership) that turn pension obligations into equity instruments in their accounts.

The FRC has acknowledged the genuine commercial reasons for establishing such alternative arrangements for supporting pension scheme funding. Its concern has focussed on companies that have used an alternative funding arrangement to reclassify pension liabilities as equity instruments in the company's consolidated accounts.

## FROM THE COURTS

### Nomination requirements for survivor's pensions for unmarried partner upheld

The High Court had previously held that requiring an unmarried cohabitee to be nominated by the member in order to be entitled to a survivor's pension breached the European Convention on Human Rights. The Northern Ireland Court of Appeal has overturned this decision. The scheme regulations were intended to provide pensions to those in stable relationships who had, by public affirmation, provided evidence of nomination.

*Brewster v Northern Ireland Local Government Officers' Superannuation Committee*

### Staged partial buy-out permissible despite absence of express powers

The Court of Appeal has held that trustees of two schemes in winding up could buy out benefits in stages, even though there were no express provisions in the scheme rules allowing partial (as opposed to full) buyout. Powers should be implied to give the trustees maximum flexibility in buying out members' benefits.

The trustees had sought directions from the court as to whether they could implement a staged buy-out, which would increase the section 75 debt recoverable from the employer (calculated on the minimum funding requirement basis because the schemes commenced winding up in 2000).

*Sarjeant and others v Rigid Group Limited*

### Aggregate liability under contribution notices

The High Court has held that contribution notices (CNs) issued to more than one target following non-compliance with a financial support direction (FSD) may specify sums to be paid which, in aggregate, exceed the amount of the section 75 debt due in relation to the scheme.

*Re Storm Funding Ltd*

## FROM THE PENSIONS OMBUDSMAN

### Capping pensionable pay did not breach employer's implied duties

The Pensions Ombudsman has held that offering an active member of a final salary scheme the option of a 1% cap on

increases in pensionable salary or joining a career average section or defined contribution scheme did not breach the employer's implied duties of trust and confidence and good faith. In reaching this conclusion, the Ombudsman took into account the scheme deficit, the employer's potential future liability, resources and obligations, and the steps it had taken to address the problems faced in relation to the scheme.

*Bradbury*

### Failure to advise member of impending ill-health early retirement rule change was maladministration

The Pensions Ombudsman has held that it was maladministration for an employer not to inform a member known to be seriously ill of an impending change in the test for awarding enhanced ill health benefits and the importance of submitting his application for the benefits before the rule change was implemented. In the circumstances, it was extremely unlikely that the member would have been able to detect the impending rule change for himself.

*Dent*

### Death benefits: trustees could require discharge before making payment

The Pensions Ombudsman has held that it was reasonable for the trustees of a self-invested personal pension to require the beneficiary of discretionary death benefits to sign a form of discharge before paying him the monies awarded to him. Trustees naturally and reasonably wish to obtain the maximum security against future litigation when making a final distribution of funds. The trustees had explained their reasons for requiring the discharge and the reasoning behind the beneficiary's reason for withholding it was not clear.

*McCoy*

### Ill-health early retirement: practicability of untried medical treatments

The Pensions Ombudsman has held that the decision-maker in an application for ill health early retirement should take into account the practicability of untried medical treatments, including the fact that the member's limited engagement with treatment was a symptom of her depression. Its failure to do this, or to clarify with the doctors who supplied medical reports the nature and likely effectiveness of treatments on the member's ability to work, was maladministration.

*Seabridge*

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

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