

IN FOCUS

Welcome

Welcome to the autumn edition of **In Focus**, our quarterly update keeping you informed of the latest developments in employment, pensions and incentives law.

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Cap in hand

Defined benefit pension schemes need to review their rules about revaluing early leavers' benefits. Some may want to do so urgently.

The statutory cap on the revaluation of deferred benefits is expected to be reduced from 5% a year to 2.5% for service after 1 January 2009. Schemes may need to amend their rules before they can apply the lower ceiling.

The change is being made through the Pensions Bill and depends on Parliament passing the Bill into law in the next few weeks.

Generally speaking, the legislation about revaluing deferred benefits overrides scheme rules so that it applies regardless of what they say. But this is not the case where the scheme rules say that members will be treated more generously than the legislation requires.

If a scheme's rules say that leavers' benefits will be indexed in accordance with prevailing statutory requirements from

time to time, the new cap will apply from January.

But if the rules say explicitly that the scheme will index benefits in line with inflation up to a maximum of 5%, the scheme will have to continue to do that in relation to benefits earned after January. Unless, that is, it amends its rules to adopt the new cap.

In the current climate in particular most schemes will want to apply the new limit. Schemes should check their rules – and amend them if necessary – to be sure they can.

On the flipside, schemes that make a positive decision to keep the higher ceiling should check whether their rules need to be amended to allow them to.

Some schemes may have restrictive amendment powers that make it difficult to take advantage of the lower cap. The government has been looking at creating statutory amendment powers to help them. It has not come up with concrete proposals yet, but there is hope that it might.

Conflict zone

The Pensions Regulator (TPR) has issued the final version of its guidance on conflict of interest. It says, *"There should be a culture of openness – disclosure of conflicts should be embraced, not ignored, and we expect all conflicts of interest to be resolved sensibly. Where a conflict comes to the attention of the Regulator, we may take action where appropriate."* Clearly conflict is a major issue for TPR.

A trustee must act in the interests of the scheme beneficiaries. He faces conflict of interest when, at the same time, he has duty to act in the interest of someone else with a competing point of view e.g. the employer, or he has a personal interest that pulls in a different direction.

Five principles

The guidance starts from five high level principles and adds detailed commentary and examples. The principles are about:

- understanding the importance of conflict
- identifying conflicts
- evaluating, managing and avoiding conflicts
- managing advisers' conflicts and
- developing a policy on conflict.

Richard Knight, partner, comments, *"Most trustee boards will need to consider what processes should be put in place or updated to manage conflict. A starting point may be to consider the Regulator's new checklist."*

Checklist

Here is a selection from TPR's checklist.

Understanding conflict

Have you identified the types of conflict that may arise in your specific circumstances?

Do new trustees receive induction training on their responsibilities?

Identifying conflict

Do you have a process to identify new conflicts?

Do your minutes record when conflicts are identified and the action taken to address them?

Evaluating and managing conflict

Do you have a policy on how to decide whether or not a conflict should be managed?

Does your policy outline the options for managing conflicts?

Adviser conflicts

Do you have procedures to ensure adviser conflicts are identified and managed?

Conflict of interest policies

Do you have a documented policy on conflict?

Does it have a process for monitoring compliance?

Is there a process for reviewing the policy?

The full guidance and the summary are on TPR's website.



Pensions & incentives news in brief

New TPR guidance asks DC pension schemes to communicate more effectively and openly with members. It applies to occupational schemes (trust based) and personal pension schemes (contract based). Among its proposals for successful communication: identify your objectives and have a clear communication plan, work out the best ways to communicate, know your audience and tailor your communications to it, and be open and honest. And no jargon.

An effective communication will have impact, clarity, and accuracy. Communication should be regular but is particularly important e.g. before joining, approaching retirement and at times of change. TPR will be issuing more guidance on governance topics for DC schemes.

TPR will not review valuations because of a low mortality assumption on its own. Instead it will normally only consider mortality if a scheme trips an existing trigger for scrutiny (the level of technical provisions or the shape of any recovery plan). But with two thirds of schemes triggering already, mortality assumptions will be open to inspection in most cases. The new approach applies to the valuation cycle that started in September 2008; the first valuations affected will be those due with TPR in December 2009.

The National Association of Pension Funds is leading a legal challenge to HMRC's refusal to refund VAT charged to pension schemes by their investment managers since 1990. If the case is successful, private sector defined benefit pension schemes will not be charged VAT on future fund management fees for segregated portfolios. (Pooled funds and insurance contracts already have an exemption.) Schemes may also be entitled to recover VAT already paid and may be able to go back several years. If you would like our note on practical things you can do to increase the chance of a refund, please email epi@burgess-salmon.com.

Notices and directions

Proposals published in April to extend TPR's powers to issue contribution notices (CNs) and financial support directions (FSDs) are largely unchanged in their final form. But there are some curbs.

- The headline is an additional ground for issuing a CN – where an act is materially detrimental to a scheme's ability to pay benefits. But TPR's use of this new ground will be constrained by a code of practice and a new statutory defence of having acted reasonably.
- Among the possible circumstances for a material detriment CN: removing or substantially reducing employer support for a scheme, making a transfer to a scheme with a weak employer covenant or inadequate funding, and business models designed for the financial benefit of someone other than scheme members.
- The current "good faith" defence for CNs is replaced by a wider reasonableness test for issuing one.
- A CN can be issued in relation to the scheme receiving a bulk transfer (2 or more people) if one could have been issued to the paying scheme. This allows support to follow transferred members. There is a corresponding change in relation to FSDs.

- The threshold for an FSD to an "insufficiently resourced" sponsor is lowered: comparison is with the whole group rather than just one other company.
- A series of acts can be the basis for a CN where no single act on its own would count.
- The changes are being made through primary legislation (the current Pensions Bill). This makes for greater certainty because the new powers have had to be more clearly defined than they might otherwise have been.
- In general the changes will have effect in relation to events occurring on or after 14 April 2008 when the government made the original proposals. But later start dates apply to series of acts.

The declared target of the changes is the new and largely unregulated non-insured buy-out market. But "material detriment" is broadly defined and, in a significant shift, is about the effects that actions have rather than the intention behind them. TPR believes that the changes will not affect responsible employers. But in the short term at least there will be a new uncertainty for corporate activity generally, not just in the non-insured buy-out market.

Heyday low day

The Advocate General's (AG) opinion in the Heyday case at the European Court of Justice (ECJ) has reduced the pressure for pension schemes to allow members to draw pension while continuing in their job. This is sometimes called "flexible retirement".

Heyday (Age Concern and others) argues that the UK regulations allowing employers to retire staff at 65 are age discriminatory and contrary to the EU Directive that lies behind them.

The AG said that a compulsory national retirement age is not age discriminatory if it is objectively justified i.e. a

proportionate means of achieving a legitimate policy aim in the national context. This supports the UK regulations in principle. The case now goes to the ECJ for final ruling, probably in the next 6 months. If the ECJ agrees with the AG, it will be up to a UK court to decide whether the default retirement age is objectively justified.

The government has promised to review the default retirement age in 2011. So whatever the outcome of the Heyday case, employers might not be able to retire employees at 65 beyond 2011 in any event. That would make flexible retirement a hot issue for pension schemes.

SAYE/Sharesave plans

The Financial Services Compensation Scheme has confirmed that it protects savings deposited as part of an HMRC approved SAYE/Sharesave plan in the same way it protects any deposit in a bank or building society that fails. This clarification is welcome as savings in a SAYE/Sharesave plan are sometimes held in individual accounts for each participant, and sometimes in a single account for everyone in the plan. FSCS

protection is generally confined to individual depositors; hence the concern. Plan savings count towards an individual's compensation limit with the savings institution. Employers may want to consider with their savings contract provider how best to communicate this to participants given current concerns about the safety of deposits.

Remember remember the 27 November ...

The spring and summer editions of *In Focus* informed readers of the Government's introduction of a new points based immigration system (PBS) for non-EEA nationals who want to work in the UK. The PBS will consist of five tiers. Tier 1 (highly skilled migrants) was implemented in the summer. Tier 2 (skilled migrants, which essentially replaces the work permit system) and Tier 5 (youth mobility and temporary workers) are due to be implemented on 27 November 2008. This means:

- from 26 November 2008 the UK Border Agency (UKBA) will no longer accept work permit applications. Transitional arrangements are in place for current holders of work permits who wish to renew or extend their work permits;
- from 27 November 2008 employers wishing to employ non-EEA nationals must be licensed as a sponsor by UKBA. Without this licence employers will not be able to recruit or second non-EEA nationals to the UK after 26 November 2008;
- before applying for a sponsor's licence employers must ensure that their current non-EEA staff have been recruited/employed lawfully in the UK. The UKBA are carrying out spot checks and issuing heavy fines to



those employers found to be non-compliant. In addition, employers must ensure their internal processes, in relation to the recruitment and monitoring of migrant workers, are sufficiently robust to meet the employer's obligations under a sponsor's licence.

It is clear that until the new PBS has had a chance to "settle down" this will be a difficult time for employers trying to bring non-EEA nationals into the UK.

Shortage occupations

In September the Migration Advisory Committee (MAC) published its recommended shortage occupation lists for the UK, which has now been accepted in full by the Government. The only change the Government made was to add social workers to the list. The Government hopes that its investment in skills and training, which is aimed at tackling skills shortages in various sectors (catering and hospitality, the nuclear industry and construction) will mean that

those vacancies will, in the future, be filled by UK residents. The list is quite specific about what constitutes a skilled shortage occupation (some roles are linked to hourly rates of pay). MAC is continuing to review the list but in the short-term these changes will have a significant impact on those employers who have relied heavily on the shortage occupation route to bring workers into the UK.

Business visas

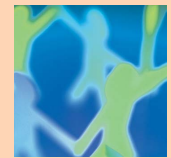
With effect from this month the UKBA has issued new rules for those individuals wishing to come to the UK on business. Under the new rules, non-EEA nationals who require a visa to come to the UK will have to obtain a business visa and entry clearance prior to entering the UK. Non-visa nationals will be able to enter the UK without a business visa and entry clearance but they will be required to comply with the new business visitor rules.

A business visa can only be used for the business activities listed below. If an employer wants to bring an employee to the UK but the activities that the employee will carry out are outside the list of qualifying business activities, the employer will have to use the PBS rather than the business visitor route to bring that employee to the UK. Qualifying business activities include:

- attending meetings and conferences;

- arranging deals, negotiating or signing trade agreements or contracts;
- undertaking fact finding missions, checking details or goods; and
- conducting site visits and promotional activities.

The Business Immigration team at Burges Salmon have been heavily involved in helping clients understand the new PBS and the impact that it will have on their businesses. If you wish to have clear, straightforward advice on any of the above areas or business immigration advice in general then please contact either Roger Bull (0117 902 2701 or roger.bull@burges-salmon.com) or Huw Cooke (0117 902 7719 or huw.cooke@burges-salmon.com) in the first instance.



Employment news in brief

Right to SSP extended

With effect from 27 October 2008 agency workers employed on fixed-term contracts of three months or less will be entitled to statutory sick pay (SSP). This change will be implemented under the Fixed-term Employees (Prevention of Less Favourable Treatment) (Amendment) Regulations 2008. The need for the amendment arose as a result of a Court of Appeal decision to the contrary in 2007. This amendment will place agency workers working on contracts of three months or less on the same footing as other workers. The normal qualifying conditions will still apply. SSP is currently £75.40 a week and is payable by the agency.

Queen's Speech

The Queen's speech will take place on 3 December 2008. The Government published its draft legislation over the summer to allow for consultation with interested parties. The Queen's speech will hopefully confirm the Government's intentions in relation to a number of pieces of legislation that will affect employers, in particular the Equality Bill, the Employment Bill and the Education and Skills Bill. In October it was suggested that a number of Government proposals were being reviewed, in particular the extension of the right for parents of children up to 16 years old to request flexible working. This will hopefully be clarified in the near future.

Seminar programme released

It is the time of year when the employment and pension teams at Burges Salmon start their seminar programme. Topics include: Crunch time – the legal implications of reducing workforce costs, Hot Topics and, in the spring, the "new" disciplinary and grievance procedures. For details please go to www.burges-salmon.com (click on News and Events) or email seminars@burges-salmon.com. These seminars are very popular so please remember to book your place early to, as they say, avoid disappointment!

Redundancy, length of service and age discrimination

Age discrimination and redundancy is a current hot topic and one that employers will, no doubt, hear more about over the next 18/24 months given the current economic climate.

The recent case of *Rolls Royce PLC v Unite* is an unusual one. Rolls Royce sought a declaration from the High Court to confirm that one of its criterion (length of service), which is used in its redundancy selection matrix, was unlawful under the Employment Equality (Age) Regulations 2006 (the Regulations) and could not be justified. This criterion was one of five that had been agreed with the union and formed part of a collective agreement.

Rolls Royce wanted to remove the length of service criterion, which benefitted older employees, its argument being that length of service was not a good determinant of the best employees to retain.

Unite wanted to protect employees with longer service. It argued that the length of service criterion was "the award of a benefit" to those employees who would find it more difficult to obtain alternative employment post redundancy. The Regulations allow an employer to award different benefits to staff, based on length of service, as

long as the employer can show that it fulfils a business need (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of its workers). Unite argued that it did.

The High Court agreed with Unite and held that the length of service criterion was a "benefit" under the relevant regulation and that Rolls Royce would be able to justify the criterion despite its discriminatory impact. The High Court gave Rolls Royce leave to appeal its decision. As matters currently stand Rolls Royce is stuck with this criterion unless the Court of Appeal or union decide differently.

It is not unusual to find length of service as a criterion in a redundancy selection matrix. However, many employers, as Rolls Royce did, want to be able to retain the best employees irrespective of their length of service. If this criterion is part of a collective agreement and employers do not wish to use it in a redundancy selection process, they may have little choice but to renegotiate or, possibly, terminate the collective agreement. On the other hand, this case gives some comfort to employers who wish to retain length of service as part of the selection process.

Revised ACAS Code of Practice on discipline and grievance

With the consultation period now closed, ACAS has published its revised Code of Practice on discipline and grievance. The Code takes into consideration a number of the comments made by interested parties during the consultation process. The Code has been approved by BERR (the Department for Business, Enterprise and Regulatory Reform) but awaits final approval from Parliament. The Code is to deal with misconduct and poor performance issues.

Key points to note about the Code are:

- an employer's failure to follow the Code will no longer make a dismissal automatically unfair (although a failure to follow due process is likely to make a dismissal unfair in any event);

- an unreasonable failure to follow the Code by either the employer or employee could increase or decrease any award made by up to 25%;
- employees will no longer have to lodge a grievance before bringing a claim at an employment tribunal.

ACAS has stated that it will produce a more detailed non-statutory guidance booklet on discipline and grievance in the near future, although tribunals will not be required to have regard to the booklet in deciding whether an employer has unreasonably failed to follow the Code.

The Employment Bill has now received royal assent, which means that the statutory dispute resolution procedures will be repealed in April 2009. The Code has been produced with that in mind.

Bristol to London bike ride

A big thank you to all of you who sponsored Chris Seaton, Tim Illston, Jamie Cameron and Huw Cooke (and others) on their charity bike ride from Bristol to Paris in September. The team had great weather and completed the 270 mile ride without injury. More importantly they have raised just under £20,000 for the Jessie May Trust, which is a charity set up to help terminally ill children remain at home.



In Focus - pdf

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Recent email alerts sent out include:

- *Tales of the unexpected*, about the right to take time off for unpaid leave to look after dependants
- *Not a high day for Heyday*, outlining the Advocate-General's opinion on the Heyday appeal
- *Cap in hand*, which explains that from the new year pension schemes will only have to index early leavers' benefits in line with inflation up to a maximum of 2.5%.

Details of how you can receive email alerts are on page 1.

In the office

Our best wishes to **Kate Granville Smith** on her marriage and her move to a new life abroad.

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