

# IN FOCUS

## Welcome

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

For further information on employment issues, please e-mail [chris.seaton@burgess-salmon.com](mailto:chris.seaton@burgess-salmon.com). For information on pensions and/or incentives, please e-mail [tim.illston@burgess-salmon.com](mailto:tim.illston@burgess-salmon.com).

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*New date for Spring...*

## Hot Topics in Pensions Law seminar

**Tuesday 28 April 2009**

5pm to 6.30pm (registration from 4.30pm)

Burgess Salmon LLP, Narrow Quay House, Narrow Quay, Bristol BS1 4AH

We have a new date for our Bristol seminar on pensions law. We hope you can come. We had to postpone the Bristol event in February because of the snow. The London seminar took place as planned and we were pleased with the feedback we received.

These are our topics:

- **The Regulator and the recession: regulating pension schemes in tough times**  
A buoyant economy gave the Pensions Regulator an easy ride for its first three years. Now we are seeing a change in its approach and would like you to be aware of it.
- **S.75 Pensions Act 1995: managing the employer debt in practice**  
What are the pros and cons of the new options for managing the debt? Our experience has given us a practical insight into the ones that work for the employer and for the trustees.
- **Assessing the employer's covenant: a legal perspective**  
Covenant review is not simply a financial question. Addressing key legal issues can add to certainty and reduce risk for trustees and employers.
- **A topical round-up, including case law**

To register, please either go online to [www.burgess-salmon.com](http://www.burgess-salmon.com) and take the Seminars tab, or email [seminars@burgess-salmon.com](mailto:seminars@burgess-salmon.com). There is no charge.

## UEL replaced

From 6 April the newly created "upper accrual point" (UAP) replaces the upper earnings limit (UEL) in the contracting out legislation. Our view is that, generally speaking, contracted out schemes do not need to amend their rules in response.

Today UEL plays a part in calculating NICs, in quantifying the state second pension (S2P) and in setting contracting out rebates. From 6 April UAP takes over for S2P and contracting out. It follows that any references in contracted out schemes to UEL need to become references to UAP.

However, we do not think schemes need to amend their rules to achieve this. This is because, in the circumstances, the clear contracting out context means that references to UEL can be read as references to UAP. (Not all contracted out schemes refer to UEL.)

The introduction of UAP is part of the groundwork for the flat rate S2P from 2012. It also allows UEL to be

aligned with the threshold for higher rate income tax (as announced in the 2007 budget). From 6 April UAP will be £770 a week and will remain at that level in future. UEL will rise to £844.

That there is a question about amending scheme rules at all is an unintended side effect of intricate changes to the NIC legislation. The DWP is aware of this and that some advisers think that rule changes might be needed. In due course it may offer a legislative fix to put the matter beyond doubt.

Contracted in schemes that refer to UEL may also be able to take them as references to UAP on the same contextual argument. But depending on the particular scheme rules, the context might be less compelling and rule amendments might be advisable, though not usually urgent. If you think your scheme is in that category, please get in touch with your usual contact in the pensions team.



## Pensions & incentives news in brief

HMRC has put off finalising draft regulations that would turn some payments that are currently unauthorised into authorised ones. This is because of the weight of comment it received. In small but significant ways these regulations will make schemes easier to administer. Examples of payments that would become authorised include commuting small stranded pensions for triviality without regard to other pensions the individual has and allowing correcting payments and minor overpayments after a death.



In our view, sponsors of DB schemes that want to adopt the reduced 2.5% cap on revaluation in deferment from April do not need to consult members before doing so. When employers plan to make certain changes to future service pension benefits, regulations require them to hold at least 60 days consultation with members beforehand. We do not think this obligation applies to adopting the new cap.



The Regulator has issued a statement to reassure employers that its funding framework is flexible enough to cope with the recession. It is ready to be pragmatic on the length of recovery plans, for example, and emphasises "reasonable affordability" for the employer. But there is toughness too in a warning that recovery plans should not be allowed to suffer on account of dividend payments to shareholders.



From 6 April, where pension scheme trustees own unregistered land and a new trustee is appointed who becomes one of the owners, this will be a cue for the compulsory first registration of the land at the Land Registry. Trustees should consider voluntary registration now rather than wait for a change of trustees.

## Covenant review

Understanding the strength of an employer's covenant to its defined benefit pension scheme requires legal as well as financial input.

A covenant review assesses the employer's ability to continue to fund its scheme. The strength of the covenant will change over time so needs regular review.

The trustees are unsecured creditors of the employer, ranking behind a range of other creditors with higher priority. Are they satisfied with this position? They need financial advice to answer the question but there is also an important legal angle.

### Regulator's view

The Pensions Regulator is keen on covenant review. The code of practice on funding says:

*"It is essential for the trustees to form an objective assessment of the employer's financial position and prospects as well as his willingness to continue to fund the scheme's benefits... This will inform decisions on both the technical provisions and any recovery plan..."*

In its statement on monitoring funding the Regulator says that if it is considering intervening after a scheme has tripped one of the early warning triggers (based on its technical provisions or the shape of its recovery plan), it will take into consideration any covenant review the trustees have done and any remedial steps they have taken in consequence e.g. taking security.

### Legal review

In a legal review of an employer's covenant we ask the trustees to obtain documents on things like group borrowing facilities and security, intercreditor

arrangements, guarantees and set-offs, cash pooling, negative pledges, dividend policy, unencumbered assets and currency policy. After reviewing the information we report to the trustees with steps they should take as a matter of urgency or should consider acting on in the medium or longer term.

Typically we report under headings like:

#### ■ Priority

This involves questions like: how much secured debt would outrank the trustees' claim for payment if the employer became insolvent? What can they do to safeguard or improve their position?

#### ■ Substitutes for covenant

Should the trustees take security? If so, what legal obstacles are there, like negative pledges to existing secured lenders?

#### ■ Corporate issues

What is the net effect of the scheme contribution rule and the statutory funding requirements? Should the trustees look for a share of company dividends? Are there currency issues?

#### ■ Jurisdiction and regulatory issues

Are there any legal hurdles in the way of the trustees enforcing the employer's obligations to them? How does the location of overseas subsidiaries affect the enforceability of rights the trustees might have against them?

Diligent and regular covenant review improves the trustees' decision making on funding and can help to keep the Regulator on side.

## Kicking conversions

Defined benefit schemes interested in converting GMPs into actuarially equivalent scheme pension can begin to make plans. Regulations setting out the detailed requirements are now available in final form. Technically they still need approval from Parliament but this is normally a formality. The plan is that they will come into effect on 6 April.

Schemes may find converting attractive in principle but there a number of hurdles:

- schemes will remain obliged to provide pensions to spouses/civil partners in tightly defined circumstances. These requirements are being retained because, as the Government explains, removing pension rights from survivors who are outside the scheme's own dependence criteria could lead to challenges under the strand of human rights law that protects property rights. This is not a risk with members themselves

because they receive a replacement scheme pension equivalent in value to the GMP they lose;

- conversion brings into the open the lingering question whether schemes need to make GMPs sex equal. In practice, most schemes have followed the majority view that what matters is equality in total benefits and that there is no need to consider GMPs separately. In papers issued with the regulations, the Government reaffirms its agreement with this view. But conversion could lead members to take a renewed interest in the question; and
- conversion would involve significant one-off costs for things like rewriting administration procedures and professional fees.

Overall it looks unlikely that many schemes will be quick off the mark in April.

# Disability - Malcolm is applied by EAT

In last summer's In Focus we reported on the important House of Lords decision in *London Borough of Lewisham - v - Malcolm* concerning disability discrimination. As readers may remember, Malcolm was a housing case rather than an employment case. One of the questions that arose from the Malcolm decision was whether it would be applied in an employment case given that the housing and employment provisions of the Disability Discrimination Act 1995 (DDA) are identical. That question has now been answered in the affirmative by the EAT (employment appeals tribunal) in the recent case of the *Child Support Agency (Dudley) - v - Truman*.

The *Malcolm* case, and now subsequently the *Truman* case, are important for employers because they overturn what was the previously held position on comparators in disability-related discrimination cases. Prior to *Malcolm* it was easier for individuals to show that they had been less favourably treated. The comparator used was a person to whom the underlying reason for the disabled employee's treatment did not apply.

Post *Malcolm* the comparator test is narrower and, therefore, it is less likely that disabled employees will be able to show that they had been treated less favourably.

The correct comparator is now a non-disabled employee whose circumstances are otherwise the same as the disabled employee. If, for example, a disabled employee is dismissed from work after a period of absence and a non-disabled employee would also have been dismissed in the same circumstances, then there would be no claim for disability-related discrimination.

Given that *Malcolm* and *Truman* provide less protection for disabled employees, the Government, in November 2008, released a consultation paper which proposed resolving this situation by introducing the concept of indirect discrimination, not currently present in the DDA. It was proposed that this legislation would be introduced in the forthcoming Equality Bill. However, this solution has not been greeted with enthusiasm by many of the parties who responded to the Government's consultation document. It is not yet known how this situation will be resolved, although one suggestion has been to revert to the pre-Malcolm days.

Until such changes take place the current position is that the narrow comparator approach taken in *Malcolm* and *Truman* is the one to be followed but all parties should bear in mind that it is likely that this position will change.



## Employment news in brief

With effect from 1 April 2009 the staff hire concession (SHC) can no longer be used. The SHC was introduced in 1997 as a temporary measure. It allowed employment businesses to charge VAT only on the margin on supplies of temporary workers rather than the full amount received by the employment business for the supply of a temporary worker. This is likely to have a big impact on those businesses that rely on temporary workers, for example private care homes, healthcare providers, private and voluntary aided schools etc but are unable to recover in full the VAT they are charged.

On 6 April 2009 the new ACAS Code of Practice on discipline and grievance will be introduced and the statutory dispute resolution procedures will be repealed. There are transitional provisions in place where disciplinary and grievance processes have already commenced on or prior to 6 April 2009. So for a period of time employers will have the added complication of operating two sets of procedures.

With effect from 6 April 2009 the weekly rate of statutory sick pay will increase to £79.15 and the weekly rate of statutory maternity (paternity and adoption) pay will increase to £123.06.

The Equality Bill which aims, amongst other things, to "simplify and strengthen equality law" is expected to be published in spring 2009.

Also with effect from 6 April 2009 employers will be required by HM Revenue & Customs to issue the new version of the form P45 to employees who stop working for them. The new form will require the employer to provide details of the employee's date of birth and gender.

## The 48 hour week and the opt-out - will it stay or will it go?

In December 2008 (see the winter edition of In Focus), we advised readers that members of the European Parliament had voted to end the opt-out from the maximum 48 hour week. However, that has been rejected by the European Commission (Commission) and the matter is now before the European Council of Ministers (Council). Unless there is a unanimous agreement by the Council on the opt-out, which is unlikely, the Council, the European Parliament and the Commission will have to enter into a period of conciliation to seek a resolution. If they fail to reach agreement then the current opt-out arrangements will remain. A decision is expected in May 2009.

Key points raised by the Commission, which relate to on-call time and the timing of compensatory rest, are as follows:

### 48-Hour Working Week Opt-Out

- To keep the opt-out but to phase it out as and when conditions allow (taking into consideration the current economic climate).
- Not to allow workers to opt-out during their probationary period.
- To extend the reference period (for calculating working time) to 52 weeks (it is currently 17 weeks).



- That there should be no upper limit on working time for workers who agree to opt-out.
- That an opt-out should expire after 12 months.

### On-Call Time

- Periods of inactive on-call time should be regarded as working time and should not count towards minimum rest periods. This is on condition that inactive on-call time is calculated in a specific way and not on an hour for hour basis.

### Timing of Compensatory Rest

- Periods of compensatory rest (taken when all or part of a rest period is missed by a worker) should be taken following a period of duty, except in specific sectors where it can be justified that the rest should be taken within a reasonable period.

If the opt-out does remain it is likely that it will be coupled with a number of safeguards to protect workers' health and safety and that may place even greater onus on employers to keep records and monitor the number of hours being worked by staff. We will keep you updated on this matter.

# Is your graduate scheme lawful?

The EAT has held that an employer (Osborne Clarke solicitors (OC) indirectly discriminated against a candidate who applied online for a training contract, when they refused to proceed with his application on the grounds that he needed a work permit. The reason given by OC for this policy was that it would be unable to obtain a work permit for a trainee solicitor.

OC stated that it would not be able to satisfy, and sign a declaration, that it could not fill the trainee solicitor role with a resident worker (an EEA national). OC relied on BIA (Border & Immigration Authority) standard guidance for that proposition. OC also argued on costs grounds that to consider all such applications would be an unnecessary financial burden. However, OC did not provide the tribunal with any evidence of that supposition.

Those arguments were rejected and OC was referred to the Code of Practice on Racial Equality and Employment (the Code). The Code states that an employer should verify a candidate's ability to work in the UK at the final stages of the selection process, not before hand. OC's online process meant that non-EEA applications did not proceed past the initial stage of selection. Nor had OC, according to the tribunal, carried out a review or considered whether it could make a successful work permit application. The costs argument was rejected by the tribunal as being "an unattractive way of justifying indirect discrimination".

The tribunal also stated that, if a non-EEA candidate passed OC's rigorous interview assessment, then that would be good evidence to put before the BIA when making a work permit application. As a



consequence, OC's appeal was turned down by the EAT and the tribunal decision was upheld. OC has said it will appeal this decision.

## Could this happen again?

Under the new points based system (see our autumn edition of In Focus for an explanation of the new points based system) non EEA candidates would be able to apply for training/graduate schemes under a number of routes:

- tier 1 (as a highly skilled worker, this would be an application by the candidate. However, with effect from 1 April 2009 applicants will need a masters degree as a minimum and pass the increased earnings threshold criteria) to qualify;
- tier 1 post study work application;
- tier 2 (which replaces the former work permit) but requires employers to satisfy the resident labour market test;
- tier 5 youth mobility (which allows an individual from a reciprocal country to work in the UK for up to two years).

## What should you do now?

- Check the application process for your graduate or similar scheme(s).
- If your company operates a non-EEA applications policy, consider whether that should be changed.
- If you do short-list a non-EEA candidate consider which tier, if any, would be the most suitable.

## TUPE - a round up of recent cases

- **Alemo-Herron & ors v Parkwood Leisure Ltd:** in this recent EAT case it was held that employees, whose contracts of employment incorporated a collective agreement, were entitled to benefit from changes made to that collective agreement post transfer even though the new employer was not a party to it. The employees had been employed in the public sector before being transferred into the private sector and claimed pay rises under a centrally agreed collective agreement. *Parkwood* has been given leave to appeal against this decision.
- **UCATT v Amicus & ors:** in this case the EAT held that the transferee employer was not obliged to consult with appropriate representatives, in this case Amicus and the TGWU, about transfer connected measures it envisaged making post transfer. The consultation obligations come to an

end on the date of the transfer. However, a transferee employer may be caught by other legislation which provides for consultation, for example if it were planning to make 20 or more redundancies post transfer.

- **Clearsprings Management Ltd v (1) Ankers & ors, and (2) Angel Services UK Ltd & ors:** in this case, the EAT decided that a transfer had not taken place as the activities carried out by an outgoing contractor, and which were now carried out by several contractors, were so fragmented post transfer that it was not possible to pinpoint which contractor now carried out those activities. This decision was based on a number of specific factors so it is not a blanket authority for the proposition that a change of service from one contractor to a number of contractors will avoid the TUPE regulations from applying.

## In the office

Congratulations to **Emily Greswell** (nee Daniels) of her recent marriage to Will.

## Recent email alerts include:

- ECJ ruling on workers' holiday pay looks set to sicken business - a decision confirming that workers accrue holiday whilst on sick leave.
- Still not a high day for Heyday – a decision of the ECJ confirming it is not unlawful for a member state to have a compulsory retirement age subject to the member state being able to satisfy that position on social policy grounds.

Narrow Quay House  
Narrow Quay  
Bristol BS1 4AH  
Tel: +44 (0)117 939 2000  
Fax: +44 (0)117 902 4400

Chancery Exchange  
10 Furnival Street  
London EC4A 1AB  
Tel: +44 (0)20 7685 1200  
Fax: +44 (0)20 7685 1266

[www.burges-salmon.com](http://www.burges-salmon.com)

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A list of members, all of whom are solicitors, may be inspected at our registered office: Narrow Quay House, Narrow Quay, Bristol BS1 4AH.