IN FOCUS

Welcome

Welcome to the winter 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@burges-salmon.com**. For information on pensions and/or incentives, please e-mail **tim.illston@burges-salmon.com**.

If you would like to receive periodic e-mail updates on employment, pensions or incentives law, please e-mail **marketing@burges-salmon.com** giving your details and specifying the areas in which you are interested. In addition, to receive your own copy of **In Focus** or if you would prefer to receive **In Focus** by e-mail, please e-mail your details to **marketing@burges-salmon.com.**

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Extension of the right to request flexible working

In last year's summer edition of In Focus we informed readers that the Government had accepted in full Imelda Walsh's (HR Director, J Sainsbury plc) recommendations to extend the right to request flexible working to parents of older children. However, in October 2008 Lord Mandelson (Secretary of State for Business and Enterprise) intimated that the Government might delay the implementation of this legislation given the current economic climate. Lord Mandelson's comments were greeted with both criticism and praise by various interested parties.

However, Pat McFadden (the Minister for Employment Relations and Postal Affairs) has now confirmed that the legislation will be implemented in April 2009 as originally planned.

For employers this means that by 6 April they will have to:

- amend any parental leave policies to ensure they are compliant with impending legislation. (The right to request flexible working will extend to those employees with parental responsibility for children up to the age of 16);
- review their processes for dealing with requests to ensure that a consistent approach is adopted across the company and that, at the very least, any agreed changes to working hours are documented;
- notify and train managers and supervisors about the changes in order that they can deal with requests from employees fairly and consistently.

However, in the current economic climate it may not just be parents with children who request a change to their working hours. Financial hardship may necessitate a need, by employees, to work more not less hours. An employer will not be legally obliged to consider requests from employees who are not covered by regulations. Whether an employer is prepared to consider requests from employees not covered by the regulations is ultimately a decision for the employer. However, what is clear is that it will not be easy for employers to balance the needs of a number of employees and so setting up a process to deal with requests consistently and fairly will be important.

The status of workers and underpayment of PAYE

Guidance on the Demibourne Regulations

The Demibourne case *(Demibourne Limited v. Revenue and Customs Commissioners (HMRC)[2005] STC 667)* confirmed that underpaid PAYE is the liability of the employer and that the employer will not be given credit for any tax the employee has paid on the sum under self-assessment. This case triggered new PAYE regulations, which came into force in 2008.

The regulations allow HMRC to make a direction that an employer is not liable to pay underpaid PAYE, if

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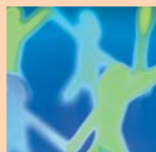

Employment news in brief

With effect from 1 February 2009 the financial limits for unfair dismissal compensation and other statutory payments will increase. For unfair dismissal the maximum compensatory award will increase from £63,000 to £66,200.

The maximum amount of a week's pay, used for example when calculating statutory redundancy payments and the basic award in unfair dismissal cases, will increase from £330 to £350. The increases will apply where the event giving rise to the entitlement to compensation or other payment (for example the effective date of termination in redundancy and unfair dismissal cases) occurs on or after 1 February 2009.

With effect from 6 April 2009 the weekly rate of statutory sick pay will increase from £75.15 to £79.15. From the same date the prescribed rate of SMP, SPP and SAP (statutory maternity, paternity and adoption pay respectively) will increase from £117.18 to £123.06.

With effect from 1 April 2009 the statutory entitlement to annual leave will increase from 24 to 28 days for all full-time workers. Part-time staff will be entitled to a pro-rata equivalent.

UK immigration restrictions continue for Bulgarians and Romanians: the Migration Advisory Committee has advised the Government not to lift restrictions which would allow Bulgarian and Romanian workers free access to the British labour market. Access for those workers has been restricted to the seasonal agricultural workers' scheme. However, the Government has increased the number of places in the scheme.

In December 2008 MEPS voted to end the UK's opt-out from the maximum 48 hour week. The next step is for the UK Government to enter negotiations with the European Council of Ministers with a view to retaining the opt-out. Practically, it is unlikely that the parties will reach an agreement and whilst there is a deadlock the opt-out will continue. The majority of MEPs want the opt-out to be scrapped within three years.

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the employee has already accounted for this tax by self-assessment (typically, following a status review where a worker is re-classified from being self-employed as an employee).

HMRC published guidance last autumn which gives information on the practical effects of the regulations, such as how it will exercise its discretion to make such a direction. The guidance states that HMRC will only refuse to make a direction in exceptional circumstances.

It is important to bear in mind that, even though HMRC may exercise its discretion under the regulations an employer may still be liable to account for underpaid National Insurance Contributions.

It is, therefore, still important to ensure that employers correctly determine the status of workers at the onset of their engagement to avoid potential tax liabilities.

Employers that retain consultants should consider including an indemnity in the consultancy agreement for any PAYE liabilities which may arise. Ideally the consultancy agreement should also require the consultant to pay tax on a self-employed basis, co-operate with the company on tax compliance issues and provide details of tax which he/she has paid or self-assessed amongst other things. For further information please contact our tax specialist, Nicola Ferguson, on +44 (0)117 902 2743 or email nicola.ferguson@burges-salmon.com.

To help employers determine the tax status of workers/employees Burges Salmon have developed a 'status toolkit'. If you would like further information on the toolkit and how it could benefit your organisation please contact Luke Bowery on +44(0)117 902 2716 or Chris Seaton on +44(0)117 939 2213 or email luke.bowery@burges-salmon.com or chris.seaton@burges-salmon.com.

ACAS Code of Practice

On 6 April 2009 the new ACAS Code of Practice on discipline and grievance will come into force (it is still in *draft* form as it has yet to be approved by Parliament but that is thought to be a formality). The autumn edition of In Focus outlined a number of the key changes.

ACAS has also published its guidance booklet to accompany the Code of Practice. The guidance booklet is just that, and tribunals will not be required to have regard to the booklet when deciding whether the employer (or employee) has unreasonably failed to follow the Code of Practice (and hence may be subject to a 25% increase (or reduction) in any award made).

Whilst the repeal of the dispute resolution regulations will be welcomed by employers there are a number of transitional arrangements which will keep them live in some cases for a while longer.

The Code of Practice, whilst not as rigid as the dispute resolution procedures, still puts emphasis on process. It is, therefore, important that all managers are properly trained on the Code of Practice to ensure that they do not unreasonably fail to comply with a provision of it thereby putting the employer at possible risk.

This is the time to be putting that training in place so that managers not only understand the Code of Practice but also so that they are familiar with the transitional arrangements so that they will know when the Code of Practice applies and when the dispute resolution procedures still apply.

In order to help employers understand the changes and their implications we are holding a seminar on the Code of Practice which will take place at our Bristol offices on 5 March and our London office on 12 March 2009. We are also delighted to announce that Michael Gibbons (in March 2007 Mr Gibbons undertook an independent review of the statutory dispute resolution procedures and, amongst other things, recommended their repeal) will be introducing the March seminar in our London office. If you would like to reserve a place at either of these seminars please email seminars@burges-salmon.com or register online by going to www.burges-salmon.com and clicking on *News and Events.*

We regularly provide in-house training to clients so if you would like specific training for a team or group of people this can be arranged. For more information please contact Kate Redshaw on kate.redshaw@burges-salmon.com or + 44 (0) 117 902 6610.

Who is a “relevant adviser”?

After consultation the Government has decided that the definition of "relevant adviser" for the purposes of signing compromise agreements will not be extended to include HR professionals. The Government had considered extending the definition to include members of the CIPD but there was insufficient support for this proposal.

The definition of relevant adviser will, therefore, remain unchanged (qualified lawyer, union officer, member, official or employee of an independent trade union who has been certified in writing as being competent to provide such advice and an employee or volunteer at an advice centre who has also been certified as competent to give such advice).

Barber lives

If any of a member's pension is payable from age 60, their whole pension has to be paid from 60. So says the latest sex equalisation case.

Unless the decision is overturned on appeal, it will mean that a lot of schemes will need to change the date they pay benefits to members with Barber window service. Schemes that allow unreduced early pensions face a significant increase in their liabilities.

Window service

The Barber window is the period after the *Barber* decision when NRDs remained unequal. In a typical scheme, all benefits accrued during the window are payable as of right at age 60. Benefits accrued after NRDs were equalised are generally expressed to be payable as of right at 65. Normally, early payment of these benefits requires company consent and the benefits are reduced. Accordingly, many schemes have been administered using 60 and 65 as separate dates of entitlement for different slices of pension.

But now the decision in *Foster Wheeler v Hanley* would give members a right to receive all their pension at 60. This includes any pension with a notional NRD of 65 which would be payable early as of right regardless of any scheme stipulation for consent. As long as the early pension was reduced, there would be no increase in cost.

Price of flexibility

The difficulty in *Foster Wheeler* was that the scheme provided for early pension taken after age 60 to be unreduced. This was deliberate: the employer wanted to be flexible about retirement. If the appeal is unsuccessful, giving members freedom of choice will cost it significantly more than it anticipated.

If the first instance decision stands, many schemes will need to bring forward that date they pay pensions. But the big issue is for schemes that offer unreduced pensions from age 60. Like Foster Wheeler, they face substantially increased liabilities.

Action

We recommend that schemes consider what implications the case has for them. In particular, schemes that offer unreduced early retirement pensions should weigh the pros and cons of waiting for the outcome on appeal (in six months or so) before considering rule changes.

If you would like our fuller note on the case, please email pensions@burges-salmon.com.

Shush

The Pensions Regulator (TPR) has found that three of its "notifiable events" have been no use as early warnings of underfunding or the employer's insolvency. Amending regulations will remove the following trio from the list of events that employers or trustees must report spontaneously.

Notifiable by the employer

- Two or more changes in CEO or finance director in 12 months.
- A change in credit rating from investment to sub-investment by Standard and Poor's, Moody's or Fitch.

Notifiable by the trustees

- Two or more changes in scheme actuary or auditor in 12 months.

The other ten or so events on the original list remain notifiable. At a guess, the obsolete events could be dropped from April.

Prompt!

TPR has reminded employers of their obligation to consult members when they make substantive changes to pension benefits for future service. This is linked to a DWP proposal to amend the regulations to allow TPR to impose civil fines on employers that fail to comply without a reasonable excuse. The fines would be on TPR's usual scale – up to limits of £50,000 for a company and £5,000 for an individual.

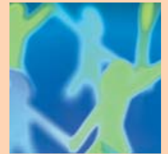
The reminder is timely in other ways. Our experience is that employers can be unaware that the consultation requirements apply to the kind of transaction they are planning. Or they can find themselves committed to a timetable that does not allow for the minimum consultation period of 60 days.

TPR's statement gives a clear hint that pressing external events of the kind that many businesses are now facing can be a reasonable excuse for non-compliance – as long as the employer does its best in the circumstances:

"We realise that it is not always practical to consult, for example, when restructuring is taking place and there is an immediate threat to either the scheme or employees' jobs if the process is delayed. In such cases we urge employers to provide as much information as possible to those affected even if only on a confidential or restricted basis and to apply the longest practicable timescale before the changes are implemented.

The regulator may agree to waive or relax any of the requirements in connection with the duty to consult if it is satisfied that it is necessary to do so in order to protect the interests of the majority of the scheme members."

TPR's reminder is at: **www.thepensionsregulator.gov.uk/pdf/EmployerDutytoConsult.pdf.**



Pensions & incentives news in brief

The DWP has consulted informally on changes to the regulations about the employer debt under s.75 Pensions Act 1995. One proposal is to tidy up the definitions of the events that trigger a debt when an employer ceases to participate in a multi-employer scheme. Otherwise the proposed changes are largely technical. There will be a public consultation on amended regulations in February. The consultation will also cover proposals (that we reported in the winter issue of Trustee Insight) that no debt should arise when an employer ceases to participate in a multi-employer scheme unless the covenant deteriorates. Changes to the regulations will come into effect in October.

■

TPR has issued final guidance on scheme record keeping. Good governance requires good data, it says. See **www.thepensionsregulator.gov.uk/pdf/RecordKeepingPDF.pdf.**

■

The European Commission is challenging the UK to amend legislation that denies a tax deduction for contributions to pension schemes established outside the UK unless the scheme gives HMRC certain information. The effect, the Commission says, is to deny workers their right to freedom of movement in the EU. If the UK cannot show that its practice is compatible with EU law, the matter could go to the European Court of Justice.

■

When TPR issues its code of practice on the new "material detriment" test for a contribution notice (CN), it will also issue guidance on the intricate statutory defence of having acted reasonably. TPR will also give examples of moves that it considers to be within range of the original CN provisions for the first time now that it no longer has to prove that someone acted in bad faith in trying to cut a s.75 debt.

Moving story

Moving data outside the European Economic Area (EEA) is risky. But with careful planning many pension schemes are addressing the risks successfully, *writes Ed Bodey from our information technology team.*

Data held in the UK is closely protected by the Data Protection Act 1998 (DPA) and other measures. Employers and pension scheme trustees should always be mindful of their duties.

Protection outside of the EEA can be weaker or non-existent. In response the Data Protection Act imposes responsibilities on data controllers like trustees who transfer data outside the EEA. If your trustee board is considering outsourcing scheme administration abroad, you need to be aware of the key obligations.

Key obligations

- Give **fair processing information** to individual scheme members stating:
  - that their data is processed by a third party on your behalf and that you propose to transfer the processing of their data outside the EEA;
  - the purposes for which their data will be processed (typically including scheme administration); and
  - the steps you are taking to comply with the DPA in making the transfer.
- Satisfy **fair processing conditions**. These must be met before the transfer. What they are depends on the type of data – is it non-sensitive personal data or sensitive personal data? For example, you can transfer non-sensitive personal data if you can show that the individual has consented, or that it is necessary for your legitimate interests as a trustee. With sensitive personal data the requirement is stricter and you must satisfy additional conditions – most commonly unambiguous, informed and express consent. This is difficult to achieve in practice.
- Ensure **adequate levels of protection**. Even where you have not got or cannot get consent, you can still transfer non-sensitive personal data by:
  - establishing binding data protection practices across the organisations involved;
  - using the "model contract clauses" approved by the Information Commissioner (the government-appointed body that enforces the DPA); or
  - making your own assessment of the adequacy of data protection measures in the relevant country.

  The "model contract clauses" is the route that most trustees take. But an increasing number of cases involve the transfer of data from a UK administrator to its overseas subsidiary rather than directly from the trustees to the overseas subsidiary. Here the "model contract clauses" do not apply, so additional steps may be needed.
- Ensure there are **appropriate technical and organisational measures** to protect the data, including:
  - risk assessments to review the physical and technical security of the data and the reliability of the staff who will have access to it;
  - audits to ensure ongoing compliance with the measures that are introduced.

  All obligations relating to the transfer of the data must be recorded in writing.

Buck stops

While your scheme administration is outsourced you should be aware that, as a data controller, you remain at all times:

- **responsible** for the acts and omissions of your third party administrator and any subsidiary that processes data outside the EEA; and
- subject to the **enforcement powers** of the Information Commissioner.

Pension scheme trustees cannot transfer data outside the EEA without considerable research, preparation and assistance.

For more information please contact **Ed Bodey** (edward.bodey@burges-salmon.com).

Looking back

TPR has been consulting on a proposal to increase the look-back period for issuing a financial support direction to 24 months (up from 12). This will mean that an employer will need to have been "insufficiently resourced" relative to other group companies (or a service company) in the two years before TPR decides to issue an FSD. The length of time it takes for TPR to become aware of the facts of a case and to go through its decision making process mean that this is a reasonable extension. So far TPR has issued only one FSD (to Sea Containers).

In Focus - pdf

If you would prefer to receive your copy of In Focus as a pdf rather than paper copy then please email **paul.kitson@burges-salmon.com** to request a pdf copy.

Recent email alerts include:

- Revised ACAS Code of Practice on discipline and grievance
- Compensation limits to increase in cases of unfair dismissal
- New government proposals to square flexible retirement with the age discrimination regulations
- ECJ ruling on a worker's right to paid holiday whilst on long-term sick leave

In the office

We welcome **Nicky Chatten** and **John Dinnegan** to the pensions team. Nicky joins us having done pensions and employment work at one of the magic circle firms in the City. John joins after working for a Dublin firm where he had three years pensions experience.

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

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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.

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