

IN FOCUS

PENSIONS & INCENTIVES NEWS

DWP inflexible

The Government is not going to create special exemptions for flexible retirement under the age discrimination regulations. But it *might* issue guidance in the longer term.

The two – very narrow – exemptions from age discrimination law that the Department for Work and Pensions put out to consultation a year ago are not going ahead. Nor will there be any other express exemptions for arrangements that allow members to draw some or all of their pension from their employer's scheme while continuing in their job.

This does not mean that flexible retirement is necessarily age discriminatory or that it cannot be justified, case by

case, as a proportionate means of achieving a legitimate business goal. It only means that there will be no statutory exemptions.

The DWP appears lukewarm about issuing guidance. Any it does issue will follow after the major consolidation of equality law that it is working on with the Equality Bill (now in Parliament). Any guidance would not be legally binding.

All that said, the two exemptions would have been little use because they defined flexible retirement very narrowly – switching to a lower job grade or reduced hours after reaching state pension age. This is a much more restricted concept of phased retirement than many schemes use.

Welcome

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

For further information on pensions issues, please email tim.illston@burges-salmon.com

Green issue

In future we intend to distribute our publications by email to reduce our environmental impact. This also has the advantage of eliminating the delay in printing and posting.

For some of you this will be the first time that you have received one of our publications by email. If it is, we hope you agree with our policy.

If you have received this newsletter by post, please let us have an email address for future mailings.

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No way round

A restriction on a scheme alteration power that protects "benefits already secured" will often refer to benefits based on *future* pay on leaving, death or retirement. It is hard for an employer to get round such a restriction by coming to individual agreements with members outside the scheme. This is what the court decided recently.

The amendment power in the IMG scheme prohibited amendments that "reduc[e] the value of benefits secured by contributions already made". When the scheme was changed from defined benefit to defined contribution, it was incorrect to convert past service benefits using pay at the time.

The court also decided:

- where an amendment power does not say whether alterations can be made retrospectively, they can be backdated as long as this would not be unfair. Backdating the conversion by three months was unfair because it deprived members of that much DB accrual;
- the information members received did not invite them to agree the switch to DC and was vague about the conversion of past service. So the employer failed in its



attempt to use the *South West Trains* case to argue that it had reached a contractual agreement with the members that trumped the scheme rules. That argument had succeeded in the *South West Trains* case where the facts were very different; and

- written agreements with the employer in which members purported to give up their claim to DB rights for past service were invalid under s.91 Pensions Act 1995. This section makes it unlawful to surrender a right to a pension except in specific circumstances that did not apply.

The events in this case predated s.67 Pensions Act 1995.

When I'm 55

A further reminder that from 6 April 2010 the minimum age for drawing an early retirement pension will normally be 55. Ill-health is one exception. Another is where, before A Day, you had a right (tightly defined) to take your pension at an

earlier age. HMRC's Pension Schemes Newsletter 38 has practical guidance: www.hmrc.gov.uk/pensionschemes/ps-newsletter38.htm.

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Employer debt decision

The court has decided what the key concept of an "employment cessation event" (ECE) in the employer debt legislation (s.75 Pensions Act 1995) meant before 6 April 2008.

This is an important decision for employers still considering whether they experienced such an event. It can also have significant implications for who counts as a "former employer" with continuing funding obligations.

The court held that an ECE did not occur when an employer participating in a multi-employer scheme ceased to employ active members but still employed:

- a late retiree who had reached NRD but postponed his pension, or
- someone who was eligible to join the scheme but had elected not to do so.

This is a narrower meaning than the court could have opted for.

The logic of the decision is that continuing to employ a deferred member (e.g. someone who had opted out) could well have the same effect.

At the time, an ECE was defined as occurring when an employer "ceases .. employing persons in the description of

employment to which the scheme relates at a time when at least one other person continues to employ such persons."

The court decided that what mattered was an individual's status as an employee, not their position as an active, deferred or pensioner under the scheme.

Amendments to the legislation in April 2008 redefined an ECE so that ceasing to employ active members (without being the last employer to do so) now normally triggers the employer debt. This widens the concept to catch more events and means there are now two distinct regimes – pre and post April 2008.

Ill-health better

When your scheme winds up or is accepted into the PPF you are better off on an ill-health pension than an ordinary early retirement pension.

The PPF compensates ill-health pension at 100% but pays only 90% of an early retirement pension and also applies its cap. There is a parallel advantage on a winding up because benefits up to PPF level have higher priority.

If there is no difference in the way the two pensions are calculated, a scheme's records may not make clear which type of pension a member is receiving. But now there is a compelling reason to document ill-health pensions clearly. Remember, too, that since A Day trustees need evidence from a doctor that the member is incapable of carrying on his occupation.

Presumption against

The Pensions Regulator has re-emphasised the need for trustees to be vigilant if the employer proposes financial incentives for members to transfer out of a DB scheme.

In a recent speech David Norgrove, TPR chair, encouraged trustees to be sceptical and to start from a presumption that incentivised transfers are not in members' interests. In his most quotable line: "If the company is willing to encourage the transfer, the company's gain is likely to be the member's loss."

On the other hand, he acknowledged that individual circumstances could lead members "to make a transfer decision based on sound rationale and advice."

TPR has become concerned by reports of "worrying tactics" like misinformation about the advantages and disadvantages, excessive pressure to make a decision, and offers of financial advice that the employer will pay for only if the member acts on it.

TPR's central message is that members should receive full and fair information and have a proper opportunity to consider their options and to take impartial advice.

Although the speech has attracted headlines, it was really only a restatement, in more quotable terms, of the guidance TPR issued a couple of years ago (under the heading "Inducement Offers").

News in brief

- The PPF has been consulting levy payers over its proposal to change the insolvency probability associated with employers' D&B failure scores for the 2011/12 levy. The PPF has worked with D&B to produce a table of probabilities that more accurately reflects its experience on the ground. The proposed probabilities are generally higher, many substantially so. The impact on bills will depend on the relative change for different failure scores. The deadline for

information to influence insolvency risk for levy year 2011/12 is 30 March 2010.

- If you do not receive our publications by email you will not have had our note on the recent case about the extent to which trustees can take account of the existence of the PPF. It is available at www.burges-salmon.com/Practices/pensions_and_incentives/Publications/default.aspx.

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