Sackers extra

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Abbreviations commonly used in 7 Days

Alert/News: Sackers Extra publications (available from the client area of our website or from your usual contact)
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
FAS: Financial Assistance Scheme
HMRC: HM Revenue & Customs
PPF: Pension Protection Fund
TPR: The Pensions Regulator

LEGISLATION

Finance Act 2010

The Finance Bill received Royal Assent and entered the statute books on 8 April 2010, barely a week after it was first published and after only a few hours of debate in Parliament.

The Finance Act 2010 includes provisions (originally announced in the 2009 Budget) for restricting tax relief on pension contributions for individuals earning £150,000 and over (including employer pension contributions), subject to a pre-tax income floor of £130,000. These are contained in Section 23 and Schedule 2 to the Act.

In addition, Section 48 amends Schedule 35 to the Finance Act 2009, to extend the "anti-forestalling" measures to individuals earning £130,000 or more from 9 December 2009 (the date of the Pre-Budget Report).

For more information on recent developments on this subject, please see our Alert: Scant relief for pensions in Darling's pre-Election Budget (dated 25 March 2010).

During debate on the Bill in the House of Lords, Financial Services Secretary to the Treasury, Lord Myners, stated that "in providing these reforms now, we have had to balance the need to provide certainty and allow industry and individuals time to prepare with the need to consult further on some aspects of implementation. Clause [24[1]] therefore provides a number of powers that allow the Government to return to aspects of the implementation." He also noted that the reforms to income tax and pensions are only expected to affect the top 2 per cent of earners.

Equality Act 2010

The Equality Bill also received Royal Assent on 8 April 2010. This new Act is designed "to harmonise discrimination law, and to strengthen the law to support progress on equality".

The Act brings together and re-states a number of anti-discrimination laws which will be familiar to those who operate in the world of occupational pension provision, including:

- The Equal Pay Act 1970;
- The Sex Discrimination Act 1975;
- The Disability Discrimination Act 1995; and
- The Employment Equality (Age) Regulations 2006.

The Act seeks to harmonise existing legislative provisions, giving a single approach where appropriate. The majority of the Act's provisions will take effect from 1 October 2010.

[1] Now section 23 of the Act

CONFEDERATION OF BRITISH INDUSTRY

Public Sector Pensions reform

The Confederation of British Industry (CBI) has published a report entitled: "Getting a grip: the route to reform of public sector pensions", in which it considers:

- the need for transparency on the costs of public sector pensions and the liabilities built up;
- the principles which should underpin the redesign of public sector pensions. The CBI suggests that these include "recognising pensions as part of the total reward package and aligning public sector retirement ages with the state pension age";
- an evaluation of the different forms that public sector pension arrangements might take; and
- a model of a pay-as-you-go DC pension scheme, which the CBI suggests "could be the future" for public sector pensions.

A cop of the CBI press release which accompanies the report can be found here.

FINANCIAL ASSISTANCE SCHEME

FAS was established under the Financial Assistance Scheme Regulations 2005 (the 2005 Regulations). FAS allows payments to be made to, or in respect of, certain members or former members of certain underfunded occupational pension schemes which went into winding-up between 1 January 1997 and 5 April 2005 with an insolvent employer.

Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2010 (the 2010 Regulations)

The 2010 Regulations complete the delivery of a package of changes to the FAS announced in December 2007. These changes have included increases to the level of payments made and the transfer of the administration of the FAS from the DWP to the PPF.

As we reported in 7 Days on 5 April 2010, the 2010 Regulations amended the 2005 Regulations with effect from 2 April 2010 so that, among other things:

- the property, rights and liabilities of those occupational pension schemes are to be transferred to the Secretary of State in certain circumstances; and
- FAS will be able to pay lump sums that are similar to some of the lump sums that registered pension schemes are permitted to pay.

As some members of schemes transferring assets would have received higher payments than the FAS would provide as standard had their scheme instead wound up in the normal way by purchasing annuities from insurance companies, these 2010 Regulations set out rules by which:

- assets of the schemes are valued;
- those assets are allocated to members;
- a 'notional pension' is calculated from the asset share allocated to the member; and
- that notional pension is compared with the amount of assistance the member would otherwise receive as standard.

The 2010 Regulations also provide for lump sums to be paid by FAS to certain members and for those lump sums to be restricted by reference to the amount of notional pension derived from the member's asset share.

Financial Assistance Scheme (Tax) Regulations 2010 (the 2010 Tax Regulations)

The Financial Assistance Scheme (Tax) Regulations 2010, which will come into force on 1 May 2010, make certain tax provisions as a consequence of the 2010 Regulations. In particular, they prevent extra tax charges from arising when the property, rights and liabilities of a tax-registered occupational pension scheme that is winding up under-funded are transferred to the Secretary of State for Work and Pensions for the purposes of FAS. They also ensure that all FAS payments receive broadly the same tax treatment as payments from a registered pension scheme in the hands of the recipient.

Further information can be found in the Explanatory Memorandum.

Consultation Response: FAS Guidance

The DWP recently consulted on draft guidance in relation to the valuation of assets and liabilities of relevant schemes, and how individual asset shares are to be calculated for scheme beneficiaries. The Government also sought views on draft guidance on how transferring schemes might deal with the impact of the Guaranteed Minimum Pension (GMP) on the equalisation (between men and women) of members' expected pensions ahead of providing data to the FAS Scheme Manager.

A parallel consultation was undertaken by the Government on revisions to the synthetic buy-out basis, which seeks to estimate the cost of securing bulk annuities with insurers. The basis is used to help calculate FAS payments and will be used by actuaries undertaking FAS valuations.

The DWP's Response to consultation notes that, in general, responses were supportive of the proposals. As a result of the consultation, a number of changes to the guidance have been made for clarity. And on the issue of GMP equalisation, the guidance has also been amended "to clarify that the suggested methodology for equalising asset shares between men and women for the effect of GMPs is not prescriptive, but rather a possible route to achieve equalisation that actuaries may choose to apply if they considered it appropriate for the particular scheme."

Revised valuation guidance is available from the PPF website. The changes to actuarial factors resulting from the revised synthetic buy-out basis are being introduced with effect from 21 April 2010, in order that FAS payments calculated after the publication of the Government's response can be made on the basis of revised actuarial factors.

HM REVENUE & CUSTOMS

New form APSS303

HMRC has published a new Pension Schemes Services Form APSS303. This is designed to help customers comply with the new requirement to report unauthorised borrowing which takes place from 6 April 2010.

National Insurance Services to Pensions Industry (NISPI) Newsletter 37

NISPI has published Pensions Industry Newsletter 37. This latest newsletter covers a wide range of subjects from "Enhancement to Data Security Arrangements" and "Changes to the State Pension Age" to the "Completion of CA forms".

PENSION PROTECTION FUND

PPF publishes its latest Management and Business Plans

The PPF has published its Management Plan 2010/11 - 2012/13 (incorporating Business Plan 2010/11), outlining its strategic objectives for the next three years, as well as key performance indicators for the year ahead.

Key objectives for the PPF include changes to the way in which it manages schemes through the assessment process, based on a series of strategic priorities that are designed to transform the way in which it manages schemes, from the point of entry into the assessment process to the point of payment of compensation to eligible scheme members.

The PPF states that its priorities include:

- the refining of its operating model, to focus internally on core activities and deliver non-core activities through partnerships that provide value for money;
- empowering the teams that facilitate schemes through the assessment process to take decisions within an acceptable risk profile, thereby expediting schemes' transfer to compensation;
- taking greater control over delivery through enforceable arrangements with its partners that reward good and penalise poor performance; and
- articulating efficient processes to external audiences and developing integrated systems to enable the PPF to ensure that individuals and partners are doing what it asks of them.

It also notes that improvement of the quality of data held and managed by pension schemes and their administrators is fundamental to the success of this programme of work, and ultimately to speeding up the assessment process. The PPF therefore intends to work with the industry and TPR "to bring about the sea-change in data quality standards that is required".

Lady Judge appointed Chair of Pension Protection Fund

Barbara Judge has been appointed as the new Chair of the PPF, with effect from 1 July 2010 for an initial period of three years. Lady Judge will join the PPF from the UK Atomic Energy Authority, which she currently chairs.

DWP Press Release

CASES

Low & Bonar PLC and Low & Bonar Pension Trustees Limited v Mercer Limited

This Scottish case centred on whether a scheme had been effectively equalised, prior to the execution of a Deed in 2002, by a board resolution in 1991. The case highlights the fact that pension scheme amendment formalities may be less restrictively interpreted in Scottish law.

Background

Prior to the *Barber* judgment on 17 May 1990, it was permissible and normal practice for UK occupational pension schemes to have unequal retirement ages between male and female members, usually at 65 for men and 60 for women. This reflected state pension ages. After the date of the judgment, 17 May 1990, all UK occupational pension schemes were required to equalise pension ages for men and women.

Like many schemes, the Low & Bonar Group Retirement Benefits Scheme (the Scheme) had a normal retirement age (NRA) of 65 for men and 60 for women. Mercer advised that the NRAs should be equalised at 65.

Facts

The case centred on the question of whether the Scheme had been effectively equalised, and if so, from what date.

Low & Bonar plc (the Company) argued that the Scheme had been equalised by a resolution at meeting of the board of directors on 5 March 1991. This resolution was approved by the Trustees in the minutes of their meeting on 5 July 1991. The resolution stated the change was to come into force on 1 July 1991.

But Clause 4 of the Trust Deed and Rules provided that amendments needed to be made by deed by the Company, with the consent of the Trustees. The Scheme's Trust Deed and Rules were not formally amended until 15 August 2002. The question therefore arose whether the Board resolution in 1991 was effective to equalise NRAs for men and women, or whether equalisation was not effective until the deed was entered into in 2002.

The Scheme was administered from 1991 as if the NRA for service was 65 for both men and women.

Decision

The Scottish Court of Session held that the board minute of 5 March 1991 amounted to a deed for the purposes of clause 4 and the scheme was therefore equalised with effect from 1 July 1991.

Under Scottish law the word 'deed' does not have a technical meaning in the same way as it does under English law. The characteristics of a deed in Scottish law are simply that it should have some degree of formality and it must demonstrate an intention to create legal relations. These were met in the following way:

- The judge decided that the board minute was a formal document. Part of the reasoning for this conclusion was that, under the Companies Act 1985 (which was in force at the time), a board minute signed by the chairman was said to be evidence of the proceedings (s385(2)).

- It was further held that the fact that the minutes referred to certain matters, including the equalisation changes, being "agreed" was sufficient to demonstrate an intention to create a legal relation.

- Finally, as the minutes of the Trustees meeting on 5 July 1991 show that they intended to implement these changes this was held to constitute the necessary consent.

Comment

This decision turns on the particular meaning of the word 'deed' under Scottish law. The Scottish court has taken a very practical and commercial approach to deciding whether the requirements for a 'deed' have been met.

By contrast, several recent cases in the English courts have held that schemes have not been equalised where formalities were not adhered to properly, for example see the 2009 cases of *Walker Morris v Masterson* and *Harland v Woolf*.