

23 January 2012

At a glance

DEPARTMENT FOR WORK AND PENSIONS

- Equalisation of Guaranteed Minimum Pensions: Consultation launched
- DWP communicates changes to State Pension Age
- Auto-enrolment campaign launched

HM REVENUE & CUSTOMS

- Pension Scheme Returns and Event Reports: 31 January deadline approaching
- Relief at Source: Project update

PENSIONS POLICY INSTITUTE

- PPI Briefing Note: What are the lessons from KiwiSaver for automatic enrolment in the UK?

THE PENSIONS REGULATOR

- TPR to issue statement on DB scheme funding

CASES

- Nortel Networks Inc and others v Trustee of Nortel Networks UK Pension Plan; Board of the Pension Protection Fund

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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

ECJ: European Court of Justice

FAS: Financial Assistance Scheme

HMRC: HM Revenue & Customs

NEST: National Employment Savings Trust

PPF: Pension Protection Fund

TPR: The Pensions Regulator

DEPARTMENT FOR WORK AND PENSIONS

Equalisation of Guaranteed Minimum Pensions (GMPs): Consultation launched

On 20 January 2012, the DWP published its long-awaited [consultation](#) on GMP equalisation.

Equalisation background

On 17 May 1990, in the case of *Barber v Guardian Royal Exchange*¹, the ECJ held that pension benefits were a form of deferred pay and therefore subject to EU equal pay provisions. This meant that it was discriminatory for schemes to provide different retirement ages for men and women. Consequently, UK legislation² includes an overriding equal treatment rule for occupational pension schemes, which requires that any rule which treats one sex less favourably than the other must be read as though it did not treat that sex less favourably.

GMPs and PPF compensation

Under the Pensions Act 2004³, the PPF is required to ensure that the compensation is paid on an equal basis to men and women. The Government concluded that this requirement extended to GMPs. Following a lengthy consultation, in November 2011 the PPF confirmed the method that it would use to calculate PPF compensation to ensure the equal treatment of men and women in respect of GMPs. Before applying the method to all pension schemes in the PPF assessment period, the PPF is undertaking a six month pilot project with selected schemes.

GMPs and occupational pension schemes

The method for calculating GMPs is set out in legislation and is different for men and women because GMPs are based on unequal state pension ages (historically 60 for women and 65 for men but in the process of being equalised at 65 and then increased for both sexes).

Until now, it has never been made clear whether contracted-out occupational pension schemes also needed to equalise GMPs. After some deliberation, the Government has decided that a change in the law is needed to make it clear that occupational pension schemes must equalise GMPs.

The DWP is therefore consulting on draft regulations which seek to amend the Equality Act 2010 to extend the equal treatment provisions to benefits derived from GMPs. The DWP has also published a possible method for equalising benefits "for the effect" of the GMPs, although it is envisaged that schemes would be able to select any appropriate method of equalisation.

¹ ECJ case ECJ Case C-262/88

² Sections 64, 67-70 Equality Act 2010

³ Section 171 Pensions Act 2004

Broadly, the DWP's possible method relies on a comparison between a member's GMP under the scheme rules and the relevant legislation with that of the opposite sex. Each year, the scheme would then pay the member the higher of:

- the amount they would receive under the scheme rules; and
- the amount they would have received under the rules were they of the opposite sex.

In addition, schemes would need to address the date benefits come into payment. If a member would have been entitled to their pension earlier had they been a member of the opposite sex then the pension should be put into payment at that earlier age.

The DWP is at pains to stress that, if published, its method "would not be legal advice to schemes on how to equalise, or be a definitive statement on how to equalise".

The consultation closes on 12 April 2012.

We will be issuing an Alert shortly.

DWP communicates changes to State Pension Age (SPA)

The DWP announced in its January 2012 [Stakeholder Bulletin](#) that the Pension Service will be writing to individuals who are affected by the forthcoming increases to SPA (i.e. those born up to 5 April 1955) to advise them of their new SPA date and provide more general information about State Pension changes and extending working lives.

Further information on the State Pension and retirement planning is available from the [Directgov website](#).

Auto-enrolment campaign launched

Starting in October 2012, employers will be required to enrol workers automatically into a workplace pension scheme. The DWP has launched a [campaign](#) aimed at individuals in two priority audience groups - the "daunted" and the "unprepared" - whom it has so far found difficult to engage on the subject of pensions.

The campaign, which includes advertising on radio, in national press and online, aims to increase understanding what a workplace pension is, and of its benefits, ahead of the more detailed information they will receive when they are enrolled. From February 2012, a telephone line will be available for those without online access.

[DWP Press Release](#)

HM REVENUE & CUSTOMS

Pension Scheme Returns and Event Reports: 31 January deadline approaching

The deadline for submitting Registered Pension Scheme Returns and Event Reports for the 2010/11 tax year is 31 January 2012. These returns and reports must be sent to Pension Schemes Services using [Pension Schemes Online](#).

Relief at Source: Project update

In June 2011, HMRC issued [Newsletter 47](#), which included an item outlining the work being done by HMRC to review the Relief at Source (RAS) process.

Since then, the project team has been exploring the potential for changes to the existing paper process and investigating the extent to which it might be possible to develop an electronic solution. A workshop is being held in January 2012 with a cross section of pension providers, to aid HMRC's understanding as to how providers currently manage member pension contributions and subsequent claims for tax relief and to consider how these might be improved using an electronic solution.

PENSIONS POLICY INSTITUTE (PPI)

PPI Briefing Note: What are the lessons from KiwiSaver for automatic enrolment in the UK?

PPI [Briefing note 62](#) examines the effect of auto-enrolment in New Zealand (NZ) and the possible implications for the UK.

Key conclusions that the PPI draws from its analysis include:

- compared to the system in NZ, the UK retains complexity which may require simplification at a later stage;
- opt-outs in the UK could be influenced by the requirement to enrol all eligible employees, and not only those joining the workforce or changing jobs, as in NZ;
- the NZ experience shows that employees and employers both tend to contribute at the legal minimum rate and that this may not be enough for some employees to achieve the level of income desired in retirement; and
- while auto-enrolment in the UK could result in a significant number of new pension savers in the target group, affordability and fear of changes in legislation once the system is rolled out may affect employees' participation.

THE PENSIONS REGULATOR

TPR to issue statement on DB scheme funding

TPR has [announced](#) that it plans to issue a statement in April 2012 which is designed to help trustees dealing with the actuarial valuation and recovery plan process in the current economic climate.

TPR's executive director, Stephen Soper, notes that "During the past four years of economic turbulence, the scheme specific funding regime has provided the flexibility necessary to support sponsoring employers and trustees to find appropriate funding arrangements that protect the scheme – as well as being affordable and reasonable for the employer. The economic conditions at each valuation date are unique and trustees will need to consider the impact of these on their valuation and recovery plan closely."

TPR therefore intends to set out its expectations of those trustees who are embarking on their valuation process, and will continue to issue such statements on an annual basis.

The press release also includes details of other plans on TPR's horizon:

- a consultation is due in April 2012 on the procedures for TPR's case teams as they bring a case to the regulator's Determinations Panel (DP) and a consultation by the DP on an updated version of the procedures it follows for making a determination on a case; and
- later in the year, setting out its strategic view as to how it will regulate the DB landscape in the future.

CASES

Nortel Networks Inc and others v Trustee of Nortel Networks UK Pension Plan; Board of the Pension Protection Fund

The US Court of Appeals has refused to overturn a decision of a US Bankruptcy Court that the issue by TPR of a warning notice for the issue of an FSD against US Nortel companies breached an automatic stay which was imposed under US Chapter 11 insolvency law.

Background

Certain Nortel companies in the UK, including Nortel Networks UK Limited (NNUK) (the principal employer of the Nortel Networks UK Pension Plan (the Plan)), entered administration in January 2009. The Plan had a £2.1 billion deficit. At the same time, certain Nortel companies in the US filed for protection under Chapter 11 of the US Bankruptcy Code.

In January 2010, TPR issued a warning notice to a number of companies in the Nortel Group, of a financial support direction (FSD). In February 2010, the US companies applied to the US Court to enforce the automatic stay (to prevent the Trustee and the PPF from participating in the UK proceedings with respect of the US Debtors' liability for NNUK's deficit in the UK Pension Plan). The FSDs were issued in July 2010.

The United States Code: Chapter 11 Bankruptcy Proceedings

In the US, when a debtor files for bankruptcy, the Bankruptcy Code imposes an automatic stay which prohibits any new actions from being brought against the company. This is one of the fundamental protections for debtors under the Bankruptcy Code.

There are, however, certain statutory exceptions to the automatic stay, including the "police power exception" which was at issue in this case. The purpose of this exception is to allow a governmental unit to commence actions to further its police or regulatory powers.

Decision

The Appeals Court agreed with the Bankruptcy Court's conclusion that neither the Trustee nor the PPF were a "governmental unit" within the scope of the police power exception. It concluded that:

- the Trustee is a private party, responsible for administering the plan and ensuring that members receive their benefits; and

- while the PPF was created by the government under the Pensions Act 2004, it is a privately funded entity that acts as a "safety net" by providing payments to members of DB pension schemes whose employers cannot fully fund their pension obligations.

The Trustee and the PPF also failed the "pecuniary purpose" and "public purpose" tests which are required for proceedings to fall within the police power exception.

Comment

This ruling from the US Appeals Court leaves the PPF on equal footing with other unsecured creditors and therefore unable to use TPR's processes to assess the amount of debt they are able to make a claim for during the bankruptcy proceedings.

Meanwhile, in the UK, the Court of Appeal confirmed the High Court's decision that, where an FSD is issued by TPR against a company in administration, the cost of complying with that direction is an expense of the administration. The FSD must therefore be paid before any distributions to unsecured creditors, giving it so-called "super priority" in the administration proceedings. The administrators for Nortel and Lehman have been granted leave to appeal this decision of the UK Court of Appeal to the Supreme Court.