

**31 October 2011**

## **At a glance**

### **LEGISLATION**

- **The Pensions Bill 2010-2011: Latest News**

### **EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS AUTHORITY**

- **Review of the EU Pensions Directive**
- **Draft report on variable annuities**

### **HM REVENUE & CUSTOMS**

- **Disguised remuneration guidance finalised**

### **NATIONAL EMPLOYMENT SAVINGS TRUST**

- **NEST signs United Nations-backed Principles for Responsible Investment**

### **OFFICE FOR NATIONAL STATISTICS**

- **Occupational Pension Schemes Survey 2010**

### **THE PENSIONS REGULATOR**

- **TPR Statement: Understanding and managing your hybrid scheme**
- **TPR appointments: new head of risk**

### **CASES**

- **Pioneer GB Limited v Webb (High Court)**

**SO7**

### 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

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## LEGISLATION

### The Pensions Bill 2010-2011: Latest news

Following approval of the [Pensions Bill](#)<sup>1</sup> by the House of Commons on 18 October 2011, the Bill was scheduled to be considered by the House of Lords today (31 October 2011).

The Lords were also due to consider an amendment put forward by Lord McKenzie of Luton which, if adopted, would further slow the timetable for equalising women's state pension age and delay the planned rise in state pension age to 66.

As both Houses must agree the exact wording of the Bill, they will each have the opportunity to consider amendments agreed by the other - a phase known as Parliamentary "ping pong".

We continue to monitor developments and will publish an Alert once the Bill receives Royal Assent.

## EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS AUTHORITY (EIOPA)

### Review of the EU Pensions Directive

EIOPA is reviewing the EU Pensions Directive<sup>2</sup> in order to provide advice to the European Commission.

In April 2011, the EU Commission asked EIOPA for advice by mid-December on the EU-wide legislative framework for institutions for occupational retirement provision (IORPs). (This deadline was later extended.)

A first consultation on its draft response to the Commission was issued by EIOPA in July 2011, seeking views on nine aspects of the Directive (of a total of 23 to be covered in its advice to the Commission), including the definition of "cross-border activity", the scope of prudential regulation and the governance of IORPs. This consultation closed in August 2011. A summary of responses, together with individual responses to consultation, are now available on [EIOPA's website](#).

The [second part of EIOPA's consultation](#) was published on 25 October 2011. As well as reviewing issues raised at the first stage, this consultation asks for views on additional aspects of the Directive, including investment and funding. As noted by the [NAPF](#) and other

<sup>1</sup> For more on the progress of this Bill, please see [7 Days](#) dated 24 October 2011

<sup>2</sup> Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision

commentators, one aspect of this consultation which is of particular interest to the UK pensions industry, is the extent to which the minimum capital and solvency requirements for the insurance sector under Solvency II may be applied to pension schemes.

The consultation closes on 2 January 2012.

#### **Draft report on variable annuities**

EIOPA is also consulting on a [draft report](#) on “Good Practices for Disclosure and Selling of Variable Annuities”.

The report summarises the findings from EIOPA's Committee on Consumer Protection and Financial Innovation, with the aim of establishing good disclosure and selling practices for variable annuities.

The consultation closes on 3 January 2012.

## **HM REVENUE & CUSTOMS**

#### **Disguised remuneration guidance finalised**

HMRC has today (31 October 2011) published technical guidance on the Finance Act 2011 rules on employment income provided through third parties as part of the [Employment Income Manual](#). This includes guidance on non-registered pension arrangements such as employer financed retirement benefit schemes (EFRBS).

This guidance was first published in draft in August 2011. HMRC has made available a [technical paper](#) which highlights the changes which HMRC has made to the original draft.

## **NATIONAL EMPLOYMENT SAVINGS TRUST**

#### **NEST signs United Nations backed Principles for Responsible Investment**

NEST has today (31 October 2011) announced it has become a signatory to the UN backed Principles for Responsible Investment (PRI), a framework for responsible investment.

NEST believes that factoring in environmental, social and governance (ESG) issues across all asset classes and markets where possible is in the interests of members.

There are currently 120 UK based signatories to the PRI, including 26 asset owners. Globally, there are 930 signatories.

[NEST Press Release](#)

## **OFFICE FOR NATIONAL STATISTICS (ONS)**

#### **Occupational Pension Schemes Survey 2010**

The ONS has published its latest annual [Occupational Pension Schemes Survey](#) (OPSS). The OPSS provides a detailed view of the nature of occupational pension provision in the UK, including estimates of pension scheme membership and contributions.

Highlights from the survey show that in 2010:

- total membership of occupational pension schemes in the UK was estimated to be 27.2 million, compared with 27.7 million in 2009;
- active membership continues to fall - there were 8.3 million active members of occupational pension schemes, the lowest level since the 1950s;
- of the total number of active members, 5.3 million were in public sector schemes and 3.0 million were in private sector schemes;
- the average contribution rate in private sector DB schemes was 5.1% for members (employees) and 15.8% for employers;
- in private sector DC schemes the average contribution rate was 2.7% for members and 6.2% for employers.

## THE PENSIONS REGULATOR

### **TPR Statement: Understanding and managing your hybrid scheme**

On 25 October 2011, TPR published a [statement](#) which is designed to help trustees and their advisers understand the structure of their hybrid scheme (schemes with both DB and DC elements) and the risks that can arise, so that they can take action to mitigate them.

A series of checklists is included in the statement, which summarise the actions that trustees, administrators, employee benefits advisers and others should take to ensure they can manage their scheme effectively.

From November 2011, additional questions will be included in TPR's scheme return (for DB and hybrid schemes), to enable TPR to understand and monitor hybrid schemes more effectively.

[TPR Press Release](#)

### **TPR appointments: new head of risk**

TPR has announced the appointment of Peter Ullmann as Head of Risk. Ullman joins from ABN AMRO Bank in Amsterdam.

Ullmann's appointment completes the changes to TPR's senior management team which were first [announced](#) in February 2011.

[TPR Press Release](#)

## CASES

### Pioneer GB Limited v Webb (High Court)

In the latest case to consider equalisation, the High Court has made an order for rectification of a scheme's rules by way of summary judgment.

#### *Background*

In the *Barber*<sup>3</sup> case in 1990, the ECJ concluded that benefits provided under an occupational pension scheme constitute "pay" for the purposes of Article 119 of the EC Treaty (now Article 157 of the Treaty on the Functioning of the European Union) and, as such, need to conform to the principle of equal treatment.

At the time, the majority of schemes had retirement ages of 60 for women and 65 for men, which resulted in unequal benefits in certain respects. In the wake of *Barber*, schemes were required to equalise retirement ages from 17 May 1990 (the date of the judgment). This could be done by increasing Normal Retirement Dates (NRDs) going forwards, but providing benefits on the more favourable basis for the period between the date of the *Barber* judgment to the date of a valid amendment to equalise benefits (known as the "*Barber* window").

However, while it was clear from *Barber* that schemes needed to equalise benefits, it was not until two later cases had been decided that trustees and employers understood how to achieve this. In particular, *Coloroll*<sup>4</sup> confirmed that benefits under occupational pension schemes only needed to accrue equally for men and women for service from the date of the *Barber* judgment onwards and not for all service.

#### *Facts*

The Pioneer GB Limited Pension and Life Assurance Scheme (the Scheme) was established by a declaration of trust in April 1974. Rules were subsequently adopted and amended from time to time over the years.

By August 1990, the rules provided for the following Normal Retirement Dates (NRD):

- 65 for men;
- 60 for women who joined the scheme before 1 April 1989; and
- 65 for women who joined the scheme on or after 1 April 1989.

Having taken advice following the *Barber* and *Coloroll* decisions, the trustees agreed that benefits under the Scheme should be equalised at age 65 for all members with effect from 1 April 1995. The issue was discussed at several trustees' meetings (when agreement was reached to make this change) and announcements approved by the trustees were issued to members informing them of the change. In addition, it was argued that the employer (whose consent was required to any amendment of the Scheme rules) had attended those meetings through the trustees who also wore "company hats" and had seen and approved the announcements to members.

<sup>3</sup> *Barber v Guardian Royal Exchange Assurance Group* ECJ Case C-262/88, [1991] QB 3440

<sup>4</sup> *Coloroll Pension Trustees v Russell* (C-200/91 [1995] All ER (EC) 23)

It had been intended that the amendment to equalise NRD would be included in a consolidating deed which was being prepared around this time (the Consolidating Deed). However, despite agreement between the employer and the trustees that they would incorporate the equalisation amendment in the Consolidating Deed, it was not in fact included. Instead, the Consolidating Deed (which was executed on 11 July 1995), incorporated the unequal NRDs set out above.

The employer applied for summary judgment to permit rectification of the Consolidating Deed.

#### *Decision*

The application for summary judgment was approved and an order for rectification of the Consolidating Deed was made.

Mr Justice Sales was satisfied that the claim for rectification was made out on the evidence before him and by reference to either of the bases for rectification that emerge from the legal authorities, whether:

- assessed objectively from things said and done before and at the time, it could be shown that there had been consensus between the parties to produce an instrument having a certain legal effect; or
- subjectively, having regard to the specific understanding of the persons acting to produce such an instrument.

Sales J found that it was “clear on the materials that each of the trustees and [the employer] positively believed that the Consolidating Deed included the changes necessary to effect the equalisation of retirement ages, which they had all agreed upon”. He also found that the participation of the employer’s representatives in the discussions regarding the change to equalise benefits under the Scheme, objectively demonstrated the parties’ intentions to enter into a deed incorporating the changes.

#### *Comment*

As in the 2009 case of *Colorcon Ltd v Huckell and others*<sup>5</sup>, there was sufficient evidence before the Court to demonstrate the common intention of the company and the trustees to enable the Court to order rectification on a summary judgment basis. And as in *Colorcon*, the defendant representing the members of the Scheme who would be detrimentally affected by the rectification of the Consolidating Deed did not seek to oppose the company’s application. The parties were therefore saved the significant time and expense that would have been involved in taking the case to full trial.

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<sup>5</sup> [2009] 039 PBLR -  
[2009] EWHC 979  
(Ch)