

# Trustee Knowledge Update

Welcome to the Winter edition of our Trustee Knowledge Update. The purpose behind this Update is to inform trustees about changes in the law to help them to comply with the duty under the Pensions Act 2004 for each trustee (or trustee director) to have knowledge and understanding of the law relating to pensions and trusts.

## PPF (<http://www.pensionprotectionfund.org.uk/>)

**2009/10 PPF levy determination:** The 2009/10 levy calculation will be based on scheme return data and employer solvency ratings from March 2008. However, deficit reduction contributions, contingent assets or bulk transfers may reduce the levy calculation for 2009/10. The deadlines for submitting relevant information are:

- **5pm on 31 March 2009** for certification of contingent assets;
- **5pm on 7 April 2009** for certification of deficit reduction contributions; and
- **5pm on 7 April 2009** for initial notification of block transfers of 100% of a scheme's assets (and both transferring and receiving schemes will need to certify the transfer). Full details of the transfer will need to be supplied by **5pm on 30 June 2009**.

Schemes wishing to certify deficit reduction contributions, contingent assets and any relevant block transfers for 2009/10 can do so through the Pensions Regulator's Exchange system.

In relation to the 2010/11 levy calculation, schemes wishing to challenge employer solvency ratings or change scheme information must do so by **5pm on 31 March 2009**. Partial transfers which take place before 31 March 2009 and are notified to the PPF by **5pm on 7 April 2009** may also be taken into account for the 2010/11 levy.

**Consultation on future development of the PPF levy:** looks at how the levy will be calculated for 2011/12 and beyond. It is proposed that a new element be introduced into the levy calculation to take into account the risk of the employer failing and the scheme going into the PPF over a 5 year period. There will also be changes to the way in which short term risk is assessed, with account being taken of the scheme's investment risk. For a scheme with average investment risk, the PPF estimates that this would result in a 10% reduction in the value of the scheme assets taken into account for the purposes of calculating the levy.

## Regulator (<http://www.pensionsregulator.gov.uk>)

**Record keeping guidance:** aimed at helping trustees and administrators put in place good practices for assessing member data. Also gives advice on assessing the risks of incomplete or inaccurate data. The tests suggested include checks that individual data items exist, are consistent with other data held and are "plausible" (an example given is to ensure that member's date of birth is before the date of commencing service).

The guidance identifies three types of data to monitor:

- "common data" - held by every scheme for every member, including all unique identifiers such as name, NI number, membership status: a table of common data is set out in the guidance;
- "conditional data" - information that may be required depending on the structure of the particular scheme (e.g. final pensionable salary data for a defined benefit scheme); and,
- "numerical data" - useful total figures that help trustees identify data deficiencies - e.g. separate membership statistics for actives, deferreds and pensioners.

The guidance also sets out specific considerations to be taken into account for dealing with defined contribution benefits; an appendix of "scheme change" events where data review is either recommended (valuation, corporate transaction, change of investment manager) or required (buy-out, wind-up, change of administrator); and a sample report on data quality.

**Statement on employer duty to consult:** Currently employers have a duty to consult affected members when certain changes are made to the scheme (such as cessation or reduction of future accrual). There are currently no penalties for failing to comply with this duty, but draft legislation has been introduced which would change this and give the Regulator power to issue fines from 6 April 2009. The statement says that in the majority of cases the Regulator expects employers to comply in full with the requirements but that it recognises that this is not always practical and in certain circumstances it may agree to waive or relax any of

the requirements if it is "satisfied that it is necessary to do so in order to protect the interests of the majority of the scheme members".

**Report on trends in recovery plans and clearance:** the following trends were identified in relation to recovery plans:

- The average funding level increased from 86% to 90% and, valued on a s179 basis from 107% to 119%.
- Weighted by scheme size, average recovery plans reduced from 9 to 6 years. The unweighted average fell from 7.7 to 7 years.

In general, the Regulator notes that there has been a fall in the number of clearance applications probably as a result of a better understanding of what its expectations and requirements are.

The Regulator notes that the report covers a period before the current financial crisis.

**Statement on current market conditions:** recognises that both falling asset values and weakening employer covenants are relevant under the scheme specific funding regime but says that there is no current intention to change existing Codes of Practice and Guidance. The statement also:

- reminds trustees that where there is a change to an existing recovery plan (eg extending the period), the Regulator must be informed;
- says that the Regulator anticipates that new recovery plans might be longer than existing ones to reflect worse funding positions and weaker employer covenants;
- reminds trustees of the importance of keeping the strength of the employer covenant under review; and
- reminds trustees of defined contribution schemes that, as the investment risk is with the member, there is a need to ensure that the members understand the current circumstances and available options.

## Legislation (<http://www.opsi.gov.uk/acts/acts2008a>)

**Pensions Act 2008:** the key provisions which are of immediate relevance are as follows:

- With effect from 6 April 2009, if a member leaves service with an entitlement to a deferred pension, the element of the deferred pension which relates to service after 5 April 2009, will need to be revalued by inflation, subject to a cap of 2.5% (as opposed to a cap of 5% as currently). Trustees will need to consider their scheme rules to see if this change applies automatically and the impact that it has on members; and

- The Regulator's powers to issue financial support directions and contribution notices to access money within corporate groups to top up underfunded pension schemes are being extended to make them more widely applicable. In particular, the Regulator may now look at the effect of a transaction, rather than just the intention to determine whether it should exercise its powers.

## Cases

**Seldon v Clarkson Wright and Jacques** (*age discrimination and objective justification*)

In February 2008 an Employment Tribunal found that the compulsory retirement of partners from a firm of solicitors at age 65 was objectively justifiable on a number of different grounds including staff retention, facilitating planning, and contributing to the firm's 'congenial' culture. The Employment Appeal Tribunal upheld the decision on all grounds except the firm's claim that performance dropped off at 65 as this was not supported by any evidence and involved stereotyping. However, such a rule could be justified in principle.

The case therefore establishes at EAT level that compulsory retirement at 65 is capable of justification. The EAT also emphasised that the tribunal should not second-guess the needs of an employer:

*" where a partnership has plainly given careful thought to this, and has taken a view in the light of its past experience, or that of similarly placed firms, that a particular retirement age should be stipulated for reasons which it can rationally explain, that will often quite properly carry considerable weight with a tribunal... those who are involved daily in the operation of the business are plainly in a much better position to assess business needs, and the effect of the business on staff, than tribunal members who may come from a totally different business background. Tribunals must be alive to this and not readily substitute their relative ignorance of a particular area for the considered wisdom of those who are in a better position to understand how the business operates."*

**Foster Wheeler Ltd v Hanley and others** (*equalisation and benefits accrued during "Barber window"*)

Following the *Barber* judgement in May 1990, Foster Wheeler, decided to equalise benefits for future service by increasing female normal retirement date from 60 to 65 and amending the early retirement provisions so that, subject to company consent, all members could retire from age 60 with no actuarial reduction. This was announced to members

sometime in 1991 and a deed of amendment executed in 1993.

The court held that the scheme effectively equalised in 1993, after the deed. This meant that for service from the date of the *Barber* judgement in 1990 until 1993, male members were to be treated as having a retirement age of 60.

The cases of *Trustee Solutions Ltd v Dubery and Hodgson v Toray Textiles Europe Ltd* suggest that any member with an entitlement for any part of their benefits to be paid at 60 is in effect entitled to have the whole of their benefits paid at 60 and under the rules of the Foster Wheeler Scheme, the whole benefit would be without any actuarial reduction. The company argued that following *Cripps v Trustee Solutions and Dubery*, the pension should be split into two tranches so that members would be entitled to take their benefit accrued with an NRD of 60 at age 60, and benefits with an NRD of 65 at age 65 (unless the company agreed to early retirement).

The court held that the correct approach was to make the minimum modification necessary to give effect to pre-equalisation and Barber window rights and in this case, that meant the removal of company consent to retirement from 60.

The consequence of this decision is that for schemes which adopted the same approach to equalisation, all members with Barber window service would be deemed to have the right to retire at 60, and to take their entire pension at 60 unreduced for early payment. Clearly this has the potential to add significantly to the liabilities of schemes at a time when most schemes are in substantial deficit.

The company has been granted leave to appeal.

**AC Skelton Pension & Life Assurance Scheme** (*documenting equalisation in an announcement and power in rules to vary NRD for individual members*)

Retirement ages were purportedly equalised at age 65 by an announcement in October 1994 from the managing director of the principal employer (one of two participating employers). The principal employer later entered administration and the independent trustee asked the court whether the scheme had been validly equalised.

It was accepted that the announcement did not amount to an effective exercise of the scheme amendment power, which required a document signed by the trustees and principal employer. However, the definition of Normal Retirement Date provided for retirement at a specified age or "*such day as the Employers shall determine in any particular case and notify in writing to the Member concerned*". The question arose whether the equalisation announcement could be said to be an effective use of this provision. The court said the wording "*in any particular case*" indicated the power was not designed to be used for all members, or even a class of members. The

announcement was designed to alter the scheme, and that alteration fell squarely within the amendment rule. The announcement could not in any case have constituted a determination by the "Employers" because it came from only one of the participating employers. Moreover, it was expressed as made by the principal employer in its capacity as trustee, rather than employer, under the scheme.

**Ombudsman** (<http://www.pensions-ombudsman.org.uk>)

**Peck (S00537):** *Member bound by collectively bargained changes*

In 2005 the employer balloted union members on a benefit package which included the introduction of a non-pensionable element of pay. The union accepted the changes and the trustees agreed to the relevant rule amendments. The member complained about the imposition of the changes on him. He had not been able to vote, because he was not a union member, while the majority of union members who had agreed to the package were not scheme members. He said the trustees should not have agreed to the amendments.

The Pensions Ombudsman said that it was not improper for alterations to a pension scheme to be decided by collective bargaining. In addition, although in this case the member's contract of employment was not expressly subject to agreed collective bargaining, such a term could be implied by custom or usage on the basis of previous dealings. The Pensions Ombudsman said that the member had not previously objected to any collectively bargained terms and had also continued in employment and benefited from the pay rise that had been part of the negotiated package. This amounted to "acceptance by conduct" of the whole package.

**Lewis (24376/1)** *Member's benefits "lost" and nobody to claim them from*

The member left service in 1978, and was given a certificate of entitlement to a deferred pension. In 1983, his former employer was bought and scheme assets transferred to the buyer's scheme. Revenue records showed the member as having a guaranteed minimum pension entitlement under the new scheme, which was itself wound-up in 1990. However, the insurance company that bought out the benefits had no record of the member. In the absence of evidence that the benefits had been transferred out prior to wind-up, the Pensions Ombudsman found that the benefits remained as scheme liabilities, but were never secured on buy-out.

As it had not been possible to establish why the benefits were not bought out, the Ombudsman felt unable to

conclude that the administrator was responsible. And while the Ombudsman thought the former trustees' failure to maintain records and pay the benefits would be maladministration:

*"even if they could be traced... there being no fund on which he could claim I would almost certainly have to find that the Trustees had acted dishonestly for them to be personally liable for his loss. There is no evidence to suggest this..."*

*Mr Lewis' benefits have been lost and it is with great regret that I have to say that there is no-one who can now be blamed for that. There is no fund or other resource on which he can make a claim. Understandably Mr Lewis finds this difficult to accept. Nevertheless I am unable to uphold his complaint."*

## Government (<http://www.dwp.gov.uk/consultations/2008>)

**Age discrimination: flexible retirement:** The Government recognises that many schemes are still concerned about the extent to which age discrimination applies where a member draws a pension whilst continuing to be in active service. No concrete proposals have yet been made and there is no time scale for implementing any amendments so this issue is no closer to resolution.

## Tax (<http://www.hmrc.gov.uk/pensionschemes/index.htm>)

**Changes to unauthorised payments regime:** In 2008, the Revenue issued draft Regulations which were intended to ensure that certain payments were not classed as unauthorised payments (for the most part where payments were small or inadvertent). These Regulations have not yet come into force, but are intended to be retrospective to April 2006.

The Revenue has issued a statement saying that where schemes have made payments which will be covered by the Regulations, they do not need to be included in an Event Report.

**Dates for diaries – trustee training:** Trustee training remains one of the most important ways of ensuring that trustees have the knowledge and understanding required to perform their duties. We have trustee training courses taking place on **22 April 2009**, **17 June 2009** and **16 September 2009**. If you have any enquiries about any of these courses or would like to reserve a place, please contact Karen Mumgaard at [karen.mumgaard@cms-cmck.com](mailto:karen.mumgaard@cms-cmck.com).

**General:** For further information on our pension services, please contact **Mark Grant – E:** [mark.grant@cms-cmck.com](mailto:mark.grant@cms-cmck.com)  
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Get to grips with the Pensions Act 2004 and all related regulatory publications by viewing our online **Plain English guide to the Pensions Act**. You will need to be a subscriber to our Law-Now website (which is free) to access this guide. Register at [http://www.law-now.com/law-now/zones/LN\\_Pensions.htm](http://www.law-now.com/law-now/zones/LN_Pensions.htm)

If you are interested in the Pensions Ombudsman's activities, visit our website [www.law-now.com/po-info](http://www.law-now.com/po-info). This site also has links to around 70 useful pensions websites.

**The Lifetime Allowance and Annual Allowance from 6 April 2011:** The Revenue has said that the Lifetime Allowance and Annual Allowance will be frozen from 2011-2016. The Revenue has also said that there "are a number of limits set by reference to the LTA, for example the commutation limit for small amounts of pension rights. These limits will also remain constant between 2011-12 and 2015-16 unless indicated otherwise in a separate announcement".

## Things to look out for

**PPF deadlines:** trustees need to be aware of the deadlines for filing information for both the 2009/10 levy and the 2010/2011 levy

**Current economic conditions:** trustees need to continue to carefully monitor the strength of the employer covenant and the funding position of their schemes (including the appropriateness of any existing recover plan).

**Revaluation:** Where revaluation rates are set out in scheme rules, trustees may be asked to consider an amendment to reflect the new statutory minimum. Trustees need to carefully consider the impact of any such proposed changes before agreeing to them.

**A-Day protection:** Members with a high level of pre-A Day benefits may wish to register those benefits with the Revenue for protection from the full application of the post A Day tax regime. Such registrations need to be completed by 6 April 2009.

The Pensions team is part of the CMS Cameron McKenna HR group and advises employers and trustees of schemes varying in size, from a few million pounds to several billion pounds. Additionally, we act for some of the largest firms of administrators, actuaries, consultants, brokers and professional trustees. We provide a full range of services in connection with occupational pension schemes, including all aspects of employment law and EU law. The team also works closely with our corporate lawyers, providing support on mergers and acquisitions, insolvency lawyers supporting us on employer covenant issues, and the financial services team which specialises in regulatory and fund management matters. This Update is intended for clients and professional contacts of CMS Cameron McKenna LLP. It is not an exhaustive review of recent developments and must not be relied upon as giving definitive advice. The Update is intended to simplify and summarise the issues which it covers.

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