

Welcome

Welcome to Pensions, our bimonthly newsletter keeping you informed of developments in pensions law.

To find out more about how we can help you with pensions issues, please email richard.knight@burgess-salmon.com or call him on 0117 939 2259.

Legal

Same sex marriage

The first same sex marriages under the recent legislation are expected in summer 2014.

Pension schemes will have to treat surviving same sex spouses the same way as surviving civil partners. This means contracted-out benefits must be based on contracted-out service since 1988; other benefits need only be based on service from 5 December 2005.



But these requirements could change. First, the legislation obliges the government to review the differences between the benefits that must be paid to survivors of the various opposite and same sex relationships that the law now recognises. Its report, which is due by the end of June 2014, must also examine the cost of eradicating them.

Secondly, an appeal is expected in *Walker v Innospec*. This is the case in which the Employment Tribunal held it was unlawful discrimination for a scheme to restrict a surviving civil partner's benefits to post 5 December 2005

service when a spouse's pension would be based on a longer period. The Tribunal held the legislation allowing this was at odds with EU equality law. If the decision is upheld on appeal, the legislation on civil partners - and same sex marriage - is likely to be changed.

That said, many schemes go beyond the legislation and already treat civil partnerships and marriages the same way.

Overall it appears only a matter of time before the law requires survivors of either sex in whatever kind of formal union to be treated the same.

Bridging pensions

From 1 October 2013 trustees will have a free-standing, statutory power (exercisable by resolution) to amend their DB scheme rules on bridging pensions in the light of rises in state pension age.

Bridging pensions are also known by other names e.g. state pension offsets. They act as a temporary substitute for the state pension when someone retires before SPA.

The power is independent of a scheme's own alteration power and any restrictions on it. Nor do the usual statutory constraints on amending accrued rights apply.

The employer's consent is required, but 60 day employer consultation is not.

Without this help, some schemes might have difficulty heading off the unforeseen extra cost of certain types of bridging pension as SPA increases.

Two options

Broadly, trustees can change the age at which a bridging pension ceases and the amount by which it is cut.

The two options depend on what a scheme's rules said as at 5 May 2010. If they allowed or required a bridging pension to stop between age 60 and 65, this can be changed to reducing any time between 60 and SPA.

continued

Where the rules said bridging would continue until SPA, the end date can be switched to an age between 60 and 65. But a pension already in payment cannot be reduced.

Under both options:

- a pension can be reduced by the bridging element or a different amount and
- the change has to be reasonable in the light of changes in SPA.

Meanwhile, the definition of an authorised “scheme pension” in the tax legislation has been amended to allow these more flexible forms of bridging.

Information for members

A revised and simplified set of requirements for the information schemes must give members will come into effect in April 2014.

Most of the changes proposed in the DWP’s consultation earlier this year will go ahead, with some adjustments to the detail. The DWP expects to issue the final text of the new regulations this autumn.

The changes will largely be optional: schemes will be able to choose whether to adopt them or to continue with their existing practice.

The new regulations will make clear schemes are not obliged to deliver any information electronically but, if they opt to do so, they must follow what the regulations say about how it must be done.

The broad aims of the changes are:

- as far as possible, to set common requirements for different types of scheme e.g. occupational and personal pension schemes, and to reduce overlap with the demands of the Financial Conduct Authority in relation to the latter,
- to simplify the basic information schemes provide, moving some items from “automatic” to “on demand”,

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- to provide members with the information they need e.g. more personalised benefit statements,
- to clarify the requirements around electronic delivery and
- to fit in with auto-enrolment procedures.

More of the requirements will be gathered into the main set of regulations but some will remain in other regulations dealing with particular topics.

The consultation paper floated the idea of switching from detailed rules to broad principles about disclosure that schemes could give effect to in their own way. The DWP is not going ahead with this.

Autumn fruit



The autumn could see developments in these important areas:

- the introduction of the new definition of “money purchase benefits”: a consultation is expected on the crucial transitional arrangements;
- news on the DWP’s exploration of GMP conversion as a possible route to equalisation and
- a consultation on the details of “pot follows member” i.e. the automatic transfer of small pots to the new employer’s scheme and the end of short service refunds from DC schemes from 2014.

Regulatory

New code of practice on DC

All DC trustees should read the TPR’s new Code of Practice on the governance and administration of trust-based (or occupational) DC schemes. It is the first Code that is specific to DC schemes. It pulls together many key elements of DC governance in one place.

However, it is not exhaustive and trustees will still need to refer to other Codes or Guidance for more detail on a range of topics, like internal controls and conflict of interest.

A separate Introduction sets out TPR’s six DC principles and its 38 DC quality features in summary form. And there is more to come: Guidance fleshing out the Code, and a statement of TPR’s overall regulatory approach to DC. These are expected by the time the Code comes into effect later this autumn.

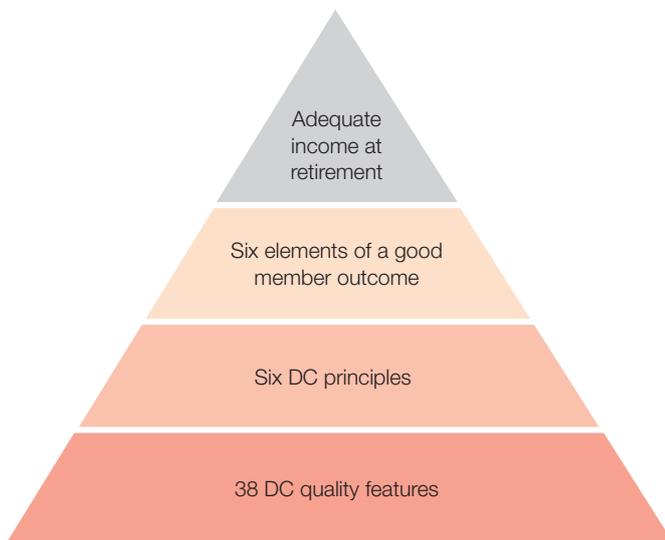
The Code and the Guidance will provide a diagnostic tool that will help trustees to identify the strengths and weaknesses of their scheme, and to address the latter.

Big picture

The big picture provides a helpful framework. TPR says the ends and means of DC governance are:

- an ultimate aim of adequate retirement income depending on schemes delivering...
- ...the 6 elements of good member outcomes which are achieved by adopting...
- ...the 6 DC principles breaking down into...
- ...the 38 DC quality features.

In TPR's visual form:



The elements to good member outcomes are:

- appropriate decisions on contributions,
- appropriate decisions on investment,
- effective and efficient administration,
- protection for the assets,
- value for money and
- appropriate decisions on decumulation.

The six DC principles are:

- essential characteristics: schemes to be durable, fair and deliver good outcomes for members,
- establishing governance: set a comprehensive governance framework with clear accountabilities, and agreed and transparent responsibilities,
- people: those accountable for decisions and activity understand their duties and are fit and proper persons,
- governance and monitoring: to be effective over the scheme's full lifecycle,
- administration: good administration with timely, accurate and comprehensive processes and records and
- communications to members: to be designed and delivered to ensure members are able to make informed decisions.

The DC quality features are all expressed as actions for the trustees to carry out on the ground.

Code of Practice

The final Code is clearer and more concise than the consultation draft. It gives extended guidance on law and practice in five core governance areas:

- know your scheme,
- risk management,
- investment,
- governance of conflicts of interest and
- administration.

It breaks down each of these into different aspects, succinctly stating the legal requirements and identifying the related DC principles and quality features.

As an example, the section on investment divides into:

- setting investment objectives and a default strategy,
- security and liquidity of scheme assets,
- monitoring and reviewing the default strategy,
- reviewing investment performance,
- investment decision-making and trustee knowledge and
- acting in best interests of members and beneficiaries.

The Code is high level. The Guidance in the autumn is likely to include a considerable number of practical tips, not least on costs and communication.

Personal pension schemes

In terms, the Code does not apply to personal pension schemes because these are largely under the jurisdiction of the Financial Conduct Authority (FCA). But TPR continues to work with the FCA on the regulation of work-based personal pensions and there are plans to publish more guidance later this year.

Transparency over DC

The ABI has launched an online tool for illustrating the effect of charges on an individual member's DC saving. It is available via TPAS at <http://www.pensionsadvisoryservice.org.uk/pension-charges-calculator>.

The tool accompanies the ABI's *Pension Charges Made Clear: Joint Industry Code of Conduct* issued last November. The main target audience is firms advising employers on schemes for auto-enrolment but it applies more generally. It requires all charges to be presented clearly and accurately in a standardised format.

Until now, the code has had the status of best practice guidance. With the launch of the online tool it comes into full effect.

DC and annuities

In another step towards transparency, the ABI has begun to publish specimen annuity rates as part of its *Code of Conduct on Retirement Choices* that came into full effect in March.

The table shows rates offered by ABI members (only) for a specimen individual. It will develop to include a dozen annuitant profiles. But it does not function like a comparison site and it seems few insurers provide their rates to such sites.

DB funding

As announced in its annual funding statement, TPR will consult over the autumn on changes to its Code of Practice on DB funding following the introduction of its new statutory objective via the Pensions Bill. The objective is, in relation to funding, "to minimise any adverse impact on the sustainable growth of an employer". TPR will also consult on its general approach to the regulation of DB schemes. The upshot of these consultations will be known early next year.

DWP tracing service

The DWP has updated its materials on its member tracing service. On certain conditions and for a modest fee, the DWP will forward a letter from a scheme addressed to an untraceable individual.

See <https://www.gov.uk/government/publications/pensions-and-insurance-tracing-and-letter-forwarding-service>.

Tax

LTA protection 2014

Individuals will be able to retain a lifetime allowance (LTA) above the new, lower LTA of £1.25m from April 2014. To do so they must apply for "fixed protection 2014" (FP14) or "individual protection 2014" (IP14).

HMRC has information about all the various transitional LTA protections at <http://www.hmrc.gov.uk/pensionschemes/pension-savings-la.htm>.

FP14

Like the corresponding protection when the LTA came down from £1.8m to £1.5m from April 2012, FP14 requires an individual to stop accruing benefits in all registered pension schemes. In practice, this means opting out of active membership.

FP14 might be useful, for example, to someone with a DC pot worth less than £1.5m in April next year that is likely to increase above £1.25m without further contributions.

HMRC has an online tool to help individuals decide whether to apply: <http://www.hmrc.gov.uk/pensionschemes/fp14online.htm>.

Applications must be made to HMRC on or before 5 April 2014. It encourages people to apply online.

"HMRC's thinking is that more flexibility over protection is required as the LTA comes down and affects more people."

IP14

A consultation on IP14 closed recently.

It will give someone with pension saving worth between £1.25m and £1.5m next April a personal LTA of that amount. They will be able to continue saving without limit in a registered scheme but the LTA tax charge will apply to the excess over their personal LTA.

For example, someone with an account worth £1.35m will have that as their personal LTA. If they continue saving in a registered scheme, the LTA tax charge will apply on the excess over £1.35m when they draw their benefits.



Someone with an account worth more than £1.5m who applies for IP14 will have a personal LTA of £1.5m.

IP14 might be attractive, for example, to someone with a DC pot over £1.25m whose employer will not agree to replace pension accrual with any other form of pay. The individual would be able to continue to benefit from the employer's contributions, albeit subject to the LTA tax charge (of 25% on money drawn as pension and 55% on lump sum).

HMRC's thinking is that more flexibility over protection is required as the LTA comes down and affects more people.

Individuals with primary or enhanced protection (which date from A Day) will not be eligible for IP14. But someone will be able to hold IP14 at the same time as either FP12 or FP14. Fixed protection will take precedence.

Next year's Finance Bill will legislate for IP14 and it will only be possible to apply when it becomes law (which normally happens in July). The plan is to allow people three years to apply.

Annual allowance: scheme pays

In certain circumstances, a member who incurs an annual allowance charge can opt to use the "scheme pays" procedure. For charges arising in tax year 2011/12, there is an extended deadline for electing to do so of 31 December 2013.

Dispute Resolution

Employer's court action pre-empts Ombudsman

The court has held that an employer can legitimately initiate court action in order to head off an application to the Pensions Ombudsman.

There was a dispute about a benefit enhancement worth several hundred thousand pounds. The member's complaint was still being considered under the scheme's internal disputes procedure - a prerequisite for an application to the PO in most cases - when the employer began legal action to decide the dispute. This denied the member access to the PO because it does not have jurisdiction once a complaint is the subject of legal proceedings.

The employer was candid that it went to court to put the member under the pressure of having to give oral evidence and to expose him to the risk of having to pay its legal costs if he lost. By contrast, the PO's procedure is paper based and designed for complainants without legal representation. Only rarely is the loser ordered to pay the winner's costs.

"Early moves to court by employers are likely to be rare because many disputes are low in value and the employer opens itself to the risk of legal costs."

The member took legal action to challenge the employer's move as an abuse of court process. He was unsuccessful. The judge explained that there is abuse where someone attempts to obtain an advantage they could not achieve in properly conducted proceedings. She held that timing court action for tactical reasons did not amount to such an attempt. Nor was the availability of an alternative, cheaper procedure sufficient grounds for striking out the employer's claim.



Choice of procedure

There is much to be said for cheap and relatively informal dispute resolution. The legislation anticipates the PO will be the usual forum for disputes involving individual members, but the court also has jurisdiction. This case shows that the simultaneous availability of the PO and the court means procedural tactics in the early stages of a dispute can have a big influence on the balance of advantage between the employer (or the trustees) and a member, and on the outcome.

Early moves to court by employers are likely to be rare because many disputes are low in value and the employer opens itself to the risk of legal costs. But where there is a lot at stake and the employer is confident it is on strong legal ground, the move could be decisive.

Pre-emptive action by a member would depend on using the limited exceptions that allow the PO to accept a complaint before IDRPs are finished. In those circumstances, the likelihood is that any court action subsequently begun by the employer would be stayed to allow the PO to make a decision.

In the office

We are delighted that **Maria Burgess** and **Ed Curtis** are joining our pensions team on qualifying as solicitors. They both trained with the firm.

Thrilled by motherhood, **Emma Hanley** has decided not to return to work after her maternity leave. Our best wishes to her and her family.

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