

# Trustee Knowledge Update

Welcome to the Winter 2009/10 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 legal requirement for each trustee (or trustee director) to have knowledge and understanding of the law relating to pensions and trusts. This Update focuses on the key legal developments over the last quarter that trustees may need to be aware of.

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

**Revised Trustee Knowledge and Understanding Code of Practice:** The revised Code of Practice came into force on 26 November 2009. It is broadly similar to the previous version, however there are changes which trustees should be aware of, including:

- “Knowing the essential elements of the scheme's trust documentation will require every trustee to read it through thoroughly.”
- The scope documents do not reflect everything that trustees need to know, trustees need to consider their own circumstances;
- In relation to the duties of the chair of trustees, the “regulator's view is that the chair must be equipped to be able to accept the particular responsibilities of the role from the date the chair is appointed”;
- Where a new trustee has to make decisions and has not completed their training “they need to rectify the matter at once and their first task is to carry out a training needs analysis, using the relevant version of the scope guidance”
- There is a greater emphasis on the trustee toolkit. “The regulator is of the view that this is required study for new trustees unless they can find an alternative learning programme which covers all the items in the scope guidance at a level relevant for them and within the timescale allowed. In any event the learning should be started immediately, on appointment if not before”.

All trustees should ensure that they read the revised Code of Practice and the relevant accompanying Scope document.

**Revised Scope documents:** The Scope documents go alongside the knowledge and understanding Code of Practice and highlight specific issues which trustees should have knowledge and understanding of or be conversant with.

There are now three Scope documents: defined benefit schemes with associated defined contribution arrangements (eg money purchase AVCs); defined contribution only arrangements; and (just introduced) wholly insured DC schemes with fewer than 100 members.

Trustees need to determine which Scope document applies to them and then check that you satisfy the requirements of the revised versions. They can be used as a checklist, so you can tick off the areas where you think your knowledge is satisfactory and consider how you might fill any gaps.

**Recovery Plan Report 2009:** Some of the key points are:

- There has been no material increase in the number of schemes triggering investigation by the Regulator;
- the average length of recovery plans is 8.3 years (up from 6.1 years for schemes with valuation dates between September 2006/07);
- as at 30 September 2009 the aggregate funding deficit for s179 liabilities for PPF-eligible schemes was £149bn as compared with a surplus of about £19bn a year ago;
- there has been greater prudence in mortality assumptions

**Call for greater scrutiny of transfer exercises:** The Regulator has called for greater scrutiny of transfer incentive exercises, warning trustees of the risks posed to members' benefits, saying: “*Trustees should start from the presumption that such exercises and transfers are not in member interests. If a company is willing to encourage the transfer, the company's gain is likely to be the member's loss... We believe that trustees should engage with such exercises and should ensure that members are aware of the issues... Where behaviours are particularly concerning, we may look to use our anti-avoidance powers and we ask trustees to be vigilant in exercising their fiduciary duties.*”

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

**2010/11 PPF levy determination:** The 2010/11 levy calculation will be based on scheme return data and employer solvency ratings from March 2009. However, deficit reduction contributions, contingent assets or bulk transfers may reduce the levy calculation for 2010/11.

The deadlines for submitting relevant information are:

- **5pm on 31 March 2010** for certification of contingent assets;

- **5pm on 9 April 2010** for certification of deficit reduction contributions; and
- **5pm on 30 June 2010** for notification of block transfers of 100% of a scheme's assets (both transferring and receiving schemes will need to certify the transfer).

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

**Calculation of 2011/12 levy:** There are changes to the calculation of the risk of employer insolvency for the 2011/12 levy. The changes include:

- businesses with three or more branches in different regions will be assessed as a national employer (rather than using the regional assessment based on the main trading address of the business);
- PPF compliant contingent assets will be excluded by D&B in calculating their scores;
- when measuring the failure score of a subsidiary whose parent company is at substantial risk of going bust, the score of the subsidiary will be that of the parent;
- employers that seek changes to their industry sector or geographical region will need to provide evidence; and
- a new probability of insolvency table has been published.

These changes will relate to failure scores which take effect from 31 March 2010 for the 2011/12 levy year. Schemes and employers need to take note of these changes and the PPF suggests contacting D&B as soon as possible to see if there is any information which can be provided which might affect a failure score. Relevant information should be provided to D&B by **30 March 2010**.

Schemes wishing to update the information on Exchange must do so by **5pm on 31 March 2010**. In addition, partial transfers which take place on or before 31 March 2010 and are notified to the PPF by **5pm on 30 June 2010** may also be taken into account for the 2011/12 levy.

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

**Newsletter 38 – Minimum Pension Age:** With effect from 6 April 2010, the minimum age at which the majority of people can take benefits from an occupational pension scheme (other than on grounds of ill-health) will rise from 50 to 55. The Revenue has issued guidance as to how this change will apply in certain circumstances:

- Minimum pension age should be determined by when the member first has an absolute entitlement to the benefit. It does not matter when the first payment is made to them.

- Where a pension entitlement crystallised prior to 6 April 2010 and the member was below 55, the pension commencement lump sum may still be paid after that date. However, as a lump sum can be paid up to 6 months before the pension entitlement arises, care needs to be taken where payment is made to someone under age 55, that their pension entitlement crystallises before 6 April or the payment will be unauthorised.
- In relation to money purchase schemes, "*where a member opts to receive a lifetime annuity, from an insurance company of their choice that does not underwrite the benefits in their pension scheme, until the purchase price is passed to the insurance company there can be no certainty that the annuity will be secured at a given rate, so the rights remain prospective. Actual entitlement occurs when the insurance company accepts payment of the consideration and is bound to pay out the annuity...*"

**Anti-forestalling:** The Pre-Budget report provides further detail about the proposed changes to tax relief on high earners' pensions in April 2011. It also introduces further restrictions to the "anti-forestalling" legislation:

- Restricting pensions tax relief from April 2011: From 6 April 2011, a "high income excess relief charge" will apply to individuals with an income of £150,000 or more, with a taper gradually reducing relief to 20% as that income reaches £180,000. Employer pension contributions will be included in the definition of income, but there will be a floor so that irrespective of the size of employer contributions, nobody with an income below £130,000 will be affected.
- Anti-forestalling: changes effective from 9 December 2009: Under the proposals introduced from 22 April 2009, a special annual allowance charge will apply if an individual with income above £150,000 changes their normal pattern of pension contributions and their pension savings exceed £20,000 per tax year (or the average of irregular money purchase contributions over the past three years, capped at £30,000). From 9 December 2009 the anti-forestalling provisions will now also apply to individuals whose income is £130,000 and over.

## Data Protection

Legislation has been introduced which will allow the Information Commissioner to impose fines of up to £500,000 on data controllers (including trustees) from 6 April 2010. Such fines are only intended to apply to serious breaches of the data protection principles which result in substantial damage or distress.

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

**Revaluation Order:** Sets the amount by which deferred pensions coming into payment at normal pension age need to be revalued to take into account increases in inflation during the period of deferment. Revaluation for the last 12 months is 0% as, despite negative inflation, it is not possible to have negative revaluation. However, total revaluation going back to 1986 has fallen by between 3.2% and 1.5% (depending on how long the pension was in deferment for).

### The Occupational and Personal Pension Schemes (Authorised Payments) Amendment Regulations 2009:

The tax regime has been amended to permit a variety of small lump sums to be paid as authorised payments. These regulations were intended to amend other legislation to facilitate the payment of these new lump sums. However, the Government has acknowledged that there is an error in the provisions which permit GMPs to be commuted as small lump sums (£2000 or less). As a result, GMPs should not currently be commuted in this way. The Government has said that it is considering amendments to correct the position.

## Cases

### Arjo Wiggins v Ralph (*time limits*)

The case concerned the 3 year time limit on claims to the Ombudsman and his discretion to accept claims brought outside it. The case concerned events in 1986.

The High Court held that when the Ombudsman is determining disputes of law (which will include claims for breach of trust, breach of contract and negligence) he cannot take a more liberal approach than the courts, including in relation to limitation defences. The result of a legal dispute should not differ depending on whether it is decided by a court or by the Ombudsman.

The judgment does not change the position in relation to cases involving maladministration. The Ombudsman may still investigate complaints in relation to "pure maladministration" (eg: rudeness, delay or incompetence where the courts would not have jurisdiction) and grant remedies which are not limited by reference to the statutory time limits for court actions. However, "the staleness of a claim" will be relevant to the Ombudsman's discretion as to whether to consider it at all.

### Cemex v MNOPF Trustees Ltd (*determining when a section 75 debt could be triggered in a multi-employer scheme*)

In 2005 Cemex employed 1 active member of the scheme, B. B reached normal pension age in November 2005 but continued working for Cemex. He could not continue as an active member of the scheme and became first a deferred

member and then a pensioner in January 2006. On 1 April 2006 Cemex began to employ another active member of the scheme. At all times Cemex had employees who were eligible to join the scheme if the trustees had exercised their discretion to allow them to do so. The question was whether the fact that Cemex did not employ any active members between November 2005 and April 2006 had triggered a cessation event and a section 75 debt had therefore become due.

In 2005/6 the relevant legislation provided that a cessation event occurred when an employer "*ceases to be an employer employing persons in the description of employment to which the scheme relates at a time when at least one other person continues to employ such persons.*" This definition was changed in April 2008 and the case is not therefore relevant to events which occur after that date.

The judge held that "*if an employer has anyone who is an employee in the description of the employment in my view such an employer remains an employer for the purpose of [the debt] regulations*". As a result, the continued employment of B as a deferred and a pensioner member was sufficient to satisfy the test as was the employment of individuals who could join the scheme but had not.

### HR Trustees v German (*changes to amendment powers*)

The Plan was established in 1977 and its amendment power said that no amendment could reduce "*the value of benefits secured by contributions already made*". A few years later that amendment power was replaced with a provision which did not contain such a restriction. In the early 1990s, the Plan was purportedly amended to convert the benefits from defined benefit to defined contribution. However, the amendment did not protect the future value of accrued final salary benefits by linking them to final pensionable salary.

The court held that the amendment power was invalid and the original power, including the restriction remained. The effect of the restriction on the amendment power was that "*a final salary entitlement to a money purchase entitlement [was] permissible, but only subject to an underpin which preserves the future monetary value of the proportion of Final Pensionable Pay which the member has accrued in respect of pre-amendment Service*". In so far as there was no underpin here, the amendment was invalid. The court dismissed arguments from the employer that members who had signed up to the revised terms were bound by the purported changes. There had been no informed consent. Finally, the court held that any purported compromise or waiver by a member of their pension entitlement or rights was an unenforceable surrender under section 91 of the Pensions Act 1995. The case is being appealed.

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

**Boughton (74851/1):** *Delays were maladministration even though no statutory time limits breached*

An ex-spouse complained of delays in processing a pensions credit. The administrators had not breached any statutory time limits but the Ombudsman identified a number of timescales which he considered inadequate:

- the delay in telling the ex-spouse that an internal transfer was not available (from 5 March to 11 April);
- the 16 working days from receipt of the transferee scheme's undertaking before the administrators asked Standard Life for the current fund value of the member's DC benefits. The Ombudsman said this should have been done within 5 working days;
- the 17 working days for the administrator to raise and send the transfer cheque to the trustees for signing. They should not have taken longer than 3 working days;
- the delay in the administrator sending the trustees the letter for them to countersign and send to Standard Life (requesting disinvestment). The fact that it was a holiday period was irrelevant. In this case this should have been done within 6 working days;
- the 15 working days it took to calculate the member's CETV and notify the ex-spouse was not unreasonable.

**Winterstein (76288/1):** *Death benefit distribution test not simply whether to deviate from nomination form*

The member died in early 2008, leaving a pregnant widow who he had married nine months earlier. His nomination form,

completed in January 2006, had nominated his widow (who he was then living with) and his sister to receive 50% each of any lump sum death benefit. When his employer, a local authority, followed that nomination the widow complained. She felt that the member would have changed his lump sum nomination to give her 100%. His sister said that he could have done so but chose not to.

The Ombudsman took the view that the authority had not asked itself the correct question. It had restricted itself to matters that it knew had changed since the nomination, and not looked closely enough at the circumstances of the potential beneficiaries. The Ombudsman also said that the authority did not have regard to the fact that *"the nomination form was completed as one of the formalities of joining the Scheme. There was a different stimulus than at the times when [the member's] circumstances changed and the existence of the form needed to be considered in that light."*

The authority was ordered to reconsider distribution of the lump sum having taken appropriate steps to identify beneficiaries and obtain sufficient information about each to give due consideration to the distribution.

## Things to look out for

**GMPs and Equalisation:** The pensions minister has made a statement suggesting that legislation will be passed requiring equalisation of the impact of Guaranteed Minimum Pension on members' benefits. The comments were made in the context of the Financial Assistance Scheme but seem to have wider implications. There are currently no further details.

**Dates for diaries:** 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 a trustee training course taking place on **21 April 2010**. 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), T: +44 (0)20 7367 2325 or your usual pension partner. Please also visit our new website at [www.cms-cmck.com](http://www.cms-cmck.com).

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 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.

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