

C/M/S/ Cameron McKenna

Pensions Update

January 2002

Issue 8



This Update should not be treated as a comprehensive review of all developments in this area of law; also while we aim for it to be as up-to-date as possible, some recent developments may miss our printing deadline.

This commentary is not a full review of the topics it covers. Specific advice should always be sought on any particular subject.



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2002



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Editorial

2001 was yet another active period for occupational pension schemes and as in previous years, our first bulletin of the new year, attempts to summarise some of the key regulatory, legislative and case law developments over the last 12 months.

One of the most important events of the year was the publication of Paul Myners' report on Institutional Investment in March, followed in October by the Government's response. In the long term this may result in changes to the way in which pension schemes operate in relation to investments and will introduce a new statutory duty of care on trustees when exercising their investment powers. Also in response to Myners (as well as much industry criticism), the Government have unveiled their proposals for long term reform of the Minimum Funding Requirement – to be replaced in the future with a scheme specific funding standard.

Further change is on the cards following the publication of a consultation paper to amend the Transfer of Undertakings Regulations to remove the existing pensions exemption. In addition, the Pickering Review currently being undertaken presents another opportunity for the overly complex regime which is currently in place to be simplified. Let us hope this review is more successful than those which have gone before – in any event, we await the outcome with interest.

On the case law front, we had the final instalment in the long running issue of backdating part-timer pension benefits when the Preston case was heard by the House of Lords in February. We also had the Williamson/Marsh Mercer judgment on GMP equalisation, which sadly left the question largely unresolved as it was deter-

mined on a jurisdictional issue. Equitable Life has spent most of the year attempting to deal with the fall-out from last year's House of Lords judgment on the rights of policy holders with guaranteed annuity rates and in November, the *Unilever v Merrill Lynch* case kept us all entertained, although from a legal perspective it unfortunately settled before any of the points of law under discussion could be determined by the court. Nonetheless, as a result of this case, trustees seem likely to scrutinise investment manager's performance as never before.

It has also been a busy year for the Pensions Team and has seen our profile continue to rise. We were short-listed for UK pension lawyers of the year by Professional Pensions and for European Pension Lawyers of the year by Global Pensions. Mark Grant won the prestigious Wallace medal awarded by the Association of Pension Lawyers for excellence in pensions writing. Simon Pilcher and Keith Webster each received the Diploma in International Employee Benefits. In addition, Mark Atkinson became a partner in May and was singled out as a "name to remember" in the Pensions Management Provider awards, in which the team as a whole won a commendation.

As always we will continue to keep you updated on developments as they happen through our bi-monthly bulletin, our spring and autumn seminars and our trustee training. Our spring seminar will be held on 26 April 2002 and the next date for our trustee training is 4 April 2002. Further details will be circulated shortly. In addition, up to the minute information can be obtained by subscribing to our free e-mail

service "LawNow" at www.law-now.com. We also continue to provide specialist information on the Pensions Ombudsman at www.po-info.com.

If you require any further information on anything contained in this bulletin, please contact either your usual contact in the pensions department or Nigel Moore (020 7367 3405), Mark Grant (020 7367 2325) or Mark Atkinson (020 7367 2184). If you would like someone else in your organisation to receive this Update or would like to amend your contact details, please contact Donna Waters (020 7367 3581 or donna.waters@cmck.com).



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Legislation

Finance Act 2001

Amongst other things, reduces the tax on repayment of surplus to employers from 40% to 35% with effect from 11 May 2001.

Employment Bill 2001

Amongst other things, contains a power enabling the Secretary of State to make regulations preventing less favourable treatment of fixed term employees. The explanatory notes say that these regulations will implement the Fixed-Term Workers Directive and prevent pay and pensions discrimination against those in fixed term employment.

State Pension Credit Bill

Introduces a new state pensions credit for people aged 60 and over which will subsume the minimum income guarantee.



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Statutory instruments

The Trustee Act 2000 (Commencement) Order 2001 SI 49

- Effective 1 February 2001.
Brings the majority of the Trustee Act 2000 into force.

The Stakeholder Pension Schemes (Amendment) Regulations 2001 SI 104

- Effective 14 February 2001.
Amend the Stakeholder Pension Scheme Regulations 2000 to amongst other things: permit non-trust stakeholder schemes to restrict membership by reference to employment or to membership of a particular organisation; include the authorised corporate director of an open-ended investment company among the categories of person who may be the manager of a non-trust scheme; and clarify that restrictions may be imposed on payment of contributions by cash, credit card or debit card.

The Personal Pension Schemes (Restriction on Discretion to Approve) (Permitted Investments) Regulations 2001 SI 117

- Effective 6 April 2001.
Impose restrictions on the Inland Revenue's discretion to approve a personal pension scheme by restricting the investments in which they can invest.

The Personal Pension Schemes (Conversion of Retirement Benefits Schemes) Regulations 2001 SI 118

- Effective 6 April 2001.
Prescribe the way in which occupational money-purchase schemes may apply to the Inland Revenue for approval as personal pension schemes.

The Personal Pension Schemes (Transfer Payments) Regulations 2001 SI 119

- Effective 4 February 2001 in relation to provisions on pension sharing orders and the exceptions to Section 638(7A) of the Income and Corporation Taxes Act 1988 and for all other purposes, 6 April 2001.
Amend and consolidate the requirements on personal pension schemes to contain a provision for the making, acceptance and application of transfer payments in order for them to gain approval from the Inland Revenue.

The Child Support, Pensions and Social Security Act 2000 (Commencement No. 6) Order 2001 SI 153

- Effective 25 January 2001 for the purpose of making reports and orders regarding the review, documentation and alteration of rebates, rates of contributions and minimum contributions under the Pension Schemes Act 1993 in relation to the State Second Pension.
- Effective 6 April 2002 for the purpose of bringing into force the provisions in the Act relating to the State Second Pension.
- Effective 9 April 2001 for the purpose of bringing into force the provisions in the Act relating to the calculation of the Category B retirement pension.

The Guaranteed Minimum Pensions Increase (No. 2) Order 2000 SI 160

- Effective 6 April 2001.
- Specifies a 3% increase for that part of a GMP which is attributable to earnings factors for the tax years 1988/1989 to 1996/1997.

The Social Security Revaluation of Earnings Factors Order 2001 SI 631

- Effective 6 April 2001.

- Contains the percentage increase in the earnings factors for the tax years 1978/1979 to 2000/2001.

The Retirement Benefits Schemes (Indexation of Earnings Cap) Order 2001 SI 637

- Effective 6 April 2001.
- Increases the earnings-cap to £95,400 for the 2001/2002 tax year.

The Pensions Increase (Review) Order 2001 SI 664

- Effective 9 April 2001.
- Provides for the increase in the rates of certain public sector pensions.

The Welfare Reform and Pensions Act 1999 (Commencement No. 10, and Transitional Provisions) Order 2001 SI 933

- Amongst other things, brings forward to 6 April 2001 (from 8 October 2001) the commencement of parts of the Act which relate to stakeholder pension schemes, in particular, the requirement that an employer consult prior to designating a stakeholder pension scheme.

The Stakeholder Pension Schemes (Amendment) (No. 2) Regulations 2001 SI 934

- Effective 5 April 2001.
- Amend the Stakeholder Pension Scheme Regulations 2000 to, amongst other things: provide that those who are not employees on the date of commencement of consultation do not have to be consulted; make different provision as to means of payment of contributions; expand on the requirements relating to investments and investment options; provide for an additional ground of refusal of contributions; make various provisions in relation to statement years and change and clarify provisions governing the deduction of contributions from remuneration.

The Occupational and Personal Pension Schemes (Perpetuities and Contracting-out) Amendment Regulations 2001 SI 943

- Effective 6 April 2001.
- Amend the Personal and Occupational Pension Schemes (Perpetuities) Regulations 1990 and

the Occupational Pension Schemes (Contracting-out Regulations 1996 principally to take into account the fact that some occupational pension schemes may now be approved under the personal pensions chapter of the Income and Corporation Taxes Act 1988.

- Amend the Personal Pension Schemes (Appropriate Schemes) Regulations 1997 which are concerned with the arrangements whereby occupational and personal pension schemes may be contracted-out to include certain stakeholder schemes.

The Social Security (Contributions) Regulations 2001 SI 1004

- Effective 6 April 2001.
- Set the lower and upper earnings limit for 2001/2 at £72 and £575 per week respectively, the primary threshold and the secondary threshold both at £87 per week.

The Social Security (Inherited SERPS) Regulations 2001 SI 1085

- Effective 6 October 2002.
- Provide for an increase in the rate of the additional pension under SERPS to which spouses widowed on or after 6 October 2002 (the date on which amount of additional pension which may be inherited by a surviving spouse under SERPS is reduced from 100% to 50%) would be entitled, where their deceased spouse had attained pensionable age.

The Occupational Pension Schemes (Pensions Compensation Provisions) Amendment Regulations 2001 SI 1218

- Effective 23 April 2001.
- Amend the Occupational Pension Schemes (Pensions Compensation) Regulations 1997 to, amongst other things, provide greater protection for members nearing retirement and remove the 90% limit by reference to which the maximum amount of compensation, the amount of interest and of payments made in anticipation, are calculated.

The Welfare Reform and Pensions Act 1999

(Commencement No. 11) Order 2001 SI 1219

- ✔ Effective 23 April 2001.
- ✔ Brings into force Section 17 of the Act which amends the Pensions Act 1995 with the aim of ensuring that more scheme members receive a greater proportion of their benefits under the compensation provisions.

The Child Support, Pensions and Social Security Act 2000 (Commencement No. 8) Order 2001 SI 1252

- ✔ Amongst other things, brings into force on 2 April 2001 provisions amending Section 37 Pensions Act 1995 concerning the payment of surplus out of an ongoing occupational pension scheme to an employer.
- ✔ Revokes an earlier commencement order which would have brought into force, on 1 June 2001 an alternative to the anti-franking rules.

The Additional Pension and Social Security Pensions (Home Responsibilities) (Amendment) Regulations 2001 SI 1323

- ✔ Effective 6 April 2002.
- ✔ Amongst other things, make additional provision for the calculation of the State Second Pension and conditions to be satisfied for entitlement to the State Second Pension where a person is treated as precluded from regular employment due to responsibilities at home.

The Social Security (Minimum Contributions to Appropriate Personal Pension Schemes) Order 2001 SI 1354

- ✔ Effective 6 April 2002.
- ✔ Specifies the appropriate age-related percentages in respect of earners for the tax years 2002/2003 to 2006/2007.

The Social Security (Reduced Rates of Class 1 Contributions, and Rebates) (Money Purchase Contracted-out Schemes) Order 2001 SI 1355

- ✔ Effective 6 April 2002.
- ✔ Specifies the appropriate flat-rate percentage in respect of earners for the tax years 2002/2003 to 2006/2007 as 1.6% in the case of primary class 1

contributions and 1% in the case of secondary class 1 contributions.

- ✔ Specifies the appropriate age-related percentages in respect of earners for the tax years 2002/2003 to 2006/2007.

The Social Security (Reduced Rates of Class 1 Contributions) (Salary Related Contracted-out Schemes) Order 2001 SI 1356

- ✔ Effective 6 April 2002.
- ✔ Alters the contracted-out percentage to be deducted from secondary Class 1 contributions in respect of members of salary related contracted-out pension schemes from 3% to 3.5%.

The Child Support, Pensions and Social Security Act 2000 (Commencement No. 9) Order 2001 SI 2295

- ✔ Brings into force on 23 July 2001 a new Section 66A Pensions Act 1995 which sets out a prohibition on occupational pension schemes having different rules in relation to entitlement and payment of benefits and contributions for members working outside the UK or requiring benefits to be paid outside the UK (subject to certain exceptions).
- ✔ Brings fully into force the provisions of the Act setting out an alternative to the anti-franking rules on 6 April 2002.

The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 SI 2660

- ✔ Effective 12 October 2001.
- ✔ Amend in particular the Sex Discrimination Act 1975 to provide that indirect discrimination will occur where an employer applies an apparently neutral provision, criterion or practice to the disadvantage of a woman and to a substantially higher proportion of women than men, unless it can be justified by objective factors unrelated to sex. In addition the burden of proof will shift from the claimant to the respondent employer if the complainant can prove facts from which the tribunal could conclude in the absence of an adequate explanation that discrimination has occurred.

The Occupational Pensions (Revaluation) Order 2001 SI 3690

- ✔ Effective 1 January 2002.
- ✔ Specifies deferred pension revaluation percentages for periods from 1986 to 2001.



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Inland Revenue

Extra Statutory Concession A101, August 2001

- Concerns personal pension schemes and tax relief for contributions. Section 639 of the Income and Corporation Taxes Act 1988 which provides the rules for giving tax relief on members' contributions to approved personal pension schemes has been amended by the Finance Act 2000 for contributions made in the tax year 2001-02 and subsequent tax years.
- Allows a member to obtain relief at the basic rate by deducting from his payment to the scheme administrator an amount equal to basic rate tax on the payment. The basic rate limit is increased by the amount of the payment where the member: (a) is liable to income tax at the higher rate on any income for the tax year in which the payment is made, or (b) would be so liable if the adjustment were not made. The consequence is that an additional amount of income is charged at the basic rate instead of the higher rate, so that the member obtains relief at the higher rate on some or all of the payment.

Extra Statutory Concession A102, October 2001

- Concerns contributions to approved personal pension plans from 6 April 2001 and age related allowances.
- Explains that changes introduced by the Finance Act 2000 mean that a deduction is no longer given in arriving at total income which affects the level of income which determines the age related personal and married couples allowances. The concession

allows contributions to reduce an individual's total income for the purposes of determining the level of the age related allowances.

Guide for Trustees of Small Self-administered Schemes, December 2001

- Aimed at helping trustees of SSASs understand the special requirements for that kind of scheme.

Double Tax Treaty – US/UK

- Singles out pension plans and other employee benefits for special treatment and aims to provide the same tax relief in the country where an individual is currently resident as applies in the country where the plan is established. This treaty is expected to be ratified in time for this to apply to UK residents working in the USA from 1 January 2001. In the UK it becomes effective on the 6 April after ratification.

Updates

Update No 82, 22 January 2001

- Provides that in future most transfers to overseas schemes may be made without seeking prior consent from PSO if certain conditions are met and if the transferee is not a controlling director or a high earner. The new practice will apply to transfer requests made to administrators/trustees, insurance companies, personal pension providers and retirement annuity contract providers on or after 6 April 2001; either the old or the new practice can be applied to transfer requests made before that date.

Update No 83, 22 January 2001

- Provides that if a large self-administered scheme is winding-up without

replacement and cannot complete winding-up within 2 years of the effective date (the "as at" date) of an Actuarial Valuation Report for reasons beyond the trustees' control, the PSO may agree to a Report not being submitted.

Update No 84, 22 January 2001

- ✔ Modifies the calculation of the Pension Debit in money purchase schemes, and clarifies some other areas of practice relating to pension sharing on divorce.

Update No 85, 22 January 2001

- ✔ Attaches a new Appendix to Practice Notes IR12 (1997) which gives details of how transfers from occupational to personal pension schemes must be calculated for certification purposes.

Update No 86, 13 February 2001

- ✔ Concerns mailing list subscriptions.

Update No 87, 13 February 2001

- ✔ Concerns changes in the method and formatting of PSO publications.

Update No 88, 27 February 2001

- ✔ Notifies publication of new FSAVCS Guidance Notes, published on the Inland Revenue website on 5 February 2001.

Update No 89, 23 March 2001

- ✔ Makes changes to Guidance Notes IR 76 (2000) which were published on the Internet on 8 September 2000.
- ✔ Changes clarify and in some cases rectify the guidance. Some new entries are included in the Glossary. Part 23 has been entirely replaced.

Update No 90, 23 March 2001

- ✔ Attaches a new edition of IR 12, available from the Inland Revenue website. In particular, the Practice Notes have been revised to reflect tax approval practice for: annuity purchase deferral and income drawdown for money purchase occupational pension schemes and buy-out contracts; flexible use of additional voluntary contributions; pension sharing on divorce; and enhancing the role of the pensioner trustee.

Update No 91, 23 March 2001

- ✔ Provides that from 1 April 2001, the Inland Revenue will cease to consider

new applications for tax approval of Simplified Defined Contributions Schemes due to lack of demand. The application form SF400 is being withdrawn accordingly. Applications for approval made before 1 April 2001 will be considered in the normal way. Existing approved schemes will not be affected.

Update No 92, 26 March 2001

- ✔ Details various organisational changes including the fact that from 1 April 2001 the Pension Schemes Office will become part of a larger Inland Revenue group called IR Savings, Pensions, Share Schemes (IRSPSS).

Update No 93, 29 March 2001

- ✔ Details changes to forms PS 5, 6, 7, 160, 161, 256, 7012 and the application forms.
- ✔ Notes that two new forms, PS 7050F and 7050T, are being introduced.

Update No 94, 29 March 2001

- ✔ Notes a revised application procedure for personal pension schemes with a tax approval date after 5 April 2001 which will no longer require a separate application for tax approval and contracting-out.

Update No 95, 23 April 2001

- ✔ Notes that an extra statutory concession which applies to section 608 of the Taxes Act has been amended to allow qualifying old pension schemes to continue to claim tax exemptions even though benefits from the scheme have been shared in accordance with the new pension sharing on divorce provisions that came into effect on 1 December 2000.

Update No 96, 14 May 2001

- ✔ Says that procedures for dealing with applications to convert from Chapter I to Chapter IV approval have now been revised in accordance with the provisions of the relevant regulations and explains that application forms for scheme approval require revision and should be reprinted in the autumn.
- ✔ Sets out the text of an additional declaration to be made by the trustees which must be submitted to IR SPSS

with the application to convert the scheme in the meantime.

Update No 97, 11 June 2001

- ✔ Acknowledges that there has been a delay in providing model rules for flexibility in pension provisions and says these should be available prior to 1 September 2001.
- ✔ Says that schemes that have already made the flexibility provisions available and whose deadline for the submission of executed documentation expires before 31 August 2001 should notify the Revenue on an individual basis.

Update No 98, 18 June 2001

- ✔ Clarifies the time limits for making enquiries.

Update No 99, 18 June 2001

- ✔ Contains amendments and corrections to IR12 (2001). Most of the amendments concern previously announced changes but there are also a small number of new changes.

Update No 100, 18 June 2001

- ✔ Notes that schemes which have not yet been approved may be abandoned in accordance with PN 14.14. Approved schemes cannot be abandoned unless the approval has been formally cancelled by IR SPSS. Only where tax approval was granted on an invalid basis may such schemes have their approval formally cancelled.

Update No 101, 2 July 2001

- ✔ Explains that the procedure for dealing with continuous service claims has been improved and there has been a minor change of practice. PN 7.15 says that if the employer changes because of a take-over, merger or reconstruction continuous service is allowable if the member's job before and after the change is essentially unchanged. Until now the Revenue have said that this means that the member must be a controlling director of both employers. As from 2 July 2001 if the member is a controlling director of one employer it is sufficient for the purposes of PN 7.15 if the member simply holds the office of director of the other employer.

Update No 102, 2 July 2001

- ✔ Provides that tax approved occupational pension schemes or schemes seeking tax approval should not transact with un-approved pension schemes.

Update No 103, 20 August 2001

- ✔ Says that from 6 April 2002 definitive documentation and rules must be submitted with applications for approval. The only exception to this will be where a scheme is set up as a result of the sale of an employer, or part of an employer's trade.

Update No 104, 20 August 2001

- ✔ Says that where a scheme changes its rules to permit the commutation of trivial pensions already in payment, IR SPSS will now allow such pensions to be commuted in the circumstances set out in this update.

Update No 105, 31 August 2001

- ✔ Attaches an amended version of Appendix XII to IR12 (2001) which contains the wording of a "grandfathering clause" to adopt the flexibility provisions including income drawdown. Such a clause will not be permissible for large self-administered schemes. Income drawdown is not permissible for schemes with a final salary element.

Update No 106, 19 September 2001

- ✔ Covers various customer service and education matters.

Update No 107, 1 October 2001

- ✔ Aims to clarify the extent of the Inland Revenue's discretion in the tax approval of pension schemes.

Update No 108, 29 October 2001

- ✔ Notes the revisions to paragraphs 5.17, 17.37 and 17.39 of IR12 (2001) concerning refunds of contributions paid in error to the employer. The criteria for a refund have been changed.

Update No 109, 29 October 2001

- ✔ Contains formal confirmation of a change announced to tax approval practice on the transfer of benefits once a member has reached normal retirement date.
- ✔ Attaches amendments to the Practice Notes covering the circumstances in which a transfer can be made at or after normal retirement date.



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Opra

During the period covered, 43,500 enquiries were received by Opra's helpdesk. A quarter of these were investigated, 459 went to the board and there were 10 criminal prosecutions. The most frequently reported problem was that employers were not paying pension contributions on time.

Opra has reviewed its approach to disclosing the names of those whom it punishes and now makes details of the Opra Board's civil determination and reviews public.

Bulletins

Bulletin 19, January 2001

- Contains the casework reviews for November and December 2000. Also contains an explanation of Opra's procedures for registration of stakeholder schemes.

Bulletin 20, March 2001

- Contains the casework reviews for January and February 2001. Also looks at Opra's powers in relation to extending time limits for transfer payments.

Bulletin 21, July 2001

- Contains the casework reviews for March, April and May 2001.
- Says that bi-monthly bulletins are ceasing and bulletins will be published quarterly in the future and be more discursive in nature.
- Explains that in future Opra will list all determinations resulting in a penalty on their website and issue press releases in relation to all late contributions cases resulting in a penalty and all cases of late accounts or late auditor's statements resulting in a penalty.

Bulletin 22, October 2001

- Looks at the employers' experience of workplace stakeholder pensions in

which seven different types of employers' experience was considered.

- Contains an article on the Opra Board's approach to deciding cases in which the types of cases considered and the reasoning of the Board is explained.
- Summarises the impact of new legislation relating to wind up of occupational schemes (which is expected to take effect in April 2001).
- Provides a useful account of the information needed when making a report to Opra.

Opra Notes

Opra Note 8: Direct Payment Arrangements by Employers to Personal Pension and Stakeholder Pension Schemes, February 2001

- Aimed at helping the providers of personal and stakeholder pension schemes, and others advising employers who make payments to such schemes. It explains the duties of the employer and the provider and the procedure for making reports to Opra.

Opra Note 9: Exposure Draft of Note on Minimum Funding Requirement - Making Extension Applications to Opra, April 2001

- Aimed at actuaries, auditors and others involved with schemes where trustees and/or sponsoring employers wish to make applications to Opra for extensions to the normal periods for restoring full and 90% funding. The Note may also be helpful, in such situations, to trustees or employers themselves.

Factsheets and Guides

Revised Guide to Help Occupational Pension Scheme Trustees Understand Their Duties and Responsibilities, June 2001

- Aimed mainly at newly-appointed trustees, including member-nominated trustees, and prospective trustees. It gives an overview of the requirements of being a scheme trustee and may be a useful reference for existing trustees and for employers in their dealings with the scheme trustees. The guide has been updated to reflect Opra's experience to date.

MFR Update, July 2001

- Confirms that whilst the Government is looking at reform of the Minimum Funding Requirement, in the meantime, Opra will continue to regulate schemes on the basis of the current MFR rules. Also highlights some issues emerging from Opra's experience in this area since the MFR came into force.

Section 103 Reports, March 2001

- Issued in March 2001 in relation to Mr Leon Tautz, Mr Raymond Slade and Mr Stephen Slade, former trustees of The Asheridge Ltd Discretionary Pension Scheme. The report was made because as a result of the trustees' actions, it was likely that members would not be paid full benefits.



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Cases

Royal Masonic Hospital v Pensions Ombudsman (High Court, Chancery Division)

20 December 2000

This was an appeal from a determination of the Pensions Ombudsman that the preservation requirements applied to unfunded schemes. The Court set aside the Pensions Ombudsman's determination.

The preservation requirements in the Pension Schemes Act 1993 applied to schemes whose resources arose from payments made by employers or such other payments as were prescribed. "Resources" in this context meant "the funds out of which the benefits provided by the scheme are payable from time to time". The Court thought that this clearly contemplated a funded scheme and did not agree with the Pensions Ombudsman's argument that the definition could also apply to an employer promise to pay benefits under an unfunded scheme.

Re AXA Equity & Law (High Court, Chancery Division)

11 January 2001

AXA was an insurance company that wanted to merge two of its subsidiaries, Equity & Law and Sun Life. It applied to the Court for approval of the merger arrangements, which included proposals for disposal of surplus assets worth £1.7 billion. One of the policyholders objected and sought a pre-emptive costs order (i.e. an order for costs in advance, regardless of the outcome of the case).

The Court held that a pre-emptive costs order would be appropriate where an action was large in terms of value or the numbers of people involved, there were

complex questions of law at issue and a large number of affected people agreed with the action. However, a pre-emptive costs order was not a blank cheque. The Court retained a discretion to disallow costs unreasonably incurred.

Under the Insurance Companies Act 1982, the Court had an absolute discretion whether to sanction such proposals. The case examined the considerations the Court should take into account when exercising this discretion. In the particular circumstances, the Court sanctioned the proposals.

Merchant Navy Ratings Pension Fund Trustees v Chambers (High Court, Chancery Division)

7 February 2001

The Merchant Navy Ratings Pension Fund was an industry wide final salary scheme. A 1999 valuation showed a substantial deficit in the scheme. The employers and trustees agreed after negotiations to proposals which would close the existing scheme to future accruals and introduce a new section for future accrual on a money purchase basis. The trustees applied to Court for approval of the proposed changes.

The Court considered in detail how the proposal would affect groups of members, including pensioners, actives and deferred members. The application of Section 67 of the Pensions Act 1995 (dealing with restriction on power to alter schemes particularly in relation to accrued rights) was also considered.

The Court decided that the trustees' decision to implement the proposal was not one which no reasonable body of trustees properly directing themselves could have reached. Nor was there any evidence to indicate that

the trustees had taken into account irrelevant, improper or irrational factors. Although in theory some members might be worse off, the Court decided that the proposal as a whole was reasonable and in good faith. The Court therefore granted the order sought.

Preston v Wolverhampton Healthcare NHS Trust (House of Lords)

8 February 2001

This case concerned part-time workers bringing sex discrimination claims because they were denied access to occupational pension schemes. Part-time workers challenged the validity of time limits for making claims and restricting the period of retrospective access to their pension schemes to two years. The case went to the European Court of Justice who determined that the two year time period was contrary to European law.

The House of Lords held that part-timers could claim retrospective membership of their occupational pension schemes back to 8 April 1976 but they would have to bring their claims within six months of leaving service.

Capital Cranfield Trust Corporation v Sagar (High Court, Chancery Division)

19 February 2001

An occupational scheme was winding up in surplus. The principal employer had been struck off the register in 1981. Under companies legislation it would have been possible to reinstate the employer on the companies register before the expiry of 20 years after the employer had been struck off, and that 20 year deadline was now imminent. The trustees wanted to know if the employer should be reinstated as it could have an entitlement to some surplus.

Questions over the identity of the principal employer arose because the company which purported to be the principal employer had not employed anyone for most of the scheme's life. The Court held that the company in question had been treated by

everyone as the principal employer and no one had ever been informed to the contrary and there had been no purported exercise of the power to change the principal employer. Therefore, the company remained the principal employer throughout. In relation to the requirement for the trustees to consult with and obtain the approval from the principal employer before distributing surplus on a winding-up, the Court said that the trustees could exercise the power without such consultations or consent where the principal employer no longer existed. In addition, there had already been considerable delay in winding up the scheme and restoration of the company might be disadvantageous for beneficiaries of the scheme because of further delay.

Marsh Mercer Pension Scheme v Pensions Ombudsman (High Court, Chancery Division)

23 February 2001

Mr Williamson had complained to the Pensions Ombudsman that his benefits were lower than an equivalent female employee in respect of the guaranteed minimum pension ("GMP") element. The Pensions Ombudsman upheld Mr Williamsons' complaint and stated that GMPs should be equalised. The employer and trustees appealed.

The Court held that the Pensions Ombudsman did not have jurisdiction to deal with the original complaint as his determination affected other members who might have wished to argue against equalisation and who were not represented before him. The Court did not therefore have to decide whether GMPs should properly be equalised or, indeed, how this should be done. However, expressing his own views, the judge said that the better analysis of GMPs was as calculation factors rather than pensions themselves or discrete elements of the scheme pension.

Derby v Scottish Equitable (Court of Appeal)

16 March 2001

Scottish Equitable mistakenly overpaid £170,000 to Mr Derby and were seeking to

recover this sum. As a result of receiving this sum, Mr Derby spent just over £9,000 on lifestyle changes, repaid his mortgage and purchased a pension policy with Norwich Union. Mr Derby argued that as a result of Scottish Equitable's mistake, he had changed his position and it would be unfair for Scottish Equitable to now recover the overpayment.

The Court of Appeal decided that the money spent on lifestyle improvements could not be recovered by Scottish Equitable. However, the Court of Appeal went on to say that paying off a debt which would otherwise have had to be paid did not amount to a change of position and the amount in respect of the mortgage could therefore be reclaimed. Likewise, the arrangement with Norwich Union could be unravelled. In general, the fact that Scottish Equitable had been careless did not preclude recovery.

Allonby v Accrington (Court of Appeal)

23 March 2001

Mrs Allonby was a part time lecturer. The college she worked for was in financial difficulties so it decided to dismiss part time lecturers and replace them with self employed agency staff. Mrs Allonby was re-employed on this basis. She claimed that her dismissal was discriminatory on grounds of sex and that as a contract worker she was also subject to discriminatory treatment (as contract workers were not entitled to some of the benefits paid to employees in particular in so far as the pension scheme trustees did not admit her to the pension scheme). The question arose whether Mrs Allonby could compare her position with that of an employee of the college for the purposes of Section 62 of the Pensions Act or indeed whether a comparator was necessary at all.

Section 62 requires a comparator "in the same employment" and it was agreed that this might not comply with Article 141 EC which requires that men and women working in the same place and under the same conditions should be treated the same. Several questions were referred to

the ECJ including the way in which comparison in indirect employment should be carried out and whether an industry wide scheme which excludes workers employed under contracts for services is discriminatory if a significantly greater number of women than men are excluded. The case also contained some discussion of objective justification. The Court said that the employment tribunal had not looked at alternatives – was there a real need to dismiss; was there any consideration of the disproportionate impact on women and did the need to dismiss outweigh any disproportionate impact?

International Power plc v Healy and National Grid Co plc v Mayes (House of Lords)

4 April 2001

The House of Lords held that arrangements made by the employers to deal with the scheme surplus, including setting off payments otherwise due to the scheme to meet the increased costs of early retirement pensions, were valid. The earlier decision in the British Coal Corporation case that using surplus to meet a debt owed by the employer amounted to repayment of surplus out of the scheme was effectively overturned.

Following the judgment in the Court of Appeal, the rules of the scheme had been amended. Lord Hoffman came to the view that no deed of amendment was needed as it added no protection to the members (the employer having the right to amend without trustee consent.) However, Lord Scott held that the arrangements were inconsistent with the rules of the scheme and therefore amendments were required.

Besttrustees v Stuart (High Court, Chancery Division)

10 April 2001

The amendment power under the BAI pension scheme allowed the principal employer to authorise the trustees in writing to alter the rules. The trustee then was to declare the alteration in writing and the rules would stand amended with effect from the declaration.

In 1994, members were informed that

in future, normal pension age would be 65 for both sexes as a result of the Barber decision that unequal pension ages breached European law. The announcement stated that the formal scheme rules were being amended from April 1994 to give effect to this. At the time of the announcement, the company was also the sole trustee of the scheme. A deed of amendment was executed in 1996.

The Court decided that the announcement in 1994 did not validly change pension ages. The 1994 notice appeared to come from the company, in its capacity as principal employer, and not as trustee – it was not expressed to be signed in its capacity as trustee. The phrase "the scheme rules are being amended" in the announcement was not a declaration in writing that the rules stood amended and therefore did not effect a change in accordance with the amendment power. Accordingly, the change in pension ages did not take effect until 1996.

Wrightson Ltd v Fletcher Challenge Nominees Ltd (Privy Council)

3 May 2001

This is a decision in relation to the application of a partial winding up rule in New Zealand. Wrightson Ltd gave notice to withdraw from participation in the Fletcher Challenge Pension Scheme. The rules of the scheme provided that upon a "cessation of participation there shall be deemed to be a dissolution of such part of the Plan as the Trustee determines to be appropriate to the Participating Company and the [full winding up provisions] shall (mutatis mutandis) apply". At first instance, the judge held that this required the trustees to adopt a share of fund approach. This was supported in the judge's view by the wording of the scheme and in particular the fact that the full winding up rule contained a provision requiring any surplus to be repaid to the participating employers or used to augment members' benefits.

The Court of Appeal and the Privy Council held that this analysis was incorrect. The justification for including part of the surplus would lie in a desire to give

Wrightson employees the same level of security in the new scheme that was being set up for them. The extent of security provided for members' benefits was at the trustees' discretion and there was nothing which obliged the trustees to provide more than the minimum necessary to secure benefits. A surplus was by its nature transitory in an ongoing scheme and members had no proprietary interest in the scheme assets. The wording of the rules did not dictate the trustees' choice between share of fund and a benefits based approach and the court refused even to indicate a presumptive starting point for calculating the transfer.

Patel v Jones (Court of Appeal)

24 May 2001

A trustee in bankruptcy claimed entitlement to a pension which came into payment after the bankruptcy was discharged. The Court of Appeal confirmed that the right to a pension was vested in the member before bankruptcy and was within the description of "property" in the Insolvency Act. The fact that actual payment of the benefits did not occur until after the bankruptcy was discharged was irrelevant to the fact that the rights vested in the member at the time he was bankrupt. However, the trustee in bankruptcy was not entitled to the amount of any pension attributable to post bankruptcy service and contributions. Post-bankruptcy contributions were made by the member in the mistaken belief that the pension rights remained vested in him and a trustee in bankruptcy should not retain money "where it would be contrary to just dealing to do so".

Non-assignability provisions under the Local Government Pension Scheme were not sufficient to defeat the trustee in bankruptcy's claim. They applied to voluntary assignment or charging of benefits, but were not expressed to include automatic vesting on bankruptcy.

Venables v Hornby (High Court, Chancery Division)

14 June 2001

Mr Venables moved from being a paid executive director to an unpaid non-executive director. The Inland Revenue claimed that there had been no "retirement" on ceasing to be a paid director and so tax was payable on the "tax free" lump sum. The Court held that retirement was a matter of fact and degree and in this case, where the individual had gone from a full-time executive position to an unpaid non-executive position, as a matter of fact he had retired. In addition, if the lump sum should not properly have been paid out of the scheme, it was held on resulting trust for the scheme and therefore it was possible to return it to the scheme without a tax charge arising.

Glossop v Copnall (High Court, Chancery Division)

5 July 2001

This was an appeal from the Pensions Ombudsman. A part-time employee had been excluded from the pension scheme and claimed back service relying on cases of indirect discrimination which at the time were working their way through the courts. The employer and the member later came to a settlement but the trustees objected to the Pensions Ombudsman nevertheless making a finding of maladministration against them. The trustees argued that just because there had been a breach of legal requirements, this did not necessarily mean that there had been maladministration and in this case the member had never actually alleged maladministration. The Court agreed it is not necessarily misadministration for a decision maker to take a wrong view of the law.

Abacus Trust Company Ltd v NSPCC (High Court, Chancery Division)

17 July 2001

This case concerned rectification of mistakes in a trust deed in relation to the power of appointment (not in relation to a pension scheme). Had the trustees been properly advised, they would not have acted as they did because of the adverse tax consequences which flowed from their actions. The court looked at the application of the rule in *Re Hastings Bass*. The three questions which needed to be considered were:

- (1) what were the trustees under a duty to consider?
- (2) did they fail to consider it? and
- (3) what would they have done had they considered it?

On question (1) the trustees were bound to have regard to the fiscal consequences of their actions and a proper consideration of those factors would have led to them doing something different. A failure to take these matters into account allowed the Court to treat it as an invalid exercise of the power, thereby avoiding a large tax claim.

Needler v Taber (High Court, Chancery Division)

31 July 2001

In a claim for compensation for personal pension mis-selling, the question arose as to whether the amount of any compensation offered should be reduced to reflect the value of shares allotted to the holders of with profits policies following the demutualisation of the insurer (in this case Norwich Union). Clearly, the individual had gained a benefit which he only acquired because he had been sold a personal pension. However, the relevant question was whether the breach of duty which caused the loss also caused the profit, were they part of a continuous transaction? In this case the answer appeared to be no. The breach of duty had given rise to the opportunity to receive the benefits but did not cause it. Therefore a demutualisation windfall to a member should be ignored in assessing compensation.

Kent v Medway (High Court, Chancery Division)

2 October 2001

This was an appeal from the Pensions Ombudsman concerning an ill-health retirement case. The pensionable pay calculation on which the pension was based did not include payment in lieu of untaken leave. In considering the meaning of pensionable pay in the scheme rules, the Court held that to constitute pensionable pay the payment had to be regular in nature and be a payment for work done under his contract of employment. Payments in lieu of leave were not of this nature.

Hagen v ICI Chemicals (High Court, Queens Bench Division)

19 October 2001

This case concerned a group of employees whose employment was transferred under the Transfer of Undertakings Regulations. Although occupational pension rights were not automatically transferred under the Regulations, the employees were assured by ICI that the pension benefits provided by their new employer would be broadly similar to those provided by ICI. The employees claimed that the new scheme was worse than they had been led to believe. It was held that ICI had breached their duty to their employees to take reasonable care in making statements about future pension rights. Had the complainants been aware of the true position after the sale, they could have tried to make ICI negotiate something more favourable as part of the sale agreement. Although there is no duty on an employer to make employees aware of any pension arrangements after a transfer, an employer must take reasonable care if it chooses to make an announcement to ensure that it is accurate.

Moore's (Wallisdown) Limited v Pensions Ombudsman (High Court, Chancery Division)

21 November 2001 and 21 December 2001

This appeal from the Pensions Ombudsman related to the closure of a final salary pension scheme in 1990 and its replacement with a targeted money purchase scheme. Members were told in a letter that the aim of the new scheme was to provide the same level of pension as under the final salary scheme, although this was stated not to be guaranteed, and the employer promised to pay the "balance of the cost" of the benefits in the new scheme. The Ombudsman held that this amounted to a binding obligation on the employer to pay whatever contributions it took to provide the same level of benefits in the new scheme as would have been paid under the old final salary scheme.

Ferris J allowed the employer's appeal on the grounds that there was no such binding promise as to the benefits to be provided under the new scheme. Part of the judges reasoning was that the new scheme was money purchase which meant that such a promise made no commercial sense. Originally, the Ombudsman did not attempt to justify his decision on the basis that there was a legally enforceable right, but instead he claimed that his jurisdiction enabled him to find maladministration even where there was no legally enforceable right, and that such a decision could not be overturned by the court. Whilst not deciding the issue, Ferris J expressed doubts as to the validity of the Ombudsman's argument.

In a separate judgment on costs, Ferris J ordered the Ombudsman to pay the employer's entire costs of the appeal. Relying on a recent Court of Appeal case relating to an appeal from a coroner, the judge overturned the previous position (first decided in the Elliott case) whereby the Ombudsman was only liable for costs to the extent that the Ombudsman's attendance increased the length of the appeal hearing.

The court refused to make a pre-emptive costs award. The trustees had duly received the guidance of the court and, since the judgment was not clearly wrong, there was no need for further proceedings. The appeal amounted to hostile litigation against the trustees. Therefore, a pre-emptive costs order would only be made if the court was satisfied that the Court of Appeal would in due course inevitably award costs to the group of members. Since that was by no means inevitable, the order would not be given. Furthermore, a court should not be tempted to make such an order just because the costs were small compared to the size of the pension fund. Pension schemes do not exist to fund litigation by a minority at the expense of the members as a whole.

Chessels v British Telecommunications plc (High Court, Chancery Division)

20 December 2001

The trustees of the BT Pension Scheme had sought and received guidance from the Court on matters affecting members' rights. A group of members were found to have been disadvantaged and therefore sought both leave to appeal the decision (which was granted) and an order that their costs be paid out of the pensions fund, whatever the result of the appeal (a "pre-emptive costs order"). It was argued that, without the costs order, the members would not be able to appeal and so a refusal to award costs would effectively deprive them of the right to appeal. Furthermore, the costs at stake were trivial compared to the pension fund.



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Ombudsman determinations

Barnes v Trustees of the Gillette UK Pension Scheme (K00508)

Late payment of pension and lump sum

In March 1999 a member was told that he was going to be made redundant. It was agreed his employment would terminate with effect from 20 June 1999. He was entitled to receive immediate early retirement benefits and had been given an estimate. He wrote to the administrators on 17 June confirming that he wished to take his pension and maximum lump sum from 21 June. The first instalment of pension should have been paid on 30 June but on 30 July the administrators wrote to the member enclosing his pension instalments for July and August and his lump sum. Nothing had been added by way of interest for late payment and the scheme rules contained no provisions on payment of interest. The member claimed interest for late payment at the rate of 10%.

The Ombudsman held it was "inequitable for the Scheme Rules to contain no provisions which protect members from injustice resulting from delays in payment of their benefits". In addition, although there was no provision on when the lump sum became payable, the Ombudsman said that "it should be a matter of good faith for the trustees to regard the lump sum as equivalent to the pension" and treat the same payment provisions as applying to it. The Ombudsman awarded interest on the lump sum from 21 June to 4 August at base rate and simple rather than compound. He awarded similar interest on the pension payments, but only from 30 June.

Westcott v Wren Holdings (now Brit Group Services Limited) (J00508)

Oral hearing, time limits and variation of benefits

In 1981 the member was offered employment with the employer. His offer letter said that his scheme pension would be 46% of final pensionable salary plus an annual sum equal to 1% of total profit commission earned during employment. In 1982 the member received a letter informing him that his pension would be something different. The member claimed a pension as set out in the original offer letter. The employer argued the member should have challenged the position in subsequent correspondence after 1982 and also that the member's claims were time barred. The member requested an oral hearing.

In relation to whether the member was in time, the Ombudsman held that his complaint could be categorised as a dispute of law in respect of the member's entitlements to benefits on retirement and on that basis time did not begin to run until benefits came into payment. The Ombudsman said he would be prepared to give an oral hearing where there were:

- differing accounts of a particular event and the credibility of statements;
- allegations of dishonesty on the part of either party; or
- disputed material and primary facts which could not otherwise be determined.

None of these applied in this case. In relation to the member's benefits, whilst "an agreement to vary by conduct will not be inferred lightly, the possibility of such an implied agreement is not completely pre-

cluded". Here, the member was at a very senior level and able to understand all of the correspondence and the Ombudsman therefore found that there had been an effective variation of the original pension promise.

Simmons v RSH Suzuyo Limited (K00158)

Liability in contract

The member's employer was taken over by another company. The sale and purchase agreement provided that the new owner would provide pension benefits on a basis "substantially equivalent overall... to the benefits.. provided" under the former employer's final salary scheme. The administrator of the new employer's scheme wrote to the member saying that a new scheme had been designed along the same lines as the former scheme and that benefits were based on service up to retirement. The member joined the scheme. The new owner never made the contributions required to comply with the sale agreement and the member was subsequently informed that the scheme was in fact a money purchase scheme.

The Ombudsman held that the new scheme had been represented to the member as providing benefits similar to those under her old scheme i.e. on a final salary basis. This had induced her to make contributions to the new scheme and had created contractual rights. The new employer was directed to make sufficient contributions to ensure the member's rights were equivalent to those provided under the former scheme.

McNeill v Department of Health, Social Services & Public Safety, Health and Personal Social Services (K00007)

Advice and information for members

The member joined the scheme in 1968. The scheme provided two categories of benefits. Between 1968 and 1973 the member changed categories three times. In 1975 he requested information on the cost of purchasing added years. He then purchased 9 added years over a 10 year period. However, in 1998 he discovered that they had been credited in a category he was in from 1970 to 1973 rather than the one he belonged to in 1975. The member had been provided with a leaflet at the time which explained that the added years would be based on his age

and salary in 1972. The member complained and argued it was reasonable to assume that the added years would be credited to the category he was in at the time he paid for them.

The Ombudsman held that although it was not completely clear that the 1972 category would be used, as the cost of the added years was based on his former category salary, the member ought perhaps to have recognised that there was a link between cost and benefit. At most, the leaflet he was given was incomplete and he should have queried the position before he decided what to do. There is no general duty on employers to advise employees about pension scheme benefits, except where the employee needs information to make a decision which he could not reasonably obtain himself.

Brown v NHS Pensions Agency (K00453)

IDR delays and jurisdiction

A member died and a dispute arose regarding distribution to his five dependent children of the child's allowance payable under the scheme. In August 1999 the member's former wife (who was mother of three of the children) complained through the scheme's IDR procedure about the apportionment of the allowance. After several letters, the matter was still being considered in June 2000. In August 2000, the former wife complained to the Ombudsman.

The Ombudsman cannot deal with cases while IDR is progressing but can intervene when the process has stalled. Although the IDR procedure had not been exhausted, the Ombudsman held that the decision had been unreasonably delayed and therefore he could exercise his discretion to accept jurisdiction of the case. The former wife lost on the merits of the claim as the Ombudsman did not find the original decision to be made improperly. But she was awarded £500 for distress caused as a result of the delay.

Green v Training 2000 Limited (K00400)

Part-timers and jurisdiction

A member-nominated trustee complained about a failure to consider a request by two part-time employees to pay AVCs to the scheme. The request had been stayed pending the outcome of questions put to the European Court of Justice in a test case. In addition, the matter appeared to have been resolved later at an Employment Tribunal.

The Ombudsman held that the fact the issue had been resolved before an Employment Tribunal excluded his jurisdiction.

Braban v NSM plc Group Pension Scheme (K00351)

Winding-up priorities

A member claimed that he would have sought ill-health benefits if he knew that the scheme was going to wind up and would accordingly have priority on winding up as a pensioner.

The Ombudsman held that the trustees had no obligation to warn people of a likely winding-up as there would always be some winners and some losers. The scheme booklet did say that if the scheme was amended or discontinued, members would be given written notice, however in the view of the Ombudsman this did not amount to a requirement to give advance notice.

Cameron v Trustees of the Digital Equipment Co. Limited Pension Plan (K00037)

Time limits and OPAS

OPAS misadvised a member complaining about a transfer value quote when it told the member that an unfair dismissal claim had ousted the Ombudsman's jurisdiction. As a result the member's claim was brought out of time.

The Ombudsman extended his usual 3 year time limit on claims to him as it was not the member's fault that the claim was brought late.

Arden v Highlands and Islands Enterprise and William M Mercer (K00541)

Letter misquoting ill-health pension held to be contractual

A member received a letter from the employer setting out ill-health retirement benefits. The member confirmed he would retire on the basis of the figures quoted. The employer subsequently claimed that the pension and lump sum figures were incorrect. The member claimed that there was a contract.

The Ombudsman held that there was a contract. The letter from the employer represented a contractual offer which the member had accepted and the employer therefore had to honour the misquoted figures. The consideration for the contract was that the employer was no longer required to pay the member's salary and was free to recruit someone else. It was irrelevant that the benefits quoted were inconsistent with the scheme rules.

Snow v The Littlewoods Organisation plc (K00346)

Need to specifically notify member with learning difficulties about right to join scheme

A member had learning difficulties. He was not eligible to join the scheme when he began employment but subsequently became eligible to do so. Announcements had been given, but the question arose of whether he should have been specifically informed of his right to join the scheme given his learning difficulties.

The Ombudsman upheld the complaint and said that as a matter of good administrative practice the employee should have been treated on an individual basis and Mr Snow's disability should therefore have been taken into account. The Ombudsman ordered Littlewoods to augment his benefits to reflect membership of the scheme commencing when he first became eligible. This was subject to Mr Snow paying backdated member contributions plus interest.

Meikle v Trustees of Eastern Counties Farmers (J00144)

Exoneration clauses and personal liability

An unsecured loan was made by the trustees to the employer of £335,000. There was an oral hearing. The case of *Walker v Stones* was referred to where the Court of Appeal held that solicitors who were trustees would not be covered by an exoneration clause if no reasonable trustee could have believed what had been done was in the interest of beneficiaries. The application of this rule will vary depending on the experience and calling of the trustees. Here one of the trustees was the finance director who was also a trained accountant.

It was held that his financial knowledge and skills as an accountant should have alerted him to the improper nature of what he was doing. Therefore he was held personally liable for the whole amount.

Clifton v Rover Group Pension Scheme (K00519)

Reasons for trustee decision in ill health case

The Ombudsman commented that as a matter of good administrative practice, the trustees should give reasons for their decision not to award an ill-health pension. He said it is difficult for a member to appeal a decision for which no reasons are given. The trustees were ordered to give reasons for their decision when the member next applied for an ill-health pension.



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European developments

Codified version of the Acquired Rights Directive **March 2001**

Codifies amendments to the 1977 Acquired Rights Directive from which TUPE is derived. The pensions provisions are now contained in Article 3(4) and pensions remain outside the employment rights which generally transfer, unless the individual member state provides otherwise.

of common objectives for supporting strategies for securing the future of pension systems, including provisions on adequacy of pensions and financial sustainability and modernisation of pensions systems.

EC Communication on Elimination of Tax Obstacles to the Cross- Border Provision of Occupational Pensions

April 2001

Looks at the elimination of tax obstacles through co-ordination rather than harmonisation. The Commission says that national rules denying equal treatment to schemes operated by institutions set up in other member states are contrary to the EC treaty, contributions payable to and benefits from a pension scheme in one EC member state should be taxed no less favourably than benefits payable or contributions from a comparable domestic scheme. The Commission also envisages an information exchange regime between Member States. Finally the Communication gives some consideration to Pan-European pension arrangements.

EC Communication on Supporting National Strategies for Safe and Sustainable Pensions

July 2001

Stresses the importance of occupational pensions provision and sets out a number



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Miscellaneous

Draft Miscellaneous Amendment Regulations

January 2001

Proposes a number of amendments. That the Internal Dispute Resolution Regulations will be amended to extend access to Internal Dispute Resolution to former spouses with pension credits. The Minimum Funding Requirement Regulations will be amended to allow the actuary to certify the schedule of contributions by reference to the funding position up to 7 days beforehand. The Scheme Administration Regulations will be amended to require sectionalised money purchase schemes to have a separate schedule of payments for each section, money purchase schemes in wind up will not have to maintain a schedule. The Deficiency Regulations will also be amended. Trustees will have to inform the employer of the existence of any debt arising on its withdrawal within 12 months of the applicable time; if the employer is not informed, no debt will become due. "Applicable time" will be the end of the scheme year in which the employer left, so that audited accounts can be used in the actuarial calculation. The Prohibition Regulations will also be amended to extend Opra's powers to prohibit trustees where in Opra's opinion the trustees' behaviour constitutes a serious and persistent breach of fiduciary duties.

Bankruptcy Consultation

February 2001

Attaches draft Regulations containing the detailed provisions for the bankruptcy provisions in the Welfare Reform and Pensions Act 1999. The draft Regulations set out what kind of unapproved pension arrangements might be excluded from a bankrupt's

estate and the procedure required for excluding them. The provisions for valuing benefits in the context of reclaiming excessive contributions are included. There are also details on information to be provided and the time limits for doing so.

Myners Report

March 2001 and

Government Response

October 2001

Makes extensive recommendations about the investment processes of trustees, including setting out a voluntary code of practice and suggesting that trustees disclose compliance with the code in their statement of investment principles. There are also proposals that the prudential duty of care in relation to investment be tightened and that trustees be paid unless there is a good reason not to do so in a particular case. The Government's response contained the final investment principles forming the code of best practice and confirmed that the Government will introduce legislation setting out a new investment duty of care and the principle of shareholder activism. The extent to which investment practices change as a result of the new investment principles will be reviewed in early 2003.

Contracting-out Draft Amendment Regulations

May 2001

Contain a variety of provisions but because primary legislation is not in place, cannot deal with problems such as the requirements for transfer of protected rights. The Regulations attempt to prevent duplication

between the disclosure required under the Disclosure Regulations, the Minimum Funding Requirement (MFR) Regulations and contracting-out legislation. Triennial reassurances duplicate the MFR requirements so they will no longer be required. There is also an attempt to simplify trivial commutation of Guaranteed Minimum Pensions and Section 9(2B) rights. The annual reassurance of certificate T required up to 2007 will no longer be required from the date of the Regulations. There is a liberalisation of transfers to overseas arrangements so that in the future pre-1997 protected rights will not need to provide for dependants' benefits if the member is not married. There will be a statutory power to commute state graduated pensions with member consent.

Sandler Review of Medium and Long Term Retail Savings **July 2001**

Covers life insurance savings products, pensions sold either direct to retail investors or to retail customers via their employers (including personal pensions, insured occupational pension schemes, Group Personal Pension and stakeholder schemes) and collective investment vehicles. It will examine the effects of regulation on competition in the industry, as well as the impact of such matters as governance structures.

OPAS Annual Report **July 2001**

Reports an increased workload: enquiries and complaints are up 13%; telephone calls up 21%; written case work up 15%; referrals to Ombudsman rose by 35% to 339 cases in the year to 31 March 2001. In relation to occupational pension schemes, most enquiries are about entitlement and membership conditions, leaving service benefits and transfers, ill-health and early retirement, and part timer issues.

Draft Winding-up Regulations **August 2001**

Relate to the provisions on winding-up in the Child Support, Pensions and Social

Security Act 2000 and are due to come into force on 6 April 2002. The Regulations make provisions in relation to the appointment of independent trustees by insolvency practitioners and set out the contents and timetable for the submission of reports to Opra on the progress of a winding-up. The Regulations also provide exceptions to the requirement for a progress report and set out the procedure for requesting an order allowing modification of scheme rules.

Draft Disclosure Regulations **August 2001**

Contain provisions requiring money purchase forecasts. When they come into force, members will get projections of what their defined contribution pensions will buy (stated in current values). The Regulations include specimen warnings and require certain mandatory wording. The proposed date for mandatory illustrations is now April 2003, with the intention that providers may start to give illustrations on a voluntary basis from April 2002.

Draft Information Powers Amendment Regulations **August 2001**

Amend the Information Powers Regulations 1995. The amendments will remove the requirement for SSAS trustees to tell the Revenue about investments in an unlisted company in relation to an OEIC. All transfers to or from pension schemes with a market value of £250,000 for Schedule D taxpayers or controlling directors must be reported to the Revenue within 28 days. Trustees (and others involved in the management) of a SSAS must report an event or transaction which constitutes a breach of a duty in relation to Revenue approval or which is not expressly authorised by the scheme's trust deed and rules. The time limit for reporting payment of a special contribution by an employer will be extended.

Minimum Funding Requirement Proposals **September 2001**

Propose the replacement of the Minimum

Funding Requirement by a scheme specific funding standard, together with a regime of transparency and disclosure. In addition, there will be a statutory duty of care on the scheme actuary, stricter conditions applicable on winding up and an extension to the compensation scheme. It is suggested that each scheme will have a funding statement, which will set out its funding objectives, its investment policy, a contributions schedule and assumptions for projecting liabilities. Schemes will have to be assessed against their funding statement on a regular basis. In relation to winding up, the Government will legislate to make it clear that employers must meet in full the accrued entitlements of all scheme members as they fall due.

RSC Order 85

September 2001

Is a practice statement about the cost of applications to the Courts by trustees or beneficiaries about the administration of a trust. Where trustees have power to pay the costs of another party, they are free to do so. Where they do not have such power or decide not to exercise it, the party seeking the order can apply to the Court at any time. A model form of the order is given and the application will usually be dealt with on paper. TUPE Consultation Paper, September 2001

Sets out the Government's proposals for reform of the TUPE Regulations which apply to transfers of undertakings and protect the rights of transferring employees. Currently future pensions accrual is not one of the rights which is protected. The consultation paper sets out various alternative methods of providing some protection for the pension rights of transferring employees which would require the new employer to provide some level of pension benefits going forward.

Pickering Review

October 2001

Alan Pickering is due to report to ministers in July 2002 on potential simplifications to existing pensions legislation. The main focus will be to reduce administrative costs and the Department of Work and Pensions has indicated that it is prepared to take radical views in reducing burdensome regulations.

Consultation Paper on Bulk Transfer of Accrued Rights without Member Consent and Pensions Ombudsman Procedure

December 2001

Proposes amendments which will amend the requirements for bulk transfers from salary related schemes to bring the current requirements under the Preservation Regulations and GN16 more in step. In addition, amendments are proposed to the Protected Rights Transfer Regulations which will allow deferred members to be transferred without their consent where trustees have made reasonable efforts to obtain it, the transfer is at least equal to the protected rights and it is applied to provide money purchase benefits. In relation to the Pensions Ombudsman, the draft Regulations provide the detail necessary to implement the provisions in the Child Support Act which will allow the Ombudsman to hear class actions and provide for payment of expenses out of scheme assets.



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Developments in 2002

During 2002, some of the things to look out for are:

- ✔ Legislation in relation to trustees' investment duties following Myners
- ✔ New MNT Regulations (which together with provisions in the Child Support Act should curtail the employer's ability to opt-out of the MNT requirements)
- ✔ Regulations bringing into force the provisions in the Child Support Act allowing the Pensions Ombudsman to hear class actions (which may lead to another Ombudsman case on GMP equalisation)
- ✔ Alan Pickering's report on pensions simplification
- ✔ Legislation to amend the Transfer of Undertakings Regulations which will in all likelihood bring pensions within the employment rights which transfer to new employers
- ✔ A decision in relation to Equitable Life's proposed compromise agreement
- ✔ Further discussions on long term amendments to the Minimum Funding Requirement, particularly as large numbers of schemes may find it increasingly difficult to meet the existing requirements
- ✔ Penalties being imposed on employers who have failed to comply with the requirements to designate a stakeholder scheme
- ✔ Legislation protecting fixed-term employees from discrimination in relation to pension rights (currently in draft in the Employment Bill)
- ✔ The High Court appeal against the Ombudsman's determination in the Shillcock case (on the application of lower earnings limits offsets to part-time employees)

- ✔ Further directions on the Preston part-timer test cases.

Of course, if past years are anything to go by, there will also be a whole raft of other things which we are not able to anticipate (and, hopefully, perhaps some of the things which currently seem likely to happen will fall by the way side!)

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