SLAUGHTER AND MAY

19 MARCH 2015
ISSUE 05

Pensions and Employment: Pensions Bulletin

Legal and regulatory developments in pensions

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Stop Press: Budget 2015

Headline pensions items (**both of which will take effect on 6th April, 2016 and will be legislated for in the new Parliament assuming this Government is re-elected**) in the Chancellor's Budget Statement on 18th March, 2015 are:

- **Removal of restrictions on buying and selling annuities:** The Government is to allow annuitants to sell on the income stream from their annuities without unwinding the original annuity contract.

  Annuitants will then be able to take the capital as a lump sum or place it into drawdown.

  Currently there is a 55% tax charge on a sale, assuming this were legally possible[1], of the income stream from an annuity. The Government will remove this so that annuitants are taxed only at their marginal rate.

  The Government says it will work with the FCA to introduce appropriate guidance and other consumer protection measures.

  A consultation on the measures needed to establish a market to sell and buy annuities was launched on 18th March, 2015 as part of the Budget.

  The Government's approach does not unwind annuity contracts; the annuity provider will continue to pay the annuity payments for the lifetime of the annuity holder, but will reassign them to the purchaser. The annuity holder will not have the right to sell their annuity back to the original provider, nor will the annuity provider be able to buy, and then discontinue, its customers' annuities.

  The Government believes that obtaining the right to annuity payments could be attractive to institutional investors and the consultation covers who should be permitted to purchase the annuity income. It does not consider annuity income purchased on the secondary market to be an appropriate investment for retail investors.

- **Reduction in LTA:** The lifetime allowance ("**LTA**") is to be further reduced, from £1.25 million to £1 million. From 6th April, 2018, the LTA will be indexed in line with increases in the CPI.

  Fixed and individual protection regimes will be introduced alongside the reduction.

A more detailed analysis of the Budget changes will be in the next Pensions Bulletin.

[1] See Sections 91 to 94 of the Pensions Act 1995 where the annuity is held in an occupational pension scheme.

Forthcoming Events

I. The Watch List

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out, with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/ action
1.	PPF levy 2015/2016	31st March, 2015 for submission of information and documentation for mitigation	Action plan sent out on 7th January, 2015 available from Lynsey Richards
2.	**Automatic enrolment: easements for employers**	**1st April, 2015**	This Pensions Bulletin
3.	Information to retiring DC members about the guidance guarantee	6th April, 2015	Client note dated 17th February, 2015 available from Lynsey Richards

4.	Information to transferring DB members about the requirement for independent financial advice	6th April, 2015	Pensions Bulletin 15/03
5.	Cap on charges in default fund for auto-enrolment qualifying schemes	6th April, 2015	Client note dated 24th February, 2015 available from Lynsey Richards
6.	New governance requirements for all occupational DC schemes	6th April, 2015	Client note dated 24th February, 2015 available from Lynsey Richards
7.	Abolition of refund of contributions for members of occupational schemes with at least 30 days' pensionable service who are just provided with money purchase benefits	1st October, 2015	Pensions Bulletin 14/14
8.	Proposed ban on corporate directors	1st October, 2015 but exception proposed for corporate trustees	Pensions Bulletin 14/18
9.	VAT recovery changes	31st December, 2015	Pensions Bulletin 14/18
10.	Abolition of DB contracting-out: managing additional costs	6th April, 2016	This Pensions Bulletin
11.	Abolition of DB contracting-out: practicalities	6th April, 2016	Pensions Bulletin 14/08
12.	Prohibition on Active Member Discounts in auto-enrolment qualifying schemes	6th April, 2016	Pensions Bulletin 14/16
13.	Automatic transfers of DC pots of £10,000 or less	Phase 1 1st October, 2016	Pensions Bulletin 15/03
14.	Registration for Individual Protection 2014	Before 6th April, 2017	Pensions Bulletin 14/12

6th April 2015 Changes

II. Pensions flexibility regulations laid before Parliament

A. Overview

All 4 sets of regulations to be made under the Pension Schemes Act 2015 (the "**Act**") have now been laid before Parliament and take effect on 6th April, 2015.

B. Disclosure

1. Regulations[2] amend the Disclosure of Information Regulations 2013 to deal with:

   – the new pension flexibilities (requiring trustees to give members information about their benefits and about the new pensions guidance service in order to help them to decide what to do with the benefits), and

   – the new public service pension schemes that take effect on 1st April, 2015.

2. The DC flexibility amendments require trustees to give members who have "flexible benefits" (broadly, money purchase and cash balance benefits):

   – a standard statement informing the member about the nature, availability and contact details of the guidance service, and

   – more detailed information about the member's flexible benefits (including an estimate of the value of those flexible benefits (i.e. money purchase and cash balance benefits available to transfer) and

[2] The Occupational and Personal Pension Schemes (Disclosure of Information) (Amendment) Regulations 2015 (S.I. 2015/482)

the member's opportunity to transfer the benefits).

3. The information is to be sent automatically at least 4 months before the scheme expects the member to take the benefits.

4. The Pensions Regulator has (6th March, 2015) published an "Essential Guide" to the new disclosure requirements and the "Second Line of Defence". See item **III** below.

5. For a copy of our February, 2015 client publication on member communications relating to DC flexibilities, or to discuss appropriate wording for your communications for DC members, please get in touch with your usual pensions contact at Slaughter and May.

   Action point: There are no transitional provisions so that, where a member is within 4 months of his expected retirement date on 6th April, 2015, schemes will in theory need to play "catch up" and provide that member with the additional information.

   It may be possible to argue that, since the legislation was not in force at the 4 month deadline, the pre-6th April, 2015 disclosure regime applies. Further advice on this point is available from your usual pensions contact at Slaughter and May.

C. New DC transfer right

1. Regulations[3]

   – make consequential amendments to the Occupational Pension Schemes (Transfer Values) Regulations 1996 relating to DC flexibility, and

   – remove the restrictions imposed on members of NEST to transfer their pension rights out of NEST from 1st April, 2017.

2. The DC flexibility changes provide additional detail on the transfer process, including the new information that trustees must provide to scheme members with flexible benefits, and the process for calculating a member's CETV.

3. They also ensure that, where trustees are unable to action a request to transfer "safeguarded benefits" (broadly, defined benefits) because the member has failed to provide the trustees with proof that the member has taken "appropriate independent advice" (see **E.** below), trustees will not be penalised for not completing the member's request within the required timeframe.

D. Scheme modification

1. Regulations[4] give trustees power to change their rules in order to offer the new DC flexibilities. The consent of the scheme's employer to the changes is required, and the scheme may impose conditions (such as payment of a fee) on the flexibilities offered. The amending regulations also ensure that section 67 does not apply to any such changes.

   Comment (1): Remember that trustees have a unilateral power, under the Finance Act 2004, to pay flexible benefits from DC funds despite any provision of the rules prohibiting such a payment. Trustees should consider, preferably in advance of 6th April, 2015, whether they intend to use this power to enable members to access the new flexibilities, and to minute their decision accordingly.

   Comment (2): This unilateral power took effect on 17th December, 2014. Schemes that made a

[3] The Occupational and Personal Pension Schemes (Transfer Values) (Amendment and Revocation) Regulations 2015 (S.I. 2015/498).

[4] The Occupational Pension Schemes (Consequential and Miscellaneous Amendments) Regulations 2015 (S.I. 2015/493).

decision on their approach to DC flexibility prior to that date will need to reaffirm that decision and minute it promptly on or after 6th April, 2015. Schemes that exercised the power after 17th December, 2014, but before 6th April, 2015, when the new flexibilities take effect, should also reaffirm their decision.

Comment (3): Schemes that decide not to offer DC flexibility will need to consider how to deal with enquiries from members or their IFA as to why the trustees made that decision. One answer may be that it is not possible to offer flexibility on a value for money basis and that it would result in higher charges being levied on the member's DC pot than he would pay on the open market.

Action point: Review scheme rules to see whether amendment is needed.

2. The amendments also allow trustees to change a scheme's rules if the rules would otherwise require them to carry out a transfer of defined benefits in circumstances where the trustee had not been able to establish that the person requesting the transfer had received appropriate independent advice (see **E.** below).

E. Transfers from DB to DC schemes: Requirement for "appropriate independent advice"

1. The Act includes a requirement that, where a member with "safeguarded benefits" (broadly, defined benefits), or a survivor of such a member, wishes to:

   - transfer those benefits to a DC arrangement, or
   - convert the DB benefits to DC benefits in the same scheme,

   the scheme trustees must check that the member or survivor has received "appropriate independent advice" from an FCA-authorised adviser.

2. The requirement does not apply where the cash equivalent of a member's "safeguarded benefits" in the scheme is £30,000 or less. Trustees must notify members whether they fall into this exemption.

3. The Act also provides for employers to pay for this advice in certain circumstances (see **5.** below).

4. Regulations[5] set out how trustees should carry out these checks, and when the employer has to pay. The new requirement will apply only where the application for a statement of entitlement to a CETV was made on or after 6th April, 2015.

5. The employer has to pay for the advice if it sends out communications actively to "encourage, induce or persuade" more than one member to transfer or convert "safeguarded benefits". The Act provides an exemption from income tax for the member for the cost of the advice in these circumstances.

6. On 5th March, 2015, regulations[6] were made providing a similar exemption from Class 1 NICs. Both exemptions take effect on 6th April, 2015.

7. The Regulator published draft guidance on the trustees' new duty on 12th February, 2015. The DWP says that registered schemes will be directed to it by email when it is finalised.

   Comment: For more information on the requirement that trustees check that a transferring member has taken appropriate independent

[5] The Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) Regulations.

[6] The Social Security (Contributions) (Amendment) Regulations 2015 (S.I. 2015/543).

advice before allowing that transfer see the Focus accompanying Pensions Bulletin 15/03.

Note: The failure by a member to obtain independent advice does not invalidate the trustee's discharge in relation to the transfer. But trustees who fail to make the requisite checks are exposed to civil penalties. We expect the Regulator to be pro-active in imposing these civil penalties on trustees in the same way as it has with employers who have failed to comply with their auto-enrolment duties.

III. Pensions Regulator's draft "Essential Guide" to member communications about DC flexibility

On 6th March, 2015, the Pensions Regulator published a draft guide providing:

- information on key changes to the Disclosure Regulations 2013 in connection with retirement communications (see **II** above), and
- good practice suggestions for communicating with members about DC flexibility.

The guide covers:

- making members aware of Pension Wise,
- other new requirements for the retirement wake-up pack, to be sent automatically, at least 4 months before a member's expected retirement date,
- timings, and
- the generic risk warnings that trustees are encouraged to provide in respect of the 4 main retirement options available to members (including sample wording) (the "Second Line of Defence").

  These should be provided after the member has been sent the retirement wake-up pack, at the point at which the member is required to make a final decision on what to do with their benefits.

The Regulator also recommends that schemes ask members to sign a statement:

- to confirm whether they have received Pension Wise guidance or regulated advice, and
- to confirm that they have read the generic risk warnings (sample wording is included).

  Note: To avoid the risk of giving advice, the Regulator recommends that schemes **do not** provide specific risk warnings based on a member's individual circumstances.

The guidance also contains a useful "good practice process" for providing information.

The draft guidance is on the Regulator's website.

Comment (1): The Pensions Regulator's guidance on the "Second Line of Defence" is much less onerous than the FCA's member-specific rules for personal pension providers (Pensions Bulletin 15/04). The Regulator warns trustees **against** providing member-specific information.

Comment (2): Remember that this is guidance not legislation. There is no legislative requirement to provide a "Second Line of Defence". But the framework under which trustees' general trust law duties to members are measured moves over time and the Regulator's guidance could be taken into account when assessing these duties. Schemes should read the guidance and adapt it according to their circumstances.

IV. FCA consultation on proposed changes to pension transfer rules

On 4th March, 2015, the FCA published Consultation Paper (CP) 15/7: "Proposed Changes to our Pension Transfer Rules".

The Pension Schemes Act 2015 brings advice on transfers from DB schemes to **occupational** DC

schemes into the FCA's remit with effect from 6th April, 2015. Previously, the FCA was responsible only for regulating advice on transfers out of DB schemes into **personal pension schemes**.

Because the new disclosure regime makes advising on pension transfers significantly more complex, the FCA intends to require all independent financial advisers advising on transfers from DB schemes to DC schemes to have the FCA's "Pension Transfer Specialist" qualification. This is already required for advising on transfers out of DB schemes into personal pension schemes.

Consultation Paper 15/7 sets out the FCA's proposals to:

- amend its rules to incorporate the new regulated activity of advising on conversions or transfers of "safeguarded benefits" to "flexible benefits", and
- require that all advice on DB to DC pension transfers be provided or checked by a Pension Transfer Specialist.

The Consultation Paper, on which responses are invited by 15th April, 2015 is on the FCA website. The intention is that the updated rules will be in place for June, 2015.

Comment: There appears to be no suggestion that DB scheme trustees will need to validate that the IFA who has advised on the transfer is a Pension Transfer Specialist; trustees' duties extend only to checking the IFA's details on the Financial Services Register before the transfer is made.

V. Auto-enrolment: Easements

Regulations[7] making a number of "technical" changes to simplify the auto-enrolment requirements on employers take effect on 1st April, 2015.

The changes:

- create exceptions to the employer duty in certain circumstances, including for those who have tax protected status for existing pension savings,
- introduce an alternative quality requirement for DB schemes, and
- simplify the information requirements on employers.

The focus accompanying this Bulletin examines the changes in more detail.

[7] The Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2015.

VI. Guidance for actuaries on transfers out of DB schemes

A. *Overview*

1. On 11th March, 2015, the Institute and Faculty of Actuaries (the "**Institute**") published guidance for its members in relation to the expected increase in transfers out of DB schemes in response to the 6th April, 2015 changes.

2. The guidance is aimed at, among others:

    2.1 scheme actuaries advising trustees to DB pension schemes,

    2.2 actuaries advising the sponsoring employer, whether in-house or externally, to DB pension schemes.

B. *Scheme actuaries*

1. The Institute advises that scheme actuaries who advise trustees on setting transfer value calculation bases should ensure that they encourage trustees to review those bases regularly. It encourages scheme actuaries to advise trustees to undertake a review of calculation bases, ideally in advance of 6th April, 2015 but, where this is not practical, shortly afterwards.

2. It also warns scheme actuaries to be aware of the potential increase in requests for non-statutory transfer values and that scheme actuaries should discuss with trustees their approach to these requests and the basis for any calculations.

3. The Institute also suggests that scheme actuaries encourage trustees to consider a review of other factors that affect member options, in particular commutation factors, where that power is available to them, or to the scheme actuary.

4. It also recommends that scheme actuaries discuss the clarity and appropriateness of any communication that trustees issue to members regarding retirement options.

C. Actuaries advising sponsoring employers

1. The Institute notes that some sponsoring employers may use the pension reforms as an opportunity to offer enhancements or incentives to transfer out. It points out that all pensions actuaries, whether advising employers or trustees, must ensure that they are aware of the professional issues regarding such enhancements/ incentives, and the importance of ensuring that actuaries are appropriately informed and objective in the formal advice they provide.

Tax

VII. DC flexibility and tax: Consequential amending regulations

The 3 sets of regulations making consequential changes to existing pensions tax legislation to reflect aspects of DC flexibility have all now been made:

1. **Provision of information:** Regulations[8] amend the Registered Pension Scheme (Provision of Information) Regulations 2006 to:

   – introduce new requirements on scheme administrators to provide information to a deceased member's personal representatives ("**PRs**") where there is a payment of death benefits that is tested against the lifetime allowance, and to require PRs to provide that information to HMRC where a lifetime allowance charge is triggered,

   – impose a new obligation on scheme administrators, where funds are being transferred that represent a drawdown fund, to provide certain information to the receiving scheme administrator, and

   – add to the list of matters to be include in a scheme's annual event report to HMRC to alert HMRC to what may be pensions liberation activity.

2. **QROPs:** Regulations[9] make amendments to the requirements an overseas pension scheme must satisfy in order to qualify for UK tax relief or to count as a Qualifying Recognised Overseas Pension Scheme ("**QROPS**").

   In particular the regulations:

   – provide that a scheme established outside the EEA that is not regulated as an occupational pension scheme by a body in its home country must be operated by a regulated pension provider,

   – require that pension benefits transferred to a QROPS (insofar as they relate to funds that have received UK tax relief) must be payable no earlier than normal minimum pension age, and

   – introduce information requirements on the scheme manager of a QROPS or former

[8] The Registered Pension Schemes (Provision of Information) (Amendment) Regulations 2015

[9] The Overseas Pension Schemes (Miscellaneous Amendments) Regulations 2015.

QROPS where a member first flexibly accesses his pension rights, broadly corresponding to the requirements that apply to UK registered pension schemes (see above).

Note that the 70% rule (that, to qualify for UK tax relief, an overseas pension scheme must contain a rule that, when members draw their benefits, at least 70% of UK tax-relieved funds are used to provide an income for life for the member) that the consultation draft proposed should be abolished, remains "temporarily" pending a review post-5th April, 2015.

HMRC says that, at a future date, replacement legislation will be enacted that will "*be targeted more precisely to ensure the principles behind allowing transfers to be made free of UK tax can continue to operate as Parliament intended*".

3. **Annuities:** Regulations[10] provide that an annuity contract entered into **on or after** 6th April, 2015 following the transfer of sums or assets from an annuity acquired **before** 6th April, 2015 will be treated as authorised for tax purposes only if the transfer is made on a like-for-like basis. This reflects the policy intention that the new flexibilities will not apply to annuities issued before 6th April, 2015.

[10] The Registered Pension Schemes (Transfer of Sums and Assets) (Amendment) Regulations 2015.

VIII. Finance Bill 2015

The Government has announced that the Finance Bill 2015 and Explanatory Notes will be published on 24th March, 2015.

The Bill is expected to complete its Parliamentary stages and receive Royal Assent on 26th March, 2015, ahead of the dissolution of Parliament on 30th March, 2015. The contents of the Bill were announced in the Budget on 18th March, 2015 (see **Stop Press** above).

New Law

IX. Abolition of DB contracting-out: Employers' override regulations

A. Overview

1. Regulations[11] taking effect on 5th April, 2015 enable employers unilaterally to amend scheme rules to reduce scheme costs to reflect the increase in employer NICs following the abolition of DB contracting-out on 6th April, 2016.

[11] The Occupational Pension Schemes (Power to Amend Schemes to reflect Abolition of Contracting-out) Regulations 2015.

2. This override power enables employers to make amendments affecting current and future active members. It does not apply to public sector schemes or to "protected persons" (those in formerly nationalised industries). The power will be available for 5 years only, i.e. it must be exercised, if at all, by 6th April, 2021.

4. The Regulations require an actuary to estimate the value of employers' additional NI costs and the value of the proposed amendments to recoup that cost. The actuary must certify that the amendment will recoup no more than the increase in the employer's NICs.

B. Changes from consultation draft

1. Key changes from the draft published for consultation on 8th May, 2014 (Pensions Bulletin 14/08) include:

1.1 **further restrictions on the use of the power**: the power cannot be used to enable an employer to make amendments which would remove a discretion from the trustees, for example to change consent provisions for early retirement.

1.2 **revised definitions of "principal employer" and "amendment date"**: to clarify the position for multi-employer schemes, anyone nominated to act on behalf of participating employers to agree

scheme funding matters with the trustees will be able to use the statutory override power on behalf of the employers. A new provision requires the employer to consult the trustees about the timing for the amendments to take effect (the "amendment date").

1.3 **assumptions**: the DWP originally proposed using the assumptions in the statement of funding principles but removing the margin for prudence. The reference to the statement of funding principles has been removed: if the calculation date is the same as the scheme valuation date, the methods and assumptions used for the valuation should be used. If it is a different date, the methods and assumptions from the previous valuation should be used, but updated for market conditions. Employers can now choose the specific assumptions from which they require prudence to be removed.

Comment: If cost neutrality (from an FRS17/IAS19 standpoint) is the starting point, as measured in the employer's accounts, employers are likely to ask the actuary to remove prudence from **all** assumptions.

1.5 **actuary's certificate**: the Regulations no longer require a specific form of certificate but instead require specific information to be included in it, such as details of the changes to the affected benefits and a statement that the actuarial value has not been increased.

1.6 **employer may not use scheme actuary**: the Regulations make it clear that an employer or principal employer must appoint an actuary for the purpose of the employer override. The DWP warns against using the scheme actuary as this will result in a conflict of interest.

1.7 **timing for trustees to provide information**: the 4 week deadline for trustees to provide information to employers in connection with the use of the override power has been removed in favour of a "reasonable period, as agreed with the employer" provision.

1.8 **schemes with different rules for different members/sections**: provisions purporting to deal with schemes with different rules for different members or sections have been removed. The DWP has concluded it is not possible satisfactorily to regulate for the various situations that may arise. Instead, it expects employers to explain clearly to employees, as part of the consultation process, how different groups are to be affected by the proposed amendments.

1.9 **non-compliant amendments**: the DWP states in the consultation response that amendments that fail to comply with the legislative requirements will be void.

Comment: This is correct from a legal standpoint.

1.10 **"double dipping"**: respondents expressed concern that employers may "double dip" by making changes using the scheme's normal scheme amendment powers to take account of increased NICs, then seeking to make further changes under the statutory override. The DWP says that trustees should obtain the employer's written consent, when agreeing any amendments under the scheme rules to recoup employers' NICs increases, to the effect that the employer will not subsequently use the statutory override powers.

1.11 **consultation with members**: the DWP confirms that the existing employer consultation provisions[12] will apply to statutory override changes, noting that the requirement to consult will apply whether the changes are being made under the statutory override or under the normal scheme rules.

Action point: Now the regulations are in final form, employers with current COSRs should evaluate the position ahead of the 6th April, 2016 deadline. A checklist of points to consider is available to clients.

[12] The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.

X. DC charges and governance: DWP/FCA call for evidence on transaction costs disclosure

On 2nd March, 2015, the FCA and DWP jointly published a call for evidence on disclosure of transaction costs. It follows the requirement, effective from 6th April, 2015, for trustees and IGCs to prepare an annual report (the "**Chair's Statement**") including information about transaction costs and administration charges.

With effect from 6th April, 2016, there will be a new requirement that information about transaction costs and administration charges be disclosed in a standardised, comparable format.

The call for evidence addresses:

- what costs should be included in the transaction cost reporting,
- how such costs should be captured and reported,
- whether information about other factors that impact on investment return should also be provided,
- how IGCs and trustees will receive costs information and whether additional disclosure requirements on other parties are necessary to enable disclosure, and
- when, how, and in what format members and/or other prescribed persons should receive transaction costs information.

The call for evidence, responses to which are invited by 4th May, 2015, is on the GOV.UK website.

Cases

XI. TUPE: Removal of rights to unreduced redundancy pension: Ombudsman's determination in relation to Heyes

A. Overview

1. On 23rd January, 2015, the Deputy Pensions Ombudsman decided in this case (PO-3333) that, on the facts, a rule amendment to the ABB Pension Plan in 2005, which removed a member's potential eligibility for a unreduced pension on redundancy, was not prohibited by TUPE because the amendment was not directly related to the 2001 TUPE transfer so the principles established in **Beckmann** did not apply.

2. The Deputy Ombudsman rejected H's argument that a 4 year prohibition contained in a 2001 acquisition agreement on changes adversely affecting members had deliberately been negotiated with a view to making changes in 2005. None of the evidence produced suggested that, in the 4 year period, the transferee employer had clear plans to change the redundancy benefit.

3. The Deputy Ombudsman also held that the 2005 amendment did not breach the acquisition agreement. Nor was there any breach of section 67 PA 1995 or the scheme's power of amendment, because the member had no accrued right to the redundancy benefit at the time of the amendment, since he did not meet the age criteria under the rules.

B. Facts

1. H was originally employed by an ICI subsidiary and was a member of the ICI Pension Fund (the "**ICI Scheme**"). In 2001, ICI sold the subsidiary to ABB Limited, to which H's employment was transferred. H elected to transfer his ICI scheme benefits to a newly established section of the ABB Plan, the former ICI Fund section ("**FIFS**").

2. Benefits in the FIFS were intended to mirror those in the ICI Scheme. That included unreduced pensions on redundancy where a member was leaving employment for a reason outside his control, was aged between 50 and 57 at the date of leaving and had completed 10 years of pensionable service.

3. In the 2001 acquisition agreement with ICI, ABB agreed that it would "*not….in the 4 year period beginning on the Completion Date… exercise any power of amendment with respect to the ABB Plan so as to adversely affect any employee who becomes a member of the ABB Plan*".

4. ABB closed the FIFS to future accrual in 2005 and altered the rules by a deed of amendment providing that the redundancy benefit would be paid only to members, who, at the date of the amendment on 1st August, 2005, had completed 10 years of pensionable service and attained age 50.

5. When H was made redundant in December 2010, ABB and the ABB Plan Trustees refused to award him the redundancy benefit on the grounds that, although he was leaving for reasons outside his control and had 10 years pensionable service, he was aged 45 on 1st August, 2005. H argued that he had become entitled to the redundancy pension in 1987 when he had completed 10 years of pensionable service. Payment of the benefit should have been triggered by redundancy at age 50, in December 2010.

6. H also claimed that, in 2001, ABB already intended to amend the FIFS and had negotiated the 4 year prohibition period in the acquisition agreement to this end. The 2005 changes were therefore related to the 2001 transfer.

C. Determination

1. The Deputy Ombudsman dismissed H's complaint.

2. H was ineligible to receive the redundancy benefit on his redundancy in 2010 because of the changes to the rules made by the 2005 deed of amendment. Under the redundancy rule as amended, entitlement to the benefit was contingent on the requisite pensionable service and age condition being met on 1st August, 2005.

3. The 2005 deed of amendment did not breach the 2001 acquisition agreement as the amendments were made after the end of the 4 year prohibition period.

4. If H's employment had ended on or immediately before 1st August, 2005, when he was aged 45, he would not have met the age condition for the redundancy benefit so he did not have an accrued right to it at the time of the 2005 Deed of Amendment. There was therefore no breach of Section 67 nor did the change require his consent under the ABB Plan's power of amendment, as both provisions protected only accrued rights.

5. Although TUPE applied to the transfer of the ICI business in 2001, there was no evidence demonstrating that the 2005 ABB Plan changes were directly related to that transfer. The Deputy Ombudsman rejected H's argument that the 4 year prohibition on changes adversely affecting members had been negotiated with a view to making the 2005 changes, noting that, from a practical perspective, it was unlikely that, at the time of the transfer, ABB had opened the FIFS with a view to closing it 4 years later.

Comment: It is difficult to make any changes to redundancy or early retirement benefits of transferring employees for reasons connected with a TUPE transfer unless there is an "ETO" (Economic, technical or organisational) reason entailing changes to the workforce.

Here, the evidence was that, at the time of the transfer, the new employer had no plans to change the redundancy benefits once the protected period had expired. On that basis there was nothing to connect the changes with the transfer.

Generally, the longer the time that elapses between the transfer and any change, the more difficult it is to show that the transfer and the change are connected.

Points in Practice

XII. DC charge cap: Meaning of default arrangement: Position for members who have switched funds as part of a "mapping" exercise

The DWP has expressed the view that, where individuals have been mapped in the past from one fund (which they selected) to another, and so have not specifically approved investment in the replacement fund, that replacement fund may be for those individuals a "default arrangement" and subject to the DC charge cap that applies to automatic enrolment default funds with effect from 6th April, 2015.

The regulations introducing the charge cap[13] have different definitions of "default arrangement" for (i) the charge cap and (ii) the governance requirements.

A "default arrangement" for charge cap purpose is, broadly:

- one where the worker has expressed no choice, or
- one to which at least 80% of workers who were contributing members on 6th April, 2015 chose to allocate their contributions, or
- one to which at least 80% of workers who first become contributing members after 6th April, 2015 chose to allocate their contributions.

The argument is that contributing members who have been "mapped" into a particular Fund have not chosen that fund and hence the fund is a "default arrangement" under the first limb of the definition. Note that the difficulty arises only in relation to members who are contributing on or after 6th April, 2015.

Comment: It is not clear that the DWP's view is correct. The Association of Pension Lawyers is pursuing the point, but, if you have any such funds which are still available to members, it may be necessary to move individuals out of the relevant fund or obtain specific consent for them to remain in it. For further information, please get in touch with your usual pensions contact at Slaughter and May.

XIII. Regulator's consultation on list of auto-enrolment schemes

On 5th March, 2015, the Pensions Regulator published its response to its 19th November, 2014 consultation on its proposal to publish on its website a list of pension schemes that are directly available to any employer to use for auto-enrolment, irrespective of how many workers they have or how much they pay them.

Following the consultation exercise, when respondents raised issues of ensuring scheme quality, and the Regulator's role in monitoring the list, the Regulator has decided not to proceed with the proposed list.

The consultation response is on the Regulator's website.

[13] The Occupational Pension Schemes (Charges and Governance) Regulations 2015.

This Bulletin is prepared by the Pensions and Employment Group of Slaughter and May in London.

We advise on a wide range of pension matters, acting both for corporate sponsors (UK and non-UK) and for trustees. We also advise on a wide range of both contentious and non-contentious employments matters, and generally on employee benefit matters.

Our pensions team is described in the 2015 edition of Chambers as follows:

- "*they employ professional and personable members of staff with a great depth of knowledge and practical know how*", and
- "*their ability to organise a transaction and make sure all things come into action is very, very good and they are incredibly thorough*"

Our recent work includes advising:

- Imperial Chemical Industries Limited and Akzo Nobel N.V. on the de-risking of the ICI Pension Fund by way of a circa £3.6 billion transaction. The transaction, which was announced on 26th March 2014, involved the Trustee of the ICI Pension Fund entering into bulk annuity buy-in policies with Legal & General Assurance Society Limited and Prudential Retirement Income Limited respectively in relation to in aggregate circa £3.6 billion of liabilities of the ICI Pension Fund (which comprise approximately one quarter of the Akzo Nobel pension liabilities). The Legal & General buy-in is the largest ever bulk annuity policy arranged by a pension scheme in the UK
- BBA Aviation plc on the pensions aspects of its disposal of the APPH entities and a "section 75 debt" apportionment arrangement with the trustees of its defined benefit pension scheme, the BBA Income and Protection Plan (the "IPP"), and thereafter on the structuring and implementation of an asset backed funding arrangement with the trustees of the IPP. The asset backed funding arrangement replaces a previously agreed schedule of contributions and is designed to generate an annual income stream of approximately £2.7 million for the pension scheme whilst minimising the risk of scheme over-funding in the future
- Aviva on the de-risking of the Aviva Staff Pension Scheme by way of a circa £5 billion longevity swap transaction involving insurance and re-insurance arrangements. The transaction is the largest of its type to date and allows the defined benefit scheme to re-insure the longevity risk relating to approximately 19,000 of its members (roughly a third of its total longevity risk). Aviva's in-house legal team also advised.
- Premier Foods, on a revised funding arrangement with the group's defined benefit pension schemes as part of Premier Food's refinancing plan. Revisions to the funding arrangements included reduced pension deficit contributions and the granting of additional security to the pension schemes
- Unilever Plc on the creation of an innovative pension funding vehicle under which a unit-linked life policy was established to fund centrally certain overseas unfunded retirement benefit obligations
- General Motors, on the pensions aspects of the sale of Millbrook Proving Ground Limited (the test and engineering technology centre). The sale was dependent on structuring a pensions reorganisation so that the Millbrook Pension Plan and all pension liabilities were retained in the General Motors group
- ConocoPhillips, on complying with its auto-enrolment duties, including analysing how different categories of employees would be provided with pension benefits in compliance with those duties and setting up a new DC pension plan and a new registered life cover pension plan
- Royal Mail on a benefit change exercise which enabled Royal Mail to use some of the c£2bn of assets remaining in the Royal Mail Pension Plan following the 2012 transfer of its pension liabilities to HM Government to fund a £300 million a year gap which would otherwise have opened up between the pension contributions which it could afford and the amount which was required to keep the Plan open for the future accrual of benefits. We had previously advised on the 2012 transfer of approximately £30 billion of Royal Mail's historic pension liabilities to HM Government
- The Trustee of the General Motors UK Retirees Pension Plan, on the surrender in October, 2012 of 2 insurance policies and the purchase of a bulk purchase annuity policy with Rothesay Life. The transaction covered all or substantially all of the Plan's benefit obligations and had an aggregate value of approximately £230 million

If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact **Jonathan Fenn** jonathan.fenn@slaughterandmay.com or your usual Slaughter and May adviser.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650

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For further information, please speak to your usual Slaughter and May contact.

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