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FAS consultation: transfer of assets to government

The DWP has issued a consultation paper and draft regulations intended to deliver the remaining changes extending FAS assistance, as announced by the government in December 2007. Consultation closes on 6 October 2009 and the government intends to lay the regulations before Parliament this winter.

The main purpose of the draft regulations is to provide for the transfer to the government (in cash where possible) of all residual assets of qualifying schemes that have not yet fully wound up. The government will use the additional value obtained from those assets to part-fund the improved FAS payments. At present, schemes qualifying for the FAS wind up by discharging their liabilities to members, typically by purchasing annuities, and the FAS tops up those payments if they are less than the FAS level. In future, if the regulations are implemented, the FAS will make the entire payment to a member, i.e. including that part which would previously have been made by the scheme trustees. Qualifying members will be able to commute part of their assistance for a pension commencement lump sum within specified limits.

The new regime will apply only to qualifying schemes that have not yet fully wound up; there will be no transfer of assets from schemes which have discharged their liabilities or whose scheme manager thinks it likely that the liabilities will be discharged, e.g., by the purchase of annuities.

Valuing s75 debts and buying out GMPs: *Headway v Easterly*

The Court of Appeal has upheld the High Court judgment in this case, confirming that trustees can increase the value of the s75 debt by partially buying out benefits before setting the applicable time for calculating the debt. The decision turns on the scheme rules (as well as statutory provisions) but may be relevant to other schemes which began winding up before 6 April 2005, i.e. before s75 debts had to be calculated on the basis of full buyout for all members.

The scheme commenced winding up in May 2002, with a solvent employer, and the s75 debt fell to be calculated on the MFR basis. The trustee planned a three-stage "arrangement":

- Use the available scheme assets to buy out benefits (partial buyout)
- Fix the applicable time for calculating the s75 debt
- Use assets recovered under s75 to purchase a second tranche of annuities.

The effect of the first stage was to make the s75 debt larger than it would have been had it been calculated (on the MFR basis) before the buyout was effected. The Court of Appeal agreed with the High Court that this was permitted both by the scheme rules and by statute and that it discharged the scheme's liabilities only to the extent of the benefit

Materials

[DWP consultation paper](#)

[The draft Financial Assistance Scheme \(Miscellaneous Amendments\) Regulations 2010](#)

For a report on the High Court case, see [Pensions Update, November 2008](#)

provided by the annuity; the scheme remained liable for the balance of the s75 debt.

On appeal the more interesting issue became whether or not the trustees could buy out a partial GMP without member consent. The Court of Appeal held that statute allows this but only if the scheme rules authorise it, which in this case they did not. This meant that, for members with a GMP higher than the benefit which could be secured, the trustees had either to obtain their consent or implement a "truncated" arrangement where those members' GMPs were not bought out at the first stage.

No duty on trustees or providers to give advice:: *Musawi v Bevis Trustees Limited*

This High Court case is a useful restatement of the principle that trustees are not required to provide advice.

Mr M was a member of the BCCI pension scheme, which was wound up in 1995 with all benefits bought out with L&G. The terms of the buyout allowed members to transfer out at any time before their 60th birthday. On his 60th birthday in 2002 Mr M elected to take a lump sum but deferred drawing his pension. Subsequently he requested a transfer of his remaining benefits. He was told that he could not transfer because he had already taken the lump sum and the attaching pension had to remain with L&G (under the tax regime which applied at that time). The Ombudsman had rejected Mr M's complaint that neither the trustee nor L&G as provider had advised him of this restriction: the trustee had had power to buy out and there was no evidence Mr M was not made aware of the terms of the policy. The High Court rejected Mr M's appeal, stating:

"The only duty was to take reasonable care that any information in fact supplied, whether given in response to a request or in compliance with statute or because it was simply volunteered, was correct."

"There was no duty on either body to volunteer advice to someone in the position of Mr M as to what his entitlement was....The only duty was to take reasonable care that any information in fact supplied, whether given in response to a request or in compliance with statute or because it was simply volunteered, was correct."

Invalid use of power of amendment: *Walker Morris Trustees Limited v Masterson*

This case is a useful reminder about the importance of properly applying the power of amendment. Most of the amendments which the trustees purported to make over a 30-year period were struck down (including Barber equalisation) because the trustees had failed to comply with the requirement of the amendment power to obtain a written opinion from the Actuary that members' accrued rights would not be substantially prejudiced. The court held that:

- the amendment rule clearly required the trustees always to seek the Actuary's opinion, even where there could not possibly be any prejudice to Members' benefits; this had not been done, so none of the amending deeds was valid
- section 67 certificates issued by the Actuary did not constitute the required written opinion: section 67 certificates are designed for a different purpose and could not be used to save the proposed amendments
- certain benefit improvements properly made under the power to augment benefits to use up surplus were valid as that was a separate, free-standing power not subject to the restrictions in the power of amendment.

The power of amendment must be followed precisely

Indirect sex discrimination - correct pool of comparators: *Pike v Somerset County Council*

The Court of Appeal has upheld the decision of the Employment Appeal Tribunal about a teacher who complained of discrimination because, having retired and returned to work as a part-timer, she was not entitled to rejoin the Teachers' Pension Scheme. The Employment Tribunal had held that the appropriate pool of comparators was all members of the Teachers' Pension Scheme. The EAT had overturned this, finding that the correct pool should not include members who had not yet retired, as they "had no interest in the advantage or disadvantage in question".

The EAT had made a finding of disparate impact on women. The appellant council argued that this question should have been remitted to the ET. The Court of Appeal found that the EAT had not exceeded its jurisdiction in making a finding on disparate impact: there was only one logical pool and, once that had been identified, only one permissible conclusion about disparate impact.

We understand that the case will now go back to the ET for consideration of objective justification.

For a report on the EAT decision, see [Pensions Update, October 2008](#)

Regulator's statement on DC schemes: more employer guidance is on its way

The Pensions Regulator has issued a statement for trustees and employers providing defined contribution schemes. The Regulator aims to **improve employer engagement** with minimal additional burden. Guidance will be provided later this year (jointly with the FSA) for employers on how and what they can tell employees. Employers of contract based arrangements are encouraged to work closely with the provider, including establishing a governance committee.

A key priority is to ensure trustees and providers are enabling members to make **informed retirement choices**. The Regulator has updated its leaflet on pre-retirement choices and is reviewing pre-retirement

Materials:

The [Statement](#)

The Regulator's [updated leaflet on pre-retirement choices](#)

The Regulator's [current guidance on voluntary employer engagement](#) (January 2008)

literature in a sample of schemes. Where shortcomings are identified trustees will be expected to make improvements.

PPF levy: proposed changes

The Pension Protection Fund has issued a consultation on changing the assumptions used for s143 and s179 valuations to bring these valuations in line with pricing in the buyout market. The changes are proposed for valuations from 31 October 2009, affecting PPF levy calculations from 2011/12. The changes may result in fewer schemes entering the PPF because valuations based on the proposed new assumptions may mean they are able to pay benefits greater than PPF levels of compensation.

Consultation closes on 11 September 2009.

The PPF has also published an update to its consultation on the development of the levy. As respondents agreed with the principle but were divided on the detail, the PPF will set up a senior industry group to develop the proposals. The proposals will not now be implemented before 2012/13, i.e. at least a year later than originally planned.

The consultation on assumptions can be found [here](#).

The PPF update document can be found [here](#).

For background information on the levy consultation see [Pensions Update, November 2008](#).

HMRC Pension Schemes Services: change of address

HMRC has announced a new address for the Pension Schemes Services: all paper correspondence should now be sent to Pension Scheme Services, FitzRoy House, Castle Meadow Road, Nottingham, NG2 1BD.

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