# Pensions and Employment: Pensions Bulletin

Legal and regulatory developments in pensions

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Contents include:
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For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or [Rebecca Hardy](#).

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New Law

As usual, the start of the summer holiday period sees a flurry of new legislation and Government initiatives. This year is particularly hectic, with a new Government keen to make its mark. Our next regular Bulletins will appear at the end of August, but we will endeavour to report important developments in the holiday period as they arise.

Ministerial Statement on moving from RPI to CPI

On 8th July, 2010, Steve Webb, Minister of State for Pensions, made a written Ministerial Statement to Parliament announcing the Government’s intention to move to using the Consumer Price Index (“CPI”) as the measure of price inflation for the purposes of indexing benefits from occupational pension schemes, in place of the Retail Prices Index (“RPI”).

The Government believes that the CPI, which excludes housing costs, provides “a more appropriate measure of pensioner inflation experience”. It intends that “the CPI will be used in determining increases for all private sector pensions and also for payments made by the PPF and financial assistance scheme”.

The CPI will be used as the basis for determining the percentage increase in the general level of prices for the 12 months ending 30th September, 2010 in the orders required in relation to revaluation and indexation of pension rights in DB schemes, and in relation to increases in GMPs in respect of pensionable service between 1988 and 1997. Legislation will be amended to enable the CPI to be used for relevant increases in respect of the PPF and FAS.

The government expects to publish the orders in November or December, 2010. It will bring forward legislation at the earliest opportunity to ensure that other references to price inflation in pensions law are consistent with using CPI as the measure of price inflation from 2011 or as soon thereafter as Parliamentary time allows.

A statement published by the DWP on 12th July, 2010 follows press reports that the DWP had suggested that the change applied only to benefits accrued from April, 2011. The statement makes it clear that the new rate of increase will apply from April, 2011, but that it will be applied to all benefits, whenever accrued. The statement includes the following examples:

- A is a pensioner member of a pension scheme. His pension has been in payment for 3 years, and he has been receiving increases related to RPI. From 2011 his future increases will be calculated in relation to CPI. This does not affect his previous increases.
- B is a deferred member of a pension scheme. She left pensionable service 5 years ago. When she reaches normal pension age, her rights will be revalued in relation to RPI in respect of the first 5 years after she left pensionable service, and then in relation to CPI until normal pension age. Once her pension has been put into payment, she will receive annual increases calculated in relation to CPI.
- C is an active member of a pension scheme. He is continuing to accrue new rights. If he continues in pensionable service until he reaches normal pension age in (for example) 2015, revaluation will not apply. Once his pension is in payment, he will receive annual increases calculated in relation to CPI.
- D is an active member of a pension scheme. She will leave pensionable service in 2013, and will reach her normal pension age in 2020 and begin to receive her pension at that time. From 2013 to 2020 her rights will be revalued in relation to CPI. Once her pension is put into payment, she will receive annual increases calculated in relation to CPI.
Revaluation of deferred benefits: Section 84 of, and Schedule 3 to, the Pension Schemes Act 1993 require defined benefit deferred pensions (in excess of GMPs) to be revalued in accordance with the revaluation order published each year by the Secretary of State for Work and Pensions. The legislation refers to the increase being by reference to the “percentage increase in the general level of prices”. Most scheme rules simply refer to increases in accordance with statutory requirements, in which case the change from RPI to CPI should flow through automatically. Schemes that include a specific revaluation rule that refers to the RPI will need to amend their rules if they wish to take advantage of the change. In the absence of overriding legislation, the amendment is likely to apply to future accrual only due to restrictions on amendments to accrued benefits imposed by Section 67 of the Pensions Act 1995.

Increases to pensions in payment: Sections 51 to 54 of the Pensions Act 1995 introduce a requirement, with effect from 6th April, 1997, that pensions in payment be increased by the lower of 5% and the increase in the RPI. The Government will need to amend Section 51 to link increases to the CPI rather than the RPI. Some scheme rules are parasitic on the statutory increase. Such rules will not require amendment to take advantage of the change. Schemes with “standalone” pension increase rules will need to amend those rules, with the Section 67 difficulties referred to above.

Increase to GMPs post 5th April, 1988: The post 5th April, 1988 element of GMPs is increased each year by the lesser of:

- the percentage increase in "the general level of prices" for the relevant period, or
- 3%.

The increase is set out in the annual Guaranteed Minimum Pensions Increase Order.

Again, most scheme rules refer to increases being in line with statutory requirements and so the change from RPI to CPI should be automatic.

The DWP’s statement is at www.dwp.gov.uk.

Action point: Schemes that wish to take advantage of the change will need to review their scheme rules to see whether they will reflect the change automatically, or whether amendment will be required. The converse is true for schemes that wish to retain the linkage to RPI.

Some schemes contain “auto fix” clauses which automatically update the rules to reflect legislative change. However, such clauses will need to be checked to ensure that they can operate in respect of pensionable service prior to the date of the deed in which the clause was introduced.

So far as the requirement to consult affected members on the change insofar as it applies to future service is concerned, the Pensions Regulator has previously confirmed (in relation to rule changes necessitated by introduction of the legislation prohibiting age discrimination in December, 2006) that the requirement does not apply to an amendment made for the purposes of complying with a statutory requirement. This point may need to be reconfirmed with the Regulator.

Comment: The change may provide a possible windfall for insurers who have entered into buy-in policies with pension fund trustees. Such policies generally provide that the insurers are not liable for any increase in cost due to the impact of any legislative change but are silent on changes that reduce the insurer’s liability. The position will turn on the exact policy wording. It is possible that that the trustees may instead benefit from the windfall because the policies pay RPI increases and the scheme now only pays CPI increases.

Note that, for service from 6th April, 2009, pension increases may be the lower of 2.5% or the increase in RPI.
EU Green Paper on pensions

This (COM (2010) 365/3) was published on 7th July, 2010 with the optimistic title of “Green paper towards adequate, sustainable and safe European pension systems”.

The Green Paper calls for a thorough review of the EU framework for pensions. It summarises key challenges (demographic ageing, changes in pensions systems, the impact of the financial and economic crisis) and sets out priorities for modernising pension policy. These include:

- a proposal for a revised solvency regime for pension schemes, drawing on the insurance sector’s Solvency II regime,
- an EU-wide requirement for a pension benefit guarantee system, potentially covering DB schemes and also providing compensation for "excessive losses" in DC arrangements,
- addressing concerns about the trend towards DC, particularly in relation to the greater risks borne by employees. Support is expressed for risk-sharing and hybrid schemes, and
- improvements to cross border portability of pensions, in particular in relation to transfers of pensions between member states.

A separate paper summarises existing EU legislation on pensions and related legislation and initiatives.

Both are available from the Europa website.

Comment: In its response to an EU consultation paper on solvency issues and cross border pension schemes published on 3rd September, 2008, the DWP made it clear that it would "strongly resist" any proposal that the EU solvency regime for insurers should be extended to pensions. Employers may want to write to the DWP reminding it of this and asking it to confirm it will respond to the latest Green Paper in similar terms.

Finance Bill 2010

This was introduced in the House of Commons on 28th June, 2010.

Clause 5 gives HM Treasury a power to make an order repealing Section 23 of Schedule 2 to the Finance Act 2010, introducing the high income excess relief charge ("HIER"). Any such order must be made on or before 31st December, 2010.

Clause 6 and Schedule 3 introduce transitional provisions dealing with the proposed removal of the requirement to annuitise at or before age 75.

The Government confirmed in the 22nd June, 2010 Budget that, with effect from 6th April, 2011, it will end the existing rules that create an effective obligation to purchase an annuity at age 75. A consultation is expected “shortly”.

The transitional arrangements allow an unsecured pension to be paid up to age 77 to a member who was under 75 on 22nd June, 2010 as an authorised payment.

For such persons:

- an unsecured pension may be paid as an authorised pension to a member or dependant until their 77th birthday,
- an alternatively secured pension fund is not created until a member’s or dependant’s 77th birthday, and
- an unsecured pension lump sum death benefit may be paid until the member’s or dependant’s 77th birthday.

There is a statutory override for scheme rules that provide that unsecured pension arrangements cannot extend or be offered beyond age 75. The override gives trustees discretion to provide unsecured pension up to age 77.
Similar changes apply for the purposes of the Inheritance tax charges that apply to pension scheme members aged 75 or over, contained in Section 151A to 151C of the Inheritance Tax Act 1984.


The guidance deals separately with changes for the transitional period relating to:

- member’s pension,
- pension commencement lump sum,
- dependants’ pension,
- lump sum death benefit rules, and
- IHT.

It also contains examples and answers to FAQs.

The draft guidance is available at www.hmrc.gov.uk.

**Action point:** The transitional provisions relating to postponing the age of compulsory annuitisation are of relevance to DC schemes that allow members flexibility over when to purchase an annuity.

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**Review of automatic enrolment provisions: terms of reference**

On 24th June, 2010, the DWP published the terms of reference for its review of auto-enrolment.

The review will be led by Paul Johnson of Frontier Economics, David Yeandle of Engineering Employers’ Foundation, and Adrian Boulding of Legal & General. It will report by 30th September, 2010.

The review will consider:

- whether the proposed scope for automatic enrolment strikes an appropriate balance between the costs and benefits to both individuals and employers, or whether the underlying policy objective of increasing private pension saving and balancing those costs and benefits would be better delivered by a different scope for automatic enrolment. In looking for the right group to enrol automatically, the review may among other things explore:
  - the earnings threshold, above which automatic enrolment applies;
  - the introduction of a de minimis level for contributions before automatic enrolment applies;

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**Increase in SPA: call for evidence**

On 24th June, 2010, the DWP published a call for evidence on its proposal to bring forward the increase in State Pension Age ("SPA").
On the current timetable, SPA is due to rise to 66 by 2026, to 67 by 2036, and to 68 by 2046.

The call for evidence notes increases in longevity, and gives comparisons with state pension age in other countries (the only countries listed with SPA as low as (or lower than) the UK are Greece, France, Italy and Poland).

Responses are sought by 6th August, 2010.

The call for evidence is on the DWP website (www.dwp.gov.uk).

Action point: For noting, unless you wish to respond to the call for evidence.

Regulator

Defined benefit multi employer schemes and employer departures: guidance for trustees: consultation


The revised guidance emphasises the importance of ensuring that the employer covenant strength is reviewed and maintained throughout the life of the scheme, not only when a particular event such as an employer departing the scheme occurs.

The revised guidance reflects legislative changes to the employer debt regime, including the introduction, with effect from 6th April, 2010, of 2 new easements, the "general" easement, and the "de minimis" easement.

It is not intended to be technical guidance; the Pensions Regulator expects that trustees will normally need to seek independent professional advice on the withdrawal of an employer from a multi employer scheme. The guidance outlines the mechanisms that are available as alternatives to paying the full Section 75 debt.

Although the guidance is aimed at trustees, it includes a section for employers, both to raise their awareness of the issues trustees have to consider, and to highlight the Regulator’s expectations of them during the process.

The guidance does not specifically deal with the recent High Court judgment in Pilots (summarised below). However, the press release accompanying publication of the draft guidance states:

"The recent High Court judgment on the Pilots National Pension Fund also highlights the importance of understanding which parties support a multi employer scheme, and the importance of seeking independent professional advice".

The draft guidance is accompanied by “bite sized” e-learning modules which cover a short checklist of the areas trustees are expected to understand, and a longer, more detailed, case study illustrating the considerations needed when an employer departs the scheme.

The guidance, on which comments are invited by 23rd September, is available from the Pensions Regulator’s website (www.thepensionsregulator.gov.uk).

Action point: Although the guidance is currently in draft form, it should be read by all trustees of multi employer schemes – the Regulator emphasis the importance of trustees understanding the impact of an employer departing the scheme, and in particular how scheme liabilities are shared between employers, well in advance of any proposed departure.

Revised guidance on transfer incentives

On 13th July, 2010, the Pensions Regulator published for consultation revised guidance on transfer incentives, alongside a new e-learning module and a joint statement with the FSA.
The revised guidance replaces the “inducement offers” guidance published by the Regulator in 2007. It highlights that trustees should start from the presumption that such exercises and transfers are not in members’ interests and should therefore approach any exercise “cautiously and actively”.

The Regulator expects:

- members to be provided with clear information that is not misleading,
- members to be provided with impartial and independent advice to ensure they make right decisions,
- trustees to engage in the offer process and apply a high level of scrutiny to all incentive exercises to ensure members’ interests are protected,
- employers to ensure that any offers made are consistent with the principles in the guidance, and
- no pressure of any sort to be placed on members to make a decision to accept the offer.

According to the Regulator, the existing guidance has lead to a “box ticking” approach that has lead to exercises being run without due consideration of the needs of scheme members, and in a manner that the Regulator does not consider in keeping with the spirit of the guidance. As a result, the revised guidance offers a more principles-based approach.

Points to note are:

- the guidance, while specifically covering transfer incentives or enhanced transfer values, can equally be applied to scheme modification or benefit forfeitures,
- the Regulator does not consider that reduced risk for one group of members is sufficient reason to allow increased risk for another group. Trustees should ensure they consider the interests of both potential transferring members and remaining members equally,
- fully independent and impartial financial advice should be made accessible to all members and promoted “in the strongest possible terms”; in almost all circumstances, the structure of the offer should require that members take financial advice. The basis on which advice is remunerated, and who is paying for that advice, should be made clear to the member before it is provided. Trustees should ensure that they are comfortable that the selection, remuneration and broader commercial interests of the adviser are aligned with members’ interests. Employers who wish to appoint advisers should consider a due diligence process for appointment to ensure that the adviser has the capacity and competence to advise members,
- in the Regulator’s view, cash incentives distort the members’ decision making process in respect of their retirement provision. The Regulator finds it difficult to see how an offer involving cash incentives would lead to sound decisions being made,
- when reviewing a complaint, the Pensions Ombudsman will take the Regulator’s guidance into account in determining whether the employer or trustees are at fault,
- the Regulator expects that an employer will not conduct an incentive exercise if it could have an adverse effect on the employer’s ability to fund the scheme’s deficit in accordance with the scheme’s existing recovery plan, and
- trustees should consider the implications of the employer’s capital being used to fund any incentive exercise on the company’s ability to directly repair any deficit in the scheme and, if necessary, bring forward a formal scheme valuation.

The joint statement by the Pensions Regulator and the FSA reminds advisers that conflicts of interest may arise if they have links to the sponsoring
employer’s advisers or are remunerated by the sponsoring employer. Remuneration structures put in place should not link payment levels to the number of transfers recommended or levels of employer liability removed where this would breach the rule on inducements. Whilst the members’ advisers may be appointed by the employer, they should be separate from those advising the employer on the exercise.

The draft guidance, on which comments are invited by 5th October, 2010, and joint Pensions Regulator/FSA statement, are available from the Pensions Regulator’s website (www.thepensionsregulator.gov.uk).

**Action point:** Employers and trustees who are considering enhanced transfer value exercises as an alternative to (or as part of an exercise towards) buying out benefits should read the draft guidance and adhere to the principles (and take legal advice).

**Comment:** Notwithstanding the Regulator’s concerns, a properly run enhanced transfer value exercise may be a win for all involved. For example, it may be a perfectly economically rational decision2 for a deferred member to accept a cash payment from the employer now in return for moving from defined benefit benefits to money purchase benefits under the enhanced transfer value arrangement.

**Note:** Slaughter and May can provide advice on the legal aspects of enhanced transfer value exercises.

**Issue of first contribution notice**

On 29th June, 2010, the Pensions Regulator published its determination, dated 14th June, 2010, to issue a £5 million contribution notice (“CN”) against Michel Van de Wiele (“VDW”), the Belgian parent of Bonas UK Limited (“Bonas”), in relation to the Bonas Group Pension Scheme (the “pension scheme”), under which Bonas was principal employer.

The decision is the Regulator’s first CN determination. It involved a “pre-pack” insolvency taking place in December, 2006. The Determinations Panel found that VDW had been party to an act (the pre-pack) falling within Section 38(5)(a) of the Pensions Act 2004 in that the main purpose of the act was prevention of the recovery of a Section 75 debt. It found that VDW’s purpose had been to retain the Bonas business while avoiding the pension liability. VDW had not engaged openly with the pension scheme trustees or the Regulator. VDW has appealed the decision.

**Note** that the question of litigation in a foreign jurisdiction is, in general, relevant only where the target has no (or insufficient) assets in the UK.

Bonas was put into administration on 5th December, 2006. Its business and assets were immediately transferred to a new company and the pension scheme entered a PPF assessment period.

The pension scheme was a DB scheme in deficit. Bonas’ management had commissioned a report from its solicitors about its options for managing the deficit. As a result of the report, VDW decided to investigate options for putting Bonas into insolvency. The proposal was not put to the pension scheme trustees, nor was clearance sought from the Regulator.

The general manager of Bonas UK prepared a draft memorandum setting out options in relation to the pension scheme, describing as the “most attractive option” liquidation of Bonas, offering current employees positions at a newly formed company, negotiating with the liquidator to buy back the assets of Bonas while avoiding taking on its pension liabilities. The report considered the likelihood of the imposition of a contribution notice and concluded it was “likely that the Pensions Regulator may take a pragmatic view when faced with litigation in a foreign jurisdiction and may negotiate a settlement of its claim”.

2 To meet another pressing financial need – for example to avoid the member’s home being repossessed because of mortgage arrears.
The Regulator issued a warning notice indicating its intention to issue a CN for the £5 million required to bring the scheme to solvency on a PPF basis (but not up to the full Section 75 debt level).

The Determinations Panel found on the facts that VDW was controlling the decision-making process relating to the future of both Bonas and the pension scheme. There was a conflict of interest between Bonas on the one hand, whose principal duty was to its creditors, amongst whom the trustees were the largest, and VDW on the other hand.

The Determinations Panel found that putting Bonas into administration, with the employees and assets saved for a future business with VDW, was the overwhelming likely course even if the timing remained uncertain.

The Determinations Panel found from the evidence that:

- at all material times, Bonas was controlled by VDW,
- the conclusion reached by VDW that Bonas was unsustainable was driven exclusively by its pension liabilities,
- implementation of the pre-pack had and was intended to have the result that Bonas’ business and assets would be retained in a new company that had no liability towards the pension scheme, and
- VDW had deliberately not informed the trustees or the Pensions Regulator of the proposed pre-pack so that it could walk away from the scheme, taking the risk of the Regulator subsequently seeking a CN.

In deciding whether the purpose test in Section 38(5)(a) was satisfied, the Determinations Panel accepted the argument of Robert Ham QC that it was first necessary to look objectively at the act to ascertain its purpose. Secondly, it was necessary to apply a subjective test: in this case what had VDW subjectively intended to achieve in acting as it did?

Applying this test, the Determinations Panel concluded that VDW’s main purpose in implementing the pre-pack was to avoid the risk of having to make a contribution to, or avoid financial support for, the pension scheme.

In deciding whether a CN of £5 million was “reasonable”, the Panel took account of VDW’s financial position, its degree of involvement with the relevant act, its close association, through its funding of Bonas, with the pension scheme and its control of Bonas, in particular its control of all aspects of its administration, the pre-pack sale and the abandonment of the scheme.

However, the Determinations Panel refused to impose a CN on Bonas’ managing director, who was also chairman of VDW. Although he had been centrally involved in all the relevant decisions, he was involved in his capacity as MD and chairman, rather than in a personal capacity.

The determination is available from the Pensions Regulator’s website.

Comment: In our view, the determination is wrong. The pension scheme’s position would have been the same on the insolvency of Bonas with or without the pre-pack, unless it could be shown that the pre-pack resulted in the business being sold at an undervalue. As the pre-pack had the effect of preserving value and jobs, this would be difficult to show. The issue of a CN in these circumstances is inappropriate; a more appropriate route to recoup funds from VDW might have been via an FSD, but this possibility was not mentioned in the determination.

FSD determination in Nortel case

On 8th July, 2010, the Pensions Regulator published its determination to issue a financial support direction ("FSD") against 25 companies in the Nortel Group in Canada, the US, Europe and Africa.

The Pensions Regulator’s Determinations Panel found that it was reasonable for the Regulator to impose
the FSD on the Nortel companies after the employer of the Nortel Networks UK Pension Plan (the “Plan”) was found to be “insufficiently resourced” within Section 44 of the Pensions Act 2004.

In January, 2009, Nortel Networks Corporation, a US company, and several subsidiaries (including Nortel Networks UK Limited (“NNUK”), the principal employer of the pension scheme) were placed into various creditor protection and administration procedures around the world.

Each insolvency process imposed a moratorium or “stay” on legal proceedings and on actions against the property of the Nortel Group. The Companies Creditors Agreement Act (CCAA) process in Canada and the Chapter 11 administration process in the US called for all creditors, including overseas creditors, to submit claims (including “contingent” claims yet to be quantified) by 30th September, 2009. The trustees of the UK pension plan and the PPF jointly filed contingent claims for £2.1 billion, the estimated pension shortfall on the Section 75 buy-out basis.

During January, 2010, the Pensions Regulator sent a warning notice to 29 target companies within the Nortel Group, warning of its intention to issue FSDs against them. All parties had the opportunity to make representations during February and early March. The case was then heard by the Regulator’s Determinations Panel on 2nd June, 2010.

At the end of February, 2010, the Ontario Superior Court of Justice declared the UK FSD process a breach of the CCAA stay and ordered that any outcome of it would be null and void in the Canadian insolvency process. The Regulator’s appeal against this decision has been dismissed but the Court stated that this should not operate to preclude the trustee and/or PPF from asserting a claim in the CCAA process.

Also at the end of February, 2010, the US Bankruptcy Court made an order against the trustees and PPF declaring that their participation in the Regulator’s proceedings (in respect of Nortel US entities involved in the Chapter 11 process) would breach the Chapter 11 stay. The trustees and PPF have filed an appeal, although the matter has not yet been heard.

The Regulator presented its case to the Determinations Panel at a hearing on 2nd June, 2010. The target Canadian, US, European and African entities chose not to participate in writing or at the oral hearing. The Determinations Panel released its determination to all parties on 25th June, 2010, from which date the parties have 28 days to appeal.

The Determinations Panel found that the Nortel Group operated as a single entity, with the distinction between corporate legal entities being largely ignored. NNNUK was effectively controlled by its Canadian parent. This included decisions over whether, and if so, how much, NNNUK should contribute to the Plan. For some 12 years, the Nortel Group had benefited by paying little or no contributions to the Plan. The group had also benefited from the parent’s failure adequately to address the deficit. Further, Nortel group companies had benefited from NNNUK’s research and development and sales and marketing activities, for which NNNUK had not been adequately compensated. Finally, the group had benefited from an interest free loan from NNNUK, made at the behest of the Canadian parent.

The determination is available from the Pensions Regulator’s website.

Comment: This decision demonstrates the breadth of the powers the Regulator believes it has in relation to the issue of FSDs. The question now is the extent to which the Regulator’s powers are capable of enforcement in an overseas jurisdiction where the target has no UK assets.

Tax

Change in normal minimum pension age: retention of protected age on a transfer

HMRC has published a note on its website (2nd July, 2010) confirming its intention to bring forward regulations to remove the unauthorised payments tax charge where an individual aged 50 and over but
under age 55 transfers their pension in payment to another pension provider. The Government intends to backdate the regulations to cover transfers made on or after 6th April, 2010.

**Action point:** For noting.

### Cases

**Multi-employer schemes: Section 75 and scheme funding issues:** High Court judgment in the "Pilots" case


The proceedings concerned the Pilots' National Pension Fund, which has 53 participating bodies and 1,800 members who are marine pilots. The scheme is in deficit and the claimant trustee was obliged to formulate a recovery plan to eliminate that deficit.

The Part 8 proceedings were brought by the trustee for determination of questions of construction of the scheme documents, the scheme funding provisions under the Pensions Act 2004 relating to the scope of the trustee's powers in relation to the recovery plan, and the employer debt provisions as they affect multiemployer schemes in Section 75 of the Pensions Act 1995.

The main points at issue, and Warren J's conclusions, are:

- could the trust deed and rules be amended to impose additional contribution obligations on employers? **Answer:** As a matter of construction of the rules, including the amendment power, yes,
- whether an employer who ceased to employ any active members **prior to April, 2008** triggered an employment cessation event for Section 75 purposes where the employer still employed a person who was eligible to become a member without requiring trustee consent. **Answer: Yes.**

For these purposes, Warren J decided "employer" includes an employer employing an employee who is eligible to join the scheme, but not an employer employing only deferred or pensioner members. Here, Warren J differed from the High Court decision in Cemex, where Peter Smith J held that the employment of deferred or pensioner members brings an employer within scope of Section 75, and from the High Court decision in Hearn v. Dobson.

This aspect of the decision is also contrary to the Pensions Regulator's November, 2005 guidance on multi employer withdrawal arrangements, to which Warren J felt able “to attach only the slightest weight”.

“I would be comforted … that my conclusion concurred with the view of the TPR. But I would have no sense of anxiety if my conclusion were to differ from that view”.

**Note:** The definition of “employer” was changed from April, 2008 to refer only to employers of active members but complex transitional provisions mean the point is still of relevance.

- who is an "employer" for the purposes of the scheme funding regime in Part 3 of the Pensions Act 2004? Warren J held that this was the same as for the Section 75 regime i.e. an employer of persons who were eligible to join the scheme, but not an employer merely of deferred or pensioner members, and
- the interaction between the scheme funding regime in the Pensions Act 2004 and the scheme rules, in particular, whether, once the Part 3 provisions had been satisfied, trustees could enforce payment obligations under the trust deed and rules that exceeded them. In deciding that the answer was yes, Warren J followed his own decision in British Vita and that of the Court of Appeal in Allied Domecq (relating to the MFR regime).
Comment: Warren J, in following British Vita, has provided judicial support for our longstanding view that the existence of the Schedule of Contributions does not preclude additional contributions being demanded under the scheme rules.

Points in Practice

FRC Stewardship Code

This was published on 2nd July, 2010.

It draws heavily on the existing Institutional Shareholders Committee ("ISC") code on the responsibilities of institutional investors published in November, 2009 and follows the FRC’s January, 2010 consultation on whether it (the FRC) should assume oversight of a new UK stewardship code and whether the ISC code would form a suitable basis for this.

There was general agreement that FRC should be responsible for the oversight and future development of the code, with the policy objectives of:

• setting standards of stewardship to which institutional investors should aspire,

• promoting a sense of ownership of the code amongst institutional investors in order to encourage UK and foreign investors to apply and report against it,

• ensuring that engagement is closely linked to the investment process within the investment firm,

• contributing towards improved communication between investors and the boards of companies in which they invest, and

• securing sufficient disclosure to enable asset managers’ prospective clients to assess how they are acting in relation to the code so that this can be taken into account when awarding and monitoring fund management mandates.

Although the code is addressed in the first instance to fund managers, a paper on how it is to be implemented, published by the FRC alongside the code, notes that, although pension funds may not wish to become directly involved in engagement, they can contribute by, for example, mandating their fund managers to do so on their behalf and scrutinising with care their reports on engagement. The preface to the Code states "The FRC strongly encourages all institutional investors to report if and how they have complied with the Code".

As with the UK corporate governance code, the code is to be applied on a “comply or explain” basis.

This entails institutional investors providing a statement on their websites containing a description of how the principles of the code have been applied, and an explanation if some elements of it have not been complied with.

The FSA is shortly to begin consultation on proposals to introduce a requirement for authorised asset managers to disclose whether or not they comply with the code.

The FRC will conduct a monitoring exercise in the second half of 2011, at which stage it will give further consideration to issues raised in response to the recent consultation, including whether institutional investors should disclose their policies on stock lending, and the nature of information to be disclosed on voting records.

In the meantime, the FRC “strongly encourages” all institutional investors to publish by the end of September, 2010 a statement on their website of the extent to which they have complied with the code, and to notify the FRC when they have done so. Those that have already published a statement of how they have applied the ISC principles on the responsibilities of institutional shareholders are encouraged to refresh it in the light of the new code.

A Slaughter and May Practitioner Alert on the code is available here www.slaughterandmay.com. The
code, and a paper on implementation, are at www.frc.org.uk.

Comment: In the context of occupational pension schemes, the code applies both to the trustees, and to their fund managers. It is not legally binding on either. However, trustees or their investment managers may already be complying in practice with a number or all of the principles in the code as part of the process of discharging their existing legal duties.

Action point: Consider reviewing investment management agreements to include a specific obligation on the fund manager to observe the principles of the code.

FSA policy statement on applying RDR principles to corporate pensions

On 25th June, 2010, the FSA published a policy statement entitled “Delivering the retail distribution review: corporate pensions – feedback to CP09/31 and final rules” (PS10/10).

In December, 2009, the FSA consulted on applying the RDR principles of adviser charging to the market for group personal pensions, group stakeholder pensions and group self-invested personal pensions (collectively “GPPs”) in its consultation paper CP09/31.

The FSA intends to proceed with the introduction of “consultancy charging”, under which all firms that assist employers with the setting up or administration of GPPs must agree their own charges with the employer in question, rather than being paid commission set by the pension provider.

Changes to the FSA handbook rules to implement the final RDR rules for the corporate pensions market are set out in the Retail Distribution Review (Corporate Pensions) Instrument 2010, which is included as an appendix to PS10/10. The new rules will take effect on 31st December, 2012.

PS10/10, and a summary aimed at firms, are available from the FSAs website (www.fsa.gov.uk).

Action point: Employers that use IFAs in connection with GPPs will, when the new rules take effect, need to agree charges with the IFA rather than relying on the GPP provider to pay the IFA commission.

PADA newsletter

The final edition of “The Link”, the Personal Accounts Delivery Authority’s newsletter, was published in July, 2010.

The newsletter coincides with publication of PADA’s third and final annual report and accounts and highlights its progress in building NEST.

PADA welcomes the Government’s review of automatic enrolment policy and delivery.

PADA was wound up on 5th July, 2010 and replaced by NEST Corporation. Tim Jones, CEO of PADA, moved across to be CEO of NEST Corporation. The office address and telephone number remain unchanged.
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 employment matters, and generally on employee benefit matters.

Our recent work includes advising:

- Uniq plc on a funding agreement (subject to clearance by the Pensions Regulator) with the trustees of its pension fund, linking future contributions to the company’s future EBITDA growth
- Gatwick Airport Limited on the establishment of a new defined contribution scheme for 2000 active members
- Cadbury plc on changes to its £1.6 billion defined benefit pension scheme to move to career average pension benefits
- RSA Insurance Group on a derisking arrangement for RSA’s 2 main defined benefit pension schemes involving a fully collateralised asset swap and longevity insurance contracts with Goldman Sachs and its insurance subsidiary, Rothesay Life, resulting in removal of a significant proportion of the schemes’ longevity, inflation and interest risk
- Royal Mail in its negotiations with its pension trustees over the Government’s investment in the Royal Mail and the Post Office and on its consultation over changing the terms of its defined benefit pension scheme
- HM Treasury on pension issues in connection with the taking into temporary public ownership of Northern Rock and Bradford & Bingley
- Marks and Spencer on its substantial contributions to its UK defined benefits pension scheme by an interest in a property-backed partnership, and on changes to benefits under that scheme, affecting 21,000 employees
- Prudential on a group bulk annuity buy-in policy purchased by the trustees of the Cable & Wireless Superannuation Fund for a premium in excess of £1 billion, covering approximately 5,000 members of the pension scheme.

If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matter, please contact one of the following or your usual Slaughter and May adviser:

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