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Current issues

December 2022

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Pensions aspects of the 2022 Autumn Statement

The Chancellor of the Exchequer, Jeremy Hunt, delivered an Autumn Statement on 17 November 2022. He relayed the Office for Budget Responsibility's conclusion that the UK economy is in recession, and that inflation will average 7.4% in 2023. Despite (or perhaps because of) that, there were few major pensions-related announcements, other than confirmation that the 'triple lock' will produce the largest ever increase to State pensions next April.

Taxation

In general, tax and National Insurance are to be fixed at their current levels for an additional two years, until April 2028. However, the threshold for the additional (45%) income tax rate will be reduced from £150,000 to £125,140 from April 2023 (this will apply to the whole of the UK for savings and dividend income, and to England, Wales and Northern Ireland in respect of other income, where the Scottish Parliament has devolved powers). The dividend allowance will be halved from April 2023, from £2,000 to £1,000; and then cut again, to £500, from April 2024.

Contrary to pre-Statement speculation, Hunt did *not* announce any extension to the freeze that is already affecting the lifetime allowance until 2025/26.

State pensions

The Chancellor confirmed that the outcome of the State pensionable age (SPA) review begun in February 2022 will be published '*in early 2023*'. By legislation, the report must be issued by May 2023.

The Government will stand by the Conservative Party's manifesto promise to maintain the 'triple-lock'. State pensions will therefore increase in April 2023 by 10.1%, in line with Consumer Prices Index inflation over the year to September 2022, at a cost of £11 billion. The income guarantee element of Pension Credit will also increase by 10.1%.

Other help with the cost of living

The Energy Price Guarantee will be extended for another year, from April 2023, albeit at the slightly less-munificent level of £3,000 for the average household, rather than the current £2,500. In 2023/24, all pensioner households will receive a Cost of Living Payment of £300; where applicable, this is in additional to the Cost of Living Payments that are to be made to households on means-tested benefits (£900) and people on disability-related benefits (£150).

Get up to speed with dashboards developments

Regulations 'made'

The *Pensions Dashboards Regulations 2022* (SI 2022 No. 1229) were 'made' (following approval resolutions in Parliament) on 21 November 2022 and will come into force on 12 December. The final Regulations contain, among other things, trustees' and pension providers' obligations in respect of pensions dashboards (for more details see the article, '*Dashboards Regulations laid in Parliament*', in *Current Issues November 2022*).

Dashboards operational standards finalised

The Pension Dashboards Project (PDP) has finalised the standards that will govern the operational practicalities of dashboards. Design standards will come later, with a consultation exercise to be held '*in the winter*'.

The updated versions of the standards take account of consultation feedback, so that several changes have been made since the draft version. These include—

- removing references to users who have taken uncrystallized funds pension lump sums (UFPLS) ceasing to be '*relevant members*' for dashboards purposes—such members will now remain '*relevant*';
- clarifying that members of schemes that may enter wind-up or Pension Protection Fund assessment do need to be found and have their benefit information displayed on the dashboards; and
- clarification on the process for updates.

The finalised standards must be formally approved by the Secretary of State before they come into force.

Staging timetable

The PDP has also created a webpage summarising the staging timetable that determines when pension schemes covered by the dashboards project must connect to the system.

- Large DC master trusts (with 20,000 or more relevant members), alongside most personal pension schemes, are to connect by the end of August 2023.
- Other money purchase schemes used for automatic enrolment have staging deadlines beginning in September 2023 (the first date being for those with 10,000 or more relevant members).
- The earliest staging deadline for private-sector DB and hybrid schemes is at the end of November 2023, for those with at least 20,000 relevant members.
- Public service pension schemes must connect by the end of September 2024.
- Medium-sized schemes (with between 100 to 999 relevant members) will connect in a second wave with deadlines from the end of October 2024.

The legislation does not currently extend to smaller schemes, but the PDP expects that it will be updated in the future to require that smaller schemes will be required to connect to the dashboards system from 2026.

Regulator consults on compliance & enforcement policy

The Pensions Regulator has begun a process of consultation on its proposed policy for enforcing the forthcoming dashboards obligations.

The draft policy contains the usual reassurance from the Regulator about its intention to operate in a risk-based, proportionate, and pragmatic fashion. Its focus will be on member outcomes, leading it to prioritize data quality and scheme governance. It says that it will support the pensions industry in devising solutions to issues, and acknowledges that many trustees will be reliant on third parties.

The Regulator will be particularly watchful for compliance with the obligation to establish and maintain connection to the dashboards infrastructure, failures to make matches that should be made, instances in which data are supplied to the wrong person, and cases involving value data that are past their 'use by' date. It will have access to information from the Money and Pensions Service about connection status and compliance reporting, and might request additional details from trustees.

The Regulator is also interested in schemes' internal controls, risk management, and breach reporting. It warns that trustees should keep good records of the steps taken toward compliance and the resolution of any problems that arise. An appendix to the draft policy illustrates of how the Regulator might respond to various hypothetical breaches.

As with auto-enrolment, the weapon of first resort is likely to be the compliance notice. The potential penalties for transgressions are up to £5,000 for individuals, and £50,000 for companies.

The deadline for responses is 24 February 2023.

EU Withdrawal Act deflects PPF-related discrimination claims

The Employment Appeal Tribunal (EAT) issued a ruling that preserves the 'temporal limitation' under pensions age-discrimination law—except in legal actions begun by 31 December 2020—and may portend how UK and EU law diverge, post-Brexit.[1]

Scene-setting

Under statute, every occupational pension scheme is taken to contain a non-discrimination rule.[2] However, legislation says that age-based rules, practices, actions and decisions do not breach the non-discrimination rule to the extent that they relate to rights accrued before 1 December 2006.[3]

An Employment Tribunal (ET) ruling in January 2022 said that this temporal limitation of the rule against age-based discrimination was incompatible with EU law, and must be disapplied. The Secretary of State for Work and Pensions appealed against that decision, to the EAT.

The judgment is the latest in a series of challenges to the restrictions imposed by the PPF legislation. Indeed, one of the people involved, Grenville Hampshire, was the successful litigant in the 2018 European Court of Justice case that established that the PPF must pay compensation worth at least 50% of the value of a member's occupational pension entitlement in the event of employer insolvency.[4]

When a defined benefit scheme enters a PPF assessment period, triggered by sponsor insolvency, its trustees are obliged to restrict any benefit payments to the amount that the PPF would pay out as compensation if it were to assume responsibility for the scheme. Members below NPA on the date of the insolvency event have their benefits trimmed back to 90%, and were historically also subject to a compensation cap (the PPF's indexation of benefits is also limited). The cap was found to be unlawful, on age-discrimination grounds, in a 2021 Court of Appeal judgment (*Hughes*[5]), and is no longer applied. However, it was still relevant when the events at the centre of this EAT case took place.

Case facts

The employer in this case experienced an insolvency event in July 2006, triggering PPF assessment of the pension scheme; at the time of writing, it is still under assessment. The claimants had all commenced receipt of their pensions before the insolvency event, and had their payments restricted by the scheme trustee because they were still below NPA. They said that, by doing so, the trustee had discriminated against them on grounds of age, contrary to EU law.

The trustee has already been forced to recalculate benefits twice, following the previously mentioned *Hampshire* and *Hughes* rulings that struck against elements of the PPF compensation rules. The claims in the EAT case were for additional sums related to injury to feelings and interest.

Judgment

The EAT judge concluded that the ET had based its decision on the general principle of equal treatment, as embodied in the Charter of Fundamental Rights of the European Union. That largely put paid to the Secretary of State's arguments that the ET judge had incorrectly assumed that the EU's Equal Treatment Directive[6] had direct effect between private persons, or that the trustee was in some sense acting as an 'emanation of the state' when restricting members' pensions in accordance with the PPF legislation (in case his primary conclusion proved to be incorrect, the judge did say that he was not persuaded that the trustee was acting as anything other than a trustee).

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[1] *Secretary of State for Work and Pensions v Beattie & others* [2022] EAT 163.
[2] Section 61 of the *Equality Act 2010.*
[3] Article 3(b) of the *Equality Act (Age Exceptions for Pension Schemes) Order 2010* (SI 2010 no. 2133).
[4] *Grenville Hampshire v The Board of the Pension Protection Fund* [2018] (Case C-17/17).
[5] *Secretary of State for Work and Pensions v Hughes* [2021] EWCA Civ 1093
[6] Directive 2000/78/EC *Establishing a General Framework for Equal Treatment in Employment and Occupation.*

The EAT ruled that there was an ongoing relationship between the pensioners and the trustee: their positions had not become permanently fixed, for the purposes of the law, when their benefits came into payment, or at the commencement of the assessment period. Consequently, they were able to invoke the 'future effects' principle and rely directly upon the general principle of equal treatment against the trustee.

However, the *European Union (Withdrawal) Act 2018* says that the Charter of Fundamental Rights is not to be treated as part of UK law with effect from the 'implementation period (IP) completion day' (31 December 2020); and that, from that point on, courts and tribunals can no longer disapply enactments on the grounds that they are incompatible with a general principle of EU law. That is *not* the case, though, for proceedings commenced before IP completion day.

Only two of the pensioners (one of them Mr Hampshire) had begun their legal cases before that cut-off date. The outcome was, therefore, that those two were able to rely on the general equal-treatment principle in the EU Charter, which could result in the disapplication of the 1 December 2006 temporal limitation for age-discrimination claims. The *Withdrawal Act* represented an '*insurmountable obstacle*' for the remaining fifteen claims.

The Secretary of State's lawyers also tried to argue that the ET had been wrong to conclude that the temporal limitation was incompatible with EU law, because it was a proportionate way for the UK to give effect to its obligations. However, the EAT judge said that this ground of appeal had been raised too late in the proceedings, as it would have required additional evidence and enquiry.

Any reference to a 'Brexit dividend' is bound to be controversial, but it seems as though the Government may have reaped one in this, admittedly narrowly constrained, sense. The attempt to overturn the benefit restrictions that apply during PPF assessment will continue, but only for two of the seventeen pension scheme members (and anyone else who, as luck would have it, happens to have gotten their complaint in before the 31 December 2020 deadline).

Had the Secretary of State's appeal failed, the resulting waves could have inconvenienced schemes swimming outside of the PPF-assessment pool. When scheme provisions were assessed for possible age-discriminatory effects, it is possible that trustees (or their legal advisers) drew a line at 1 December 2006 and ignored anything linked to earlier service, in reliance on the temporal limitation.

The PPF has not, so far as we are aware, commented directly on the EAT judgment. However, it did post two tweets on the following day, reassuring members that its continued existence and operation would be unaffected by the Retained EU Law (Revocation and Reform) Bill, and that would continue to recalculate compensation for those affected by the 2018 Hampshire ruling (it expects to finish the job in 2023).

Lastly, the case is bound to increase speculation about what other elements of EU-derived pensions law might be overturned, post-Brexit. In truth, though, there may be few such protections and governance requirements that we would be willing to relinquish (especially given that the UK was often rather influential in shaping them).

HMRC Newsletters: November 2022

Public Service Pensions Remedy Newsletter

His Majesty's Revenue and Customs (HMRC) published a new *Public Service Pensions Remedy Newsletter*. The first edition advertised a consultation exercise on draft Regulations and guidance intended to ensure that the remedy for the discrimination judged unlawful in the *McCloud* case receives the appropriate tax treatment.

The draft *Public Services Pensions Schemes (Rectification of Unlawful Discrimination) (Tax) Regulations 2023* would, for example, ensure that scheme administrators do not have to unpick historical contributions tax relief, and that members who need to make up contribution shortfalls obtain suitable relief. They would also modify the annual and lifetime allowance rules, recognize some historical transfers that would otherwise be retrospectively de-authorized, and provide for compensation payments to be free of income and capital gains tax.

The consultation period ends on 6 January 2023.

Pensions Schemes Newsletter 145

Pension Schemes Newsletter 145 has articles—

- advertising the first Public Service Pensions Remedy Newsletter (see above),
- nudging trustees (yet again) to do what is necessary to migrate their schemes from Pension Schemes Online to the successor Managing Pension Schemes service (also telling them how MPS will show any interest on overdue charges),
- incentivizing the PSO-to-MPS migration by pointing out (yet again) that MPS is now the sole means of submitting Accounting for Tax returns, and
- asking trustees to remind members to declare any 2021/22 annual allowance charge liabilities via self-assessment.

Revaluation Order

The Occupational Pensions (Revaluation) Order 2022 (SI 2022 No. 1229) has been made, laid before Parliament, and comes into force on 1 January 2023. The Order sets out the minimum statutory increases in deferment for early leavers with final-salary benefit who reach their normal pension ages during 2023. It also, indirectly, establishes the minimum statutory increases to pensions in payment.

The Order reflects the 10.1% inflation for the year to September 2022; however, it also illustrates the nuances of the statutory revaluation rules. The caps on inflationary increases—set at 5% per annum for benefits accrued prior to 6 April 2009, and at 2.5% p.a. subsequently—apply cumulatively, over the full period of deferment. When, as is now the case, a year of cap-busting inflation follows several years in which it remained well below the cap, the 'headroom' built up in those earlier years can accommodate the full measure of inflation within the minimum revaluation percentages for multi-year deferral periods. Thus, in the latest Order, the 5% cap loses its influence once one reaches the third row from the bottom of the table, corresponding to a three-year deferment period. By contrast, the lower (2.5%) cap's effect almost reaches back to the first year in which it applied.

Journey into un-chartered territory

The Institute and Faculty of Actuaries (IFoA) is calling on its actuaries to participate in an upcoming member vote on whether to adopt the designation of Chartered Actuary. The proposals reflect the increasing need to distinguish qualified actuaries from others carrying out actuarial work, who may not hold a professional qualification or have undertaken any formal actuarial training.

As the actuarial profession continues to evolve globally and diversify into less-traditional areas such as cyber risk, data analytics, sustainability and social care, there is an increased need to legally recognize the term ‘actuary’. Adoption of Chartered status would provide this legal protection whilst also providing an additional distinction between the work done by IFoA actuaries and those qualified and regulated by other bodies. Under the proposals, the current high standards for qualification as both an associate and fellow of the IFoA would remain unchanged but actuaries would have the option to adopt enhanced post-nominals to reflect their new chartered status.

The member vote will run from 15 November 2022 until 13 December 2022, with results expected to be announced on the IFoA's website at midday GMT on Thursday 15 December.

We’re supportive of the IFoA’s proposals and its commitment to enhancing the reputation of the actuarial profession. We see the adoption of the Chartered designation as a key step in protecting the future of the profession by ensuring that it can adapt to new and developing areas in which our actuaries work. Whilst we haven’t come across other professionals laying claim to ‘actuarial’ credentials in the pensions consulting environment, it isn’t a stretch to see how this could occur in less-traditional business areas in which actuaries operate.

As is the case with any type of ballot, voter turnout is key. Whilst it is up to individual members to make their own decision on the proposals, now appears a timely opportunity to safeguard the future of the profession ahead of the actuarial regulatory reforms which will come with the establishment of the Audit, Reporting and Governance Authority (ARGA) next year. As the proposals are structured in such a way that there won’t be any ‘losers’, we would strongly encourage members to vote in favour of adopting the Chartered actuary designation.

And Finally…

This thing of ours

The article in this edition of *Current Issues* about the Institute and Faculty of Actuaries' proposed 'Chartered Actuary' designation (*Journey into unchartered territory*) reminded *AF* of a former colleague's revelation about one possible combination of letters after actuaries' names. His sheer delight arose from a realization considerably more frivolous than the IFoA's concerns about the potential for farkakt-uaries (we don't have enough Yiddish puns in this publication) to masquerade as members of the profession. It was that someone with a master's degree who also became a Fellow of the Institute of Actuaries might thereafter be entitled to sign off his letters with,

'*Yours sincerely, Vito Corleone MA FIA*'…

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