SQUIRE SANDERS

EQUALITY IN PENSIONS = WORK IN PROGRESS

June 2012

The famous quote from George Orwell's *Animal Farm*: **"ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS"** applies to some extent to pension provision. The fact that women used to be 'more equal' than men in terms of state pension ages is being addressed in legislation to achieve equalisation by April 2018. Other inequalities in pensions have yet to be addressed and this article looks at some of the issues that have recently come on to the radar.

Civil marriages

The Government issued a consultation on equal civil marriage on 15 March 2012. The consultation has revived another potential area of discrimination in the private pensions arena. This relates to the provision within the Equality Act 2010 that currently allows for non-GMP benefits accrued prior to 5 December 2005 (the date the Civil Partnership Act 2004 came into force) to be disregarded by occupational pension plans in assessing what is due to surviving civil partners in relation to their prospective pension benefits. The consultation confirms that survivor benefits in occupational pension plans is an area that will require further consideration and states that the Department for Work and Pensions is currently assessing whether the provision in the Equality Act 2010 should be retained and the impact of its removal or modification.

If the current inequality is retained, this leaves open the possibility of a challenge by a disgruntled civil partner to the Court of Justice of the European Union on the basis that this area of UK law is itself discriminatory. It could be that such a challenge would succeed unless it were shown that the impact of the removal of this inequality would be destabilising to UK occupational pension provision generally (which may be a difficult argument). If legislation is not amended to remove the inequality, the danger for a UK occupational pension plan is that it could potentially become a test case in which the law, rather than the pension plan rules, is open to examination. In such circumstances both the cost and potential reputational damage of a defence would be disproportionate to the cost of simply allowing for equality in the pension plan.

The Government's response to the answers given to its question as to what should be done or its justification for continued inequality (if that is to be the chosen route) will be awaited with interest. The consultation closed on 14 June 2012.

Until this issue reaches a conclusion, trustees and employers who receive complaints involving civil partner benefits are encouraged to seek legal advice.

Test Achats – latest developments

In March 2011 the Court of Justice of the European Union held in the *Test Achats* case that insurers should not be permitted to use gender based risk factors when setting individual benefits and premiums, and that legislation permitting this practice should cease to have effect from 21 December 2012.

The UK Government has published its response to the *Test Achats* ruling stating clearly that it is "disappointed by this judgment" which will have "unintended and unpredictable consequences". However the Government has no option but to amend UK law to give effect to the decision. The amendment will be to the Equality Act 2010.

In terms of the effect on occupational pension plans, guidelines issued by the European Commission have muddied the waters regarding the extent to which annuity purchase is caught by the requirement for gender neutral factors. Clarity is needed on whether such factors must apply only to open market annuities purchased in the name of the member or whether the requirement will extend to annuities purchased in the name of the trustees. In practice, it may be that gender neutral terms are offered by insurers in all cases.

Retirement age ruling

The Supreme Court has provided further guidance concerning the impact of age discrimination legislation on the use of compulsory retirement ages in *Seldon v Clarkson Wright & Jakes*. Employers still using compulsory retirement ages can take some (limited) comfort from the Supreme Court's recognition of a number of legitimate reasons for having a contractual retirement age, in this case: staff retention, workforce planning and limiting the need to expel older employees by way of demeaning and undignified performance management. However, the most interesting issue is still to be decided by the Employment Tribunal – can Clarkson Wright & Jakes demonstrate that the selected compulsory retirement age of 65 was a proportionate means of achieving their aims? We await the Tribunal's decision with interest.

Many employers have shied away from such legal wrangles by dispensing with compulsory retirement ages altogether. This approach can have advantages, for example, making it easier for employers to hold on to more experienced employees. The downside of this approach is that there is less certainty about when employees are likely to leave employment. Employers may therefore face difficulties such as providing promotion opportunities for younger workers and planning for the replacement of key individuals when they retire. Where sponsoring employers do not make use of a compulsory retirement age there is increased importance that their pension plans are aligned.

In all cases pension plans should address late retirement options to ensure compliance with non-discriminatory requirements. Trustees should note that they also have a duty not to unlawfully discriminate on grounds of age and so should liaise with sponsoring employers to ensure that the pension plan operates on a non-discriminatory basis and dovetails with the employer's own practices.

Employers are encouraged to monitor developments that may impact upon their retirement policies. Trustees and employers should work together to ensure that appropriate pension provisions are in place for older employees.

Equalisation of normal retirement dates

We are now over 22 years on from the date of the *Barber v Guardian Royal Exchange* ruling but cases involving the validity of methods adopted to equalise normal retirement ages between men and women continue to be tested in the Courts. We have recently seen some surprisingly pragmatic judgments where it has been held that pension plan rules have been validly amended in spite of the fact that the power of amendment had not been precisely followed.

In *Premier Foods v RHM Pension Trust,* the High Court held that a deed of intention to amend the trust deed and rules constituted a valid amendment (even though the actual formal deed of amendment was not executed for a further two years).

In *Low and Bonar v Mercer,* a decision by the Outer House of the Court of Session in Scotland ruled that the pension plan's equalisation solution was valid even though the rule amendments had not been effected by deed, as required by the amendment power. The Court held that the word 'deed' did not have a technical meaning in Scots law and a board minute of the sponsoring employer fulfilled the necessary requirements of formality and intention to create legal relations.

However, each case is very dependent upon its own facts and we would warn against drawing general conclusions on how the Courts would interpret other equalisation problems put before them.

GMP equalisation

The DWP consulted in January on a possible methodology for equalisation of guaranteed minimum pensions (GMPs) and also published draft regulations. The consultation closed on 12 April.

Arguments about whether there is a legal case for having to equalise GMPs have raged for years, often revolving around whether there is any need to equalise at all a benefit which replicates an unequal state benefit. However, the DWP's consultation document undermines such objections by proposing amendments to the Equality Act 2010 and doing so in such a way that it would not be necessary to find a comparator of the opposite sex who is more favourably treated (as is normally the case for discrimination claims) when the difference in treatment results from GMPs.

As part of its consultation the DWP has put forward a proposed methodology for equalising GMPs which is about as generous and as complicated as any equalisation solution could possibly be! For example, this method involves an annual calculation of the benefit that each pensioner is receiving as compared with a notional member of the opposite sex for the period of contracted out service from 17 May 1990 to 5 April 1997. The pensioner would get the better of the two pension calculations. This would be an administrative nightmare and has been widely criticised by the industry as "gold plating" benefits.

Where does this leave us?

The industry has been lobbying Government to amend the regulations so as to narrow the potential scope of the amendments to the Equality Act. We do not know what the outcome of that debate might be, nor how long it will take to resolve. **It is highly likely that no draft legislation will be ready before the Parliamentary recess in July, but trustee boards should be alert to the need to take action at some stage in the future.**

And finally…

2012 will go down in British history not just for the Queen's Diamond Jubilee and the London Olympics but also as the year in which a dancing dog won *Britain's Got Talent.* We wonder if Pudsey the dog received half of the £500k prize money? If not, do his talents extend to making a claim via the Courts? We suspect, in reality, that such a claim will not be forthcoming, as Pudsey's needs and aspirations are likely to be more modest than that of his owner – and besides, some animals are more equal than others after all…

Catherine McKenna
Partner
T +44 113 284 7045
E catherine.mckenna@squiresanders.com

Charmian Johnson
Partner
T +44 161 830 5047
E charmian.johnson@squiresanders.com

Ian Forrest
Partner
T +44 121 222 3418
E ian.forrest@squiresanders.com

Wendy Hunter
Partner
T +44 20 7655 1119
E wendy.hunter@squiresanders.com