

Private Pensions Policy
and Regulation

Flexible Retirement and Pension Provision

Government Response to the
Consultation on Draft Regulations

10 December 2009

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1. Introduction

1.1 This document contains both a summary of responses to the consultation document “Flexible Retirement and Pension Provision” published on 16 December 2008 and the Government's conclusions following the consultation.

1.2 This document is on the Department's website at:
<http://www.dwp.gov.uk/consultations/2008/>

1.3 We have sent this document to people and organisations who have already been involved in this work or who have expressed an interest.

1.4 We value your feedback on how well we consult. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact our Consultation Coordinator:

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1.5 In particular, please tell us if you feel that the consultation does not satisfy Cabinet Office Code of Practice on Consultation. Please also make any suggestions as to how the process of consultation could be improved further.

If you have any requirements that we need to meet to enable you to comment, please let us know.

2. Background

2.1 The Employment Equality (Age) Regulations 2006 – the “Age Regulations”¹ implement the age strand of Directive 2000/78/EC – the “Directive”.² In so doing, the regulations require occupational pension schemes to have a non-discrimination rule in respect of age – however because the Government recognises that certain age related rules and practices are necessary for the proper operation of occupational schemes, the schedule contains a number of statutory exceptions to the non-discrimination rule.

2.2 In December 2008, the Department for Work and Pensions (DWP) consulted on alternative sets of draft regulations that would add a further exception to the non-discrimination rule to facilitate the setting up of flexible retirement arrangements. The first set “**Option 1**” would except all pensions rules and practices linked to flexible retirement arrangements, the second “**Option 2**”, was more limited, allowing occupational pension schemes discretion to treat members in flexible retirement arrangements as pensioner members for the purposes of death benefits.

2.3 Both sets of draft regulations defined “flexible retirement” as an arrangement between a member an occupational pension scheme and the employer under which the member either:

- reduces hours worked; or
- grade held;

after becoming eligible to receive all or part of the age-related benefits under the scheme.

2.4 The exceptions would be permissive, rather than mandatory. Employers and schemes would be free to consider their individual position (and that of the sector in which they operate) to determine the extent to which they wish to rely on any exception. In some cases, they may choose not to use the exception at all.

2.5 This response was delayed pending the judgment of the High Court in the Heyday Case³, delivered on 25 September 2009. This case, concerning the proportionality of a Member State’s discretion in implementing Community law and Directive 2000/78/EC in particular had the potential to affect the regulations as currently drafted and therefore any further amendments the Government may wish to propose.

¹ The Employment Equality (Age) Regulations 2006 SI 2006/1031

² (establishing a general framework for equal treatment in employment and vocational training)

³ Age UK, R (on the application of) v Attorney General [2009] EWHC 2336 (Admin)

3. The responses

3.1 The consultation contained five specific questions. These and a summary of the replies are below:

Question 1 – The definition of ‘flexible retirement’ excludes members continuing in the same grade with the same hours, but who take all or part of their age-related benefits. Do you (or employers or schemes you advise) enable workers to continue to work after NPA [normal pension age] in the same grade and with the same hours whilst taking their age related benefits? If so, does the practice cause significant problems for the scheme and are you (or any of the employers or schemes you advise) considering withdrawing the policy? If not, please explain why the practice has not been adopted.

Many respondents thought that (in general) flexible retirement arrangements allowed workers to continue to work in the same grade and with the same hours after NPA whilst taking their age-related benefits. **NAPF** and **Wragge** both stated that they were not aware of this being a significant problem, a view shared by the **Pensions Trust**, which added that the volume of cases remained low.

No respondent was aware of intentions to withdraw such a policy - in **Ashurst**’s opinion there could be “no underlying policy justification” for excluding people continuing in the same job, and to permit employees to continue to work in the same role/same hours from flexible retirement.

APL, **Capita Hartshead** and **AXA Sunlife** thought that private sector practice was not to limit the arrangements to taking benefits from NPA, nor to a reduction in working hours. **Buck** also knew of schemes that allow flexible retirement both above and below state pension age, and that allow employees to remain on unchanged pay and conditions.

GMB thought it was important that any exception should apply only to those over state pension age, but felt that the main issue was the operation of the Age Regulations themselves - “not that they were too generous to employees”.

Question 2 – As drafted, the exemption could be used to justify stopping further accrual of benefits, but not to provide future accruals at a lower rate than that previously enjoyed. Would you welcome a more flexible approach which would allow accruals at a lower rate?

Many respondents considered a more flexible approach would be welcome – a common remark was that inflexible regulations would lead to employers deciding not to offer flexible retirement.

First Actuarial Consultants and **Watson Wyatt** thought that the exemption should only allow for accruals at a lower rate. **Hammond, NAPF, SPC** and **Meyer Brown** would welcome the flexibility of offering a different or lower level of benefits or offering accrual in a different arrangement. **Buck** stated that ceasing further accruals was often justified as the result of an employee's choice, and knew of no problems with this approach, but cautioned that legislation that was too specific may add confusion.

Wragge wrote that in their experience, schemes either offered the member accruals at the same rate or an alternative, such as membership of a DC scheme. They thought that enabling lower accruals would just increase administrative complexity, but would support regulations allowing alternative accruals in another arrangement.

Ashurst and **DLA Piper** thought employers should be allowed to move employees into a defined contribution (DC) scheme. Failure to do this would mean that employers who did offer further accruals (albeit at a lower rate) would have to justify themselves while employers who offer no further accruals would be covered by the exception.

Age Concern thought treating people within flexible retirement arrangements as pensioner members would lose them the right to any lump-sum death in service or ill-health benefit, leaving them in limbo between active membership and pensioner membership.

AXA Sunlife was concerned that the draft appeared to limit the effectiveness of an exemption. **Eversheds** felt that some employers would have to change their current practice to fit within the exemption. **Buck** strongly believed that any exemption should be as wide as possible.

Capita Hartshead felt that a more flexible approach could be achieved by simply removing the references to reductions in hours or grade from the definition of flexible retirement arrangements.

The Pensions Trust thought it more sensible if the alternative would be to offer Personal Accounts for those employees aged over 65 who ask to be enrolled in a pension arrangement.

Question 3 – Given this, do you consider that the implementation of these regulations would meet the Government's overall aim of encouraging employers to provide flexible retirement arrangements?

The **TUC** was doubtful that the options would help to meet the Government's aim, **Age Concern** going rather further, thinking that Option 1 in particular was “likely to reduce the appeal of flexible employment”.

Scottish Widows believed “that if an exemption is to be introduced it would have to be much wider than that proposed to avoid the risk of unintentionally rendering unlawful any action already taken by employers and trustees”. Similar points were made by **Sackers, Wolseley** and **Lovells**.

DLA Piper cautioned that the draft regulations would “add a further narrow technical exemption to regulations that are already very technical and difficult to interpret”

NAPF thought that the extending working life agenda would benefit if employers were not constrained by age-related regulation.

EFA thought that whichever option was chosen, many employers would still be in the position of having to argue objective justification for flexible retirement on a case-by-case basis.

TAEN cautioned that the law, however framed: “should not preclude less conventional ways of reducing hours or working flexibly to meet the needs of employer and employees”.

As part of its response, the **CBI** carried out a member survey that showed that nearly two-thirds of those surveyed would prefer a “more flexible definition ... [to] ... allow for a wider range of practices”.

ACA, Ashurst, Meyer Brown and **Age Concern** all thought employers face uncertainty in the application of the Age Regulations to flexible retirement arrangements.

Both **Eversheds** and **Towers Perrin** thought the draft regulations would provide some encouragement for employers to adopt flexible retirement arrangements, as to some extent did the **CBI**, though its response went on to say that “further clarity “ was necessary.

First Actuarial Consultants also agreed, and thought they would give employers “some certainty as to the potential conflicts with the Age Regulations when setting up a flexible retirement arrangement”, although they would like to see the exemption extended.

Capita Hartshead agreed that the regulations would provide at least some encouragement for employers to adopt flexible retirement arrangements, but felt guidance should be issued on how a scheme can adopt flexible retirement before a member reached SPA/NPA without falling foul of the Age Regulations.

In **APL's** opinion a general exemption to allow employees the option to take their benefits but whilst employers cannot terminate accrual or benefits unilaterally was more likely to encourage employers to provide flexible retirement. However, the risk of introducing this specific exemption may discourage employers from introducing flexible retirement options with member consent, and may result in employers withdrawing existing options.

AXA Sunlife believed that Option 1 would provide some reassurance for employers however they thought that the exemption should also cover employees continuing in the same job and to those members whose accrual or entitlement was reduced (as set out in comments to Q1 and Q2)

Buck believed that trustees should have the right to prohibit further accruals if they wish. They also noted that employees would potentially have access to further accruals through separate legislation (presumably the Pensions Act 2008).

Hammonds did not think that the draft regulations would meet the Government's overall aim of encouraging employers to provide flexible retirement arrangements. On the contrary, they thought that it would encourage employers to dismiss employees at 65 unless they agreed to a reduction in hours or grade.

SPC said the proposed changes would have a limited effect, even if adopted by employers and trustees.

While the regulations will allow the provision of flexible retirement (within certain parameters), **Wragge** felt that the higher cost of some insured benefits for older people needs to be dealt with.

Question 4 – We welcome further evidence to determine the extent to which the Age Regulations deter employers from offering flexible retirement arrangements. Do you (or the employers or schemes you advise) currently provide flexible retirement arrangements to staff? If so, are you (or the employers or schemes you advise) considering withdrawing or limiting those arrangements? Why? If you (or the employers or schemes you advise) do not offer flexible retirement arrangements, what is the reason for this? Would an exemption from the Age Regulations lead you (or the employers or schemes you advise) to change your current practice?

ACA and **AON** considered that the uncertainty and confusion surrounding flexible retirement did little to encourage employers to offer it. **APL** thought the danger of the limited exemption would be that employers would be inhibited from introducing arrangements that did not fall within the strict wording of the exemption. **Buck** believed that if the regulations are too specific this will only lead to confusion.

Ashurst was concerned that clients were “taking advantage of the decision in the Heyday case to compel employers to retire at 65”, seeing this as further evidence that given a choice between “all or nothing”, employers would choose nothing.

AXA Sunlife’s view was that one of the reasons employers may not offer flexible retirement was the “perceived risk of a claim for age discrimination as there is (currently) no exemption”, and thought Option 1 went “some way to addressing that reason and would encourage some employers to offer flexible retirement where they don’t currently... an extension to Option 1 ... would remove further obstacles and provide more encouragement”.

Eversheds felt that clarification, in the form of further regulations, was needed to make clear what practices would not be discriminatory pursuant to the age regulations.

Capita Hartshead would appreciate further flexibility or clarification in respect of schemes. **First Actuarial Consultants** and **Hammonds** said that due to the uncertainty about the application of the Age Regulations, many employers were waiting for further clarification “before taking any decisive action” on flexible retirement, as “they are unsure of the legal position and do not want to ‘do the wrong thing’”. **Towers Perrin** experience was that uncertainty, lack of guidance and protracted consultations makes employers reluctant to offer Flexible Retirement as an option.

Wragge wrote that in terms of the employers and schemes with flexible retirement arrangements that they advise: there was “... no general move to withdraw or limit ... arrangements in place ... but a suitable exemption ... is likely to result in greater use of flexible retirement provisions that were introduced, but have not been used”.

Question 5 – We welcome views on whether the provision of ill-health benefits during a flexible retirement arrangement should form part of the exemption. Does your scheme currently provide ill-health benefits? What (if any) detriment does the continued provision of ill-health benefits during a flexible retirement arrangement cause?

ACA thought that they should form part of the exception– to remove potential double counting and uncertainty. **Buck** and **DLA Piper** too found it reasonable that an employee already in receipt of his pension should not be entitled to ill health benefits. However, they believe that the decisions should be left to the scheme rather than to the employer. **Eversheds** thought that the exemption should be extended so that a member within a flexible retirement arrangement would not have to be provided with ill-health benefits since they should be treated as pensioner members – they believed the same logic applies to death benefits.

Ashurst saw the inclusion of continued ill-health benefits within the exemption as a step towards the flexibility they advocate. However, **AON** thought that if a person in work and receiving benefits fell ill, the expectation was that they would retire and should not be allowed to further enhance their pensions. The **Society of Pension Consultants** thought the normal course of action would probably be to simply retire.

In **APL**'s opinion it did not appear very logical to require employers to provide permanent health insurance after State Retirement Age, or normal retirement age if later, in relation to a defined contribution scheme. **Wragge** would support any move to include these other benefits in the exemption and so reduce the burden on employers who have to fund them. They were hopeful that this issue may be considered in the Single Equality Bill.

Capita Hartshead thought that if Option 2 was implemented without inclusion of ill-health benefits then this would no doubt dissuade many employers from offering flexible retirement due to high costs of providing such benefits for members above age 65. However, **Hammonds** final salary scheme clients will offer ill-health pensions of some kind. **The Pensions Trust** provides ill-health benefits up to NPA; none of them offer enhancements for a period of service beyond NPA.

Watson Wyatt think that some schemes may have ill-health benefits which are calculated up to normal retirement date, but the exemption only covers those over SPA and does not cover ill-health benefits outside the scheme as is often the case with DC provision.

Wragge was not aware of significant problems in schemes that allow members to continue working in the same capacity after NPA as they did before. However, the issue of whether these employees should be treated as an active or pensioner member for the purpose of death benefits needs 'careful consideration'. **GMB** found "the apparent need to ensure survivors of those who die receive the lowest amount of death benefit available deeply concerning".

4. Conclusions

4.1 In addition to answers to the five specific questions, the responses spanned a wide range of opinion from the need for a broad exemption to doubts that any change was necessary:

- “without a broad exemption for voluntary flexible retirement schemes ... risk-averse firms ... [would]...choose the safety of retirement at the Normal Retirement Age ... rather than opening themselves up to the possibility of legal action against unintentionally discriminatory practices” (**CBI** - reporting the views expressed in its member survey);
- “we do not think there is robust evidence to show that the current law gives rise to a genuine barrier to flexible retirement, or that any exemption would comply with Directive 2000/7/EC”. (**Age Concern**)
- “[we do] not believe that there should be different provisions and protections for any worker on the grounds of age”. (**GMB**)

4.2 **Towers Perrin** made the point that “uncertainty, lack of guidance and protracted consultations” may make employers reluctant to offer flexible retirement. Other reasons could include, as **AXA** pointed out, “... administration problems, insurability, employees deciding to work either full or part-time after taking their retirement benefits but with another employer or returning after a complete break in service”.

4.3 On the other hand, it was equally clear from respondents that a range of flexible retirement options have been successfully established. **Capita Hartshead** thought they were “relatively common” in the private sector, although **GMB** considered take up was “very low”. This raises questions over whether it would be possible to defend any change as proportionate and having a legitimate aim in terms of Article 6 of the Directive.

4.4 In addition, some correspondents considered that flexible retirement was not inherently age discriminatory:

- “Most lawyers take the view... that no age discrimination issues arise when an employee is offered flexible retirement provided that he or she has also been offered the option of continuing to accrue benefits on the normal basis”, **Meyer Brown**;
- **CBI** quoted advice given to the automotive industry that it was “... not inherently age discriminatory to restrict access to benefits to those of a particular age, so long as the accrual of, or eligibility to accrue these benefits during employment is not normally age-related” - although the advice also called for “the position of a flexibly retiring member ... to be clarified” with “clear guidance that a flexibly retired member is a different category of scheme member to active, retired or deferred members”.
- **Unison** could not see why flexible retirement could be seen as contravening Age Equality legislation.

4.5 Many respondents thought (in answer to Question 3) that the definition of “flexible retirement” used in the draft regulations was too narrow as it included requirements that the employee:

- reduced hours worked, or grade held; and
- had to be over male state pension age

and that the general exception - option 1 in the consultation – was thus unlikely to lead to an increase in the availability of flexible retirement arrangements.

4.6 There were calls for a wider exception in respect of any employee who takes age-related whilst continuing to work. In looking at this proposal, we considered whether such an exception could be considered as appropriate and necessary means of facilitating the availability of flexible retirement arrangements.

4.7 Given:

- the evidence that flexible retirement arrangements have been successfully set up within the current framework; and
- the number of correspondents who doubted that “flexible retirement” in concept was discriminatory;

our conclusion is that the consultation has not provided sufficient robust evidence to proceed with either of the exceptions set out in the consultation.

Guidance

4.8 We recognise that this will disappoint those advocates of further legislative change, and it is clear from the wide range of responses that there remains significant uncertainty around the interaction between the Directive and the Age Regulations and flexible retirement practices. We will therefore consider the prospects for further general guidance on occupational pension schemes and age discrimination. The development of such guidance would need to take into account ongoing work on equality in general – in particular the Equality Bill currently before Parliament, and take any opportunities for the sharing of best practice between stakeholders.

List of respondents

Age Concern/Help the Aged
Allen and Overy LLP
AEGON
Aon Consulting
Ashurst LLP
Association of Consulting Actuaries (ACA)
Association of Pension Lawyers (APL)
AXA Sunlife
Buck Consultants
Capita Hartshead
Confederation of British Industry (CBI)
DLA Piper UK LLP
Employers Forum on Age (EFA)
Eversheds LLP
First Actuarial plc
GMB
Hammonds LLP
Hewitt Associates Limited
Ms Tina James
Law Society of Scotland
Lloyds TSB
Lovells LLP
Mayer Brown International LLP
National Association of Pension Funds (NAPF)
Pensions Management Institute (PMI)
Reed Smith Richards Butler LLP
Sacker and Partners LLP
Sainsbury's plc
Scottish Widows
Society of Pensions Consultants (SPC)
Stephenson Harwood
The Age and Employment Network (TAEN)
The Pensions Management Institute (PMI)
The Pensions Trust
Towers Perrin
Travers Smith
Trades Union Congress (TUC)
Mr J W D Trythall
Unison
University and College Union (UNU)
Watson Wyatt
Wragge and Co

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