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Tracy Murray
EU and International Pension Policy Team
DWP
The Adelphi
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1-11 John Adam Street
London WC2N 6HT

Dear Ms Murray,

Response to Flexible Retirement & Pension Provision consultation

Thank you for giving us the opportunity to comment on the *Flexible Retirement & Pension Provision* consultation issued in October 2007.

Members of the ACA provide advice to thousands of pension schemes, including most of the country's largest schemes. Members of the Association are all qualified actuaries and are subject to the Code of Professional Conduct of the Faculty and the Institute of Actuaries. Advice given to clients is independent and impartial. The ACA includes the Scheme Actuaries to schemes covering the majority of members of defined benefit pension schemes.

The ACA is the representative body for consulting actuaries, whilst the Faculty and Institute of Actuaries are the professional bodies.

We were expecting a more substantive consultation document with specific guidance, rather than mainly a series of questions. DWP have no doubt given considerable thought to and taken legal advice on many of the issues covered. A greater sharing of those thoughts and advice could have allowed a more informed consultation. Surely it is not too late to do this.

We have responded to your specific questions in the Appendix, but first we would like to make some general points.

Occupational pensions inescapably involve people building up rights to benefits in their earlier years, and then receiving those benefits in their later years. Occupational pensions are therefore inherently age discriminatory, and there is no way to avoid that. Government has chosen to deal with this issue by establishing an already long list of pension practices which are exempt from the anti-age discrimination legislation. However, it is simply inevitable that there will be uncertainty about whether many existing and future practices are covered by the exemptions.

It is equally inevitable that such uncertainty hampers employers from developing arrangements which support their legitimate business aims, and the stated aim of government to encourage flexible retirement.

In theory, court cases will eventually clarify such uncertainty, but trustees and employers do not wish to be the subject of such court cases, and clarification by this route could take many years. Therefore, the only ways to remove/reduce the level of uncertainty are:

- Amending the legislation to include further exemptions, or clarification of existing exemptions
- Whilst not carrying the weight of law, formal guidance from the DWP on practices which are intended to be covered by the existing exemptions

We believe strongly that there is a need for further clarifying exemptions on flexible retirement, or at the very least for published DWP Guidance. Our responses below to your specific questions are framed with this in mind.

If Government wishes flexible retirement to flourish, as we believe it should, it must make clear what flexible retirement practices will not leave employers/trustees open to claims of age discrimination.

Yours sincerely,

Charles Young
Chairman
ACA Pension Schemes Committee

ACA RESPONSE TO FLEXIBLE RETIREMENT & PENSION PROVISION CONSULTATION

APPENDIX

Q1. We would welcome your views on what you believe might constitute direct or indirect age discrimination in relation to flexible retirement.
The crux of the matter is that a whole raft of practices in relation to flexible retirement could constitute age discrimination. There is even a view that not offering flexible retirement could constitute age discrimination (although see Q14). Offering continued benefit accrual after NPA with an actuarial late retirement factor could constitute age discrimination. Offering continued benefit accrual without an actuarial late retirement factor could constitute age discrimination. Offering defined contribution pension accrual to a flexible retiree could constitute age discrimination. Offering active member death benefits to a flexible retiree could constitute age discrimination. Offering retiree death benefits to a flexible retiree could constitute age discrimination.

Q2. It would also be helpful if you could indicate practices which you believe should be exempt or which could be easily objectively justified under any new provision.
Providing flexible retirees with the same accrual as other members, but with no actuarial late retirement factors having to be applied to accrual post NPA, and no active member death benefits payable on death after taking benefits. For employers who wish to allow defined benefits to be taken while employees are continuing to work, a provision that explicitly allows defined contribution benefits to be provided in the future would go a long way to encourage them to buy into flexible benefits in the fullest sense.

Q3. We would welcome your views and opinions on the retention of NPA below 65. Do you believe this is critical to the workforce planning and smooth operation of pension schemes?
Yes

Q4. We also welcome your view on the operation of the DRA/NRA and NPA when flexible retirement is provided. Do you have any suggestions for change which would provide generic solutions?
Permitted approaches should be consistent with approaches that the Government adopts in relation to the items discussed in questions 1 and 2. Generally, we prefer flexibility and certainty in the legislation.

Q5. We in particular welcome comments on how pension provision is handled over NPA (if before DRA/NRA).
See response to Q2

We are aware that in some cases drawing benefits and continuing to work is not an option.
Q6. What do you think are the reasons for this?
Employer's original rationale for offering pensions was to provide an income to employees after they retire. Some will therefore be reluctant for their scheme to pay pension at the same time as paying the individual a salary. In addition, as highlighted above, there is uncertainty on what can be done in these circumstances without the risk of an age discrimination claim. No employer wants to be taken to a tribunal. If Government wishes to encourage flexibility, it must provide more certainty over what is and is not allowed under its own legislation.

In some cases drawing benefits and continuing to work is not an option.
Q7. How common a practice do you think this is?
Not uncommon in relation to employees aged below NPA. Less common in relation to employees aged over NPA.

Q8. Do you or don't you consider such practice discriminatory – and why?
It is discriminatory if it is applied only to employees below NPA. If the same policy is applied below and above NPA it is not discriminatory.

Q9. What are the specific scheme rules and legislative provisions which create the problems in this area?
If scheme rules already allow flexible retirement above NPA, it may be difficult or impossible to remove this provision. In these circumstances not applying it to employees below NPA is probably discriminatory. Any legislation which leaves employers uncertain about what practices do or don't comply with it is a problem.

If the employee has reached their maximum number of years of service and the scheme is closed to new entrants (with, for example, new entrants being given access to a DC Scheme).
Q10. Do you, as the employer, trustee or pension administrator offer the same scheme as that offered to new entrants therefore treating everyone in the same way?
You shouldn't need to. There is an existing exemption covering maximum periods of service counting towards benefits, and if an employee has reached this maximum there should be no requirement to provide further benefits, either defined benefit or defined contribution.

Q11. If there is a waiting period should this be waived?
Not relevant given the response to Q10.

Q12. Do you, as the employer, trustee or pension administrator allow the member who has reached their maximum number of years service permitted by the scheme to continue to accrue benefits in that scheme?
Not applicable.

If the employee has not reached their maximum number of years of service.
Q13. Do you, as the employer, trustee or pension administrator allow them to continue to accrue up to their maximum and then be treated as above if they still have not reached NRA or above? We'd be grateful to know your reasons for your answer.
We believe that it should be up to the employer to decide whether or not to permit this.

We note with interest the statement in the consultation document which says "As there is no legal requirement to provide flexible retirement at present, scheme rules may still state that a pension will only be paid when a member leaves service/retires." This is useful clarification, although including an explicit exemption in the Regulations to this effect would be better.

Q14. What are your views on this? Is there a concern that this may continue to promote an early exit from labour market – and why?
This position may indeed promote early exit from the labour market, but if Government wishes to prevent this, then it should consult and, if appropriate, legislate for this accordingly and clearly.

Q15. What are your views on not providing benefits after NPA?
We are surprised that it is considered that this would not constitute age discrimination.

Q16. Is there any evidence that if this option (allowing part benefits etc) were to be pursued further it would have a detrimental effect on the scheme provision?
It is crystal clear in our members' experience and confirmed by ACA research that one of the factors behind reducing levels of defined benefit provision has been the level of complication imposed by legislation. Any further imposed complication can only exacerbate the position.

Q17. Please tell us other views or suggestions which you believe should be considered?
No response

Preservation proposal
Q18. Do you agree that this would be the simplest solution?
Yes, if it works.

Q19. Are there other solutions you could share with us?
No response

Provision of death benefits beyond a certain age
Q20. What are your views on this? Do you believe there are any occasions where it may be justifiable to not provide death benefits to employees after NPA? And why?
There is a clear conflict here between age discrimination and practicalities. It is a fact that as people get older they are less likely to need to provision for a lump sum payable on their death. Children are more likely to be grown up and self supporting; spouses are less likely to need a lump sum; mortgages are more likely to be paid off etc. etc. It is fact that the cost of death benefit insurance increases very steeply for older employees. The arguments for anti age discrimination legislation are well versed and accepted, but sometimes do these arguments have to be balanced against requiring employers to provide benefits which are much less needed, and very expensive?

Existing pre retirement and post retirement death benefit designs have evolved recognising these practicalities. In practice, we suggest the simplest solution is to exempt employers from having to provide pre retirement death benefits once an employee becomes a flexible retiree.

Paper produced by:

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