

Not for Profit eNews

September 2022



Now, for tomorrow





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Welcome to the latest edition of MHA Not for Profit eNews.

In this edition of eNews, we review pension consultants Spence and Partner's, assessment of the impact increasing interest rates is having on defined benefit pension schemes and exit plans – a must read for anyone who has a pension scheme like the LGPS.

We also summarise the recent Harpur Trust v Brazel Supreme Court case, which has clarified laws in relation to holiday entitlement and holiday pay for individuals employed on a Part Year, Casual, Zero-Hours or Annualised contract.

Further clarifications, this time from the Charity Commission regarding various stakeholders' roles and responsibilities with respect to bullying and harassment, are also reviewed in this edition. We have also highlighted the Office for Tax Simplifications launching of a review into hybrid and distance working.

As ever, if there are any points you wish to discuss further in this issue please do get in touch.

Best Regards,
MHA Not for Profit team



Increasing interest rates provides a welcome opportunity for employers with defined benefit pension schemes

With rampant inflation, rising interest rates and a cost-of-living crisis, it's very easy to think around every corner is something ever more negative. However, David Davison, a Director at pension consultants Spence and Partners, has explained how the upward trajectory of interest rates has created an unexpected opportunity for employers participating in Local Government Pension Schemes (LGPS). Whilst David reports purely on the impact of rising interest rates on LGPS, the principle applies to other defined benefit pension schemes.

20-year annualised inflation peaked at about 4.1% at the end of March 2022, just when most employers were getting their triennial results. However, corporate bond yields (and gilt yields) had also increased - the higher the corporate bond yield, the lower the value placed on liabilities. The increase in corporate bond yields more than offset the increase in inflation, and as such many employers would have seen an improvement in their accounting position.

However, from April 2022 onwards the gap between inflation and gilt yields has narrowed as gilt yields have continued to rise while inflation has come down from its peak, reflecting an expectation of a future reduction as a result of higher interest rates. Most if not all employers will be unaware of the impact.

Participants in LGPS have seen exit debts at record highs over the past couple of years which has meant many organisations have been trapped in schemes that they are unable to afford to exit. These market changes however will have had a very material impact on exit debts; the assumptions used to calculate exit debts are now more in line with the assumptions used for accounting purposes, the latter of which are likely to be significantly smaller given the narrowing of the gap between inflation and gilt yields rates.

If employers are considering an exit from an LGPS, they should be looking at their position at the moment as they need to question if these market conditions are likely to persist indefinitely. The Bank of England's Monetary Policy Committee meet again on the 15 September 2022 and the expectation is that we could have a further interest rate increase, however further increases will be less likely if and when inflation comes under control.

However, if employers are considering exiting a Scheme, note that this is rarely achieved over a period of less than six months, so if these underlying market conditions are likely to be a temporary phenomenon, then employers need to begin to examine their options now.

Employers in England, Wales and Northern Ireland should be getting their updated actuarial valuations as at 31 March 2022 in the next few months and this would seem to present an ideal opportunity to review their options.

Holiday Entitlement and Holiday Pay



The Supreme Court case of Harpur Trust v Brazel (2022) has recently clarified the law in relation to pro-rated holiday entitlement, and the impacts for employers could be significant.

The case was about a Part-Year worker who had a continuing contract but did not work every week of the year. The decision affects Part-Year workers, Zero-Hour workers, Seasonal workers and potentially Annualised Hours and Casual workers; it does not affect part-time workers who are contracted to work every week.

The Supreme Court judgment is that anyone on a Part Year, Casual, Zero-Hours or Annualised Hours continuing contract who does not work every week in a year is entitled to 5.6 weeks' holiday, not a pro-rated entitlement.

This means that employers will no longer be able to pay holiday to such workers at the 12.07% rate. Holiday pay will also need to be paid at the 52-week average.

How has this happened?

The Working Time Directive contained the 'conformity principle' meaning that anyone working less than full time, be that hours per week or weeks per year, would have a pro-rated entitlement. When the Directive was enacted in the UK as the Working Time Regulations, this was not included. Therefore, the Regulations state that all workers are entitled to 5.6 weeks' leave per year. The Working Time Directive does not prevent a more generous provision being made by domestic law. The UK could have amended the domestic legislation but chose not to.

What are the implications?

Part Year, Zero Hours and Season workers continuing contracts should be amended to remove references to the 12.07% holiday entitlement or to the pro rating of holiday entitlement. Existing staff on these contracts should be issued with an Amendment to Contract, and this should be done within one month.

Employees on Part-Time and Annualised Hours contracts should also be reviewed to highlight anyone who does not work every week.

Employees on these contracts will be entitled to 5.6 weeks' holiday per year from now on. Holiday pay will then be based on their average weekly pay over the previous 52 weeks, excluding any weeks which they did not work and taking into account the remuneration of earlier weeks to bring the total up the 52 weeks (if the worker has not worked for the employer for 52 weeks, then an average of the weeks worked should be used).

This should be implemented promptly to correctly pay workers holiday entitlement thus reducing the likelihood of claims for backdated holiday (there is a three-month time limit for such claims). Otherwise, employers could face costly Tribunal claims. Casual worker contracts which provide for no continuity of service between assignments will not be affected as these are not continuing contracts. Employees on Fixed Term contracts will similarly be unaffected.

MHA's HR Solutions team can review Contracts of Employment and advise on the correct calculation of holiday entitlement and pay going forward.

Charity Commission clarifies bullying and harassment roles and responsibilities



The outcomes of a working group, which included the Charity Commission and a range of charity sector and other representatives, has resulted in the Charity Commission **clarifying respective responsibilities in preventing and responding to incidents of bullying and harassment in charities.**

Addressing bullying and harassment, which should never be accepted in the charity sector, benefits from collective recognition of the contributions required from individual charities, wider sector leadership, the regulator, government, and other experts. The working group focused on the discussion and clarification of those respective roles and responsibilities and explored ways those involved can take action to address bullying and harassment.

The role of trustees


- 1** Trustees must recognise that there is simply no place for bullying and harassment within, or by, charities.
- 2** Trustees have a central role to play to ensure their charity has clear policies, and that allegations are handled appropriately and in line with employment and other laws.
- 3** Trustees are responsible for ensuring the charity has processes in place to hear any concerns raised and address the matter.

The role of the Charity Commission

- 1** Being a risk-based regulator, the Charity Commission prioritises involvement to address the highest risk of harm, for example where there are concerns that trustees have not addressed reported bullying or harassment that is widespread and systemic within a charity.
- 2** The Commission has a range of possible responses to such cases, from providing regulatory advice to trustees to the opening of a statutory inquiry.
- 3** The Commission seeks to ensure that the charity's trustees are responding to the incidents appropriately
- 4** It is not the Commission's role to resolve individual employment issues.

The Commission continues to encourage charity workers and volunteers to **report issues that could seriously harm**: the people a charity helps, the charity's staff or volunteers, services the charity provides, the charity's assets and the charity's reputation.

The working group will continue to meet to explore further strands of work relating to charity leadership, what constitutes or contributes to bullying behaviour, as well as increasing visibility of existing resources.



Office of Tax Simplification launch review into hybrid and distance working

The Charity Tax Group have recently **summarised** the context of and the key issues to be covered by the Office of Tax Simplifications (OTS) upcoming review.

You don't need to look far for evidence of the seismic change in working from home in the UK; people have come to expect more flexible working conditions, and businesses recognise that to retain and attract talent they need to offer that flexibility. With the drive to adapt to the changing market, and a breadth of regulations to consider, tax isn't always the first thing on people's minds when designing their policies.

Over forty jurisdictions across the world already offer 'digital nomad' visas to attract mobile workers, many of them aimed at a tax-free stay for the visitor. Even in the UK, rules and guidance around employee expenses, and concepts like permanent workplace, seem designed for traditional ways of working and may begin to feel stretched.

The OTS is looking for evidence of trends in relation to increasing numbers of people choosing to work in different ways, including across borders.

The review will also consider whether the tax and social security rules are flexible enough to cope with the changes to how and where people are working, and how businesses, advisors and other bodies are experiencing these changes.

Other key issues the review will cover include:

- 1 Working across international borders, and what that means for things like tax, social security, tax residence, and permanent establishment
- 2 How accommodation, travel, and other expenses work in a hybrid world, including who will pay and whether permanent workplace rules make sense
- 3 Application of short term business visitor rules, overseas workday relief, and modified payroll
- 4 The treatment and impact on pension contributions and share schemes
- 5 The risks or otherwise of creating permanent establishments or even changing corporate residence

OTS particularly want to speak to employers and employees across a range of sectors and sizes, and self-employed people who may spend part of their time working in another country.



Interested parties can contact OTS for a meeting, or to send their written response, at ots@ots.gov.uk.

MHA Not for Profit Contacts



Sudhir Singh
Head of MHA Not for Profit
E: sudhir.singh@mhllp.co.uk



London & South East
Stuart McKay
Partner
E: stuart.mckay@mhllp.co.uk



North West
Nicola Mason
Director
E: nicola.mason@mooreandsmalley.co.uk



Midlands
Helen Blundell
Director
E: helen.blundell@mhllp.co.uk



South West
Bianca Silva
Head of Education, Partner
E: bianca.silva@mhllp.co.uk



North East
Rebecca Hughes
Partner
E: rebecca.hughes@mhllp.co.uk

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