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Jersey Pensions Update

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Is there specific legislation in Jersey relating to pensions?

Jersey has no specific pension legislation. However, Jersey pensions and pension schemes have their own local tax approval regime which is contained in Part 19 of the Income Tax (Jersey) Law 1961, as amended (the "**Jersey Income Tax Law**").

Is there a pensions regulator in Jersey?

There is currently no pensions regulator in Jersey and, accordingly, no specific pensions regulatory regime. However, scheme trustees and administrators may by reason of their activities fall within the provisions of other existing financial services regulation. Certain but not all pension related activities may form the basis of complaints to the Channel Islands Financial Ombudsman.

The States of Jersey is considering moving towards a regulatory regime for pension business. The proposal is to introduce regulation in order to uphold standards of consumer protection and ensure that Jersey is a well-regulated and reputable industry with high standards. The States of Jersey commenced a consultation with interested parties during November 2018.

Approved pension schemes in Jersey

If a pension scheme meets certain requirements, an application can be made to the Comptroller of Taxes in Jersey (the "**Comptroller**") for approval under the relevant Article of the Jersey Income Tax Law. If approval is obtained, there are certain tax and other benefits for employers and scheme members. The types of approved schemes in Jersey are as follows:

Article 131	-	Jersey occupational pension schemes for locally resident employees
Article 131A	-	occupational pension schemes for overseas (i.e. non Jersey resident) employees
Article 131B	-	Jersey retirement annuity contracts (personal pension plans) for local residents
Article 131C	-	retirement annuity contracts for overseas residents
Article 131CA	-	Jersey retirement trust schemes (open to local residents and non Jersey residents)
Article 131D	-	approved drawdown contracts
Article 131E	-	approved trusts

Guidance notes for approved pension schemes

Guidance as to the requirements for each type of approved pension scheme is set out in the Tax Guidance Notes for Pension Scheme Administrators (the "**Pension Guidance Notes**") which can be accessed on the States of Jersey website - gov.je.

Unapproved pension schemes

It may not always be appropriate or necessary for a pension scheme to be an approved scheme, in which case it may be administered on an unapproved basis. However, legal and tax advice should be taken when establishing or joining an unapproved pension scheme or seeking to transfer benefits to or from such a scheme.

Defined benefit or defined contribution?

The majority of occupational (employer sponsored) pension schemes are now defined contribution (also known as "money purchase") schemes. This means the amount of a member's pension will depend on the value of their individual fund or "pension pot" in the scheme when they take their benefits. This amount will depend on matters such as the amount of contributions made by or on behalf of a member and how well the investments in which such contributions have been invested, have performed over the period during which they have been held in the scheme.

Pension scheme members of defined benefit pension schemes will normally receive a multiple of their final salary as a pension when they choose to take their benefits. However, many such schemes have been closed to new members over recent years due to their costs for employers who have become unwilling to contribute the funds required to enable the schemes to pay such pensions in full when they fall due.

Recent tax changes

Since 2015, greater pension flexibility has been afforded to members of Jersey schemes, particularly in respect of occupational pension schemes approved under Article 131 of the Jersey Income Tax Law. One of the principal flexibilities was the removal of limits on benefits that schemes could provide. At the same time, a restriction was introduced whereby a member who leaves the service of an employer and who wishes to receive a refund of his contributions can only do so if he has been a member of the scheme for less than five years.

It is important to note that the legislative changes were designed to permit tax approved schemes to provide more flexible benefits. Existing schemes were not required to change their rules to provide the greater flexibilities now permitted and it remains the case that a scheme's rules will govern the benefits that can be provided to a member of that particular scheme.

Notwithstanding the above, certain transitional arrangements were introduced at the same time which may necessitate a change to a scheme's rules if an rule change may be required. In particular:

- the terms of a pension scheme approved under Article 131 prior to 1 January 2015 must:
  a. expressly set out the nature of the benefits to be paid rather than referring to what is permitted under applicable legislation by 1 January 2018; and
  b. include the restriction relating to the refund of a member's contributions referred to above by 1 January 2020; and
- a multi-jurisdictional occupational pension scheme established in Jersey which has had automatic part approval under Article 131A since 1 January 2015 for its non-Jersey resident members, must have formal approval under Article 131A by 1 January 2018.

Further changes have been introduced, including the following:

- With effect from 1 January 2018:
  a. the maximum limit for commutation of trivial pensions for members aged 60 or over increased from £30,000 to £35,000;
  b. the ability to commute small funds of up to £19,000 was introduced (provided the aggregate value of the fund and sums previously commuted does not exceed £50,000);
  c. many of the provisions for small fund commutations were extended to all approved Jersey schemes including retirement annuity contracts, retirement trust schemes and occupational pension schemes
  d. a specific provision permitting bulk transfers between approved Jersey occupational pension schemes was introduced, subject to the prior written approval of the Comptroller;
  e. an anti-avoidance measure has been put in place whereby a member who transfers benefits to an overseas scheme (and resides overseas) will be liable to pay income tax on payment of any lump sum to him from the transferred amount whilst overseas if he becomes resident in Jersey within 3 years of assessment following the transfer.
- With effect from 9 October 2018, changes were made to prevent members from using the different commutation provisions to access more than 30% of the pension fund tax free.
- With effect from 1 January 2019, funds transferred-in from another approved Jersey scheme in respect of a member can be taken into account (less any commutations previously made from the transferor scheme) when calculating the tax free commutation available to that member.

Multi-jurisdictional occupational pension schemes

It is common for an employer to want to establish a pension scheme for employees employed in and resident in a number of different jurisdictions. Where such a scheme includes Jersey resident employees, it is possible, if the necessary requirements are met, for part approval under Article 131 of the Jersey Income Tax Law to be obtained in respect of the section relating to Jersey employees. Where the scheme is established in Jersey, the remaining part of the pension scheme, covering members in other jurisdictions, may, if it meets the necessary requirements, be approved under Article 131A of the Jersey Income Tax Law. An advantage of obtaining Article 131A approval is that payments made from the scheme to non Jersey resident members will not be subject to Jersey income tax.

Guidance on multi-jurisdictional occupational pension schemes whether established in Jersey or elsewhere is contained in the Pension Guidance Notes.

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Qualifying Recognised Overseas Pension Schemes (QROPS)

Jersey schemes which meet the relevant United Kingdom tax criteria are capable of being QROPS and therefore able to receive transfers of United Kingdom pension benefits.

Transfers between pension schemes

It is possible to transfer accrued benefits between pension schemes in certain circumstances. Relevant factors will include what is permitted under the relevant scheme documentation and whether either or both schemes have obtained formal approval, registration or similar, in the relevant jurisdiction or jurisdictions. As outlined earlier, scheme managers can under Article 131CH effect bulk transfers between approved Jersey occupational schemes in certain circumstances. In certain cases, the approval of the Comptroller to a proposed transfer will be required. It is possible to make transfers between pension schemes in Jersey and the UK if various conditions are met.

We recommend specific advice is always taken on any proposed transfer to ascertain whether it is possible, what the legal requirements are and what the tax implications will be.

Pension scheme documentation

In Jersey, pension schemes other than retirement annuity contracts or drawdown contracts are typically documented by way of a trust instrument with scheme rules attached. Normally, the trustees arrange for scheme funds to be invested and often appoint an investment manager to assist with this. Alternatively, trustees may purchase one or more insurance policies to meet the benefits due under a particular pension scheme.

Divorce - can pension sharing orders from other jurisdictions be enforced?

Pension sharing orders cannot normally be enforced in Jersey as there is currently no legislation in Jersey which recognises them.

An alternative solution therefore needs to be sought in these cases, such as offsetting the value of the pension against other assets. This often means that the party with the pension arrangement may have to sacrifice liquid capital to retain the benefit of the pension arrangement.

Retirement age - are there any issues under the discrimination law in Jersey?

Age was added as a "protected characteristic" under the Discrimination (Jersey) Law 2013 ("Discrimination Law") in September 2016. Under Article 6(1) of the Discrimination Law a person *"discriminates against another person (the "subject") if because of a protected characteristic, the person treats the subject less favourably than the person treats or would treat others".*

Schedule 2 of the Discrimination Law lists exceptions to what would otherwise be prohibited acts under the legislation.

Paragraph 33(1) of Part 4 of Schedule 2 of the Discrimination Law provides as follows: "*The provision and the terms of an occupational pension scheme, or any personal or group pension scheme, do not contravene this Law in relation to the protected characteristic of age.*" Accordingly, the inclusion of different benefits or other rules based on age in a scheme's rules does not by itself contravene the Discrimination Law.

There are however potential limits to the scope of the statutory exception for occupational pension schemes. For example, it would appear that the exercise of powers or discretions which are not contained in a pension scheme trust instrument and rules may fall outside the statutory exception. This would include for example, powers of trustees contained in the Trusts (Jersey) Law 1984, as amended, and powers contained in other related pension scheme documents. It is, therefore, important for pension scheme trustees to understand when powers and discretions which are not in the pension scheme trust instrument and rules are being exercised and to exercise them in such a way so as not to be discriminatory on the grounds of age.

Are there any other aspects of discrimination which are relevant to pension schemes?

Pension schemes can be discriminatory in various ways, in addition to age. Some of the key areas of discrimination in a pensions context are set out below.

Sex discrimination

Historically, men would become entitled to benefits from a pension scheme at a higher age than women, meaning that men could potentially be treated unfavourably on grounds of sex. This practice is prohibited in the UK, where the equalisation of retirement ages between men and women is a statutory requirement. Under Article 3 of the Law, discriminating on grounds of sex (i.e. by operating unequal retirement ages on grounds of sex) is generally not permitted. However, the Law contains certain exemptions which permit discrimination on grounds of sex where:

- it relates to the terms on which an annuity or policy of insurance is offered (i.e. in terms of actuarial factors or statistical data), provided the discrimination is reasonable in the circumstances.
- it relates to the provision of a personal pension scheme or other relevant financial service, made by an employer for an employee.

Sexual orientation

Same-sex marriages – and conversion of civil partnerships to same-sex marriages - became possible in Jersey from 1 July 2018.

The rules of pension schemes in Jersey may provide that, for example, death benefits are payable only to an opposite-sex married partner. In our view, it would constitute unlawful discrimination on the grounds of sexual orientation for a

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pension scheme to provide more favourable benefits to, or in respect of, a member who is an opposite-sex marriage than to a member who is in a civil partnership or same-sex marriage.

In the UK, the case of *Walker v Innospec* has meant that same-sex married partners should be treated in the same way as opposite-sex married partner in terms of the survivor's benefits payable on death of a member.

Employers and providers may need to review their pension scheme rules to confirm the position in this respect. Please let your legal advisers know if this is an issue for your scheme.

Disability

A person with a disability could experience discrimination in a pensions context if, for example, the employer or provider of a pension scheme restricts access to it by reason of the person's disability (for example, if it would cost more to provide pensions literature in a non-standard written format).

Since 1 September 2018, disability is a protected characteristic under the Law and discrimination on grounds of disability is not permitted. The concept of disability is defined as applying to a person who "*has one or more long-term physical, mental, intellectual or sensory impairments which can adversely affect a person's ability to engage or participate in any activity*".

Tax

The tax issues concerning a pension scheme or a particular action to be taken under a pension scheme should always be ascertained. In respect of pension schemes which are approved schemes in Jersey, the tax implications are set out in the Jersey Income Tax Law and the Pension Guidance Notes. In respect of pension schemes for overseas employees and individuals, tax advice in all relevant jurisdictions(s) should be taken.

Is there a Jersey equivalent to the UK's Section 75 debt?

There is no equivalent in Jersey to a UK statutory Section 75 debt under which an employer may be obliged to stand behind a scheme's ongoing liabilities and any debt on a scheme's discontinuance. The employer's obligations in relation to funding are as contained in the scheme trust instrument and rules and in the event of a deficiency in a defined benefit pension scheme in Jersey the employer and the trustees would be expected to consider together how this may be cleared, including by putting in place a recovery plan.

Are there any plans to introduce the pension flexibilities which are available in the UK?

No. Although the Jersey tax approval regime was amended substantially with effect from 1 January 2015 to provide greater flexibility in the way in which pension scheme benefits may be provided and further changes have been introduced from 1 January 2018, there are currently no plans to amend Jersey legislation to introduce "pension freedom" along the lines introduced in the United Kingdom in 2015.

Further information

We are happy to supply specific advice, where required.

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