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Contents

01 Introduction

01 Reminder: act now to certify contingent assets for 2016/17 PPF levy purposes

02 Abolition of DB contracting-out: HMRC issues Countdown bulletin no. 12

03 Abolition of DB contracting-out: HMRC publishes new TIIN

03 TPR publishes draft prosecution policy for consultation

03 *Alexander and others as trustees of the Scottish Solicitors Staff Pension Fund v Pattison & Sim and others* [2015]: Scottish court rejects appeal challenging validity of amendments to pension fund rules

05 *The Queen on the application of Fleet Maritime Services (Bermuda) Limited v The Pensions Regulato*r [2015] EWHC: High Court provides guidance on ‘ordinarily working in Great Britain’ test

Introduction

Essential Pensions News covers the latest pensions developments each month in an ‘at a glance’ format.

Reminder: act now to certify contingent assets for 2016/17 PPF levy purposes

Of interest to all schemes providing DB benefits are the various deadlines, which are set out in detail below, for submitting data and documents to the Pension Protection Fund (PPF) for calculation of insolvency scores used to calculate the PPF risk-based levy. Documentation relating to the certification of contingent assets much reach the PPF by midnight on *March 31, 2016*.

As preparation of contingent asset documentation can take several weeks, clients who are intending to use contingent assets to reduce their risk-based levy are urged to start the process without delay.

The PPF has now confirmed its rules governing the calculation of levies for the 2016/17 levy year, which starts on *April 1, 2016*. Proposals made by the PPF to simplify and apply a ‘lighter touch’ to the re-certification procedures for asset-backed contribution (ABC) arrangements and excluded mortgages have been largely welcomed. The PPF’s ABCs guidance has been redrafted to include example situations where this approach may be suitable. The guidance also confirms that, on re-certification, trustees may use previously-obtained legal advice as long as the underlying legal position has not changed. In addition, a valuer may use a ‘prudent estimation’ approach rather than certifying a specific figure.

PPF-eligible schemes should check their insolvency scores and diarise the relevant deadlines for submitting data and documents to the PPF. In particular, they should note the deadline for submitting certain items has been moved from *5 pm to midnight on March 31, 2016* to align the position with the equivalent deadline for reporting to TPR.

The key dates for the various major reporting requirements are set out below.

Reporting requirement	Deadline
Monthly Experian Scores to be used in the 2016/17 levy	Between April 30, 2015 and March 31, 2016
Deadline for providing updated information (to Experian) to impact on Monthly Experian Scores	One calendar month before the 'Score Measurement Date'
Submit scheme returns on Exchange	By Midnight on March 31, 2016
Reference period over which funding is smoothed	Five- year period to March 31, 2016
Certification of contingent assets	By Midnight on March 31, 2016
Certification of asset backed contributions	By Midnight on March 31, 2016
Certification of mortgages (emailed to Experian)	By Midnight on March 31, 2016
Certification of deficit-reduction contributions	By 5pm on April 30, 2016
Certification of full block transfers	By 5pm on June 30, 2016
Invoicing starts	Autumn 2016

Abolition of DB contracting-out: HMRC issues Countdown bulletin no. 12

Of interest to all schemes contracted-out on a final salary basis is the publication of the latest issue of HMRC's Countdown bulletin on December 22, 2015. Contracted-out DB schemes wishing to use the recommended Scheme Reconciliation Service are reminded that they must register to do so before *April 5, 2016*.

The Scheme Reconciliation Service (SRS) helps scheme administrators to reconcile their scheme records against those held by HMRC in advance of the abolition of DB contracting-out in April 2016.

A complementary GMP service is planned to go live in April 2016, the aim of which is to provide administrators with accurate GMP calculations, contracted-out contributions and earnings information on a self-service basis. HMRC recommends that administrators first request and reconcile their scheme data using the SRS. HMRC also seeks schemes willing to act as test schemes for the GMP service between now and April.

Details are also provided of HMRC's proposed dates and venues throughout the country for pension forum events to discuss the SRS. Administrators are invited to sign up online to a convenient forum.

View the Countdown bulletin.

Abolition of DB contracting-out: HMRC publishes new TIIN

Of interest to all schemes contracted-out on a final salary basis is the publication by HMRC of a new Tax Information and Impact Note (TIIN), which sets out changes to the employers' reporting requirements from *April 6, 2016* on the abolition of the contracted-out rebate independent advice for pensions schemes. Further detail is available below.

View the TIIN.

The Pensions Act 2014 implements the new State Pension and also abolishes the contracted-out rebate from *April 6, 2016*. A consequence of this change is a reduction in the amount of earnings information that employers will need to report to HMRC when making Real Time Information (RTI) returns.

Legislation prescribes the information that employers are required to report to HMRC for the purposes of calculating contributory benefit entitlement and administering the National Insurance contributions (NICs) system. The objective is to only collect NICs information that is needed for these purposes. The abolition of contracted-out rebates from *April 6, 2016* provides an opportunity to simplify RTI returns by removing information that HMRC no longer requires.

The changes will come into force from *April 6, 2016* and apply to the contributions paid in the 2016 to 2017 and future tax years.

TPR publishes draft prosecution policy for consultation

One of the statutory objectives of the Pensions Regulator (TPR) is to maximise employers' compliance with their legal obligations in providing pension benefits. Examples of situations where TPR will intervene include non-compliance with auto-enrolment duties, the provision of false or misleading information, or where an individual has acted as a trustee while prohibited or suspended. Where such non-compliance cannot be resolved by guidance, support or advice from TPR, there are a number of enforcement options available, including criminal proceedings.

The draft prosecution policy explains when and how these powers will be used, with consultation responses being requested by *February 19, 2016*.

View the draft policy.

Alexander and others as trustees of the Scottish Solicitors Staff Pension Fund v Pattison & Sim and others [2015]: Scottish court rejects appeal challenging validity of amendments to pension fund rules

Of interest to all schemes is the decision on December 30, 2015, of the Inner House of the Court of Session in Scotland (equivalent to the Court of Appeal in England and Wales), which has dismissed an appeal by the partners of a firm of solicitors relating to a claim by the trustees for arrears of pension contributions allegedly due to the Scottish Solicitors Staff Pension Fund. The firm argued that the trustees were not entitled to bring their claim for arrears on the basis that amendments made to the Fund's governing deed on several occasions since 1980 were invalid.

Facts

This case was an appeal by the partners of a firm of solicitors in ongoing litigation relating to a claim for arrears of pension contributions allegedly due from the firm to the Scottish Solicitors Staff Pension Fund (the Fund). The partners denied liability to pay the arrears and argued that the trustees were not entitled to bring their claim on the basis that amendments made to the Fund since 1980 were invalid.

Until 1991, the Fund's governing deed required that any amendments had to be approved under a 'triple-lock' mechanism. This required a set of three general meetings to be held at which each constituency involved with the Fund had to approve the amendment by a two-thirds majority vote. An alternative, simpler amendment procedure had been adopted in 1991 and subsequent amendments were made using that procedure.

The partners argued the triple lock mechanism had not been followed for amendments purportedly made in 1980 and 1990 and the trustees' claim for arrears was accordingly based on documents that were ineffective. On being challenged about the validity of the amendments, the trustees had undertaken extensive searches of historical documents, but were unable to produce evidence confirming that the triple lock had been fully complied with in 1980 or 1990.

At first instance, the Outer House of the Court of Session rejected the partners' argument. The partners appealed to the Inner House.

Decision

The Inner House rejected the partners' argument. Citing the decision of the Outer House in *Low & Bonar plc v Mercer Ltd* [2010], Lord Drummond Young commented that the general approach to the interpretation of pension scheme documents should in the court's view reflect the fact that pension schemes and the trusts under which they operated were designed to exist for long periods and were likely to affect a substantial number of beneficiaries.

Lord Drummond Young noted that the Latin maxim *omnia praesumuntur rite esse acta* (all things are presumed to have been done in due form) applied in considering transactions that took place a significant time in the past. He held that four reasons justified the application of the maxim:

- in practice, substance was more important than form. Any defects in procedure tended to be matters of form rather than substance
- any substantial objections to a transaction would usually be raised immediately, even if only informally
- if a lengthy period had elapsed since a transaction occurred, evidence was likely to have been lost
- transactions did not stand alone, but were relied on by the parties and others in their future dealings. Allowing a party to challenge the validity of a transaction long after the event would be 'an intolerable situation'. Indeed, 'no pension fund could seriously carry on its administration under such a threat'.

The court held that the maxim applied on the facts. Given its application, the onus was on the partners to prove the triple lock mechanism had not been followed. They could not do so and the various amendments had therefore been properly effected.

The maxim also applied in relation to amendments made in 1991 and 2009 under the revised procedure that replaced the triple lock. Although the available evidence demonstrating compliance with the revised procedure was 'manifestly incomplete', certain evidence of compliance was available and the amendment was confirmed by subsequent practice adopted by the Fund's managers. In such a situation, 'the policy considerations that underlie the maxim are just as applicable in our opinion as in a case where a formal deed is available'.

The court reiterated that it was not for the trustees to establish that amendments to the Fund's governing deed had been properly effected: instead, those who challenged the regularity of past procedures were obliged to prove that proper procedures had not been followed. Without this rule 'the sensible administration of pension funds, and indeed other long-term contracts and trusts, would be rendered unacceptably difficult'.

Comment

The approach adopted by the court in this case acknowledges the practical point that pension funds must be allowed to operate free from concerns that historic actions may be challenged, in some cases many years after the event. However, the decision raises questions about how the court should attempt to balance these concerns against the requirement for legal certainty implicit in the obligation to follow proper procedures.

Although the rules relating to the execution of deeds differ in Scots law from those applying in England and Wales, it will be interesting to see whether this decision is taken into account in the forthcoming appeal against the 2014 High Court decision in *Briggs and others v Gleeds* which could be heard on July 11 or 12, 2016.

In *Gleeds* on which we reported in our May 2014 update the High Court held that deeds dating back over 20 years relating to the Gleeds Retirement Benefits Scheme (the Scheme) had been invalidly executed and that the changes would not stand. Several purported amendments, including such changes as a post-Barber equalisation of benefits exercise, trustee and principal employer appointments, the adoption of a new trust deed and rules, introduction of a new defined contribution section, an increase in member contributions and a closure of the defined benefits section to future accrual were held to be ineffective.

The judgment was a blow for the Scheme's employers, with serious consequences in terms of increased funding costs. While some employees who thought they had joined the Scheme had not actually done so, others who thought their benefits had been reduced stood to receive windfall payments. As the judge said, 'Unfortunate consequences are, I am afraid, unsurprising when so many documents have not been validly executed.'

The Queen on the application of Fleet Maritime Services (Bermuda) Limited v The Pensions Regulator [2015] EWHC: High Court provides guidance on 'ordinarily working in Great Britain' test

Of particular interest to all employers whose workers spend time abroad is the first consideration of the High Court of what it means to be ordinarily working in Great Britain for the purposes of pensions auto-enrolment legislation (Pensions Act 2008).

A seafarer living in Great Britain, who spends most of their time in foreign waters, will ordinarily be working in Great Britain if they habitually join and leave the ship in Great Britain. However, a seafarer living in Great Britain, who spends most of their time in foreign waters, will not ordinarily be working in Great Britain if the ports where they join and leave the ship are outside Great Britain. The correct question to ask is where these peripatetic employees are based, following *Lawson v Serco* and subsequent case law. However, the High Court indicated that not all peripatetic workers will necessarily have a base for pension auto-enrolment purposes.

While the approach adopted by TPR in this case was endorsed, part of its decision was quashed, as it had not acted reasonably when regarding those spending all of their tours of duty outside Great Britain as ordinarily working in Great Britain.

Decision

The High Court concluded that:

- a seafarer who lives in Great Britain, who spends most of their time in foreign waters, will be ordinarily working in Great Britain if they habitually join and leave the ship in Great Britain (what is habitual cannot be deduced from a single tour of duty)
- a seafarer living in Great Britain, who spends most of their time in foreign waters, will *not* ordinarily be working in Great Britain if the ports at which they join and leave the ship are outside Great Britain.

Comment

In this case, both the employer and TPR claimed victory. TPR's normal approach to assessing who 'ordinarily works in the UK' was endorsed by the Court, although its decision to issue a compliance notice in this case was quashed.

TPR took the view that as the seafarers were paid for their travel to and from the ship, and those journeys started and ended in the UK, the seafarers should be auto-enrolled. The Court disagreed, as the actual tour of duty on board began and ended outside the UK once the seafarers joined the ship, so they could not be considered to be ordinarily working in the UK. The journey time in the UK was seen by the Court as a paid commute.

It was argued for the employer that it (Fleet Maritime) was the successful party and that TPR's approach could be compared to 'Napoleon sitting on St Helena recounting the victory at Quatre Bras but ignoring Waterloo'. In a continuation of the Waterloo analogy, no order was made as to costs, as the Judge 'regard[ed] the result of this case as not merely a close run thing but too close to call'.

The Court's decision reflects the conclusions set out in our January 2015 briefing *Working and ordinarily working in the UK* which confirms that auto-enrolment duties apply where the ship is based in the UK.

View the judgment.

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