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NORTON ROSE FULBRIGHT

Essential pensions news

Updater

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Introduction

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

TPR's guidance statement for trustees on market volatility following EU referendum

Summary

The Pensions Regulator (TPR) has issued a Guidance Statement to trustees of pension schemes in relation to the market volatility following the UK's vote to leave the EU. TPR has emphasised that although trustees should regularly review the circumstances of their scheme, as pension schemes are long-term investors, they should not be overly influenced by short-term market fluctuations.

TPR's press release includes the following quotation from Andrew Warwick-Thompson, Executive Director for Regulatory Policy:

"Pension schemes plan and invest for the longer term and our message to trustees is not to over-react to the current volatility. We will provide support and clear direction to trustees and other parties to help them through the uncertainty ahead.

Contingency planning is an integral part of the effective stewardship of pension schemes. We expect trustees to review their plans and how they interact with current circumstances on a regular basis.

At this time we expect trustees of DB schemes to review their employer covenant to understand how the vote to leave the EU could affect it. Similarly, they should consider how market volatility has impacted on their scheme's funding position.

Trustees should carry out the review as part of their ongoing risk management approach, as set out in our integrated risk management guidance and DB code of practice. They should include consideration of issues relating to liquidity and cash flow management. Where their assessment results in the conclusion that the scheme is exposed to an inappropriate level of risk, we expect trustees to take a long-term view and review their investment strategy in that context.

In time, as implications become clearer, trustees of schemes with money purchase benefits may also consider it appropriate to make changes to the investments included in the scheme's default arrangement or the investments offered to members."

Guidance Statement

The Guidance Statement emphasises that although trustees should continue to review their scheme's circumstances regularly, their approach should focus on the longer term. In light of the market volatility, which is likely to continue for the coming weeks and months, TPR also expects trustees to have an "open and collaborative discussion with their sponsor about the possible effects to their business". TPR has said it will provide more guidance to trustees of DB and DC schemes as necessary.

The Guidance Statement notes that "Following the vote, there will be a period of transition and this uncertainty can be destabilising for employers". The impact on sponsors will depend on the sector that they operate in and on each individual sponsor's particular circumstances. Trustees should consider how exposed their sponsor is to certain risks following the referendum, such as the change in the strength of sterling.

TPR states that for schemes which are carrying out a valuation, there has been no change to the requirements or deadlines and that schemes should continue with this process.

In relation to communications to members, TPR notes that members may be nervous about the impact of the referendum result on their pension savings. TPR states to trustees that "you should be prepared to explain to your members – clearly, and in plain English – the approach that you plan to take".

Read the Guidance Statement.

Pensions Regulator issues first fine for non-compliance

Summary

The Pensions Regulator (TPR) has warned that trustees of defined contribution (DC) schemes will face a fine of up to £2,000 for failing to comply with the new governance requirements. TPR has recently published a section 89 report on the first fine issued to the trustee of Abbey Manor Group Pension Scheme who did not prepare the required annual governance statement signed by the chair of trustees within the statutory timeframe. However, the trustee reported the breach to TPR and promptly took action to prepare the statement, and in this case, the trustee received the minimum mandatory fine of £500.

Andrew Warwick-Thompson, Executive Director for Regulatory Policy at TPR, said: "This case demonstrates that we must comply with the law and must impose a penalty where trustees fail to prepare an annual governance statement signed by the chair of trustees.

In this particular case, the trustees did the right thing by promptly complying with their duty to notify us of the breach, and quickly taking action to prepare the required statement. A fine of up to £2,000 could be imposed for such a breach.

We are supporting trustees in numerous ways, including new web guidance and news-by-email to help them understand how to complete the new scheme return in order to demonstrate they are meeting new governance standards.

However, schemes should be aware that this type of breach will result in a fine and we hope that our report will act as a reminder and a deterrent for other schemes."

Comment

Following the statutory changes to DC governance requirements, trustees of DC schemes are now required to produce a chair's statement to confirm that the scheme is meeting the governance requirements.

In the section 89 report in relation to the failure of the trustee of Abbey Manor Group Pension Scheme to prepare the chair's statement in time, TPR notes that "trustees should be aware that we are required by law to impose a penalty where this type of breach occurs. This is still the case even when, as in this instance, the trustee notifies us of the breach and takes immediate remedial action."

Trustees should ensure that they are familiar with the new governance requirements and the time limits for complying with them. In the event that trustees fail to comply with these requirements, they should promptly notify TPR and seek to rectify the situation.

Read the report.

DWP launches consultation on NEST's future

The Department for Work and Pensions (DWP) has launched a consultation on the future of the National Employment Savings Trust (NEST). The press release states that the consultation will consider whether NEST's "remit needs to better reflect recent changes to the pensions landscape, including the introduction of the pension freedoms and the new State Pension, to meet the needs of its three million members. This may include providing new ways for members to access their pension savings and expanding the scheme to enable individuals, employers and other schemes to access NEST's services."

Former Pensions Minister Baroness Ros Altmann said: "The pensions landscape has changed significantly in recent years and automatic enrolment has meant millions more people are saving for their retirement, with the help of their employer. NEST has played a vital role in the success of automatic enrolment and its importance is likely to increase in coming years. It is right, therefore, that we now consider how it continues to deliver its services in future."

NEST is a trust-based occupational defined contribution pension scheme run by the NEST Corporation, its trustee body. It was set up in 2010 following the introduction of the policy to automatically enrol all employees into workplace pensions.

The consultation closes on September 28, 2016.

View the consultation.

Financial Advice Working Group established

On June 20, 2016, the FCA published a press release in which it announced the establishment of a Financial Advice Working Group, as recommended in the final report on the Financial Advice Market Review (FAMR). This report was published in March 2016 and included a number of recommendations to improve access to advice and guidance.

The Terms of Reference published by the FCA state that the Working Group will be responsible for taking forward the three recommendations assigned to it by the FAMR, which are

- The Working Group "should work with employer groups to develop a guide to the top ten ways to support employees' financial health, and devise a strategy for rolling this out. It should align the timing of this with the joint factsheet for employers and trustees that is due to be published by the FCA and the Pensions Regulator in early 2017".
- The Working Group "should publish a shortlist of potential new terms to describe "guidance" and "advice" by Q3/Q4 2016".
- The Working Group "should lead a task force formed of interested stakeholders to design a set of rules of thumb and nudges with the aim of increasing consumer engagement. The Working Group should consider the crucial life stages at which these nudges and rules of thumb could be delivered and complete initial testing of these by Q1 2017".

The Working Group will provide a report to the FCA Board and the Economic Secretary in 12 months and will set out any further work that is necessary to complete the recommendations.

Read the Terms of Reference.

The Pensions Regulator publishes final notice in London Quantum Retirement Benefit Scheme case

Summary

The Pensions Regulator (TPR) has published a final notice which confirms its previous decision to appoint an independent trustee, Dalriada Trustees Limited, to the London Quantum Retirement Benefit Scheme (Scheme) to the exclusion of the other trustees of the Scheme. In particular, the press release says that TPR was concerned about

- "Risky and illiquid investments – the investments exhibited inappropriately high levels of risk which members were not made aware of.
- Lack of documentation – TPR investigations revealed significant gaps in the expected documentation. Whether or not documentation actually existed in relation to some of the Scheme's investments was doubtful and called into question their legitimacy.
- Introducer fees – the Scheme was promoted to potential new members by introducers, including cold callers, who were paid by commission (sometimes up to 30 per cent) in breach of trust.
- Advisers – no auditor was appointed to the Scheme and [the trustee] failed to take proper advice on the investments."

TPR found during the course of its investigation that approximately £5,800,000 of new members' pension savings were put at risk through being transferred into the Scheme between August 2014 and May 2015. Nicola Parish, Director of Case Management at TPR, said: "The concerns we received about the scheme highlighted worrying factors regarding its governance. This case should act as a reminder to all savers, pension scheme trustees and administrators to remain alert to the dangers of transferring pension savings in order to access unrealistically high returns often associated with exotic sounding investment opportunities."

Background

The Scheme is an occupational pension scheme and was established in April 2012. The Employer is Quantum Investment Management Solutions LLP (QIMS). Originally two partners of QIMS were also the trustees of the Scheme, but in 2014 they were replaced by a corporate trustee, Dorrixo Alliance (UK) Ltd (Dorrixo).

Between April 2012 and April 2014, the Scheme had only three members. The Scheme received transfers in of £616,383.58 from these members. Of this amount, £600,000 was transferred out to the members between May 2012 and November 2012. QIMS submitted that these payments were invested in a company called London Quantum One Limited (Quantum One). The three original members of the Scheme were all appointed as directors of Quantum One, one member was the sole shareholder and another was the company secretary. QIMS argued that the original members wanted to use Quantum One to invest in a business referred to as VIP Greetings. TPR noted in relation to VIP Greetings that "it remains unclear ... as to what, precisely, the nature of the business is and how it is said to have any meaningful economic value". TPR was concerned that the Scheme was being used as a vehicle for pension liberation and that the payments to the original members could be unauthorised payments

In about April 2014, the Scheme was opened to new members. At the time when Dalriada was appointed by TPR as the sole trustee, the Scheme had almost 100 members and there were 609 files on potential new members. The assets of the Scheme had increased to approximately £6.8 million between April 2014 and June 2015. TPR stated that its investigations in relation to this period were made difficult by the fact that "certain documents and records that it expected Dorrixo to have retained were missing", including a full set of Scheme documentation and the documents relating to the investments.

The Scheme was promoted to new members by introducers who received commission for each new member who transferred in to the Scheme. New members were given the choice to invest in a limited selection of investments, and the introducers' commission was based on the combination of investments chosen by each member. New members were required to sign a declaration stating that they were self-certified sophisticated investors and that they were aware of the high-risk nature of the Scheme's investments. However, a number of new members transferred in relatively small pension pots and a survey of a sample of new members suggested that a material number of new members had a low or medium risk appetite and were unaware that the Scheme's investments were high risk. TPR even noted that one application form included documentation that showed that the new member was receiving jobseeker's allowance.

The Scheme had only nine investments which included, for example, investments in 18 car park spaces in Glasgow, investments in leases on car park spaces in Dubai and investment in a company with purported land rights in Brazilian farm land. An independent report on the Scheme's investments concluded that they were high risk, as many investments were volatile,

involved high commission fees, had a high level of credit risk and "promised implausibly high returns". There was also concern about the legitimacy of some of the investments, given the lack of contractual documentation in a number of cases.

Conclusion

TPR held that it was reasonable to appoint an independent trustee to the exclusion of the other trustees for the following reasons:

Investment

In relation to investments, Dorrixo had breached its common law and statutory duties to invest the Scheme's assets and had "exercised its powers of investment with a serious disregard of some obvious risks, and indifference to other risks posed by the Scheme's investments". These breaches included Dorrixo's failure to take proper advice in relation to its investment of the Scheme's assets and its failure to ensure that the Scheme's investments were sufficiently diversified.

Competence and capability

TPR held that Dorrixo lacked competence and capability as trustee, as demonstrated, for example, by its failure to obtain a copy of the original Scheme Trust Deed and Rules, its failure to maintain complete and accurate records of the Scheme's investments and its failure to appoint an auditor.

Fees

TPR held that fees paid to Gerard Associates Limited (Gerard) (which amounted to £220,000) were paid in breach of trust. Gerard was not involved in the administration of the Scheme and therefore the payments were not made in accordance with the Trust Deed and Rules. The payments to Gerard were also not authorised payments.

Dorrixo received £63,000 in fees from the Scheme, but as there was no evidence as to what services specifically Dorrixo was being paid for, TPR was unable to reach a conclusion as to whether or not Dorrixo's fees were justified.

Comment

This case is a reminder of the danger that pension scams pose to members of pension schemes who transfer their pension pots in response to promises of high investment returns. TPR's findings show that a number of members who transferred to the Scheme were unsuited to the very high-risk profile of the Scheme's investments and that many did not understand the risks they were taking. There are concerns that the new "freedom and choice" regime may expose more members to a variety of pension scams. This case also demonstrates how TPR can exercise its statutory powers to protect members' pension benefits where these are at risk.

FCA publishes Terms of Reference for Retirement Outcomes Review

Summary

The Financial Conduct Authority (FCA) has published the Terms of Reference for its Retirement Outcomes Review. The focus of the review will be on the role of competition in the decumulation market, following the introduction of the "freedom and choice" reforms in April 2015.

Background

The Terms of Reference state that "Pensions are a priority area of focus for the [FCA] given their economic and social importance, as well as the fundamental changes this market has experienced." The FCA acknowledges that while the "freedom and choice" reforms have given consumers greater flexibility when accessing their pensions, these reforms also "increase the range of financial planning decisions individual consumers may need to make in decumulation. This brings both opportunities and risks." The Terms of Reference note that since April 2015, the market has become more fragmented, as consumers are accessing their savings through a wider range of products and options and annuity sales are lower than before April 2015.

Topics covered by Retirement Outcomes Review

The Terms of Reference set out the following topics to be explored by the Retirement Outcomes Review

- Shopping around and switching – the FCA wants to understand to what extent consumers can compare the larger range of products and options now available to them and whether they can shop around and switch providers where they are not receiving what they want.

- Non-advised consumer journeys – since consumers can now access more complex products without advice, the FCA wants to understand whether "non-advised consumer journeys have become more complex for consumers to navigate".

- Business models and barriers to entry – the FCA wants to explore what business models and products are emerging in response to the market changes and what risks these might create for competition in this market.

- Impact of regulation on retirement outcomes – the FCA wants to explore whether there are examples of FCA regulations which are "overly burdensome and may be inadvertently contributing to barriers to entry or preventing useful product innovation by firms".

The Terms of Reference set out specific questions which stakeholders are requested to respond to by August 31, 2016.

Read the Terms of Reference.

TPR's regulatory intervention report – Halcrow Pension Scheme

Summary

The Pensions Regulator (TPR) has published a regulatory intervention report under section 89 of the Pensions Act 2004 in relation to the Halcrow Pension Scheme (Scheme) and the regulated apportionment arrangement (RAA) which it recently approved in respect of the Scheme. TPR's report states that "in our view, the RAA represents the best outcome for all parties in difficult circumstances".

Background

The sponsoring employer of the Scheme is Halcrow Group Limited (HGL). HGL's parent company was acquired by CH2M HILL (CH2M) in 2011. The trustees and HGL were unable to agree the Scheme's 2011 valuation within the statutory deadline, because the contributions that HGL could afford to make to the Scheme were significantly less than the amount

required to fund the Scheme appropriately. As a result of the failure to agree the valuation, TPR became involved. TPR decided that it would not be helpful to impose a recovery plan on HGL and instead it allowed the trustees and HGL additional time to discuss what options might be available to them.

Proposed change to benefits

In our May 2016 update, we discussed the Part 8 application by the trustees in relation to the proposed restructuring of the benefits under the Scheme. The Court held that the proposal could not take place without member consent. The proposal as it stood was therefore not viable.

RAA

During the period from January to April 2016, the trustees, HGL and CH2M, in conjunction with TPR and the PPF, negotiated a new proposal. This involved making similar changes to benefits but with member consent:

- Members would be offered the chance to transfer to a new scheme (HPS2) which would provide benefits which were above the PPF level but lower than the benefits members would have received under the Scheme. HGL would be the sponsoring employer of HPS2 but CH2M would provide a guarantee.
- Members who did not consent to the transfer would be transferred to the PPF.
- A cash payment would be made to the Scheme from CH2M, together with an equity stake in HGL in view of the loss of employer support through the use of an RAA.

TPR's report states that "RAAs are extremely uncommon and the continuation of a scheme following the conclusion of an RAA is even rarer. The trustees supported the proposal as they were of the view that this presented the best outcome for members in the circumstances and the PPF, after the negotiations we and the PPF had with HGL and CH2M, was able to provide its non-objection as required."

TPR has to approve an RAA and approval will only be given if TPR believes it is reasonable and certain tests are met. TPR's report concludes that "In the specific circumstances of this case, we concluded that an RAA and the ability for members to choose to transfer to HPS2 was an appropriate and reasonable course of action. Furthermore, we ensured that the level of risk being proposed for HPS2's funding strategy was at an acceptable level and steps were going to be taken to manage future risks and ensure that HPS2 remained viable."

Comment

This case is an interesting example of TPR working creatively with the trustees and the scheme's sponsors to reach a solution that avoids the sponsoring employer becoming insolvent and the scheme as a whole falling into the PPF. However, the report states that trustees should approach a reduction of accrued benefits by a transfer to a new scheme with member consent "with the utmost caution".

The proposed restructuring of the Scheme's benefits is being challenged by the Halcrow Pensioners' Association which has submitted a case to the Upper Tribunal of TPR. However, TPR has stated that certain conditions required for a full Upper Tribunal hearing have not yet been met. There is likely to be a preliminary oral hearing shortly to decide whether the Halcrow Pensioners' Association is entitled to request a full hearing.

Read the report.

The Employers' Duties (Implementation) (Amendment) Regulations 2016

The Employers' Duties (Implementation) (Amendment) Regulations 2016 have been published which extend the two transitional periods during which higher auto-enrolment minimum contributions are phased in. This change was announced in the 2015 Autumn Statement and Spending Review, and is designed to simplify administration for pension schemes, so that the transitional periods are aligned with the start of the tax years. The changes will come into force on October 1, 2016.

As a result of these changes, the transitional periods for minimum contribution levels to occupational or personal defined contribution "qualifying schemes" (for the purposes of the auto-enrolment legislation) will be as follows:

The first transitional period will be from an employer's staging date until April 5, 2018 (previously this period was due to end on September 30, 2017). The total contributions must be at least two per cent of a jobholder's qualifying earnings (of which the employer must contribute at least one per cent).

The second transitional period will be from April 6, 2018 to April 5, 2019 (previously this period was due to end on September 30, 2018). The total contributions must be at least five per cent of a jobholder's qualifying earnings (of which the employer must contribute at least two per cent).

From April 6, 2019, the total contributions must be at least eight per cent of a jobholder's qualifying earnings, of which the employer must contribute at least three per cent.

Shannan v Viavi Solutions UK Ltd [2016] EWHC 1530 (Ch) (June 27, 2016) – High Court clarifies uncertainty over validity of historic deeds

Introduction

The High Court has recently reached a decision in relation to confusion about historic amendments to the rules of a pension scheme, in particular deeds which purported to substitute the scheme's principal employer. The High Court held that there was no need to imply "a degree of formality" to the rule containing the power to substitute the principal employer which did not contain any specific formalities as to how the substitution should be carried out. Other rules containing powers under the scheme included certain formal requirements, and it was unlikely that a formality had been unintentionally missed out.

Background

The Wandel & Goltermann Retirement Benefits Scheme (Scheme) was a defined benefit pension scheme. Due to some confusion about the validity of certain historic deeds of amendment, it was unclear who the Scheme's principal employer had been during the period 1997 to 2003, when the Scheme closed to future accrual. It was accepted that since 2003 Viavi Solutions UK Limited (Viavi) had been the principal employer of the Scheme.

Principally, the Court examined the validity of the following deeds

- The 1995 Deed and Rules, which substituted new scheme rules for the previous ones and was executed by Viavi and the then trustees. The issue in relation to this deed was that it

was unclear whether at the date of execution, Wandel & Goltermann Management Limited (Management) had become the principal employer of the Scheme, rather than Viavi.

- The 1999 Deed of Amendment (1999 Deed), which amended the rules and which was executed by Management and the then trustees, but not by Viavi. There was uncertainty about whether Management was the principal employer at the time the deed was executed.
- The 2001 Deed of Rectification which was intended to rectify a drafting error in the 1999 Deed. It was signed by the then trustees and Management and was dated December 31, 2001.
- The 2002 Deed of Novation, executed on March 13, 2002, which was designed to make Management the Scheme's principal employer with retrospective effect from September 30, 1994 and to ratify all actions and decisions of Management, acting as the principal employer, between 1994 and the date of the Deed of Novation. The Court considered whether this substitution had been validly made and if so, whether it was effective from 1994 or the date of this deed.

Decision

In relation to the 1995 Deed and Rules

The Court held that Viavi, rather than Management, was the principal employer at the time of the execution of the 1995 Deed and therefore the 1995 Deed had been validly executed by Viavi with effect from November 7, 1995. Part of the Court's reasoning for this decision was that there were documents which demonstrated that Management had not been appointed as principal employer in place of Viavi at this date, and it had not become a participating employer until 1996.

In relation to the 1999 Deed

The 1999 Deed had been executed by Management and the then trustees, and Viavi was not a party to this deed. The 1999 Deed stated in its recitals that Management had been substituted for Viavi as principal employer on September 30, 1994, but it was accepted by the parties that this was incorrect.

The 1995 Rules required the consent of the trustees, Management and Viavi for the substitution of the principal employer. The issue before the Court was whether this rule required written consent. The judge held that simply because a rule did not contain any specific formalities, there was no need to imply "a degree of formality". Other rules containing powers under the scheme included certain formal requirements, but there were no formalities in the substitution rule. The judge held that the wording of the substitution rule could not be interpreted as requiring written consent for the exercise of this power. The judge held that the 1995 Deed was "a carefully drawn professional document" and this seemed "to point firmly away from any conclusion that the draftsman simply overlooked an obvious term".

The judge referred to the decision in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another* [2015] UKSC 72, and its application to the present case was summarised as "does the 1995 Deed lack business coherence without the implied term"? The judge considered that although it would have been advisable to keep a written record of the consent to the substitution, he did not consider that the 1995 Deed could not function without this requirement: "The notion that the 1995 Deed could not properly work without there being a written agreement on a change is not one that, in my

view, stands up to scrutiny. Best practice is one thing; necessity another. Terms are not lightly to be implied into complex and carefully drawn agreements."

The judge held that at the time the 1999 Deed was executed, it was the understanding of all the parties that Management was not already the principal employer but would become the principal employer with retrospective effect to 1994. There was no evidence which satisfactorily demonstrated that before the execution of the 1999 Deed, the trustees, Viavi and Management had agreed to the substitution of principal employer.

The judge decided that the power to substitute the principal employer in the 1995 Deed did not allow this power to be exercised retrospectively. The judge acknowledged that it might be possible to appoint a principal employer retrospectively where this related to a short period of time and was designed to fill a gap where a previous principal employer had, for example, been dissolved. However, the judge could see "no good reason" why the trustees and the company which had been acting as principal employer should be allowed to agree that the company had not been subject to the obligations and requirements of principal employer at a certain time in the past. He also noted that in this case the retrospective substitution could invalidate acts by the principal employer which were valid at the time they were done, and could validate acts of the new principal employer which were invalid at the time they were done.

The judge considered whether the 1999 Deed could be deemed to be the "...necessary agreement of the trustees, Management and Viavi to Management becoming the principal employer going forward (though not with retrospective effect)...". As Viavi was a wholly-owned subsidiary of Management, based on the "Duomatic principle" from Re Duomatic Ltd [1969] 2 Ch 365, the judge noted that decisions could be taken on Viavi's behalf informally by Management, without a resolution being passed by Viavi. The judge concluded that the 1999 Deed was effective in substituting Management as the principal employer.

As an alternative argument, the judge decided that if his interpretation that the 1999 Deed appointed Management as principal employer instead of Viavi was incorrect, following the principle in *Davis v Richards and Wallington Industries Limited* [1991] 2 All ER 563 that there was no requirement to refer explicitly to the amendment power in order to exercise that power, it could be inferred that the trustees and Management exercised the substitution power at the same time as they made the amendments under the 1999 Deed.

Deed of Rectification

The Deed of Rectification, which was executed on December 31, 2001, was intended to rectify retrospectively an error in the 1999 Deed in relation to post-April 6, 1997 pension increases (with effect from September 15, 1999). However, section 67 of the Pensions Act 1995 would not allow this amendment to have retrospective effect, as it would affect members' accrued rights.

The Court also considered whether the Deed of Rectification had effectively made another amendment to the pension increase provisions. The Deed of Rectification contained a recital which referred to an attempt to amend the pension increase provision by initialling the relevant page of the 1999 Deed at the trustees' meeting in November 2000, but the Deed of Rectification did not refer to the amendment power in relation to this change. The parties accepted that the amendment-by-initialling was not an effective amendment, as the amendment power required that any amendment needed to be made by a deed executed by the principal employer.

The judge decided that although the recital did not refer expressly to the amendment power, following the principle in *Davis v Richards and Wallington*, if there was sufficient evidence that Management intended to exercise its power to amend the pension increase rule, the previous amendment-by-initialling could be made with effect from the effective date of the Deed of Rectification. This evidence was provided by the reference in the Deed of Rectification to the earlier amendment-by-initialling ("in error the mistake … was not corrected at the same time") although the amendment could not have retrospective effect.

Deed of Novation

As the judge had held that the 1999 Deed validly appointed Management as principal employer, the issue in relation to the Deed of Novation was whether it had effectively backdated that appointment. The judge held it did not backdate the appointment, as at the date the Deed of Novation was executed, Management was already the principal employer of the Scheme and so there was no need to ratify its actions.

Comment

This case emphasises the importance of keeping a clear written record of all decisions in relation to pension schemes, as even the most (apparently) obvious facts (such as the identity of the principal employer) can be called into question. The judge's decision in relation to the substitution of the principal employer turns on the specific wording of the substitution rule, which did not require written consent to the substitution. However, in practice it is always advisable for trustees and employers to document in writing these types of decisions, even if this is not strictly required by the scheme rules.

The judgment refers to possible future court proceedings relating to estoppel, so there may be further consideration of some of the key points in this case.

Heis and others v MF Global UK Services Ltd [2016] EWCA Civ 569 (June 21, 2016) – Court of Appeal upholds decision that there was an implied contract between group companies

Introduction

The Court of Appeal has upheld the High Court's decision that there was an implied contract between a service company and the group company to which its employees were seconded and that this implied contract included an indemnity for any section 75 debt which arose in respect of those employees. The High Court's decision was discussed in our June 2015 update.

Background

MF Global UK Services Limited (Services), a service company, and MF Global UK Limited (MFG) were both companies in the MF Global Group which entered administration in 2011. All the employees in Services were seconded to other UK group companies and most of them were seconded to MFG. There was a defined benefit pension scheme (Scheme) for those employees and Services was the Scheme's principal employer.

There was no contract between MFG and Services in relation to the seconded employees; the only agreement was between the group holding company and Services which set out the terms on which employees would be seconded from Services to other group companies. This agreement provided that the holding company would "procure" that the companies to which the employees were seconded would pay for all payroll costs which were defined as "all salary, bonus, and contractual and discretionary cash and non-cash benefits" including

but not limited to pension contributions. MFG also made payments under the schedule of contributions directly to the Scheme's trustees.

When the group went into administration in 2011, the section 75 debt was over £35 million. There was a settlement agreement in respect of the section 75 debt but MFG and Services could not agree about how they would fund the payment to the Scheme.

Decision

The two issues before the Court were: (i) was there a contract between MFG and Services in relation to the seconded employees and the payment of the payroll costs and (ii) if so, did the contract include an indemnity from MFG to Services in respect of the section 75 debt?

The Court of Appeal upheld the High Court's decision that there was an implied contract between MFG and Services in relation to the payment of employee costs. By paying Services for the costs of the seconded employees, MFG was fulfilling contractual relations and it was "overwhelmingly likely" that MFG and Services intended to enter into legal relations with each other. The High Court also held that the terms of the implied contract included an indemnity from MFG to Services in respect of the section 75 debt. The judge held that pensions are a form of deferred remuneration and therefore fall within the definition of payroll costs, and "a section 75 debt constitutes a cost in relation to the pensions of seconded staff". The judge also noted that the context was important in reaching this decision, in that Services had no net assets and therefore was unable to meet any liabilities in respect of the seconded employees, and there was no evidence that the directors of the group, when setting up this arrangement, had intended Services to be left with liabilities which it could never be expected to meet.

Comment

This case turned on the specific wording of the agreement between the holding company and MFG and the context in which Services operated, in that it had no assets to meet any liabilities on its own. However, this case will be of interest to groups with similar arrangements relating to the secondment of employees by a service company to other group companies. It could also be particularly important in circumstances where a service company is providing services to companies outside the service company's group. The judge in this case held that the general definition of "payroll costs" included a section 75 debt. It would therefore be advisable for companies to consider, when drawing up similar agreements, which company would be liable for any section 75 debt and to state this explicitly in the contract.

View the judgment.

Pensions Ombudsman: Mr Philippe Pollet (PO-3658) – concerns over transfer delays

Summary

The Ombudsman has upheld a complaint by a member (Mr Pollet) in relation to delays to his transfer payment. Optimum Capital Limited (OCL), which was the Principal Employer and a Trustee of the Optimum Internal Pension Plan (Plan), failed to grant Mr Pollet's statutory transfer request within a reasonable time. The Ombudsman did not accept OCL's arguments that this was due to problems with the scheme administrator (which was also a Trustee). As a Trustee itself, OCL had a joint duty to comply with Mr Pollet's statutory transfer request.

Background

The Plan was a defined contribution occupational pension scheme. The Trustees were OCL, which was also the Principal Employer, a Pensioneer Trustee and Tudor Capital Management Ltd (Tudor), which was also the scheme administrator. In April 2010, the Pensions Regulator suspended Tudor from acting as a trustee after HMRC launched criminal proceedings. Two directors of Tudor were later jailed for pension tax fraud. Tudor was removed as a Trustee of the Plan with effect from August 10, 2010 and was removed as the scheme administrator by a letter dated February 22, 2012.

In October 2012, Mr Pollet's IFA contacted OCL requesting a transfer value and other details about Mr Pollet's pension arrangements. OCL responded that £21,794.87 was held in two bank accounts. A few days later, the IFA emailed OCL to inform it that Mr Pollet wanted to transfer his benefits and asked what steps were required for the transfer to take place. Between October and December 2012, there was correspondence between OCL and its legal advisers about the requirements for making the transfer.

On January 30, 2013, the IFA made a formal complaint to OCL that it had had no further contact from OCL and that OCL had not provided the information originally requested. On March 5, 2013, OCL provided bank statements for Mr Pollet's holdings in the Plan and the transfer discharge form. Mr Pollet and Legal & General, the provider of the SIPP to which Mr Pollet intended to transfer, signed the discharge form and returned it to OCL in July 2013, along with an application form and a request for the transfer payment to be made. On September 10, 2013, a director of OCL wrote to Mr Pollet stating that under the Rules of the Plan, the administrator had the power to effect the transfer but that Tudor had to date failed to comply with OCL's request to action the transfer. The letter stated that OCL was prepared to act unilaterally, without Tudor's consent, to try to make the transfer payment but that OCL was dependent on the agreement of the Plan's bank and also that if OCL acted in this way, it could be committing a breach of trust, breach of duty or maladministration. OCL asked Mr Pollet to sign a discharge form that he would take no action against OCL for breach of trust, breach of duty or maladministration in relation to the transfer and that he would indemnify OCL against all costs incurred as a result of actioning the transfer. Mr Pollet was not prepared to sign this declaration and complained to the Ombudsman.

Decision

The Ombudsman held that Mr Pollet had a right to transfer under the Plan Rules and a statutory right to a cash equivalent transfer to a registered scheme (which the SIPP in question is). The Ombudsman stated that "It is inadequate for OCL to say that there was a problem with the administrator because as a Current Trustee OCL has a joint duty to comply – so OCL must process the transfer itself or appoint another administrator and make sure the transfer is completed." Tudor had been removed as a Trustee and scheme administrator before the transfer request and therefore these issues should not have affected the payment of Mr Pollet's transfer. In addition, the Rules of the Plan did not provide that the power to transfer was only vested in the scheme administrator, but rather said that the transfer must be made by a direct payment between "the trustees/scheme administrator". The Ombudsman held that "OCL is the only constant throughout and it has breached its duty as a Current Trustee by not ensuring that the transfer was processed." The Ombudsman also stated that OCL did not have a right to require Mr Pollet to sign the further disclaimer, as this was "an attempt to 'settle' any potential possible claims against them in respect of anything that they may have done in return for doing something they have no legal right to refuse."

The Ombudsman held that the transfer should have been completed within one month of the date on which Legal & General sent the completed standard discharge form to OCL in July 2013. OCL was instructed to calculate what the transfer value would have been at that date and to find out how many accumulation shares this would have purchased on August 1, 2013, and to pay for any additional accumulation shares which Mr Pollet would have been able to purchase had the transfer been made in August 2013. The Ombudsman also awarded Mr Pollet £500 for distress and inconvenience.

Comment

This case emphasises how important it is for trustees to have processes in place for the prompt payment of transfer values where the member has a right to transfer. The Ombudsman's decision suggests that in general, as a matter of best practice, trustees should aim to complete a standard transfer request within one month. It is advisable for trustees to set out timeframes for the member when they request their transfer value and to keep the member informed throughout the process. The trustees will need to have good reasons for substantial delays, and in this case, the Ombudsman was clearly not prepared to accept OCL's excuses relating to previous problems with Tudor.

Read the decision.

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