NORTON ROSE FULBRIGHT

Essential pensions news

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Introduction

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

Consultation papers published by FCA and DWP on capping early exit charges for access to pension freedoms

Of general interest is the announcement on January 19, 2016 by the Chancellor that the Government would introduce legislation to cap prohibitive early exit charges in both personal and occupational pension schemes where individuals seek to access the new pension freedoms.

The FCA has published its proposals for consultation on the application and level of a cap relating to personal pension schemes, together with draft amendments to its rules. The FCA proposes to impose a cap of one per cent of existing policy values at exit. For new personal and stakeholder pension contracts coming into force after the implementation of the new rules, the FCA proposes to cap early exit charges at zero per cent.

This reflects feedback that the FCA received that the exit fee relates The FCA consultation period ends on August 18, 2016.

View Capping early exit pension charges (CP16/15).

The DWP has also published a consultation paper seeking views on complementary exit charge capping measures in respect of occupational pension schemes. Its consultation period ends on *August 16, 2016*.

It is proposed the cap in relation to occupational schemes should apply as follows

- The cap will apply to early exit charges levied on a member wishing to draw flexible benefits under an occupational scheme, where the member has reached normal minimum pension age (normally 55) but has not reached the scheme's normal retirement age.
- The DWP cap is proposed at the same levels as those the FCA will apply to personal pension schemes.
- HM Treasury intends to exempt market value adjustments (MVAs) in personal pensions from the scope of the cap. The rationale is that an MVA is a change to the nominal value of a member's benefits to reflect the underlying market value, rather than a genuine charge for services. However, a terminal bonus under a with-profits policy will not be considered an MVA if the member has a reasonable expectation of entitlement to it.
- The primary duty to comply with the cap will fall on service providers, unless a charge is applied in practice by trustees or managers. TPR will be responsible for enforcing the cap.

View Capping early exit charges for members of occupational pension schemes.

The consultations reflect the Government's intention to "crack down" on schemes which impose high charges, thus creating a financial barrier for individuals who wish to access their pension funds as part of the new flexible regime. The Government hopes that schemes will begin to reduce their exit charges in advance of actually being forced to do so in *2017*, when it is proposed the new legislation will be implemented.

Pensions Ombudsman announces new approach to published decisions

Of general interest is the announcement by the Pensions Ombudsman (PO) that it will anonymise all new published decisions.

The name of the person making the complaint, as well as any other identifying personal data, will be removed unless the PO considers it is essential for understanding the decision or if the decision is of wider public interest or sets a precedent. The PO states that the "new policy on anonymisation reflects the prevailing approach of dispute handling schemes towards increased protection of personal information ... ".

The PO's office has also announced a new approach to its published determinations. These will now include determinations that are made by the PO after a complainant has appealed against an initial opinion given by an adjudicator. Separately, adjudicators' opinions that are "considered to be of interest" will also be published in future even if they do not lead to an eventual PO determination.

The Bank of England and Financial Services Act 2016

On May 17, 2016, the Financial Services and Markets Act 2000 (Pensions Guidance) Regulations 2016 were made, and came into force on *June 15, 2016*.

They specify terms used in the amended definition of "pensions guidance" in section 333A of the Financial Services and Markets Act 2000. Under the Act, "pensions guidance" means guidance given for the purpose of

- Helping a member of a pension scheme, (or a survivor of that member), to make decisions about what to do with the flexible benefits that may be provided to the member or survivor
- Helping an individual who has an interest in an annuity to make decisions in connection with transferring or otherwise dealing with the right to payments under that annuity.

Under the legislation, references to a member or a survivor under a scheme also include those individuals with interests in schemes for which the PPF has assumed responsibility.

This section was amended by the Bank of England and Financial Services Act 2016.

On June 7, 2016, the Bank of England and Financial Services Act 2016 (Commencement No 3) Regulations 2016 were made. They bring into force on *July 6, 2016* the majority of the provisions of the Act, including those on pensions reforms relating to advice about annuity payments, independent advice on conversions and transfers of pension benefits and early exit pension charges (sections 33 to 35).

Aldeguer Tomás v Spain [2016] ECHR 202 (June 14, 2016) – ECHR holds denial of same-sex survivor's pension not discriminatory

On June 14, 2016, the European Court of Human Rights (ECHR) rejected an appeal by a Spanish applicant that he had been discriminated against on the grounds of sexual orientation contrary to Article 14 (the prohibition of discrimination), in conjunction with Article 8 (the right to respect for private and family life) of the European Convention on Human Rights (the Convention). The applicant had been denied a survivor's pension following the death of his partner in 2002, with whom he had lived in a ***de facto*** marital relationship for twelve years.

Antonio Aldeguer Tomás had been prevented from marrying his partner under Spanish law as legislation permitting same sex-marriage did not come into force until 2005, three years after his partner's death.

Under Spanish law, heterosexual cohabiting couples (where one or both parties had been previously married to other partners) were unable to marry before amendments to legislation were made in 1981, allowing couples to divorce. The legislation that effected this change also included a specific provision that extended retrospectively the right to a survivor's pension to "stable cohabiting couples" in certain circumstances.

Tomás submitted that, by choosing not to apply the retrospectivity clause to his case, the Spanish court's decision resulted in discriminatory treatment based solely on his sexual orientation. In his appeal to the ECHR against a decision of the Madrid High Court of Justice he alleged that his circumstances were "relevantly similar or analogous" to those of the surviving partner of a heterosexual cohabiting couple who had been unable to marry before Spanish law changed in 1981 to allow couples to divorce.

The ECHR confirmed that Tomás' relationship with his late partner fell within the notion of "private life" and that of "family life" under Article 8 of the Convention. However, although it acknowledged there were "certain similarities" with the position of opposite-sex couples in that there had been a legal obstacle to both hetero- and single-sex couples marrying, it rejected his appeal.

The ECHR held that the provision in the 1981 legislation was for the specific purpose of providing an "extraordinary solution" to affected couples and had to be viewed against a background where the access to and accrual of pension rights had not been equally distributed between the sexes, with women being underrepresented in the Spanish workforce.

The ECHR considered that the legal impediment to marriage was different in the case of same-sex and heterosexual couples in that

- Tomás was unable to marry his partner as the law in force at the time of his partner's death restricted marriage to heterosexual couples; whereas
- For heterosexual couples, the impediment was not to marriage, but to remarriage, and this was not based on gender or sexual orientation, but on still being married without the availability in law of a divorce

This, the ECHR said, made the respective positions "fundamentally different".

The subsequent enactment of same-sex marriage legislation in 2005 could not be taken as evidence of Spain recognising that its previous position was incompatible with the Convention. The ECHR noted that states enjoyed a "margin of appreciation" in the timing of the introduction of legislative changes, and that it would be "completely inappropriate" for the ECHR to require them to provide for a retroactive application of legislation recognising same-sex marriage.

Comment

In our Stop Press of October 2015, we provided an update in the case of *Walker v Innospec Ltd* and others, in which Mr Walker, who retired in 2003, claimed that his employer Innospec had discriminated against him as the employer's scheme provided a spouse's pension to a member's civil partner, but only in relation to service on and after December 5, 2005, which was the date the Civil Partnership Act 2005 came into force. The Court of Appeal (CA) had ruled unanimously that the calculation of pensions for surviving civil partners could be restricted to the period of the member's service on and after the implementation of the relevant law.

The differences in survivor's benefits for heterosexual and same-sex partners in this case were particularly pronounced as Mr Walker's surviving husband would be entitled to a pension of approximately £500 a year, whereas a surviving widow's annual pension would be in the region of £41,000.

There have been rather dramatic press headlines on the financial impact of this case but, clearly following the CA decision (and the similar views of the ECHR), those schemes which have only provided post-2005 accrual will be spared additional costs. Many schemes have already decided to equalise survivor benefits for all periods of service, irrespective of the sexual orientation of the members to whom they apply.

The essential message from these cases is that the Courts are generally not prepared to manipulate legislation to give it retrospective effect, no matter how desirable and fair such a step may appear in a particular case.

It is unclear whether the *Walker* case will be appealed in the Supreme Court as no permission to do so has yet been published. We will provide an update if the case if further appealed.

High Court: *Hinton v Wotherspoon* [2016] – pensions and bankruptcy

In our April 2012 Stop Press, we reported on the case of *Raithatha v Williamson*, in which the High Court ruled that an income payments order under section 310 of the Insolvency Act 1986 (an IPO) could be made where the bankrupt had an entitlement to elect to draw a pension but had not exercised it at the time of the application. This meant the bankrupt's pension could be applied towards paying his debts, and was a controversial decision as, previously, pensions funds were beyond the reach of a bankrupt's creditors. The parties settled on confidential terms before the case was due to be heard in the Court of Appeal.

In our January 2015 update, we reported on the contradictory decision in *Horton v Henry* [2014], where the High Court declined to follow the *Raithatha* ruling and held that a bankrupt's unexercised rights to draw his pension did not represent income to which he was entitled within the meaning of the Insolvency Act 1986, and so did not form part of the bankruptcy estate. The bankrupt could *not* therefore be compelled to draw his pension and apply that income towards satisfying his bankruptcy creditors.

In the most recent case to consider whether a bankrupt's pension fund should be part of his bankruptcy estate, *Hinton v Wotherspoon*, the High Court preferred the decision in *Horton v Henry*. However, these are all first instance decisions and are not binding authority for future cases which may come before the High Court. Until such time as the Court of Appeal has an opportunity to rule on which approach is correct, or alternatively there is further statutory clarification, the contradictory decisions leave the law in an unsatisfactory state.

We will look in depth at the subject of pensions and bankruptcy in detail in a future briefing.

Background

When an individual becomes bankrupt and a trustee in bankruptcy (TIB) is appointed, all assets to which the individual is beneficially entitled vest automatically in the TIB, and this is the bankruptcy estate. The TIB's function is to realise the value of the assets in the bankruptcy estate and to effect distribution to the bankrupt's creditors in settlement of his debts. If the bankrupt receives an income during his bankruptcy, the TIB may apply for a court order (IPO) compelling the bankrupt to pay some or all of that income to the TIB for inclusion in the bankruptcy estate.

The conflicting case law

In *Raithatha*, the High Court ruled that an IPO could be made where the bankrupt had an entitlement to elect to draw a pension but had not exercised it at the time of the application.

Before *Raithatha*, pension benefits were regarded as protected from creditors as, under the Welfare Reform and Pensions Act 1999, a bankrupt's rights under an approved pension arrangement do not vest in the TIB. However, the Court held that as the bankrupt, Mr Williamson, had reached the scheme's pension age, although he continued to work, the pension could be considered as income and therefore used to repay creditors.

The decision resulted in a successful application by Mr Raithatha, as Williamson's TIB, for a court order compelling Williamson to draw his pension and apply that income towards satisfying his bankruptcy creditors.

As a result of that decision, it appeared that a pension scheme was no longer a safe place in which an individual could seek to shelter funds from his creditors. The judgment was a warning to all those with substantial pension pots which had until then been considered beyond the reach of a TIB. A bankrupt of scheme pension age, even when is he is still employed and working, with no intention of taking his pension, may be forced to access pensions savings to pay off creditors where he is entitled to draw benefits but chooses not to.

Although leave was granted for Williamson to appeal, the appeal was not progressed, as the parties reached a confidential settlement. The full potential impact on occupational pension schemes therefore remained unclear.

In *Horton v Henry* [2014], the bankrupt (Henry) had assets including four personal pension policies which did not form part of the bankruptcy estate. Throughout his bankruptcy, he was entitled to draw his pension, but chose not to do so. On the day before his discharge from bankruptcy, Horton, as his TIB, applied for an IPO seeking a share of lump sum payments and income from the pensions.

Henry opposed the application. He relied largely on the arguments advanced by the bankrupt in *Raithatha*. The Court held that his undrawn pensions could not be subjected to an IPO. Although the circumstances of the application were acknowledged by the Court to be indistinguishable from *Raithatha*, it was held that *Raithatha* was wrongly decided and the Court declined to follow that decision.

The Court noted that in order for the bankrupt to receive pension monies, he would have to make a number of decisions and elections. Unless and until these were made, the pension rights were uncrystallised and uncertain in value.

In *Hinton v Wotherspoon*, (in which the Court did actually decide to make an IPO), the Court considered the point at which a bankrupt would become entitled to pension income. The judge noted that if the bankrupt had made an election to enter drawdown but had neither actually withdrawn a lump sum, purchased an annuity, nor started to receive an income from the fund, the entitlement to income had not arisen and thus no IPO could be made. It was possible, for example, for a pension fund to be subjected to an election to draw down, without any instructions as to payment (or annuity purchase) having been given: only once such instructions had been made was there an entitlement which could found the basis of an IPO.

The Court's comments on this aspect of the case were *obiter*, as the bankrupt in this case had actually selected and had started to receive specific and quantified payments.

Comment

The decision in *Raithatha* is considered by many to be at odds with the legislative aim of protecting pensions from a bankruptcy estate.

As a result of the Budget 2014 and the pension flexibilities introduced from April 6, 2015, an individual with defined contribution pension savings is able to access his fund in full once he reaches age 55, provided this is permitted under the scheme rules. The effect of the changes means that for affected schemes, there will no longer be a distinction between the member's pension and lump sums, making even a relatively small pension fund an attractive target for an IPO.

The various elections and decisions to be made by the bankrupt before a pension benefit crystallises (as referred to in *Horton* and *Hinton* cases) will continue to apply. However, the financial benefit of a successful IPO claim could make an application by a TIB, and potential pursuit of the bankrupt to the Court of Appeal, a worthwhile prospect.

The position for occupational pension schemes is further complicated, as the payment of lump sums on commencement may be subject not only to elections and decisions by the bankrupt but also to the discretion of the scheme's trustees.

High Court: *The Girls' Day School Trust v GDST Pension Trustees Ltd & Another* [2016] – rectification of trust deed granted by summary judgment without a hearing

The High Court has granted an application for rectification by summary judgment without a hearing to correct the mistaken execution of an earlier version of a trust deed when a subsequent version correctly reflected the parties' intentions.

The trust deed was intended to set up a new scheme as part of a transfer from the Independent Schools Pension Scheme. A series of draft trust deeds had been prepared and circulated for comment before a final version (which included provisions that would allow for future changes to the benefit structure) was agreed. However, instead of the agreed final version, an earlier draft was executed in its place.

Background

Rectification is an equitable remedy that can only be granted by the court, which will apply the following test

- The parties had a common continuing intention, which existed at the time of execution of the document in respect of which rectification is sought
- Such common intention must be established by reference to what an objective observer would have thought the intentions of the parties to be
- By mistake, the instrument did not reflect that common intention

On a successful application, the document in question will be amended retrospectively to reflect the intended agreed terms of the parties. The burden of proof is on the party seeking rectification and although the standard of proof is the balance of probabilities, convincing evidence is needed to overcome the assumption that the parties must have intended to agree the terms they actually included in the written instrument.

For summary judgment to be possible, the applicant must show that the other party has no realistic prospect of successfully defending the claim, and that there is no other reason for a trial. The Civil Procedure Rules (CPR) state that the court "will" dispose of the application without a hearing if it considers that to do so "will save time or expense" and that "a hearing is not necessary". The CPR also provide that where the court deals with an application without a hearing, any resultant court order will give the parties an opportunity, within a stated time, to apply to vary or discharge the order at an oral hearing.

Confidential evidence

The judge agreed that certain evidence, specifically an opinion from counsel that the representative beneficiary relied upon to support the position that were no grounds for proper opposition of the application, could be kept confidential. Initially, Norris J had been in favour of unrestricted access to all of the evidence considered as part of the application, as, without this disclosure, there could be a concern that a successful application summary judgment without a hearing could suffer a "taint" of being "a deal done behind closed doors". Ultimately, however, he was prepared to restrict access to the opinion for several reasons

- The evidence (even without the opinion) was "full and has been scrutinised and tested"
- The opinion had been written without consideration of being widely disclosed and for the court, not the public
- The written judgment considered all the facts that formed the basis of the opinion
- The position is sufficiently covered by the CPR, which provide that someone who is a party to the proceedings may obtain from the records of the court any written evidence filed in relation to an application unless the court otherwise orders

Lack of a public hearing

Norris J confirmed that although in this case he was prepared to grant summary judgment without a hearing, the court retained a discretion to order one and, in relation to a summary judgment application concerning the rectification of a pension scheme would ordinarily require one. The reasons were that it was

- Often not an efficient use of court time for the judge to have to consider a mass of material raising potentially complex issues unassisted by the oral submissions from counsel, and then to have to deliver a written ruling
- "Especially important" in relation to pension schemes that scheme members were not left with the impression that there had been a "deal done in a dark corner"

However, the judge was satisfied that any "taint" relating to the lack of a public hearing could be obviated in this case by making the judgment public. With this in mind he held that

- The judgment would be published online (BAILLI) when it was handed down
- The order for rectification would not take effect for 42 days after the date of the judgment
- GDST or the trustee must inform scheme members of the judgment and offer to provide a hard copy. In addition, the web address of the BAILLI report should be included in the information provided

However, the judge made clear that, in future cases, the standard position on confidential evidence should be that any party applying for rectification by obtaining an order for summary judgment without a hearing must understand that it is likely that the Court will insist that after judgment all evidence be open to inspection. If this is not acceptable, then the application for summary judgment must be listed for a public hearing.

Decision

In granting summary judgment without a hearing, Norris J confirmed that he was happy to do so "in such a plain case". The evidence supporting the application had satisfied the judge that there was "no real prospect of a realistic challenge" to the position that the final version of the deed should have been executed, not an earlier version that was subsequently revised. In order to dispel potential member concerns that the judgment was "a deal done behind closed doors" he stated that concerns had to be addressed over publicity of the decision (absent a public hearing) and as to part of the evidence being marked as confidential. On publicity, the judge confirmed that as well as the judgment being available online, notice would be given to all scheme members along with the offer of a hard copy if requested. In addition, the order for rectification would not take effect for 42 days. On the issue of keeping part of the evidence confidential, Norris J was prepared to preserve confidentiality in this case, due to the scrutiny given to the "full" evidence provided, and the fact that the confidential evidence in question (an opinion from counsel) had not been prepared in contemplation of disclosure to a wider audience.

However, he did confirm that those applying for rectification in future, who were not prepared to have all evidence open to inspection, should consider a public hearing.

Comment

This is a further example of the use of the summary judgment procedure in rectification applications, but notably in this case the court granted the application without a hearing. This route can reduce substantially the fees involved. The judge's points on the treatment of confidential evidence, and the need for publicity where no hearing is held, are interesting for advisers.

View the judgment.

Pensions Ombudsman: Mrs R (PO-7345) – widow married deceased member too late to qualify for spouse's pension

The Pensions Ombudsman (PO) has given his determination in a complaint by Mrs R against the trustees of the Signet Group Pension Scheme (the Scheme), ruling that the widow of a deceased Scheme member had no entitlement to a spouse's pension, despite living with the member for over 20 years, because she had not been married to him at the point the Scheme rules required her to be in order to qualify for this benefit.

The PO dismissed the widow's complaint as she had married the member in 2013, six months before his death, albeit that the couple had shared their finances and lived together since the early 1990s. Under the Scheme rules, in order for the widow to qualify for a spouse's pension, the couple needed to have been married at the time the member ceased his employment with the sponsoring employer, which happened on his redundancy in 1997. The PO held that regardless of whether the widow had been "treated fairly in the general sense" by the trustees, they had no discretion to award her a spouse's pension and must follow the Scheme rules.

The PO also held that the widow could not qualify for a discretionary lump-sum death benefit as the rules required the member to have died within five years of the commencement of his pension, which was also in 1997.

Facts

Mr R was employed by Signet and was a member of employer's Scheme. In 1997, he was made redundant after 32 years' service and his pension went into payment. In 2003 he completed an expression of wishes form in favour of his unmarried partner of more than ten years in relation to any lump-sum death benefit. The couple married in 2013, but in Mr R died in June 2014.

The Scheme rules provided that in order to receive a spouse's pension, an individual must be a "Qualifying Spouse", defined as "a Member's legal spouse or Civil Partner at the earlier of the Member's Normal Pension date and the date they ceased to be an employee of Signet". The rules also provided that if a member died within five years of his pension commencing, a lump-sum death benefit equivalent to five years' pension payment was payable at the trustees' discretion.

Before his death Mr R queried whether Mrs R would qualify for a spouse's pension. After taking legal advice, the trustees said that she would not because she was not a Qualifying Spouse as the couple were not married at the date he ceased being a Signet employee in 1997. The trustees maintained this position after Mr R's death and also said Mrs R did not qualify for a lump-sum death benefit as Mr R had died more than five years after his pension started. Her subsequent appeals under the scheme's internal dispute resolution procedure (IDRP) were unsuccessful. She was also advised by The Pensions Advisory Service (TPAS) that the trustees' position was correct.

Mrs R complained to the PO that the trustees should exercise their discretion so as to waive the requirements of the Scheme rules and pay her a spouse's pension. She submitted that she and Mr R had lived together for over 20 years and shared their finances; and that the Scheme rules were unfair and did not reflect modern society.

Determination

The PO dismissed the complaint, noting that he agreed with the initial Ombudsman adjudicator's opinion, which Mrs R had not accepted.

The PO agreed with the trustees' interpretation of the Scheme rules, both in relation to the spouse's pension and the lump-sum death benefit. In relation to the spouse's pension, he found that the trustees had no discretion to pay the pension as they must administer the Scheme in accordance with its trust deed and rules.

While the PO expressed his "enormous sympathy" for Mrs R's situation, he stressed that: "... my role does not extend to considering whether she has been treated fairly in the general sense, I can only consider whether there has been maladministration, or a breach of law."

Comment

In many schemes' governing trust deeds, spouses' pensions are available as of right to a deceased member's surviving spouse at the time of their death, with no stipulation that the member and the spouse must have been married when the late member's pension came into payment. While provisions dealing with so-called "death bed marriages" are reasonably common, these are often drafted to give trustees a discretion whether to pay a spouse's pension in a particular case.

On the facts of this complaint, there is no suggestion a "death bed marriage" had occurred. The evidence was that the complainant and the late member had been in a long-standing relationship for many years. However, the Scheme rules were narrowly drafted and had not been updated to reflect the fact that in the modern world many pensioners are likely to spend several decades drawing a pension, and may marry or re-marry in that time. Given the strict terms of the rules, the PO had little choice but to reject the complaint, however sympathetic he may have been to her position.

In the light of this decision, trustees and employers may wish to review the death benefit provisions under their scheme rules, and the definition of "qualifying spouse". They should ensure that the rules reflect the intended position, given the likelihood of pensioners living for many years after starting to draw benefits, and the potential for changes in their personal circumstances and relationships during their retirement.

Deputy Pensions Ombudsman: Mr N – de-risking: employer could exclude pensioner member from PIE offer

Of interest to DB schemes seeking to manage their liabilities is the determination of the Deputy Pensions Ombudsman (DPO) on May 25, 2016 that an employer could decide to exclude a pensioner member from a pension increase exchange (PIE) exercise. PIEs are exercises where members already in retirement are offered a choice to give up their future pension increases in exchange for a one-off increase to their current pension.

The DPO dismissed a complaint by a pensioner member, who submitted that the decision to exclude him from the PIE was made by the buy-in insurance companies, to whom he said control and financing of the scheme had been transferred. The DPO found that the employer had made the decision itself and in light of its own commercial interests in securing the lowest cost for the subsequent full buyout of the scheme.

The DPO also held that in signing the deed providing for the PIE, the trustee had not breached any duty to members, as the deed made it possible for any member chosen by the employer to be offered a PIE. Further, the DPO held that the decision whether to insure scheme benefits via the earlier buy-in fell within the trustee's discretionary powers, which it had properly exercised without needing to consult or obtain the member's consent.

Facts

Mr N was pensioner member of the Philips Pension Fund (the Scheme). In 2013, the trustee, Philips Pension Trustees Ltd, completed a buy-in of the Scheme's pensioner liabilities. A PIE exercise was subsequently conducted from which certain pensioners were excluded, among them the applicant. A deed dated August 6, 2015 provided that under the PIE process, the Philips Electronics UK Ltd (Philips, the employer) could offer a member an augmentation in exchange for surrendering the right to non-statutory pension increases. A full buyout of the Scheme was completed following the PIE exercise later in 2015.

Following an unsuccessful complaint to the trustee, the applicant complained to the Ombudsman's office that the buy-in had been performed without any consultation and without his consent. He submitted that the decision to exclude him had been made by the buy-in insurance companies, to whom control and financing of the scheme had been transferred. In support, he referred to a statement made to him that "the insurance companies' attitudes to insuring the changed benefits are key to selection for an offer". He also submitted that the trustee had decided to introduce the PIE exercise in breach of its primary duties to treat each member fairly and that it should have refused to execute the August 2015 deed.

Determination

The DPO dismissed the complaint, noting that she essentially agreed with the Ombudsman adjudicator's opinion, which Mr N had not accepted.

Adjudicator's opinion

The Scheme's investment strategy and the decision whether to insure Scheme benefits did not affect the amount of pension Mr N would receive and came within the trustee's discretionary powers. The trustee did not have to consult members in the exercise of this discretion although it was obliged to observe certain well-established principles. It had to take into account only relevant matters, ask itself the correct questions, direct itself correctly in law and it must not arrive at a perverse decision (that is, a decision which no reasonable decision-maker, properly directing itself, could arrive at in the circumstances). The trustee had taken appropriate advice in choosing an insurer and after the buy-in, members' benefits were arguably more secure and less dependent on the employer's ability to support the fund. The trustee had therefore exercised its discretion properly.

The decision to carry out a PIE exercise was taken by Philips, and the decision over which members would be offered the PIE fell within its discretion. Mr N's exclusion had not caused him any financial loss in relation to the benefits he was entitled to under the Scheme. There were several reasons why a member might be excluded and it was not the DPO's role to decide which members should be excluded or not.

DPO’s findings

The DPO responded to key points made by Mr N after receiving the adjudicator’s opinion.

Although Philips, had confirmed that it took advice from the insurance companies involved in the earlier buy-in because they had information on the pensioners, it was ultimately the employer’s decision which pensioners to exclude. The PIE offer was made to those members where it was anticipated the largest savings could be made in order to reduce the anticipated total cost of the buyout. There was “no reason to doubt Philips’ assertion that it made the decision in light of its own commercial interests in securing the cheapest total scheme buyout”.

In relation to Mr N’s submission that the trustee should have refused to execute the August 2015 deed, the DPO found that the deed made it possible for any of the members chosen by Philips to have a PIE and did nothing to rule out Mr N from the PIE exercise.

Comment

This is an interesting complaint as it focuses on two topics where there have to date been relatively few determinations made by the PO: buy-ins and PIEs.

Once a buy-in has taken place, questions arise as to the role the buy-in insurer is likely to play in the scheme in the future, given it has its own commercial interests at heart. However, a buy-in policy is an asset of the scheme and the trustees continue to be responsible for setting the scheme’s investment strategy. Even with careful communications, members may misunderstand the insurer’s position and misconstrue steps taken by the employer or trustees. In this case, the DPO was satisfied there was no breach of the employer’s or trustees’ duties to members, either in relation to the buy-in or selection for a PIE offer.

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Kampala[3]

Middle East

Abu Dhabi
Bahrain
Dubai
Riyadh[2]

Central Asia

Almaty

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