NORTON ROSE FULBRIGHT

Essential UK Pensions News

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Introduction

Essential UK Pensions News covers the latest pensions developments each month.

Pensions Regulator recognises commercial decisions are not grounds to issue a contribution notice for Bernard Matthews pre-pack insolvency

The Pensions Regulator (TPR) has concluded that the actions of a shareholder in taking a commercial decision not to sell a business at a loss do not by themselves provide grounds for ordering that shareholder *to pay further contributions to the pension scheme.*

Background

TPR investigated whether to issue a contribution notice in respect of Rutland, an investor in a struggling company, Bernard Matthews Ltd (BML), which ultimately ended up in a pre-pack insolvency in 2016 with its pension scheme entering the PPF. Following its investigation, TPR decided not to issue a contribution notice. TPR confirmed that they did not look at issuing a financial support direction in their investigation because their initial analysis suggested that the insufficiently resourced test could not be satisfied.

In 2013, Rutland provided £25 million worth of investment to BML and secured its financing with a charge which ranked ahead of the pension scheme. The trustees of the pension scheme also had to agree to the change in the scheme's security. There was no clearance application made in relation to this process.

However, the business continued to struggle due to wider market issues and in 2016, Rutland received two offers to sell BML. One offer from Boparan Private Office (BPO) would have enabled BML to continue supporting the pension scheme but would have required Rutland to write off most of its investment. The other offer excluded all BML's liabilities, including the pension scheme (and would have also meant a significant loss to Rutland). These offers were rejected by Rutland and another offer from BPO was made which excluded the pension liabilities. The BML board took the view, having taken professional advice, that a sale of the business through a pre-pack insolvency was the most appropriate option at the time, taking into account the interests of all of the group's creditors.

BML entered administration in September 2016. Rutland made a profit of £13.9 million on its investment and the pension scheme received nothing under its third ranking charge and entered the PPF.

TPR's investigation

TPR launched an investigation into whether to issue a contribution notice. It looked at three periods: (i) Rutland's initial investment, (ii) the period between 2013 and 2016 when BML was under Rutland's ownership and (iii) the rejection of BPO's first offer and the run-up to the pre-pack insolvency.

In relation to the initial investment, TPR did not consider the test for a contribution notice was met, because Rutland's terms were in line with what was on offer in the private equity market at the time and the terms were negotiated by an independent BML board on an arm's length commercial basis.

In relation to the period between 2013 and 2016, TPR decided that the decline in BML's financial performance was due to wider market factors and was not attributable to Rutland.

In relation to the bids to buy BML and the pre-pack insolvency, TPR decided that Rutland had not conducted itself inappropriately or sought to unduly influence the process. It stated that "Rutland's profit was a legitimate consequence of the terms of its high-risk investment in BML which had been negotiated and agreed on an arm's length commercial basis with the board of BML and the scheme's trustees. We have no evidence of unreasonable conduct on Rutland's part at any stage of its association with BML and the scheme or in respect of the sales and insolvency processes."

The Section 89 report can be read in full here.

Comment

This decision is interesting for investors looking to invest in struggling companies with defined benefit pension schemes.

TPR said that in this case, the investor had behaved appropriately in taking a profit as a result of the pre-pack insolvency which resulted in the pension scheme entering the PPF, because its profit was a legitimate consequence of its high-risk investment in the company. Other relevant factors in TPR reaching its decision were that the investor had negotiated the terms of its investment on an arm's length commercial basis and that the trustees of the pension scheme were involved in the process and agreed to the changes in the pension scheme's

security as a result of the original investment. TPR notes in its report that without Rutland's initial investment in 2013, it appeared likely that BML would become insolvent and this was one of the reasons the trustees agreed to the terms of the initial investment, as it seemed preferable to give the employer a chance to recover financially so it could continue to support the pension scheme.

Investors in high-risk businesses can take some comfort from this decision but should bear in mind that TPR's decision whether or not to exercise its powers will depend on the individual circumstances and particularly the way in which the parties have conducted themselves in relation to turning around a struggling business.

TPR annual report and accounts

TPR has published its annual report and accounts for 2019/20 which summarises TPR's actions over this time period. Of particular note is that over the last year, TPR has rolled out its new supervisory approach in relation to 123 of the "most strategically important schemes". In addition, TPR conducted four regulatory initiatives that engaged 1,200 schemes on important issues such as scheme funding and record-keeping.

TPR also conducted an investment governance regulatory initiative to engage with DC schemes, particularly smaller schemes which may not previously have had much interaction with TPR. TPR states that it used targeted communications to set out clear expectations of trustees in relation to the review of their default investment strategies, as well as providing simple guidance, a timeframe for the trustees to take the appropriate action and a request for the trustees to report back to TPR on progress.

Following the Court of Appeal's decision in the *Box Clever* case in June 2019, TPR has issued five financial directions in relation to the *Box Clever* Pension Scheme, setting out a specific timeframe for the targets to propose the form of financial support.

HMRC confirms pension schemes exempt in response to consultation on Fifth Money Laundering Directive and Trust Registration Service

HMRC has published its response to the consultation on the Fifth Money Laundering Directive (5MLD) and Trust Registration Service (TRS). The consultation outlined how the government intended to implement changes to the TRS in order to comply with 5MLD. The amendments to the Money Laundering and Terrorist Financing (Information on the Payer) Regulations 2017 implementing 5MLD came into force on January 10, 2020, but did not include changes to the registration of beneficial ownership information for trusts so that HMRC had time to consult on this issue.

HMRC noted that in the responses it received to its consultation, there was concern that although there was a carve-out for registered pension schemes and for trusts holding life policies, there were some pension trusts that would still need to register, even though they were regulated separately.

In its response, HMRC has confirmed that UK-registered pension trusts, pure protection life insurance policies and those paying out on critical illness or disablement, including group policies will be exempt from registration on TRS.

Draft regulations which, among other things, set out the registration requirements in relation to the TRS have been laid before Parliament.

Comment

This is a useful clarification from HMRC that pension schemes which have already registered with HMRC will not be required to register again in order to comply with the new anti-money laundering legislation.

HMRC's response to the consultation can be viewed here.

GMP equalisation: PASA publishes member communications guidance

The cross-industry Guaranteed Minimum Pension Equalisation Working Group (GMPEWG) has published a new guide designed to help trustees manage their communications with members in relation to GMP equalisation. The broad premise of the guidance is to help *"schemes in the early planning stages of GMP Equalisation where they are considering how they will approach their communications, how they will work effectively with their administrators, and what they really need to say to their members."*

The guidance includes suggested answers for questions which members may raise, a checklist of the communications which schemes provide to members which may need to be reviewed in the context of GMP equalisation and a "jargon buster" to help administrators communicate in a way which is more easily understandable by members.

The guidance can be viewed here.

Draft Finance Bill 2021 legislation: Pensions measures

On July 21, 2020, HM Treasury and HMRC published draft legislation for the Finance Bill 2021, along with explanatory notes and consultation papers.

The current version of the Finance Bill 2021 amends the Finance Act 2004 (FA 2004) to enable collective money purchase pension schemes (CMPs) to operate as UK-registered pension schemes, in the same way that existing UK registered pension schemes can operate. Separately, the Pension Schemes Bill which is currently before Parliament sets out a framework for regulating CMP schemes. These changes are designed to avoid a situation where payments by CMPs resulted in unauthorised payment charges for the members and schemes, and also to make tax relief available for CMPs and enable CMPs to be used for automatic enrolment.

The draft Finance Bill 2021 is open for technical consultation until September 15, 2020.

Regulatory intervention report: Engagement by TPR results in additional statutory employer for the scheme

Summary

TPR has published a regulatory intervention report about how it considered using its anti-avoidance powers in relation to the National Institute of Agricultural Botany pension scheme (Scheme). Following months of negotiations and after TPR had issued a warning notice, the Scheme now has two statutory employers and is in a stronger position as a result.

Background

NIAB was the sole statutory employer of the Scheme. NIAB Trust is a registered charity and has responsibility for the historic entity's land, buildings and valuable assets. The Scheme's trustees decided that the covenant of NIAB alone was insufficient to support the Scheme and unsuccessfully tried to obtain formal support for the Scheme from NIAB Trust. This resulted in a failure to agree the 2015 valuation and TPR became involved.

Involvement of TPR

TPR informed NIAB Trust that it was considering issuing a financial support direction. Following this, there were months of negotiations with NIAB Trust and TPR also issued a warning notice against NIAB Trust seeking a financial support direction. A settlement was reached by which NIAB Trust became a statutory employer in relation to the Scheme, so that it now shares responsibility for the Scheme's deficit with NIAB.

Comment

This is another example of where TPR has used the threat of its anti-avoidance powers as a tool in negotiations in relation to support for defined benefit pension schemes which are in deficit.

HMRC Managing pension schemes service newsletter

HMRC has published its Managing pension schemes service newsletter – July 2020, in which it updates scheme administrators on the latest changes to its Managing pension schemes (MPS) service.

Scheme administrators can now submit an Accounting for Tax return via the online service and amend an existing return and search their returns for a member.

The newsletter also sets out the new timeline for launching "phase two" of the MPS service, which includes pension scheme registration and reporting. The introduction of phase two has been delayed due to the COVID-19 pandemic and the intention is now to introduce registration and reporting in mid-2021. Other features such as event reporting have been postponed until an unspecified later date.

Work and Pensions Committee to investigate pensions scams

The Work and Pensions Committee (WPC) has issued a call for evidence in relation to its investigation into pension scams. This is the first part of a three-part investigation into the impact of the pension freedoms on the protection of pension savers. The Chair of the WPC, Stephen Timms MP, stated that:

"The Government's shake-up of the pensions system of five years ago will have brought new freedoms for people to plan financially for their futures. But on the flip side, more flexibility means more potential for the unscrupulous to take advantage and scam savers out of what will very often be their largest financial asset, crippling their dreams of a comfortable retirement. Extra financial hardship brought about by the coronavirus pandemic also provides an added opportunity for tricksters to prey on those people who may be looking to use their pension savings as a form of support."

The call for evidence sets out nine questions to which it is seeking responses, such as how prevalent pension scams are, the current trends in pension scams and what more can be done to prevent pension scammers from operating.

The deadline for submissions in relation to the call for evidence is September 9, 2020.

PLSA issues DC Decumulation Call for Evidence

The Pensions and Lifetime Savings Association (PLSA) has published a call for evidence in relation to its proposals on DC scheme decumulation (the point at which the value of a member's pension pot is used to provide an income for retirement).

The call for evidence states that the PLSA's proposals have a number of objectives, including providing more support to savers who do not engage with their options and mitigating some of the risks to savers and schemes.

The PLSA recommends that the government should introduce a new regulatory regime, including a new statutory obligation for schemes to support their members in respect of decumulation decisions, including support for (i) member engagement and communications; (ii) decumulation products; and (iii) the related scheme/governance processes.

The deadline for responding to the call for evidence is September 4, 2020.

PASA publishes follow-up COVID-19 guidance for scheme administrators

The Pensions Administration Standards Association (PASA) has issued follow-up guidance to help scheme administrators manage their responsibilities in the current evolving situation in response to the COVID-19 pandemic.

The follow-up guidance looks at topics such as member identity verification, reporting KPIs to trustees and a return-to-office working.

Commenting on the guidance, Kim Gubler, the chair of PASA states that, *"When we issued the PASA Guidance to administrators as we entered lockdown on 23 March, little did we know the total impact it would have on all our lives. Fast forward four months and although lockdown has eased, for administrators some of the changes made through the period could become permanent. We're realising we can no longer talk about 'returning to normal', but rather how we can adapt and evolve the way high quality administration is delivered in future.*

All administrators should have learned something new during the last few months, whether about their people, their technology or their members. PASA has pulled together these learnings to shape our Guidance, we hope organisations can use this to learn from each other's experiences as they look to implement their plans for the future."

The guidance can be viewed here.

TPR warns of an "approaching storm" for sponsoring employers affected by the COVID-19 pandemic

TPR has written a blog post about the challenges facing defined benefit pension schemes as a result of the COVID-19 pandemic. Describing what it refers to as an "approaching storm", TPR states that since March 2020, it has received 108 revised recovery plans, 86 per cent of which have seen pension schemes agree to defer their employer's deficit repair contributions because of the strain on the employer at this time.

With the government's Coronavirus Job Retention Scheme ending in October, TPR expects that many employers will continue to face financial challenges and that there will be an increased number of corporate insolvencies and restructurings from the autumn of 2020 and into 2021.

TPR acknowledges that it cannot get involved with every UK-defined benefit scheme and therefore emphasises the importance of trustees engaging early and thoroughly with their employers, in order *"to understand the flexibilities that could be offered to distressed employers where appropriate and how to structure support so it doesn't disproportionately weaken their scheme."*

TPR emphasises that trustees should be open to reasonable requests from an employer in financial distress but that they should ensure that they are satisfied that it is in members' best interests to agree to the request. If trustees decide it is appropriate to agree to an employer's request to suspend or reduce contributions, they should seek appropriate mitigation, for example, requiring that no dividends are paid until the deferred or suspended contributions are paid and ensuring that the scheme has the same recourse to security or valuable assets as other creditors. TPR emphasises that trustees should make sure that they obtain all the relevant information that they were able to, that they took advice when appropriate and made decisions in good faith and in accordance with scheme rules. Trustees should also ensure that they keep clear records to demonstrate that they followed the correct process if their decisions are ever examined in the future.

Consultation on proposals to remove age discrimination from the Local Government Pension Scheme in England and Wales (LGPS)

Summary

On July 16, 2020, the Ministry of Housing, Communities & Local Government issued a consultation on draft regulations to amend the Local Government Pension Scheme Regulations 2013. The regulations seek to remove the provisions which the court held in *Lord Chancellor and another v McCloud and others; Secretary of State for the Home Department and others v Sargeant and others* [2018] EWCA Civ 2844 amounted to unlawful age discrimination. The consultation runs until October 8, 2020.

Background

Changes were made to the LGPS in 2014 which changed the benefit structure of the scheme, including moving benefit accrual from a final salary to a career average basis. However, transitional protection was put in place for members who were near retirement age in the form of an underpin. All LGPS members moved to the career average scheme in 2014, but members who met certain criteria (including members who were within ten years of their normal pension age on April 1, 2012) were given an underpin (i.e. they would receive the higher of the career average pension under the new scheme and their final salary pension under the old scheme).

In the cases of *McCloud* and *Sargeant*, the Court of Appeal held that the transitional protection given to older members in the judicial and firefighters' pension schemes directly discriminated against younger members in those schemes and could not be objectively justified.

The main changes proposed by the consultation are to remove the age requirement in relation to qualifying for the underpin. From April 2022, it is proposed that the underpin protection will be removed entirely and all active LGPS members will accrue career average benefits without any final salary underpin.

Comment

Much of the consultation document deals with the technical issues around how the underpin should operate in practice. The proposals to extend the underpin protection will be costly to LGPS employers; the Government Actuary's Department estimates that the future cost to LGPS employers as a result of these amendments could be in the region of £2.5 billion.

Mr S (PO-21047): Maladministration in relation to incorrect information about a deferred member's options in respect of his AVCs

Summary

A deferred member's complaint has been upheld by the Pensions Ombudsman in relation to the information which he was given about how he could use his additional voluntary contributions (AVCs).

Background

The member was a member of the Northamptonshire Pension Fund which is a section of the Local Government Pension Scheme (LGPS). In July 2002, Mr S asked Northampton County Council (the Council), the scheme administrator, for information about transferring his free standing AVCs into the LGPS. Mr S stated that the Council had told him that he could use the AVCs to buy additional scheme pension at the point at which he retired. Mr S made the transfer but subsequently discovered that the information provided to him by the Council had been incorrect and that this option was not available and had never been available.

Mr S asserted that he had suffered a financial loss as he was not able to purchase equivalent benefits on the open market. He also claimed that, had he been aware in 2002 that he would not be able to purchase additional pension, in late 2002 or early 2003, he would have made a lump sum payment into his AVC fund from his redundancy pay to make sure he had sufficient funds at retirement to provide the benefits he needed. He also stated that he would have considered the option of transferring the AVCs to another provider.

Pensions Ombudsman's decision

The Pensions Ombudsman decided that it was maladministration on the part of the Council to have provided this incorrect information to Mr S. The Ombudsman agreed with the Adjudicator that it was reasonable that Mr S would, on the balance of probabilities, have invested £10,000 of his redundancy payment into his AVC fund.

The Ombudsman held that Mr S should be put in the position he would have been in had the AVCs been invested as of January 2003, directing the Council to calculate and pay any investment loss that Mr S had suffered. The Ombudsman also directed the Council to pay the member £1,000 for the serious distress and inconvenience he had suffered.

The Pensions Ombudsman's determination can be viewed here.

Comment

This decision is another example which highlights the importance for scheme administrators of providing accurate information to members about the retirement options available to them under the scheme in question.

Mr S (PO-15170): Negligent misstatement where scheme manager provided incorrect pension estimate to member with protected pension age

Summary

A complaint brought by a member of the Firefighters' Pension Scheme, a public sector scheme, has been upheld. The member complained that the scheme manager had failed to tell him that he risked invalidating his protected pension age (PPA) if he undertook linked employment within one month of retirement.

Background

Mr S was originally employed as both a whole-time duty firefighter (WDF) and a retained duty firefighter (RDF) at the same time. As a result of his membership of the 1992 Firefighters' Pension Scheme, he was entitled to retire from the age of 50. However, there are certain restrictions in relation to retaining a PPA, including that the member must cease all employment with the employer for at least one month after retirement.

In 2013, Mr S retired as a WDF and continued RDF employment. It later came to light that because Mr S had continued employment as a RDF, he had forfeited his PPA and therefore all pension payments made before age 55, the minimum pension age, were subject to unauthorised payment tax charges. In 2015, Mr S paid the unauthorised tax charge of £47,299.12, including interest of £1,004.52. Later, Mr S's union complained to the Pensions Ombudsman on his behalf.

Pensions Ombudsman's decision

The Pensions Ombudsman held that the scheme manager knew, or should have known, about Mr S's employment situation at the time his pension came into payment and that it should have known about the implications in relation to Mr S's PPA. The pre-retirement pension estimate which was provided to Mr S, and which referred to a tax-free lump sum while he was still under the RDF contract, amounted to a negligent misstatement. The misstatement gave rise to financial loss for Mr S which was foreseeable and therefore the scheme manager was liable for this financial loss.

The Pensions Ombudsman directed the scheme manager to reimburse the member the sum equivalent to the tax liability he paid to HMRC. The Pensions Ombudsman also directed the scheme manager to pay Mr S £2,000 for the severe distress and inconvenience which had been caused.

The Pensions Ombudsman's determination can be viewed here.

Comment

In this case, the Pensions Ombudsman held that the scheme manager knew or should have known about Mr S's employment situation and should have factored this knowledge into the information which it provided to him at retirement. Administrators should seek to ensure that they take into consideration any specific circumstances relating to the member which they are aware of and ensure that they inform members of any consequences of these circumstances under the specific rules of the scheme in question.

Mr S (PO-28262): Maladministration where ill-health early retirement: Respondent's failure to question contradictory medical opinions amounted to maladministration

Summary

The Pensions Ombudsman upheld a complaint by a member whose ill-health early retirement pension was stopped, because medical advice was given that the member would recover within a period of two years.

Background

Mr S was employed by British Airways plc (BA) and was a member of the New Airways Pension Scheme (Scheme). From April 2016, Mr S was absent from work due to being diagnosed with generalised anxiety disorder. Because of medical evidence that Mr S would not be fit to return to work within a certain period, BA gave notice to Mr S to terminate his contract of employment.

Under the rules of the Scheme, one of the criteria for eligibility for an ill-health early retirement pension is that the member *"in the opinion of the Principal Company's medical adviser will not recover for the foreseeable future".* There was guidance agreed between BA and the trustees of the Scheme that for these purposes, "foreseeable future" should be defined as a period of two years.

On the basis of initial medical advice, BA authorised the Scheme to pay Mr S an ill-health early retirement pension. However, subsequent medical advice from a different doctor, Dr Caddis, determined that Mr S's condition had improved and that he would likely recover within two years. The doctor therefore concluded that Mr S did not meet the criteria for an ill-health early retirement pension. On the basis of this medical advice, Mr S's pension payments were stopped. Mr S obtained medical opinions from different doctors and unsuccessfully appealed the decision under the Scheme's IDRP and then complained to the Pensions Ombudsman.

Pensions Ombudsman's decision

The main question for the Ombudsman to consider was whether the Scheme had acted in a proper manner in determining whether Mr S met the requirement under the Scheme rules that he would not recover for the "foreseeable future" (i.e. two years as agreed by BA and the trustees). The Ombudsman stated that the differences in opinion on this point between Dr Caddis and the other doctors was "concerning" and that Dr Caddis did not provide a clear explanation for why this was the case in his report. When Mr S's case was referred to another doctor, Dr Emslie, as part of the appeal under the Scheme's IDRP, the Ombudsman noted that Dr Emslie provided even less explanation as to why he considered that Mr S would be fit to fly within two years. The Ombudsman stated that he found the reports prepared by Dr Caddis and Dr Emslie "confusing and contradictory" and that the Scheme's failure to clarify the reasoning in these reports meant that it had not considered Mr S's request in a proper manner.

The Ombudsman directed the Scheme to reconsider Mr S's request, having obtained additional medical evidence, and to pay Mr S £500 for significant non-financial injustice.

The Pensions Ombudsman's determination can be viewed here.

Comment

When considering medical evidence regarding requests for ill-health early retirement, trustees should take care to consider differences in opinions from medical practitioners and should, where necessary, seek further information to clarify the reasoning behind these different opinions.

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