Hogan Lovells

Pensions monthly update: keeping you on track

July 2013

Pension briefing

HIGHLIGHTS

Hogan Lovells pension group is delighted to send you our news Alerter for July, setting out developments over the last month (for a print-friendly version, please click on the link in the email Alerter).

Our Pension Planner gives a comprehensive overview of legal developments in the previous 12 months and expected future changes. For the latest issue, please click on the link in the email alerter.

DATES FOR YOUR DIARY

13 September 2013 – trustee training day

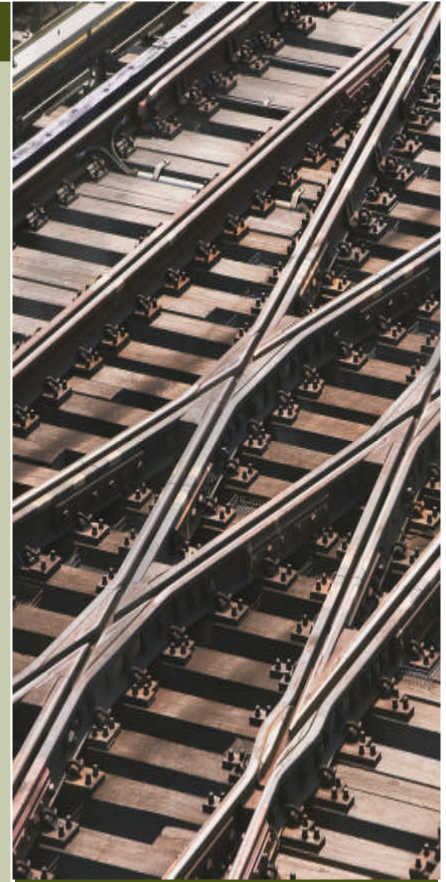
A full day seminar aimed at new or inexperienced trustees, or those who would like a refresher, covering all legal aspects of the Pension Regulator's trustee knowledge and understanding syllabus. For an invitation, or to book a place, please click on the link in the email alerter.

13 November 2013 – recent developments in pensions

Our regular informal breakfast seminar aimed at trustees and sponsors of occupational pension schemes and their advisers. Speakers from the Hogan Lovells pension team will review legal developments over the past few months and will explain the practical implications for pension schemes. To book a place, please click on the link in the email alerter.

NEW PUBLICATION

We are pleased to attach our latest briefing note, on pension liberation. The note explains the issues that arise for trustees and members from pension liberation and sets out safeguards that trustees may adopt to help protect themselves and members from unauthorised or fraudulent transfers.



FROM THE PENSIONS REGULATOR

Moral hazard powers – Regulator may consider pre-Pensions Act 2004 events

The Pensions Regulator has issued a revised s89 report in relation to a previous debt for equity restructuring. The Regulator has clarified that it is able to consider events that pre-date the Pensions Act 2004 when assessing the reasonableness of an exercise of its moral hazard powers.

In the case concerned, however, because certain transactions and events took place before 27 April 2004, entities which might otherwise have fallen within the scope of the Regulator's moral hazard powers were no longer associated or connected with a scheme employer and so were outside the Regulator's moral hazard jurisdiction. In the circumstances, the question of reasonableness of exercising moral hazard powers did not arise.

Reporting late payment of contributions

Following consultation, the Pensions Regulator has amended its revised versions of codes of practice 5 (reporting late payment of contributions to money purchase occupational pension schemes) and 6 (reporting late payment of contributions to personal pension schemes). Points to note include:

- The Regulator makes clear that it was not its intention to require the monitoring of every contribution received or the duplication of calculation procedures undertaken by payroll.
- Trustees and managers may take information from employers at face value, unless they have reason to believe it is incorrect.
- The proposed requirement for schemes to make nil returns when there is nothing to report has been dropped.
- Employers should provide payment information requested by the trustees or managers to enable effective monitoring within seven working days. Trustees or managers should report failures to supply information requested within 14 days of the request.
- Trustees or managers should report payment failures to the Regulator where the failure is likely to be of material significance and, in any case, where contributions are outstanding for 90 days (reduced from 120 days proposed in consultation).
- A material payment failure should be reported to members within 30 days of its having been reported to the Regulator.

In addition, the Regulator makes clear that it disagrees with comments that managers' legal obligations are limited to monitoring the fact and timing of contributions received. In its view, legislation provides that managers should understand what falls to be paid to the scheme under direct payment arrangements and should have a process in place to identify underpayments or overpayments.

Trustees – prohibition orders

The Pensions Regulator has issued a statement setting out its policy on exercising its power to prohibit individuals or corporate bodies from acting as pension scheme trustees. The statement gives guidance on the criteria the Regulator will use to determine whether a person is "fit and proper" to be a trustee.

FROM HMRC: LIFETIME ALLOWANCE (LTA) – INDIVIDUAL PROTECTION 2014

HMRC has given details of a new form of protection, "Individual Protection 2014 (IP14)", available to those with pension savings of at least £1.25m on 6 April 2014 (when the LTA will reduce from £1.5m to £1.25m). IP14 may be combined with Fixed Protection 2012 (FP12), which gives a fixed LTA of £1.8m, or Fixed Protection 2014 (FP14) – which gives a fixed LTA of £1.5m.

An individual with FP14 (or FP12) may wish to register for IP14 as well. While both protections are in place, the fixed protection will take precedence. However, if the individual inadvertently accrues some additional pension benefit then fixed protection will be lost. In such a case it would be an advantage to have IP14 in place to fall back on.

The table below compares key features of IP14 and FP14.

	Fixed protection 2014	**Individual protection 2014**
Minimum pension savings to apply?	No minimum	Pension savings at 5 April 2014 of at least £1.25m
Amount of LTA	Fixed £1.5m	Value of pension savings at 5 April 2014 to maximum of £1.5m
Further accrual allowed?	No (DC investment growth & limited DB revaluation permitted)	Yes
Consequence of accrual	FP14 lost	LTA charge on benefits above LTA, including on revaluation and investment growth
When to apply?	Before 6 April 2014	Within three years from 6 April 2014
Combine with other protection?	Enhanced protection – NO Primary protection – NO IP14 – YES	Enhanced protection – NO Primary protection – NO FP12 or FP14 – YES

FROM THE COURTS

Olympic Airlines – employer could not be wound up in the UK

The employer was a Greek company subject to insolvency proceedings in Greece. The company's winding-up outside the UK was not an "insolvency event" for the purposes of entry to the Pension Protection Fund, meaning that the members of its UK pension scheme faced the loss of their benefits with no PPF compensation. The pension scheme trustees petitioned the courts to have the company wound up in the UK. The High Court held that it had jurisdiction under European insolvency regulations to order the winding up of a Greek company, notwithstanding that it was already subject to insolvency proceedings in Greece. The company appealed.

The Court of Appeal has allowed the appeal, holding that the judge at first instance had erred in deciding that the company had an "establishment" in the UK at the date of the winding-up petition. It followed that the UK court did not have power to order the company's winding up and the Court recognised with regret that this meant that the members of the company's pension scheme would be outside the remit of the PPF. (*Trustees of Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA*)

Administrator liable for scheme sanction charge despite no knowledge of unauthorised payment

The First-tier tribunal has rejected the scheme administrator's appeal against a scheme sanction charge in respect of an unauthorised loan of £100,000 to the employer.

Under the Finance Act 2004, the administrator could obtain relief from the scheme sanction charge if:

- it reasonably believed that the unauthorised payment was not a scheme chargeable payment; and
- in all the circumstances, it would not be just and reasonable for the administrator to be liable for the charge.

The tribunal accepted that the loan probably would not have been made, had the administrator been aware of it in advance of it being paid. However, it was implicit in the first limb of the test above that the administrator should have systems in place whereby it is aware of what payments are going to be made by the trustees. (*Willey v HMRC*)

Members not entitled to RPI increases

The High Court was asked to decide the correct interpretation of a pension increase rule which said:

> *"…[certain members who had previously been members of the Post Office Pension Plan ("POPP")] and who had been* ***entitled to have their pension in payment or in deferment increase without limitation in line with the retail prices index shall continue to be so entitled*** *under this Scheme."*

Under the POPP, members had a right to increases in accordance with the Pensions (Increase) Act 1971, applicable to civil service and other "official" pensions. Such pensions are subject to full index-linking by reference to "the general level of prices" as determined by the Secretary of State. In practice, official pensions had increased in line with the retail prices index (RPI) until 2011, and thereafter in accordance with the consumer prices index (CPI).

The High Court held that the reference in the scheme rule to RPI was shorthand for the provisions which had applied under the POPP and was therefore intended to refer to increases in line with the 1971 Act. It followed that members did not have a right to increases in line with RPI. (*Royal Mail Group Limited v Evans and others*)

Compulsory retirement age of 65 was proportionate means of achieving legitimate aims

The Employment Tribunal has held that a compulsory retirement age of 65 for partners in a law firm was a proportionate means of achieving the legitimate aims of workforce planning and retention of junior lawyers.

In reaching this conclusion, the Tribunal held that:

- There was a narrow range of retirement ages, any one of which would achieve the legitimate aims.
- It was relevant that the partners had consented to the mandatory retirement age of 65.

The Tribunal pointed out that it had to determine the issue as at 31 December 2006, when the compulsory retirement provision applied to the applicant. It considered that the position might have been different if the relevant date had fallen after the abolition of the statutory default retirement age and increases to state pension age. (*Seldon v Clarkson Wright & Jakes*)

OMBUDSMAN'S DETERMINATIONS

Overpaid pension should not be reduced

The Deputy Pensions Ombudsman has upheld a member's complaint that her pension should not be reduced following the realisation, seven years after the pension had been put into payment, that it had been incorrectly calculated by reference to an earlier normal retirement date than was correct. The member was able to rely on the defence of estoppel:

- Clear, unequivocal representations had been made by the trustees to the member in the scheme booklet, a trustee resolution and in numerous benefit statements to the effect that her normal retirement date was age 60 for service to 1 October 1996 and thereafter age 62.
- It was more likely than not that the representations were a significant factor that the member took into account in making her retirement plans.
- Had the member been informed of the correct NRD she could have continued working until age 65 and would have been in a more favourable financial position. In addition, the loss of the opportunity to make a fully informed choice was also a form of detriment.

The trustee was directed to restore the member's pension to its incorrect higher level (plus increases) and to pay her £150 in respect of inconvenience. (*Brand*)

£100,000 overpayment could not be recovered

The scheme administrator overstated Mr McNicholas' transfer value, provided in connection with divorce proceedings. As part of an irreversible financial settlement, his pension (mistakenly overvalued) was divided equally with his former wife, resulting in a transfer to her SIPP of £100,000 in excess of the correct figure.

The Pensions Ombudsman held that Mrs McNicholas could rely on the defence of estoppel and directed the administrator not to seek recovery of the overpayment. Since Mrs McNicholas' priority was to ensure a sound financial basis for her children, especially a child who was disabled, it was more likely than not that had she known the correct position she would have sought and obtained a different settlement, providing her with more or less the same level of assets.

Mrs McNicholas had lost the opportunity to negotiate either a larger share of her husband's pension or a more favourable division of other assets, which amounted to injustice arising as a result of the administrator's maladministration. (*McNicholas*)

FROM THE EU

EU reform/IORP directive: solvency requirements excluded

Michel Barnier, European Commissioner for Internal Market and Services, has announced that the proposal for a directive on occupational pension funds (expected following the review of the IORP directive) will focus on governance, transparency and reporting requirements. The proposal will not cover the issue of solvency rules for pension schemes, which will remain an open issue.

EU reform: portability of pensions

The European Council has agreed a general approach on a directive on improving the acquisition and preservation of supplementary (occupational) pension rights. Such a directive was first proposed in 2005. In May 2013, the Irish Presidency tabled a revised proposal, limiting the scope of the directive to workers who move employment between Member States. Member States are, however, encouraged to ensure equal treatment of workers moving employment within the same Member State.

Key features of the directive will include:

- any minimum service requirement before joining a scheme must not exceed one year;
- minimum vesting ages above 21 will not be allowed;
- maximum vesting periods will be one year for workers over 25 and five years for those aged less than 25.

Member States will have three years from the adoption of the directive to incorporate its provisions in national legislation.

OTHER DEVELOPMENTS

Directors' remuneration

The Department for Business, Innovation and Skills has issued final form regulations, setting out disclosure requirements in relation to the remuneration of directors of quoted companies. An annual remuneration report must be prepared, in which the cash value of pension scheme membership and of payments in lieu of pension must be given for each director.

In addition, for each director who has a prospective entitlement to defined benefits or cash balance benefits, the report must include:

- details of those rights at the year end, including the person's normal retirement date;

- a description of any additional benefit that the director will be entitled to in the event of early retirement;
- where the person has rights to more than one type of pension benefit, separate details of each type.

The new requirements will apply for financial years ending from 30 September 2013.

Pension Protection Fund: increase to compensation cap

The Pensions Minister has announced that the cap on PPF compensation will be amended to make some allowance for long service. As amended, the cap will increase by 3% for every full year of service above 20 years, subject to a maximum of double the amount of the basic cap.

The changes will apply to schemes that enter the PPF or commence winding-up after the revised cap is introduced. Affected individuals already receiving PPF benefits will see their compensation increased from the date the legislation is in force.

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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