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REVIEW OF PENSIONS INSTITUTIONS

Summary. A government review has recommended that the office of the Ombudsman should be transferred into a new pensions jurisdiction in the Financial Ombudsman Service.

Background. The DWP asked Paul Thornton (a past president of the Institute of Actuaries) to review how the various institutions operating in the pensions field fitted in with existing government policy, its pensions reform proposals and wider developments in the pensions market. In his report, Mr Thornton has recommended:

- Underpinning the close co-operation which already exists between the Pension Protection Fund (“PPF”) and the Pensions Regulator (“TPR”).
- Further developing the joint working between the Financial Services Authority (“FSA”) and TPR in the area of work-based defined contribution pensions.
- Transferring the office of the Pensions Ombudsman (“PO”) into a new pensions jurisdiction in the Financial Ombudsman Service (“FOS”).

PPF and TPR. Mr Thornton’s recommendations include:

- Standing invitation for the chief executive of TPR to attend Board meetings of PPF (and vice versa).
- Establishing a formal Pensions Institutions Forum to include TPR, PPF, the advisory service TPAS, PO, DWP, The Treasury and FSA and FOS in their pensions capacity.
- A joint policy statement of the principles associated with data collection and information gathering by PPF and TPR.
- A joint policy statement of the respective roles and responsibilities of PPF and TPR in cases where PPF is also involved in clearance applications made to TPR.

TPR and FSA. Both these bodies have responsibility in relation to work-based defined contribution pensions (including occupational money purchase pension schemes, group personal pension plans and stakeholder pensions). Mr Thornton considers that the two bodies should retain their separate functions but recommends:

- Combined information, including development of an electronic toolkit, covering the aspects of DC regulation for which the two bodies are responsible.
- Enhancement of the current arrangements for consumer and practitioner input in the areas of mutual interest.

PO and FOS. Both PO and FOS are ombudsmen services but covering different areas and with differences in the way they conduct cases e.g. there is a cash limit on compensation which can be awarded by FOS but no such limit for the PO. Mr Thornton considers merging the PO into the FOS would improve the workflow and case management of those cases currently handled by PO and establish a single, unified scheme for handling all pensions cases, thus avoiding customer confusion and the need for redirection of cases from one body to the other. He also believes a merger would produce some costs savings through shared resources. He therefore recommends creation of a single, freestanding pensions jurisdiction within the FOS to manage those pensions cases currently dealt with by the PO and a DWP lead working group to identify what can be done to simplify the PO jurisdiction and improve its effectiveness. However, he feels that the revised arrangements must allow TPAS to continue providing its present enquiry and mediation service.

Source : A Review of Pensions Institutions: report sent to the DWP by Paul Thornton on 5 June 2007.

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GAD PASSPORTS

Summary. These will no longer be valid for staff transfers covered by the Local Government Pension Scheme in England and Wales taking effect after 26 April 2007.

Background. Where a company is proposing to accept a transfer of an undertaking which is being outsourced by a local authority or similar public sector body, the company can obtain a certificate of broad comparability (passport) for its pension scheme from the Government Actuary's Department ("GAD"). The passport confirms that the company's pension scheme is broadly comparable with a public sector pension scheme (e.g. the Local Government Pension Scheme) and thus enables the company to undertake, in the outsourcing negotiations, that staff transferring to its employment as part of the outsourcing will, on joining the company's pension scheme, have comparable benefits to those of their current public sector scheme.

Withdrawal. The GAD has announced that passports issued before 26 April 2007 are no longer valid for staff transfers in respect of the Local Government Pension Scheme in England and Wales taking effect after that date. This is because significant changes will be made to the LGPS in England and Wales, although the changes will not take effect until 1 April 2008. It is likely that similar action will be taken in the future regarding the National Health Service Pension Scheme and the Principal Civil Service Pension Scheme.

Comment. The GAD has been criticised for making this announcement with little prior warning as the announcement could cause difficulties for companies which are currently involved in outsourcing negotiations.

Source: GAD Announcement 16 May 2007.

The GAD has announced that passports issued before 26 April 2007 are no longer valid for staff transfers in respect of the Local Government Pension Scheme in England and Wales taking effect after that date.

COMPROMISE AGREEMENTS AND ORAL CONTRACTS

Summary. The High Court has ruled that compromise agreements with the employer need to be extended to pension scheme trustees in order to bar an employee from making a claim against the trustees.

Background. The Employer and the Trustees appealed against the Pensions Ombudsman's decision on the complaints of two former employees, M and B.

The Scheme provided that pension benefits upon retirement should be calculated on earnings which included bonuses. The Employer and the Trustees decided that pension benefits should exclude references to bonuses on the basis that M and B had agreed to this variation by an oral agreement in 1989. M and B complained on grounds of maladministration to the Pensions Ombudsman.

The Employer and the Trustees provided witness statements (which the High Court held were "clearly credible") to support the oral agreement. Both M and B made written submissions through their legal representatives but did not submit witness statements to the contrary. The Employer and the Trustees had corresponded with the Ombudsman on the basis that there should be an examination of the parties' witnesses at an oral hearing if their witnesses' written evidence was not accepted.

In 1999 M and B entered into compromise agreements with the Employer in full and final settlement of all claims. The Employer and the Trustees contended that the complaints to the Ombudsman should not be heard given that M and B had compromised all claims against the Employer.

The Ombudsman rejected the Employer and the Trustees' case because in his opinion an oral agreement did not exist.

Compromise agreement. Clause 4.1 of the compromise agreements stated that: "The Employee will accept the Severance Payment and Continuing Benefits in full and final settlement of all his claims if any against the Company and any director officer or employee of the Company arising out of his employment by the Company and the termination of it". The High Court held that although M and B had settled and compromised all claims against the Employer, this was "...not effective to extinguish a claim against anyone else even though the claim against that other person may occasion an obligation on the part of the employer to make good the cost of meeting that claim and in particular (as in this case) to fund the added cost to the pension fund."

Oral variation agreement. The High Court concluded that the evidence before the Ombudsman was in favour of the oral agreement. Rather than looking at whether an oral agreement existed, the Ombudsman had looked at whether M and B were aware of the oral agreement. The High Court stated that the "...real issue was not of the existence of awareness or notification, but of the existence of oral agreements." It ruled that the Ombudsman "...could not have properly held that there was no such agreement, at least without an oral hearing and cross-examination of the witnesses on whose evidence the Employer and the Trustees relied".

Comment. Employers need to consider extending compromise agreements to settle claims against pension scheme trustees. This would prevent an employee who has compromised a pension claim against the employers from then making the same claim against the trustees. There may be greater scope to argue that oral hearings should be held where the employer/trustee's case relies on witness statements.

Source: Judgment of the High Court in (1) A F Blakemore & Son Ltd (2) Trustees of the A F Blakemore & Son Ltd Staff Retirement Benefit Scheme v (1) N D Machin (2) J H Browne given on 2 May 2007.

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BERLIN
Potsdamer Platz 8
10117 Berlin
Telephone: +49 (0)30 20 61 30 90

BRUSSELS
Avenue des Arts 52
Brussels 1000
Belgium
Telephone: + 32 (0)2 502 5517

CHARLOTTE
Bank of America Corporate Center
214 North Tryon Street
Suite 3800
Charlotte
North Carolina 28202-2137, USA
Telephone: + 1 704 444 3500

CHICAGO
Hyatt Center
71 South Wacker Drive
Chicago
Illinois 60603-3441, USA
Telephone: + 1 312 782 0600

COLOGNE
Kaiser-Wilhelm-Ring 27-29
50672 Cologne
Germany
Telephone: + 49 221 5771 100

FRANKFURT
Bockenheimer Landstrasse 98-100
60323 Frankfurt/Main
Germany
Telephone: + 49 69 79410

HONG KONG
7th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Telephone: + 852 3763 7000

HOUSTON
700 Louisiana Street
Suite 3400
Houston
Texas 77002-2730, USA
Telephone: + 1 713 238 3000

LONDON
11 Pilgrim Street,
London EC4V 6RW
United Kingdom
Telephone: + 44 (0)20 7248 4282

31st Floor
30 St Mary Axe
London EC3A 8EP
United Kingdom
Telephone: +44 (0)20 7398 4600

LOS ANGELES
350 South Grand Avenue
25th Floor
Los Angeles
California 90071-1503, USA
Telephone: + 1 213 229 9500

NEW YORK
1675 Broadway
New York
New York 10019-5820, USA
Telephone: + 1 212 506 2500

PALO ALTO
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto
California 94306-2112, USA
Telephone: + 1 650 331 2000

PARIS
41 Avenue Hoche
75008 Paris
France
Telephone: + 33 1 5353 4343

WASHINGTON DC
1909 K Street N.W.
Washington D.C. 20006-1101, USA
Telephone: + 1 202 263 3000

Representative office

BEIJING
MBP Consulting Limited LLC
Tower W3, Oriental Plaza
Suite 1505, 15/F
1 East Chang An Avenue
Dongcheng District
Beijing 100738
China
Telephone: +86 10 8518 198

Independent alliance law firms

Jauregui, Navarrete y Nader S.C.

MEXICO CITY
Jauregui, Navarrete y Nader S.C.
Abogados Torre Arcos
Paseo de los Tamarindos No. 400-B
Col. Bosques de las Lomas
05120 Mexico D.F.
Telephone: + 5255 5267 4500

Ramón & Cajal - principal offices

MADRID
Ramón & Cajal
Paseo de la Castellana, 4
28046 Madrid
Spain
Telephone: +34 91 576 19 00

BARCELONA
Ramón & Cajal
Avda. Diagonal 613, 4a,
08034 Barcelona
Spain
Telephone: +34 93 494 74 82

Tonucci & Partners - principal offices

ROME
Tonucci & Partners
Via Principessa Clotilde, 7
00196, Roma
Italy
Telephone: +39 06 362 271

MILAN
Tonucci & Partners
20121 Milan
Via dei Bossi, 4
Italy
Telephone: +39 02 859 191

Additional offices:
Padua, Florence, Bucharest, Tirana