



Contract-based schemes. The Pensions Regulator has published guidance for employers on contract-based pension schemes such as group personal pensions and stakeholder pension schemes. **p1**

Sea Containers Limited. Sea Containers Limited has decided not to appeal the decision of the Pensions Regulator to issue two financial support directions. **p1**

Final salary pensions. The Court of Appeal has held that misleading information published by the government about pension schemes amounted to maladministration. **p2**

Contract-based schemes

Summary. The Pensions Regulator (the Regulator) has published guidance (the guidance) for employers on contract-based pension schemes such as group personal pensions and stakeholder pension schemes.

Facts. The guidance states the view that contract-based schemes benefit from periodic review.

The guidance suggests options for employers who offer contract-based pension schemes who wish to monitor the running of those schemes more closely. These include: working closely with independent financial advisers in reviewing the scheme and the performance of the scheme provider, having employer representatives to informally monitor the scheme along with other benefits, and employee groups (for example, staff forums) to represent interests of members.

The guidance recognises that there should not be a universal approach, and highlights a number of general aims of employer engagement:

- Early identification of administrative problems.
- Monitoring of charges and competitiveness of the scheme in light of market changes.
- Improvement of member understanding.
- Minimisation of member complaints.

Source: Employer engagement: Voluntary employer engagement in workplace contract-based pension schemes, January 2008, available at www.thepensionsregulator.gov.uk/pdf/VoluntaryEmployerEngagement.pdf.

Sea Containers Limited

Summary. Sea Containers Limited (SCL) has decided not to appeal the decision of the Pensions Regulator (the Regulator) to issue two financial support directions.

Background. If the Regulator considers a participating employer in a defined benefit occupational pension scheme to be insufficiently resourced or the participating employer is a service company, it has the power to issue a Financial Support Direction (FSD) to associated or connected companies ordering them to provide financial support to the pension scheme. If an FSD is ignored, the Regulator can issue a contribution notice for a specified sum, which can be pursued through the civil courts.

In June 2007, the Regulator issued two FSDs to SCL, a Bermuda-based holding company, in relation to two UK final salary schemes operated by its subsidiary service company. This made SCL responsible for any debt under section 75 of the Pensions Act 1995 in the two schemes attributable to the service company, which was estimated at approximately £130 million.

This was the Regulator's first use of the anti-avoidance (or moral hazard) powers under the Pensions Act 2004.

Facts. SCL has now withdrawn its appeal to the Regulator's Tribunal and will have to provide financial support within 30 days.

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This is the first time that the Pensions Regulator has used its moral hazard powers. The decision demonstrates the Regulator's willingness to step in where it feels a pension scheme is not adequately supported.

It may mean that more companies seek clearance from the Regulator that it will not use these powers on corporate transactions where the employer covenant could be significantly weakened.

Source: Regulator press release, 6 February 2008, available at www.thepensionsregulator.gov.uk/whatsNew/3267.aspx.

Final salary pensions

Summary. The Court of Appeal has held that that misleading information published by the government about pension schemes amounted to maladministration.

Background. On 15 March 2006, the Parliamentary Ombudsman (the Ombudsman) determined that the government was guilty of maladministration when it provided misleading information to the members of final salary pension schemes about the security of their pension entitlements. The Ombudsman concluded that the finding of maladministration was one of a number of factors that caused injustice to over 75,000 people. Among her recommendations was that the government should consider arrangements for the restoration of the benefits of those affected.

Facts. Four individuals who each lost their pension entitlements on winding up of their employer's pension scheme following the insolvency of their principal employer applied for judicial review of the government's decision, arguing that the government was wrong to reject the Ombudsman's recommendations.

The High Court held that the government's rejection of the Ombudsman's finding of maladministration (consisting of the provision of misleading official information) was unlawful. However, it upheld the government's rejection of the Ombudsman's conclusion that the maladministration had caused injustice to all individuals who had suffered losses on the winding up of their pension schemes between 1995 and 2005. In order to prove injustice, the individuals would have to show that they had read the offending leaflets, or relied on advice from others who did. The government appealed the decision.

Decision. The court upheld the High Court's decision that the Secretary of State was irrational in rejecting the Ombudsman's finding that the government was guilty of maladministration in issuing information about final salary schemes which was incomplete and potentially misleading.

However, it would have been open to the Secretary of State to reject the Ombudsman's finding of maladministration if he had acted rationally in doing so (statute does not bind those whose conduct is the subject of a Ombudsman investigation to accept a finding of maladministration if they have a reason for rejecting the finding).

There was no challenge to the Ombudsman's view that injustice was a concept wide enough to cover outrage, distress, anxiety, uncertainty and loss of opportunities to make informed choices or take remedial action.

Comment. It is reported that an appeal is planned.

Source: R (On the application of Bradley and others) v Secretary of State for Work and Pensions [2008] EWCA Civ 36.

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