

Pensions Legal Update

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Do one thing this month

From 2012, all employers will have a duty to automatically enrol eligible workers or jobholders into their own qualifying pension scheme or the new personal accounts scheme: a defined contribution occupational pension scheme set up by the government and monitored by the Pensions Regulator.

Pension schemes should consider alerting members who may be affected, prior to this final deadline.

The Pensions Ombudsman (the Ombudsman) has held that the trustees of a pension scheme were personally liable for improper investment decisions

Trustee personal liability

Summary. The Pensions Ombudsman (the Ombudsman) has held that the trustees of a pension scheme were personally liable for improper investment decisions and for making a transfer payment in respect of augmented benefits.

Background. Section 33 of the Pensions Act 1995 (1995 Act) limits trustees' ability to exclude liability for bad investment decisions. Section 36 of the 1995 Act requires trustees to take proper advice before making certain investment decisions. Section 61 of the 1995 Act allows a trustee to escape personal liability where, in the court's view, he has acted honestly and reasonably and ought fairly to be excused for breach of trust. These provisions came into force on 6 April 1997.

Facts. Some members of a pension scheme (the scheme) made the following complaints:

- The employers owed the scheme substantial contributions. To meet such contributions, the trustees were issued with shares in one participating employer in July 1996, and then paid £195,000 for shares in another employer in July 1998. Both employers subsequently failed.
- Contrary to investment advice, the scheme held a significant amount of assets in cash for four years from 1996.
- Benefits for one trustee, Mr Robinson (R), were augmented. Later, in March 1999, the trustees transferred one-sixth of the scheme assets to an overseas arrangement for R.

The trustees sought to escape liability by relying on a wide exoneration clause, and an indemnity from the scheme assets contained in the scheme rules and section 61.

Decision. The Ombudsman held that:

- No loss was suffered as a result of the first issue of shares to the trustees. However, the trustees were personally liable for the investment of £195,000 to buy shares in the second employer. The trustees had failed to comply with the requirements of section 36, section 33 precluded the trustees relying on the scheme's exoneration and indemnity clauses and, while the trustees had not been dishonest, it was not reasonable for them to rely on section 61.

- The trustees' failure to invest from 1996 in accordance with investment advice constituted a continuing breach of duty. The exoneration and indemnity clauses were available to the trustees for the period before 6 April 1997 but, after 5 April 1997, section 33 precluded the trustees from relying on these clauses. The trustees could also not rely on section 61. The Ombudsman rejected the argument that new trustees should not be liable for a period of time while familiarising themselves with the scheme.
- While the augmentation of R's benefits was in accordance with the scheme rules, the transfer to the overseas scheme was not. Only R was liable for this transfer as he seemed to have contrived circumstances to allow for his transfer by convincing the other trustee that the correct advice had been obtained.

Comment. While R's culpability is understandable, the fact that other trustees face personal liability is of wider interest.

Case: Mr R Adams and others v ES Group Pension Scheme [M00358].

Ill-health pensions: definition of duty

Summary. The Court of Appeal has held that, when considering whether fire-fighters were permanently disabled under the pension scheme rules, the relevant duties were the duties that the fire-fighters were employed to carry out, not all the duties of a fire-fighter.

Background. The grounds of appeal in the Court of Appeal included whether the performance of duty referred only to the operational duties of an active fire-fighter or extended to include all non-operational duties.

Facts. A pension scheme (the scheme) allowed an ill-health award to be paid to a "regular fire-fighter" who retired on the grounds of permanent disability. Permanent disability was defined as "incapacity...for the performance of duty". The London Fire and Emergency Planning Authority (the Authority) had discretion under the scheme rules to decide, in the light of medical opinion, whether to retire a fireman on the grounds of permanent disability.

If a fire-fighter's disability was caused by a qualifying injury, he would also be entitled to an injury award. The definition of a "regular fire-fighter" under the scheme rules was amended in 2004 to enable those who were capable of performing non-operational duties to remain in the scheme.

Three firemen each obtained medical opinions that they were permanently disabled and the Authority permitted them to take early retirement on the grounds of ill-health. The firemen each appealed to a board of medical referees (the board) on the extent to which their injuries constituted qualifying injuries. Their appeals were not based on the permanency, or otherwise, of their disability.

The board confirmed that the fire-fighters were permanently disabled for the purpose of performing operational duties but dismissed their appeals on the basis that they were not permanently disabled for the purpose of the scheme as they could perform some other non-operational work, even though there was no non-operational work available. The fire-fighters' pensions were suspended with immediate effect.

Decision. The court allowed the appeal and restored the fire-fighters' ill-health pensions.

The court held that the question of permanent disablement was dependant on what duties the individual was required to perform under his contract of employment. The amended definition of a "regular fire-fighter" under the scheme rules included a requirement to perform other non-operational duties as well as operational ones, which meant that such obligations theoretically formed part of the fire-fighters' contractual duties.

However, the question of permanent disability should have been considered in relation to the non-operational duties only if such duties were available. As there was no alternative employment, the relevant duty should be restricted to operational duties only, for which it had been accepted that all the fire-fighters were permanently disabled.

The court concluded that the board was incorrect to decide that the fire-fighters were not permanently disabled because they may have been capable of carrying out some non-operational duties.

Comment. The judgment centred around a purposive approach of the scheme rules to avoid a situation where the fire-fighters were both without a pension and without a job. It provides useful guidance for the private sector when considering the meaning of duty under scheme rules for ill-health purposes.

Case: Marrion & Others, R (on the application of) v The Boards of Medical Referees [2009] EWCA Civ 450.

The judgment provides useful guidance for the private sector when considering the meaning of duty under scheme rules for ill-health purposes.

From 2012, all employers will have a duty to automatically enrol eligible workers or jobholders into their own qualifying pension scheme or the new personal accounts scheme

Personal accounts: consultation

Summary. The Department for Work and Pensions (DWP) and the Personal Accounts Delivery Authority (PADA) are consulting on draft legislation setting out the legal framework for the new personal accounts scheme.

Background. From 2012, all employers will have a duty to automatically enrol eligible workers or jobholders into their own qualifying pension scheme or the new personal accounts scheme: a defined contribution occupational pension scheme set up by the government and monitored by the Pensions Regulator. Jobholders who do not wish to be included need to actively opt out of the scheme.

Broadly, the total amount of contributions paid to a personal account will be equal to 8% of the jobholder's qualifying earnings (this will consist of 4% employee contributions, 3% employer contributions and 1% from the government in the form of tax relief).

Facts. The DWP and PADA are consulting on the draft Pension Scheme Order 2009, the draft scheme rules and the draft Transfer Values (Disapplication) Regulations 2009. These draft documents set out the legal constitution, functions and rules of the personal accounts scheme. Key points are:

- The scheme is an occupational pension scheme which will be managed by a trustee corporation broadly in line with existing pensions legislation.
- The trustee must admit employers who are obliged to automatically enrol jobholders to the scheme.
- A members' panel and employers' panel will be set up so that the trustee can consult with members and participating employers about the operation, development and amendment of the scheme, as appropriate.
- Each member will be allocated a pension account, which comprises the member's contributions, employer contributions and any sums credited to that account (including investment returns) but excludes any expenses that the trustee can properly deduct from the account.
- The maximum amount of annual contributions that can be made in respect of a member will be £3,600 (based on 2005 earning levels). The draft Pension Scheme Order 2009 also states which payments are excluded from the definition of contributions.
- Investment funds are arranged by the trustee. Where the member does not expressly choose how their assets will be invested they will be allocated a default investment fund.
- Member benefits will be paid out at any time between normal minimum pension age and age 75. Incapacity benefits may be paid earlier at the trustee's discretion.
- Lump sum death benefits must be paid to a nominated beneficiary if the member dies before age 75 and are not paid at the discretion of the trustee.
- There are restrictions on transfers in and out of the scheme.

Comment. It is interesting that the personal accounts scheme does not have a single retirement age and that members can take their benefits between normal minimum pension age and age 75 to provide maximum flexibility for members. Also, because lump sum death benefits are not paid at the discretion of the trustee, the payment may be subject to inheritance tax. It will be interesting to see how the government will respond to this if it becomes an issue.

Source: Consultation on Draft Scheme Order and Rules, 28 April 2009, <http://www.dwp.gov.uk/consultations/2009/draft-scheme-order-and-rules28april2009.pdf>.

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