

Upper Tribunal criticises size of the £5 million contribution notice in the Bonas case

In June of last year The Pensions Regulator (TPR) issued, for the first time, a contribution notice of just over £5 million, ordering a Belgian company, Michel Van De Wiele, (VDW) to make good a gap in the pension scheme (Scheme) of its UK subsidiary, Bonas UK Limited (Bonas), which it claimed had been placed into administration to avoid maintaining the Scheme.

Since April 2005, TPR has had the ability to issue a contribution notice in certain circumstances. Under a contribution notice, a person (which can include individuals as well as companies) can (in broad terms) be made liable for a pension scheme's underfunding if they have been a party to an act/"failure to act" designed to avoid a pension scheme's liabilities. In this case, the relevant test for issuing a contribution notice was whether the main purpose or one of the main purposes of the act/failure to act prevented or potentially prevented recovery of a statutory employer debt to the Scheme. Any issue of a contribution notice must also be reasonable in TPR's opinion.

VDW appealed to the Upper Tribunal. As part of that appeal, VDW made an interlocutory application to strike-out TPR's case. The Upper Tribunal rejected the strike-out application as TPR had a real, and not simply fanciful, prospect of success. It also found that TPR was not permitted to appeal its own decision and TPR was prevented from widening its pursuit to seek a contribution notice against Bonas' managing director (as well as VDW) as it had already ruled this out.

The ruling was principally concerned with procedural matters. However, it did make a number of interesting observations:

- A "failure to act" means that "...a person has perceived different possible steps and has decided not to take a step which he might, not necessarily ought, to have taken." There could be a failure to act even where there was no duty to act. So,

for example, the decision not to engage with the trustees and TPR on Bonas' administration could be considered to be a deliberate "failure to act" in this case;

- The "main purpose" test consists of subjective and objective elements;
- The £5 million demand in the contribution notice may be unsustainable. The £5 million demand reflected the amount needed to cover compensation under the Pension Protection Fund. The Upper Tribunal observed that a contribution notice should compensate a scheme for the detriment suffered as a result of the act/failure to act. It should not act as a penalty. It should generally represent "...the amount by which the sum which should have been available in the administration exceeds the sum actually available." This issue, however, would need to be examined in detail at the full trial.

Comment

The case now proceeds to full trial and it will be interesting to see whether VDW is successful in its appeal. At the very least, it would seem that the size of the contribution notice is likely to be reduced.

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