Client briefing

Fine for failure to obtain audited accounts

The Pensions Regulator

Fine for failure to obtain audited accounts

The Regulator's Determinations Panel has imposed a £500 on each of four trustees of an occupational DB pension scheme. The fines were imposed because the trustees of the Pakistan International Airlines Retirement and Death Benefits Plan failed to comply with their statutory duty to obtain audited accounts and an auditor's statement, for two years running. The scheme actuary reported the breaches to the Regulator, who contacted the trustees. Despite this, the trustees were slow to rectify the breach in relation to the 2015 accounts and the 2016 accounts were still outstanding at the time the fines were imposed.

This is the first time that the Regulator has used its powers under section 10 of the Pensions Act 2004 in relation to this type of breach. The level of the fines was set after drawing a comparison with the failure to submit a scheme return, for which a fine of £500 would ordinarily be imposed.

Fine for failure to provide a workplace pension

The Regulator has criminally prosecuted an employer and its managing director for failure to provide a workplace pension for its staff. Having pleaded guilty, Stotts Tours (Oldham) Limited and Mr Stott will have to pay more than £60,000 between them for breach of their duties.

This is the first time that the Regulator has exercised its powers under section 45 of the Pensions Act 2004 to bring such a prosecution.

Confiscation of assets

In another first, following the Regulator's application under section 16 of the Pensions Act 2004, four people have been ordered by the High Court to repay funds that they dishonestly misused or misappropriated from a pension scheme.

The defendants conned their 245 victims into transferring money from a legitimate scheme to one of eleven scam schemes. The Regulator reports that "victims were told that if they transferred their pension post to the schemes they would receive a tax-free payment commonly described as a "commission rebate" from investments made by the pension scheme." Victims were also promised a rate of return of 5% pa on their investments following the transfer.

The order will allow the independent trustee appointed by the Regulator to take over the running of the receiving schemes, to seek confiscation of the scammers assets for the benefit of their victims.

Fine for failure to provide information

Dominic Chappell has been found guilty of neglecting or refusing to provide information and documents to the Regulator, without reasonable excuse. Mr Chappell was the majority shareholder in the company that bought BHS for £1. The Regulator had required him to provide information into the sale and then collapse of BHS, and in relation to a possible unauthorised disclosure of restricted material.

Mr Chappell is due to be sentenced on 23 February 2018 and an unlimited fine can be imposed.

This is the fifth criminal conviction secured by the Regulator for failure to comply with notices issued under section 72 of the Pensions Act 2004.

Pensions Protection Fund

Levy rules

On 19 December 2017, the PPF confirmed the rules governing the levy calculation for the year 2018/19. Although the levy has decreased from £615million to £550million, the savings are focused on small and medium-sized employers and it is anticipated that some schemes supported by larger employers will see a significant increase in their levy payment.

Contingent asset arrangements

The PPF has also published revised documentation and guidance for certifying contingent asset arrangements that are entered into on or after 18 January 2018.

Recent cases

Severing the final salary link - Wedgewood Pension Plan Trustee Ltd v Salt (2018) EWHC 79 (Ch)

This case considered whether a restriction in the scheme's power of amendment prevented the scheme's effective closure to future accrual prior to it entering into a PPF assessment period. If the amendment was not effective, members who remained employed after the purported closure would be entitled to a higher level of PPF compensation.

The trust documents provided that the principal employer could amend the rules "provided always that no alteration modification or addition shall be made which … shall prejudice or adversely affect … the rights of any member."

Amongst the issues considered by the court, it was held that the fetter in the scheme's amendment power applied only in relation to the members' rights accrued at the date of the amendment, and did not cover any rights that might be obtained as a result of future service.

The two Employment Appeal Tribunal cases of *Sargeant* and *McCloud* both concern age discrimination in relation to public sector pension reforms. At first instance, the Employment Tribunals appeared to reach incompatible decisions on similar facts.

Age discrimination - Sargeant and others v London Fire and Emergency Planning Authority and others EAT/0116/17 and

McCloud and others v Lord Chancellor and Secretary of State for Justice and another ET/2201483/2015

In both cases before the ETs, transitional provisions had been enacted that allowed older members of the relevant public sector pension scheme to remain in the more generous scheme, whilst younger members received either tapered or no protection and membership of a less generous scheme.

In the case of *Sargeant* (concerning the firefighters pension scheme), the ET held that the age discrimination was objectively justified, because it was a proportionate means of achieving legitimate aims. Whereas, in *McCloud* (concerning the judicial pension scheme), the ET concluded that the discrimination was not objectively justified because the Government's aims were not legitimate and that, even if they had been, the means of achieving them was not proportionate.

Appeals were made in both cases.

In *Sargeant*, the EAT agreed with the ET that legitimate aims existed, but held that the ET had not correctly considered whether the means of achieving those aims were proportionate i.e. whether there is a less proportionate way of achieving the aim. The case was remitted back to the ET on this basis.

In *McCloud*, the EAT again found that the Government's aims were legitimate, but upheld the ET's finding that the means of achieving those aims was not proportionate. The discrimination was therefore unlawful. Permission has been granted to appeal to the Court of Appeal.

These decisions provide a helpful reminder of the process to be followed in deciding whether discrimination is objectively justified. They also open up the possibility of scrutiny of similar arrangements that were made in relation to other public sector schemes.

RPI - British Telecommunications plc v BT Pension Scheme Trustees Limited and another (2018) EWHC 69 (Ch)

BT sought clarification from the court about whether the rules of its pension scheme allowed a switch from RPI to CPI for the purposes of calculating pension increases. The court held that the change could not be made, as the RPI had not "become inappropriate".

The decision turned on the exact wording in the rules of the BT scheme. The relevant rule provided that pension increases would be calculated by reference to the increase in the "cost of living" where "*the cost of living will be measured by the Government's published General (All Items) Index of Retail Prices or if this ceases to be published or becomes inappropriate, such other measure as the Principal Company, in consultation with the Trustees, decides.*"

The court held that, as a matter of construction, the question of whether RPI had become inappropriate was a one of objective fact. In the absence of agreement between BT and the trustee, the question could be determined by the court. The court held that RPI had not "become inappropriate", so the opportunity for the parties to agree on an alternative measure was not triggered.

BT has confirmed that it intends to appeal the decision.

Also in the news

Collective Defined Contribution scheme

Royal Mail has reached an agreement with the Communication Workers Union to close its final salary scheme and instead offer membership of the UK's first collective defined contribution (CDC) scheme.

A CDC scheme is similar to a normal DC scheme, in that the individual member's benefits are determined by reference to contributions paid in, plus (or minus) investment returns. However, in a CDC, members pay into a collective pot which targets a particular benefit level in retirement. Although there is no guarantee that this target will be reached, economies of scale and access to different and longer term investments may offer a better investment return than traditional DC arrangements.

Before the Royal Mail CDC scheme can be set up, additional legislation will be required under the Pension Schemes Act 2015. The House of Commons Work and Pensions Committee launched an inquiry into CDC schemes on 24 November 2017, with responses requested by 8 January 2018. However, it is not anticipated that implementation of the necessary legislation will be imminent.

Looking ahead

General Data Protection Regulation

The Regulation comes into force on 25 May 2018 and will govern the processing of personal data. With no transitional period, the Trustees must be ready to comply with the requirements of the Regulation by this date.

Anti-money laundering

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 came into force last year, imposing new duties on trustees of occupational pension schemes. Depending on whether and when a scheme has paid particular categories of tax, trustees should already have registered with HMRC to provide certain information about the scheme and its beneficial owners. In relation to schemes required to register by 31 January 2018, HMRC has confirmed that it will not impose a penalty provided registration takes place by no later than 5 March 2018.

Protected rights

As part of the arrangements for the abolition of contracting-out on a protected rights basis, trustees of schemes that were contracted-out on this basis have had a statutory power to amend their scheme to remove relevant rules. On 5 April 2018, the period for exercising this statutory power ends.

Bulk transfers without consent

Under current legislation, members of a former contracted-out salary-related scheme, cannot be bulk transferred without their consent to a scheme that has never been contracted-out. Since the abolition of contracting-out on 6 April 2016, it has therefore not be possible for such a transfer to take place to a new scheme.

Towards the end of last year, the Department for Work and Pensions published a consultation on regulations that would address this issue and allow such transfers to be made in certain circumstances. The consultation closed on 17 January 2018. Although no response to the consultation has yet been published, it is anticipated that the amending regulations will come into force on 6 April.

Auto-enrolment contribution rise

On 6 April 2018, the statutory minimum employer contribution for an auto-enrolment DC scheme, will rise to 2%, and the minimum total contribution (for employer and employee, including tax relief) will increase to 5%.

On 6 April 2019, these will increase again to 3% and 8% respectively.

Restrictions on statutory transfers

In August 2017, the DWP and HM Treasury published a joint paper on various measures aimed at addressing the growing issue of pension scams. Included in the paper was a proposal to restrict members' right to a statutory transfer where the receiving scheme may be fraudulent. It is anticipated that these restrictions will be finalised later this year.