employment unit focus

Sacker & Partners' Employment Unit draws together the firm's wide experience of working with employers and trustees on employment issues as they relate to pensions. In this newsletter we focus on three employment-related issues which have hit the headlines recently, and how they impact on pension schemes.

Maternity leave – is it all pensionable?

Recent changes to sex discrimination laws have caused schemes to start questioning whether all of an employee's maternity leave now needs to be pensioned.

In recent years, schemes have been required to pension ordinary maternity leave ("OML" – the first 26 weeks, when basically all employment terms other than salary continue). However, they only need to pension additional maternity leave ("AML" – the next 26 weeks when only minimal employment terms have continued) when it is paid.

For employees giving birth to children after 5 October this year, however, AML will start to be treated the same as OML for most purposes, but not for pensions.

The reason is that UK maternity and sex discrimination laws have changed[1] following a successful Equal Opportunities Commission challenge[2] that the old legislation did not reflect European Court of Justice (ECJ) decisions. This means that the UK can no longer maintain the same distinction in the treatment of benefits between OML and AML.

The case does not go so far as saying that normal remuneration (as opposed to benefits) needs to be continued, but there is some uncertainty whether pensions are benefits or remuneration for maternity leave purposes. The courts have previously decided that pensions are like pay[3], but could conceivably take a different view here.

Helpfully, the Government has indicated that it does not think unpaid AML needs to be pensioned and this view is now reflected in amendments to the maternity law affecting pensions[4].

So for now schemes should not need to change their practice on pensions, but just keep an eye out for future developments. Of course the whole debate may become academic in the next few years if the UK Government carries through its proposals to extend the right to pay to all maternity leave (which would make the full period pensionable under current laws).

Why changing administrators might not change the people administering the scheme

Employment rights have long been protected on business sales, with TUPE[5] meaning the buyer takes on liability for the seller's employees. But for a long time it has been less clear whether a change of service provider would be caught by TUPE too. Changes to TUPE in recent years have tried to make things clearer, and the result is that it is now safest for schemes to assume that TUPE will apply to a change of administrators.

The key is that TUPE will apply to the transfer of an "organised grouping" of employees – which could even be a single employee – which has the "principal purpose" of providing services on an ongoing basis to a client (e.g. a pension scheme trustee).

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1 Sex Discrimination Act 1975 and Employment Rights Act 1996

2 Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] IRLR 327

3 Barber v Guardian Royal Exchange [1990] 2 All ER 660

4 Maternity and Parental Leave etc. Regulations 1999 (as amended in 2008)

5 The Transfer of Undertakings (Protection of Employment) Regulations 1981 and now 2006

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The extent to which work done for a client is an employee's principal purpose will vary from case to case, but generally speaking where an individual spends at least 50% of his or her time on one client, TUPE could well apply. Employment Tribunals have been reluctant to put a figure on this, but have accepted that an employee spending 70% of their time working for a client was primarily engaged in a business and therefore transferred by TUPE, even though they also worked on other accounts.

Therefore, when trustees are changing administrators they need to consider how employees will be treated on termination of the contract. For example, is it expected that employees working on the account will be taken on by a subsequent service provider? If not, how will the parties deal with any dismissal costs? (Dismissals in connection with a TUPE transfer are automatically unfair). The tender process is an ideal starting point to flush this out, when providers are in the process of pricing their services to the trustees.

Trustees should take steps to ensure that any new service agreement contains specific provisions for dealing with TUPE issues on termination, and should ideally seek an indemnity from the provider for employee costs on subsequent changes.

Full benefits for Civil Partners?

In the UK, the Civil Partnership Act 2004 (CPA) provides that civil partners are entitled to receive contracted-out survivors' benefits relating to service on or after 6 April 1988 (the date that contracted-out benefits for widowers were introduced) and all other survivors' benefits relating to service on or after 5 December 2005.

However, unless schemes decide to be more generous, civil partners don't get the full benefits a spouse would be entitled to. It is this limitation that has recently been called into question by a decision of the ECJ.

In the case in question, Mr Maruko claimed that he was discriminated against on the grounds of sexual orientation[6]. He had entered into a registered partnership agreement under German law (akin to the UK's civil partnership), but when his partner died, Mr Maruko was refused a survivor's pension because they had not been married.

That the ECJ held it was discriminatory not to pay a survivor's pension to a same sex partner was not surprising given that the Framework Directive on Equal Treatment now prevents discrimination on the grounds of sexual orientation throughout the European Union (EU). But the interesting aspect of this case is that the ECJ saw no reason why a same sex partner should not receive the full pension a spouse would have received, rather than only the pension accrued since the date same sex partners became protected under German law. This begs the question of when it is appropriate for Governments to impose time limits on backdating discrimination claims which originate from EU law.

So does UK law go far enough in the light of Tadao Maruko? Clearly the ECJ has been prepared to limit discrimination claims in the past (e.g. limitations currently apply to part-timers claims[7] and in equalising benefits between men and women[8]). However, this decision may well suggest that the ECJ is not willing to have limits in all cases.

The decision does not mean that trustees must automatically extend benefits now, as the existing restrictions remain in place under the CPA. But it is conceivable that we will see a future challenge.

6 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen (C-267/06)
7 Preston v. Wolverhampton Health Care NHS Trust [2001] 3 All ER 947
8 Barber, see footnote 3

We work closely with our clients to deliver a first-class service. To discuss any issues raised in this newsletter, please contact either:

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