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DISPUTES – DRAFT REGULATIONS AND CODE ON TRIAL

1 INTRODUCTION

Are there signs that the Government is listening to trustees' concerns about the regulatory burden on pensions? Hot on the heels of the Deregulatory Review¹ comes a genuine piece of simplification – the introduction of the option to have a simplified single stage internal dispute resolution procedure (IDRP).

On 25 October, showing a level of cooperation which belies the subject matter (!), the Department for Work and Pensions (DWP) published draft Regulations² and the Pensions Regulator published a draft Code of Practice³ for consultation. The consultation periods close on 18 and 19 December 2007 respectively.

2 KEY POINTS

- The new provisions will allow for the introduction of a single stage IDRP. But some schemes may wish to keep their existing two-stage IDRP (section 4).
- The new framework requirements are designed to allow for a scheme specific IDRP (sections 5 and 6).
- IDRP decisions must be made within a “reasonable period”, although further clarity on what this means for a two-stage procedure would be helpful (section 7).

¹ See our Sackers Extra Alert – “Action and Reaction: MNTs and the Deregulatory Review“ dated 26 October 2007

² The draft Occupational Pension Schemes (Internal Dispute Resolution Procedures Consequential and Miscellaneous Amendments) Regulations 2008

³ Code of Practice: Dispute resolution – reasonable periods

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3 THE STORY SO FAR

The road to the simplified single stage IDRPs has taken a number of twists and turns. The amendments proposed to section 50 of the Pensions Act 1995 (PA95) to allow for a single stage IDRPs⁴ were originally slated to come into force on 6 April 2006. However, these included the condition that the "trustees" make the decision at each stage – with no option for them to delegate their decision-making powers. This would have ruled out the possibility of delegating a first stage decision (as some schemes do) to, say, the pensions manager.

As a result of concerns raised by Sackers (and, we suspect, others), the DWP decided not to implement the revised IDRPs provisions. Changes were then introduced in the Pensions Act 2007 to ensure that the provisions gave the flexibility promised. After a delay of two years, the new provisions on IDRPs will now come into force in April 2008.⁵

4 IN BRIEF

In a move away from the prescriptive two-stage IDRPs required by PA95, the amended provisions will leave it up to scheme trustees to design a process for dealing with pension disputes which is appropriate for their scheme. This can be a single stage or a two-stage procedure, provided that it complies with the new requirements. We anticipate that many schemes will wish to retain their current two-stage procedure to settle clear-cut disputes quickly or weed out spurious claims.

In order to test whether a current IDRPs will continue to comply post-April 2008 trustees should be asking themselves:

- Does the IDRPs meet the framework requirements? (see sections 5 and 6)
- Do the time limits built into the current IDRPs meet the Pensions Regulator's proposed requirements as to "reasonable periods"? (see section 7)

⁴ Included in the Pensions Act 2004

⁵ Any "disagreement which is ongoing" before 6 April 2008, should be dealt with under the current IDRPs

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5 FRAMEWORK REQUIREMENTS

The trustees must ensure that the scheme has an IDRPs which deals with the following essential requirements:

- The manner in which the application is to be made (including any time limits for making such an application).
- The particulars which must be included with the application.
- The manner in which decisions are to be reached and given.
- A statement notifying the applicant of the services of the Pensions Ombudsman, to be included with the trustees' decision.

6 WHO MUST MAKE THE DECISION?

If the trustees choose to operate a two-stage procedure, a third party – typically the pensions manager – can decide the dispute at the first stage, provided that if the applicant wants to take the matter further the procedure enables that person's decision to be "confirmed or replaced" by a decision of the trustees.

But as the statutory default is that the dispute must be decided by the trustees (or a sub-committee of the trustees), so if the trustees wish to operate a single stage IDRPs, they cannot take advantage of the flexibility to allow a third party to make the decision.

7 REASONABLE PERIODS

Application

The reasonable period for making an IDRPs application is within six months from

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the date the applicant ceased to be a person with “an interest in the scheme”⁶.

The draft code says that “the Pensions Regulator would not normally expect an application received within the reasonable period to be refused”. But this period may need to be extended where the person could not reasonably have known about the dispute or because of exceptional reasons, such as incapacity.

Making the decision

The current legislation requires that the two-stage IDRPs is completed within 10 months of the application. But in the future time limits will be governed by the draft code which sets out the Pensions Regulator’s expectations of what constitutes “reasonable periods” for dealing with a complaint.

- Under the code, the trustees must make a decision within four months of receipt of the application. (The code notes that this period is “thought to be appropriate as it fits in with a timetable of quarterly trustee meetings”.)
- However, the code does not differentiate between schemes which operate a single stage IDRPs and those which have a two-stage procedure. Although not made explicit in the code, we understand that the Pensions Regulator’s view is that the draft code does not need to specify a reasonable time period for the (“informal”) first stage of a two-stage procedure as the trustees are not making the decision at this stage.
- So, reading between the lines, provided it is reasonable in the context of the scheme, an existing two-stage procedure which sets 10 months as its allowed time frame could comply with framework requirements. Nevertheless, it would be helpful to have clarity on this issue within the code.

⁶ The key change from the current list of potential applicants is the addition of a “surviving non-dependant beneficiary of a deceased member” i.e. presumably a person who could be entitled to a lump sum death benefit

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Notification of Decision

- Applicants should be informed of the IDRPs decision “usually no later than 15 working days after the decision has been made”.

8 AND FINALLY ...

Initial concerns that members could abandon the IDRPs in favour of a complaint to the Pensions Ombudsman seem largely unfounded.

Although existing Regulations provide that the Ombudsman is prevented from investigating any complaint until the IDRPs is complete, section 50 requires that once the Ombudsman takes on the dispute the IDRPs ceases. But we understand that this is designed to allow flexibility for the Ombudsman to take on a complaint where there is no reasonable prospect of it being settled by the IDRPs. Indeed, the Ombudsman’s Annual Report states that he declined to take on 229 complaints (or approximately 7% of the total) in 2006-7 because they had not been through the IDRPs.