Sackers extra

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At a glance

FINANCIAL ASSISTANCE SCHEME
- FAS guidance on calculation of expected pension
- The use of residual assets

FINANCIAL SERVICES AUTHORITY
- FSA publishes annual report for 2009/10

HM TREASURY
- Spending review spotlight on public sector pensions

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)
- OECD publishes Working Paper 2: "Assessing Default Investment Strategies in Defined Contribution Pension Plans"

THE PENSIONS INSTITUTE (PI)
- Back to the Future: A Long Term Solution to the Occupational Pensions Crisis

THE PENSIONS REGULATOR
- Employer covenant on TPR's radar

CASES
- Ward Hadaway Solicitors v Love and others (Employment Appeals Tribunal)

SO7

Abbreviations commonly used in 7 Days

Alert/News: Sackers Extra publications (available from the client area of our website or from your usual contact)
DB: Defined benefit
DC: Defined contribution
FAS: Financial Assistance Scheme
FSA: Financial Services Authority
HMT: HM Treasury
PPF: Pension Protection Fund
TPR: The Pensions Regulator

FINANCIAL ASSISTANCE SCHEME

The PPF is now responsible for administering FAS and has recently published guidance on specific issues.

FAS guidance on calculation of expected pension

Members of pension schemes for which the FAS assumes responsibility can see their benefits topped up, up to a total of 90% of their accrued pension as at the start of wind-up, revalued to their eligibility date (subject to a cap). This revalued pension amount is known as the member's "expected pension".

The PPF (which is now responsible for FAS compensation) notes that in some circumstances trustees may need to calculate what 90% of expected pension is to inform their decisions. It has therefore published a guide which is designed to help trustees understand how to calculate 90% of expected pension.

The use of residual assets

The PPF also notes that some FAS qualifying schemes which have wound up have been left with residual assets after initially discharging members' liabilities. It therefore advises trustees that if residual assets are left in a scheme where it would not be cost effective to divide these amongst members, they can consider applying to the FAS scheme manager to transfer these assets to the Secretary of State.

Application to Transfer Residual Assets

FINANCIAL SERVICES AUTHORITY

FSA publishes annual report for 2009/10

The FSA has published its Annual Report, in which it outlines progress against the objectives set out in its 2009/10 Business Plan and the FSA's statutory objectives.

In his foreword to the Report, FSA chairman, Lord Turner, notes that over the last three years, "the FSA has transformed its approach to regulation and supervision and as a result has had to go through a process of intense internal change". The FSA considers that key elements of this transformation process include:

- a changed approach to prudential supervision and in particular to the supervision of high impact firms, including stress testing, accounting reviews, challenges to business models, detailed liquidity assessments and reviews of remuneration policy;

- increased involvement in the international and European forums (including the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) to help drive global agreement on the complete revision of the prudential regulatory regime;

- change to the FSA's enforcement approach, aiming for "credible deterrence" and pursuing market abuse and inadequate management responsibility more aggressively. The FSA notes that sustained investment in this over the last three years has resulted in major successes in 2009/10; and

- the launch of a new approach to "conduct risk", improving customer protection in retail markets by earlier intervention to reduce the scale and frequency of problems that lead to customer detriment.

FSA Press Release

HM TREASURY

Spending review spotlight on public sector pensions

Public sector pensions have been identified as key area for scrutiny in the Coalition Government's forthcoming Spending Review.

On 8 June 2010, the Chancellor of the Exchequer, George Osborne, and Chief Secretary to the Treasury, Danny Alexander, announced details of how the next Spending Review will be conducted. The Spending Review, which is due to conclude in the autumn, will set spending limits for every Government department for the period 2011/12 to 2014/15.

In its Spending Review Framework, the Government notes that the Review will "set out a long-term vision for public services and a programme of key reforms to deliver that vision, including the specific actions being taken to implement reforms". In terms of pensions, it will "set out its plans to reform the welfare system, and to restrain the costs of public sector pay and pensions", stating that "The more that can be achieved in these areas, the more the Government will be able to do to protect jobs and spending on frontline public services".

HM Treasury Press Release

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

OECD publishes Working Paper 2: "Assessing Default Investment Strategies in Defined Contribution Pension Plans"

The OECD's Working Paper 2 assesses the relative performance of different investment strategies for different structures of the payout phase.

It looks, in particular, at whether the specific glide-path of life-cycle investment strategies and the introduction of dynamic features in the design of default investment strategies affect retirement income outcomes significantly.

Perhaps unsurprisingly, the analysis concludes that there is no "one-size-fits-all" default investment option, with both life-cycle and dynamic investment strategies delivering comparable replacement rates adjusted by risk. However, its findings show that life-cycle strategies which maintain a constant exposure to equities during most of the accumulation period, switching swiftly to bonds in the last decade before retirement, seem to produce

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better results and are easier to explain. By contrast, dynamic management strategies are found to provide higher replacement rates for a given level of risk than the more deterministic strategies, at least in the case of pay-outs in the form of variable withdrawals. In addition, the length of the contribution period also affects the ranking of the different investment strategies, with life-cycle strategies having a stronger positive impact where the contribution period is shorter.

THE PENSIONS INSTITUTE (PI)

Back to the Future: A Long Term Solution to the Occupational Pensions Crisis

The PI has published a discussion paper which looks at the future for occupational pension schemes.

The report's author, Charles Sutcliffe, considers the trend in the UK and elsewhere to replace DB schemes with DC alternatives. He notes that "DC schemes have some substantial weaknesses, and a continuation of current policies will probably lead to another pensions crisis in a few decades."

The report suggests an alternative solution, of using single premium deferred annuity arrangements (SPDAs) "which would avoid the major defects of DC schemes". These are described as looking like career average revalued earnings (CARE) schemes to the members, but due to their funding by way of SPDA, appearing like a DC scheme to the employer. With SPDA arrangements, pension provision is outsourced to specialist providers (insurance companies), meaning that the risk (and the decisions that must be made by members of a DC scheme) is managed by insurers, not the employer or the scheme members.

THE PENSIONS REGULATOR

Employer covenant on TPR's radar

The Pensions Regulator has published a statement on "Understanding employer support for DB schemes".

The statement builds on last year's focus on scheme funding and covenant and outlines TPR's main expectations of trustees of DB schemes in relation to the employer covenant. It also flags that guidance on this issue will be published for consultation "in the coming weeks".

The statement sets out TPR's main expectations of trustees in relation to the employer covenant. By way of example, TPR notes that:

- trustees should ask probing questions to properly understand the employer's covenant and where they have any doubts about their ability to do this, "they should engage the right professional help";
- all trustees should have a framework for assessing, reviewing, and monitoring their employer's covenant, which is viewed by TPR as being just as important to "the security of the scheme as monitoring fund performance"; and
- trustees and employers should prepare plans for realising the employer support standing behind a scheme, should this become necessary.

In addition to TPR's forthcoming guidance on monitoring employer support, it also intends to issue for consultation guidance for trustees of multi-employer schemes. TPR notes that this

guidance will explain the importance of understanding who is legally responsible for supporting the scheme's liability and how to assess the strength of the covenant, as well as the options for mitigating the risk to the scheme when one of the participating employers leaves.

For more information, please see our Alert: "Employer covenant on TPR's radar"

TPR Press Release

CASES

Ward Hadaway Solicitors v Love and others (Employment Appeals Tribunal)[1]

This decision of the Employment Appeal Tribunal (EAT) considered the extent to which there had been "service provision change" under TUPE[2] (which would lead to a transfer of staff from one firm to the next), when a client moved its business from one firm of solicitors to another.

Background

Ward Hadaway Solicitors (WHS) was one of a number of law firms which provided legal services to the Nursing and Midwifery Council (NMC). The NMC was not obliged to award contracts to WHS, just as WHS was not obliged to accept them. In 2005 there was a period of around six months when no work was allocated to WHS, when they did not have capacity to take new work on.

In 2007, the NMC decided to tender its work and chose Capsticks Solicitors as the single provider of its legal services. The contract with WHS terminated, but ongoing matters remained the responsibility of WHS until those matters were closed.

L and S were solicitors employed by WHS. They sought a declaration of terms of conditions and subsequently claimed unfair dismissal.

Service provision changes

Under TUPE, a service provision change occurs when "activities" previously carried out for a client are transferred to another person or organisation. TUPE will apply to a transfer of an "organised grouping" of employees (which could comprise just one employee) where the "principal purpose" of the organised grouping is to provide a client with services on an ongoing basis.

Decision

In the employment tribunal, WHS had argued that the transfer of the NMC contract amounted to a transfer under TUPE. It claimed that the contracts of all solicitors and other staff who worked primarily on the NMC contract should automatically become Capsticks' responsibility. However, the employment tribunal (ET) held that only work in progress (as opposed to the expectation of future work) constituted activities under TUPE. This meant that the solicitors did not transfer under TUPE

In dismissing WHS's appeal, the EAT pointed to the ET's finding that work in progress for NMC had continued unabated in 2005 when its availability to take on new work had ceased. It found that "the Tribunal cannot be faulted in its clear decision that the activities for the purposes of a service provision change were the work in progress."

[1] 25 March 2010 (EAT No. 0471/09)

[2] The Transfer of Undertakings (Protection of Employment) Regulations 2006

Comment

This decision brings some clarification on the scope of service provision changes and will be welcomed by contractors and service providers alike. However, it may have been influenced by the fact that WHS were still engaged to complete the run-off work for NMC and was therefore likely to keep solicitors L and S engaged for some time. Should the run-off work also have transferred, the decision may have been different.

For trustees and employers of occupational pension schemes, a service provision change is most likely to arise when a scheme's administration service provider is changed. Given that in these circumstances, the impetus for a change of administrator may be a wish to change the personnel, it is worth considering when signing a new administration agreement how an administrator's employees are to be treated on the termination of a contract.

For more information, please refer to our "Employment Unit Focus" dated September 2008, which can be found in the client area of our website.

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