Sackers extra

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At a glance

LEGISLATION
- The Pensions Bill 2010-11

GOVERNMENT ACTUARY'S DEPARTMENT
- GAD Annual Report 2010/11

NATIONAL EMPLOYMENT SAVINGS TRUST
- Employers sign up to NEST ahead of auto-enrolment

THE PENSIONS REGULATOR
- TPR statement: The role of trustees in DC schemes

CASES
- Court of Appeal confirms High Court ruling in Lehman / Nortel insolvencies

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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
DWP: Department for Work and Pensions
FAS: Financial Assistance Scheme
GAD: Government Acuary's Department
HMRC: HM Revenue & Customs
NEST: National Employment Savings Trust
PPF: Pension Protection Fund
TPR: The Pensions Regulator

LEGISLATION

The Pensions Bill 2010-11

The Pensions Bill is due to have its third reading in the House of Commons on 18 October 2011. During this sitting, the Bill will undergo both the report and third reading stages.

Proposed amendments to be considered include:

- changes to the definition of "money purchase benefits", following the decision in the *Bridge Trustees*[1] case and the DWP's subsequent announcement that it would legislate in order to provide certainty for pension scheme members; and
- delaying the increase of the State Pension Age (SPA) to 66 by six months from April to October 2012 (as announced by the Welfare Secretary, Iain Duncan Smith) so as to reduce the impact on women in their late 50s.

The Bill is expected to receive Royal Assent following the third reading. We will be issuing an Alert when Royal Assent is granted.

GOVERNMENT ACTUARY'S DEPARTMENT

GAD Annual Report 2010/11

GAD has published its annual report for 2010/11, outlining its achievements over the past 12 months and its plans for the next three years.

Looking ahead, issues on GAD's agenda include:

- helping clients with the analysis required to take forward scheme design changes which result from the report of the Independent Public Service Pensions Commission (chaired by Lord Hutton); and
- any transition which may be required in connection with staff transfers once the outcome of the review of the Fair Deal policy is announced.

[1] Please see our Alert: Bridge too far? DWP set to legislate dated 28 July 2011

NATIONAL EMPLOYMENT SAVINGS TRUST

Employers sign up to NEST ahead of auto-enrolment

NEST has announced that nearly 100 employers have so far signed up to NEST, ahead of the introduction of automatic enrolment in 2012.

Tim Jones, Chief Executive of NEST Corporation, notes that NEST has been launched progressively over 2011 with volunteer employers, to ensure that it works well for employers of all sizes.

Jones explains that "Many of these employers are joining NEST and getting ready for automatic enrolment well ahead of their staging dates, which is incredibly encouraging. Others are getting their plans in place ready for automatic enrolment and using NEST as part of their solution alongside other schemes - that's exactly the role NEST is here to play."

For its own staff, NEST will offer both membership of NEST, plus a private top-up group personal pension scheme.

THE PENSIONS REGULATOR

TPR statement: The role of trustees in DC schemes

On 13 October 2011, TPR issued a statement aimed at trustees of DC schemes with more than 12 members, as well as qualifying schemes which are set up in anticipation of the introduction of automatic enrolment.

In this statement, TPR reminds trustees of the key differences between DB and DC schemes and emphasises that whilst governance functions may be similar, steps taken to manage these functions are not identical. It also clarifies TPR's expectations in terms of the behaviour it expects DC scheme trustees to demonstrate, for example, in relation to trustee knowledge and understanding, investment and administration.

TPR notes in particular, that it expects to see improvements in DC governance and that trustees should "embrace the behaviours outlined in this statement".

TPR also explains that its own longer term strategy in relation to DC schemes "will be to develop an operational framework which will enable us to determine compliance with standards of good practice and behaviours".

CASES

Court of Appeal confirms High Court ruling in Lehman / Nortel insolvencies

In a judgment handed down on 14 October 2011, the Court of Appeal has confirmed the High Court's decision that, where a financial support direction (FSD) is issued by TPR against a company in administration, the cost of complying with that direction is an expense of the administration. The FSD must therefore be paid before any distributions to unsecured creditors.

Background

In 2010, TPR published determinations to issue FSDs against companies within the Lehman Brothers and Nortel groups, both of which were involved in insolvency proceedings in the UK and elsewhere. In each group there was a significant employer debt.

The administrators of the insolvent companies in those groups challenged TPR's ability to enforce the FSDs. The administrators argued that they should not have to take the FSDs into account as they were not a provable debt (i.e. one which has arisen out of matters which have occurred, or begun to occur, prior to the insolvency cut-off date). TPR argued that it was an expense of the administration and should therefore be paid out before other creditors.

High Court decision

Briggs J held that he was bound by precedent to find that FSDs were an expense of the administration.

He noted, however, that the outcome is "likely to prove unfair to the creditors of an insolvent target" and suggested that the Government may wish to consider a suitable amendment, either to the Insolvency Rules or to the Pensions Act 2004 to address this.

The effect of the High Court judgment was to give FSDs and contribution notices "super priority" in an insolvency.

Court of Appeal Decision

The appeal against the High Court's decision was unanimously dismissed by the appeal court judges.

In particular, the Court of Appeal considered:

- whether the liability under an FSD or CN is a provable debt; or
- whether it is an expense in the administration.

The issues were considered in detail, but Lord Justice Lloyd ultimately concluded that the liability under an FSD or CN could not be classed as a provable debt in the administration of the companies concerned, as no prior legal obligation under the FSD regime existed before the companies entered administration. In reaching this decision, Lloyd LJ was bound by previous decisions of the Court of Appeal.

Following the principle in the *Toshoku* case[2] (as the High Court had done previously), where statutory liabilities were held to constitute liquidation expenses because they were "necessary disbursements" of the liquidator, Lloyd LJ held that, despite the anomalies which arise from categorising a liability under the FSD regime as an expense of the administration, Briggs J in the High Court had been right to reach this conclusion.

Lloyd LJ considered that there would be a greater anomaly if an FSD/CN were neither a provable debt nor an expense of the administration, as the only other alternative would result in what he described as a "black hole", namely, the possibility that the liability would not be met at all. Lloyd LJ noted that to conclude in favour of the black hole "would render

[2] [2002] 1 WLR 671

this particular regime entirely futile in relation to an insolvent target" and that it "must be relatively likely that the regime has to be used in relation to an insolvent target".

Comment

As with the High Court's decision in 2010, the effect of this judgment is to give FSDs and CNs "super-priority" in an administration or insolvency process. This means that, counter-intuitively, an FSD/CN has the potential to be of much greater financial value to a pension scheme if it is issued after a target enters into an insolvency process, rather than before doing so, raising the question of whether this could influence TPR and/or trustees' behaviour. However, although the amount of an FSD/CN is to be determined by TPR, it must be reasonable. Such a determination is also subject to review by the Upper Tribunal. The method of financial support provided is also subject to TPR's approval.

It now seems inevitable, given the importance of this case for banks and other creditors who remain below trustees on the priority ladder that the decision will be appealed to the Supreme Court. However, leave to appeal has yet to be granted.

For more background to TPR's determination and the High Court decision, please see 7 Days dated 13 December 2010.

TPR Press Release (14 October 2011)