21 May 2012

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S07

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
ECJ: European Court of Justice
FAS: Financial Assistance Scheme
GMP: Guaranteed Minimum Pension
HMRC: HM Revenue & Customs
NEST: National Employment Savings Trust
PPF: Pension Protection Fund
TPR: The Pensions Regulator

LEGISLATION

The Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2012

These regulations (which were published in draft earlier this year[1]) amend existing auto-enrolment legislation to implement the recommendations of an independent review of automatic enrolment. Among other matters they:

- amend the certification process for DC schemes; and
- make changes to allow an average salary scheme to revalue benefits under the scheme in line with the general level of prices.

The regulations come into force on 1 July 2012.

Explanatory memorandum

NATIONAL ASSOCIATION OF PENSION FUNDS (NAPF)

Telling Employers about DC Pension Charges: A Consultation

On 16 May 2012, the NAPF published a consultation document on a draft code of conduct for disclosing pension charges to employers.

The purpose of the draft code is to ensure that charges are presented to employers in a consistent way. This will help employers understand the impact charges will have on the retirement incomes of their employees and that will enable them to make informed choices about which scheme to use for automatic enrolment. Its key elements are:

- a requirement that all charges should be clearly and accurately stated in writing in a "summary of charges" document to an employer before the employer makes a choice of pension scheme, both for the charges borne by the employer and the employee; and
- a requirement to provide the employer with information in a standard format which will help employers make comparisons between schemes. A standard guide is proposed to help with comparing the effect of charges on the pension pots of sample employees and the services offered by the pension arrangement.

[1] See 7days dated 6 February 2012

The draft code is intended to apply to all parties providing services to employers in setting up and administering pension schemes. It will also apply to the default fund(s) used for automatic enrolment purposes.

The consultation closes on 4 July 2012.

Press release

NATIONAL EMPLOYMENT SAVINGS TRUST (NEST)

Employer plans for automatic enrolment

On 18 May 2012, NEST released top line results from its independent research into UK employers' readiness and plans for automatic enrolment, as well as their attitudes to NEST. The results focus primarily on employers in the first six to nine months of staging.

NEST intends to publish more data from this research at the end of the year.

PENSION PROTECTION FUND

Certification of block transfers

With the 29 June deadline for the 2012 certification of full block transfers approaching, the PPF has put together a user guide to help schemes understand when a full block transfer has taken place and what they need to do to certify it.

Strategic plan 2012

The PPF has published its strategic plan for 2012. Its objectives are:

- manage schemes through the assessment and wind-up processes in a timely and efficient manner;
- meet its funding target through prudent and effective management of its balance sheet;
- set and collect an appropriate levy and allocate it fairly;
- maintain its reputation by communicating clearly what it does and why;
- be an efficient and effective organisation where staff are recognised and valued; and
- maintain effective risk management in all areas of PPF business.

Press release

THE PENSIONS REGULATOR

Occupational pension schemes governance report

TPR has published its sixth scheme governance survey.

Its key findings included the following:

- larger schemes tend to be associated with higher levels of governance activity;
- the proportion of schemes that provide trustees with an induction programme of learning activities on appointment has declined;
- the number of trustees undertaking formal structured training remains low;
- most schemes report that default funds have been established principally on the basis of risk profile and appetite of scheme members;
- member communication is identified by schemes as an area where trustee boards can make improvements; and
- trustee boards' knowledge of DC scheme charges remains low. Additionally, a significant proportion of schemes are not confident that the charges incurred by their members offer value for money.

CASES

The Proctor & Gamble Company v Svenska Cellulosa Aktiebolaget and Another

This case gives the pensions industry long awaited guidance on the commercial application of the ECJ's decisions in *Beckmann*[2] and *Martin*[3] regarding the transfer of early retirement benefits under the Transfer of Undertakings Protection of Employment Regulations 2006 ("TUPE").

Facts

In 2007, the Proctor & Gamble Company ("P&G") sold its European tissue towel business to Svenska Cellulosa Aktiebolaget ("SCA"). 129 of the employees transferring to SCA under TUPE were members of P&G's defined benefit pension scheme (the "Scheme").

When the sale was completed and the employees ceased their employment with P&G they automatically became deferred members of the Scheme. This meant that, while they remained entitled to a deferred pension, they lost:

- the possibility of taking early retirement from age 55 with P&G's consent; and
- the possibility of accruing sufficient service (15 years) to qualify for the application of more generous reduction factors (together, these are called the "Enhancements").

TUPE

TUPE provides that obligations of the seller (in this case P&G) are transferred to the buyer (SCA) as though the contract of employment (and rights and obligations arising from the employment relationship generally) had been made directly between the buyer and the transferring employees.

[2] [2002] 64 PBLR
[3] [2003] 85 PBLR

However, TUPE contains an exemption in respect of benefits under occupational pension schemes relating to “old age, invalidity and survivors”. This means that such benefits do not transfer.

Two ECJ decisions (*Beckmann* and *Martin*) indicated that liability for early retirement benefits under an occupational pension scheme do transfer under TUPE as they do not fall within the exemption.

The dispute

For this reason, the sale and purchase agreement between P&G and SCA made provision for an adjustment to be made to the purchase price in respect of any pension obligations which SCA was liable to meet as a result of the operation of TUPE. Usually, in a case such as this, an indemnity would be agreed between the parties to cover the early retirement benefits. But this was not the case here and a dispute arose as to the appropriate adjustment.

P&G's advisers considered that no adjustment was required to the purchase price, whereas SCA's advisers set the adjustment at £19 million (broadly the estimated cost of providing early retirement pensions to all the transferring employees). These proceedings were brought to determine which liabilities transferred and therefore what needed to be valued.

Decision

The court concluded that, on the facts, the pension liabilities which transferred under TUPE from P&G to SCA were an entitlement to good faith consideration for early retirement benefits. However, it was then necessary to separate out from the package of "early retirement benefits", benefits which had already been fulfilled and which remained exercisable against the P&G pension scheme trustees, i.e. the employees' deferred pensions. Only the remainder transferred to SCA. Mr Justice Hildyard was satisfied that this conclusion "promoted the objective of TUPE [(and the underlying EU Directive)] of safeguarding the interests of transferring employees by vesting the discretionary power to provide early retirement benefits in the management of the entity that employs them".

In addition, it was made clear that this liability only covered the pension paid from age 55 (the earliest date on which benefits can be taken) to the member's normal retirement date (NRD). Pension payments made from normal retirement date are "old age benefits", are covered by the exemption to TUPE and, as such, do not transfer.

Comment

This is an unusual case as an indemnity was not agreed between the parties as is common. As a result it is a useful decision for those involved in putting a value on the pension liabilities which transfer under TUPE. The pragmatic limiting of early retirement benefits to those paid to NRD only is welcome.