ALLEN & OVERY

Pensions in Dispute

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Welcome to our quarterly pensions litigation briefing, designed to help pensions managers identify key risks in scheme administration, and trustees update their knowledge and understanding. This briefing highlights recent Pensions Ombudsman determinations that have practical implications for schemes generally. For more information, please contact pensions.team@allenovery.com .

A duty to inform, or a matter of good practice?

If a member chooses to do something which will trigger tax charges under a pension scheme, does the employer – or the scheme trustee – have a duty to warn the member what the consequences will be?

The question has come up recently in the *Cherry* determination, where a police officer was re-employed by his employer "to accommodate the needs of the Force" within a month of taking his Police Pension Scheme benefits based on a protected pension age. A protected pension age may apply where a member had a minimum pension age under the scheme rules at A-Day which was below age 55. If the member retires in reliance on this protected pension age between age 50 and age 55, then he or she must comply with specific restrictions (for example, on re-employment with the employer), otherwise the protected pension age will be lost.

As a result of his re-employment, the member in this case lost his protection. Past and future pension payments up to normal minimum pension age were unauthorised payments, triggering tax charges. The member complained that he should have been informed about the tax implications of re-employment.

Ombudsman's view

The Ombudsman determined that as a 'responsible employer', the Police Commissioner had a duty of care to provide relevant information about the tax implications of re-employment on the member's pension and should therefore bear the burden of the tax charges incurred by the member.

The House of Lords has previously held (*Scally*, 1991) that an implied contractual obligation may exist to provide information about pension scheme options where:

– a contract (which has not been individually negotiated) includes a term which makes available to the employee a valuable right which is contingent on action being taken by him; and

– the employee could not, in all the circumstances, reasonably be expected to be aware of the term unless it were drawn to his attention.

Where those conditions apply, an employer may be in breach of the duty if it does not take reasonable steps to draw an employee's attention to the existence of the right.

Our view

Should this case be taken as an indication that employers now have a duty of care to provide information to (but not advise) members about tax and pensions issues? Our view is that this interpretation is too simplistic.

It's important to remember that Pensions Ombudsman determinations are binding only on the parties involved. The case involved a complex piece of legislation, which is not common knowledge, and which applied to the member as a result of his re-employment at the request of the employer. The employer had also rather fallen on its sword by stating that a "responsible employer" would put systems in place to ensure that an individual could not be re-employed within a month. All these factors might suggest the case turned on its own facts.

The determination has parallels with *Scally* (see box) – both cases raise questions over the extent to which a duty may exist to provide relevant information to a member who cannot otherwise reasonably be expected to know it. The answer in each case may depend on the type of information involved. For example, in various cases tax tribunals have ruled that members should have been aware of the availability of lifetime allowance protections because of widespread media and government publicity. The outcome in *Cherry* may well be the right one in the specific circumstances, particularly given the complex rules involved, but that doesn't mean that employers should assume a duty of care will exist in every case.

In practice, many employers and trustees will want to assist employees by providing information – for example, about the further reduction in the lifetime allowance from 6 April 2016, and the further tax changes expected in the March 2016 Budget. However, that doesn't necessarily mean that they have a duty of care to do so in these circumstances – or that they would be exposed to a greater risk of liability to members if they choose not to do so and members trigger tax charges as a result. As we've seen, there is authority to suggest that members should be aware of changes of this type.

It may well be appropriate to take steps to alert members to relevant tax developments, in order to minimise the risk of future complaints – but in our view this should be seen as best practice rather than as a legal obligation. Any such communications should, of course, be as clear and accurate as possible, but ultimately it is members' responsibility to read and understand communications sent to them, to be aware of well-publicised tax changes, and to take their own advice where appropriate.

Correcting mistakes in pension scheme rules

The High Court has permitted a trustee to treat its scheme rules as continuing to include a clause on pension increases which had been deleted on a previous consolidation exercise, without pursuing a formal rule amendment or rectification order: *Re BCA Pension Trustees Ltd.*

The clause had indicated which rate of pension increase (statutory minimum or flat rate 3%) applied to which period of members' service. Without this provision, there was nothing to dictate which element of a member's pension should be increased by either rate. In the circumstances, Mr Justice Snowden was able to grant the order under a simplified court process, as there was clearly no intention to change the rule. However, he highlighted that members would remain free to contend for a different meaning.

Our view

The order has clarified an interpretation issue for the scheme, and provides protection to the trustee from claims that it is administering the trust wrongly, but has limitations in that it is not binding on members. This simplified method will not therefore be appropriate in all circumstances, but could be a useful and cost-effective route where members are unlikely to successfully pursue a claim for a different construction of the rules.

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