

news

Employer Debts and Multi-Employer Hybrid Schemes

The recent Pitmans case shed some judicial light on the rarely litigated area of section 75 of the Pensions Act 1995. The action by the trustees to recover a debt from the (last remaining) employer concerned the winding up of the BETEC Retirement Benefits Plan ("the BETEC Plan"). Whilst the trustees were temporarily unsuccessful in recovering the debt (for technical reasons), the case's overall importance for multi-employer and hybrid schemes cannot be ignored.

Background

A brief chronology

- In 1999, following an acquisition, the Roxspur Money Purchase Scheme was merged into the BETEC Plan. The merged scheme comprised both defined benefit (DB) and defined contribution (DC) benefits.
- Following a notice from the sponsoring employer, the trustees resolved to wind-up the BETEC Plan in May 2002.
- At this point, the only remaining employer in the BETEC Plan was Roxspur plc ("Roxspur"). Significantly, Roxspur only commenced participating in the BETEC Plan (DC section) in May 2000.

Section 75 debt

Action by trustees
to recover

- Section 75 of the Pensions Act 1995 broadly provides that, when a DB scheme winds-up in deficit, a debt is due from the employer to the trustees.
- But different sections of a scheme may be treated as separate schemes entirely ("sectionalised schemes"), provided certain criteria are met.
- The trustees claimed a debt in excess of £4.4 million from Roxspur, assessed on a gilts matching basis (which is typically higher than the equity-based minimum funding requirement).

Employer's arguments...

...against the debt

Roxspur essentially claimed that:

- the BETEC Plan was a sectionalised scheme (with its responsibility being confined to the DC section);
- it was not therefore liable for the DB debt because it had never been an employer in relation to that section;
- the gilts matching policy had not been properly implemented as it was not consulted on the changes to the Statement of Investment Principles ("SIP").

Sectionalised Scheme?

- The judge held that the scheme was a single scheme for the purposes of the debt on the employer legislation because:
 - there was a single trust covering both the DB and DC sections;
 - the rules made no distinction on an employer by employer basis between the DB and DC sections.
- This meant that Roxspur was responsible for the debt arising under the BETEC Plan *as a whole*.

Calculating the debt

Meaning of the "applicable time"

- The "applicable time" is the point during winding-up at which a scheme's assets and liabilities are assessed to determine whether there is a statutory debt.
- It has been previously argued that trustees may choose two or more "applicable times" (i.e. have more than one "bite at the cherry" so as to maximise a debt).
- Although not binding, the judge commented that it would be "odd" if the legislation allowed this.

The revised SIP

Meaning of "consultation"?

- The judge found that the SIP adopting the gilts matching policy was invalid because the employer was not properly "consulted" beforehand (as required by the legislation).
- In effect, the employer was only given two working days to respond to a letter from the trustees notifying it of the change (and did not see a draft of the new SIP).
- "Consultation" involves more than simply giving notice.

Conclusions

- *Crucially, the decision reinforces the possibility that the last employer standing when a scheme winds up may well pick up the entire debt.*
- A hybrid scheme, with DB and DC elements, will not automatically satisfy the test for being a sectionalised scheme under the legislation.
- The judge followed a developing line of thought that the legislation provides "one bite only" at the debt, which may make it more challenging for trustees to argue the contrary in the future.

We acknowledge the contribution of our solicitor Zoë Lynch in the preparation of this newsletter.

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