Sackers extra

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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
DWP: Department for Work and Pensions
ECJ: European Court of Justice
FSA: Financial Services Authority
HMRC: HM Revenue & Customs
NEST: National Employment Savings Trust
PPF: Pension Protection Fund
TPR: The Pensions Regulator

FINANCIAL SERVICES AUTHORITY

FSA proposes extending eligibility to the FSCS for certain corporate trustees

The FSA has today (6 June 2011) published a consultation paper on miscellaneous amendments to the FSA Handbook.

At present, if a life insurer fails, the protection available from the Financial Services Compensation Scheme (FSCS) for trustees of occupational pension schemes and underlying beneficiaries depends on the scheme structure the employer has chosen to adopt. Where the employer is a large employer, FSCS protection will depend on whether the trustee is a corporate trustee in the same group as the life insurer that issued the policies held by the trustees. Currently protection is not available in these circumstances. The proposed changes will rectify this anomaly.

The proposed amendments to the Compensation Sourcebook (COMP) are designed to enable corporate trustees of occupational pension schemes to make claims to the FSCS relation to a life insurance policy of an insurer in the same group, where the sponsoring employer is a 'large employer'.

The consultation closes (in relation to these proposals) on 6 August 2011. The proposed commencement date for these amendments is 6 October 2011.

FSA Summary of CP11/11

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

Survey of investment regulation of pension funds

On 1 June 2011, the OECD published a report which describes the main quantitative investment regulations which apply to pension arrangements in OECD and selected non-OECD countries as at December 2010.

The report covers all types of pension arrangement, including occupational and personal, mandatory and voluntary, and DB/DC.

PENSIONS POLICY INSTITUTE (PPI)

Pensions Primer updated

The PPI has published an updated version of its Pensions Primer, which gives a detailed description of the current pensions system in the UK (as at 12 May 2011), as well as some historical background. The Pensions Primer is designed for people wanting to learn about UK pensions policy.

The PPI has also updated some of the tables in the Pensions Facts section of its website. The information in this section has been selected by the PPI to answer the questions it is most frequently asked and where the data is not easily available from other sources.

PUBLIC SECTOR PENSIONS

The impact of 2007/08 changes to public sector pensions

The House of Commons Public Accounts Committee has published a report which examines the cost of public service pensions and the impact of the changes made in 2007/08, on the basis of evidence from HM Treasury and the Department of Health.

Background

In 2007/08, new pension schemes were introduced for civil servants, NHS staff and teachers. These changes were made in response to Treasury requirements for savings in taxpayer costs, to make public service pensions affordable. Three main changes were made:

- the age at which a scheme member could draw a full pension was increased from 60 to 65 for new members;
- employee contributions were increased by 0.4% of pay for teachers and by up to 2.5% of pay for NHS staff;
- a new cost sharing and capping mechanism was introduced to transfer, from employers to employees, extra costs that arise if pensioners live longer than previously expected.

Additional changes to public service pensions were announced in 2010, including increasing pensions in payment (and deferment) by the Consumer Prices Index, as opposed to the Retail Prices Index. And further changes are awaited, following the recommendations of the Public Service Pensions Commission (the Hutton Commission).

Select Committee Report

Among the Select Committee's conclusions and recommendations, it considers that:

- Government projections show that the expected cost of public service pensions has reduced substantially because of changes made in 2007 and 2008;
- however, there is no measure defining an affordable level of expenditure on public service pensions, against which actual costs can be compared;
- employees are not given the information they need to understand the value of their pensions. As a result, this hinders their ability to make rational decisions about important matters such as alternative employment options or whether to stay in, or opt out of, a pension scheme; and
- further reforms expected in the near future present the opportunity for the Government to determine a stable, long-term direction for public service pensions.

Commons Select Committee press release

The Government announced in the 2011 Budget that it has accepted Hutton's recommendations and the next stage is for formal proposals to be set out - these are expected in autumn 2011. For more information on Hutton's recommendations, please see our Alert: "Hutton recommends new career average scheme" dated 10 March 2011.

CASES

Stena Line Limited v Merchant Navy Ratings Pension Fund Trustees Ltd and another

This case concerns the proper construction of the rules of the Merchant Navy Ratings Pension Fund (MNRPF).

The Court of Appeal (CA) has confirmed the High Court's ruling that the removal of a right of veto over a deficit repair scheme, which had been taken out of the MNRPF rules by a properly executed amendment in 2001, was definitive. As the removal of this right had only been expressly agreed with a fraction of the total number of participating employers, there had been uncertainty as to whether the rules retained the veto by way of an implied term for the remaining participating employers.

Background

In order to address a significant deficit in the MNRPF, in 2001 a "deficit repair scheme" (the 2001 Scheme) was adopted. The 2001 Scheme was approved by a group of around 40 participating employers, referred to as the "Current Employers". As a result, the Current Employers were required to make contributions to fund the deficit. The case was brought by some 200 other participating employers "the Specified Employers". These Specified Employers had seen details of the 2001 Scheme at the time of adoption but had not expressly agreed to the changes.

As part of the 2001 Scheme, a provision relating to winding-up was removed from the MNRPF rules. The relevant provision had allowed the MNRPF to be terminated if there was a deficiency in the MNRPF and (among other events) there were "no agreed measures acceptable to the Participating Employers" for overcoming that deficiency (i.e. a deficit repair scheme). This provision had effectively previously given participating employers a veto over trustee proposals for addressing the deficiency.

As the deficit in the MNRPF subsequently grew (being estimated at £370m on a buyout basis), the trustees wished to introduce a new deficit repair scheme. This required further amendment to the MNRPF rules to impose a contribution obligation on all the employers, including the Specified Employers, not just the forty or so Current Employers who had approved the 2001 Scheme.

The Specified Employers wanted to ascertain whether they in fact retained the power of veto over any proposed deficit repair scheme or whether it had been removed definitively as a consequence of the 2001 Scheme. In other words, they asked whether it should be implied into the MNRPF rules that the veto remained in place in relation to the Specified Employers. The Court was also asked to determine whether, on proper construction of the scheme rules, the scheme would go into wind-up if a new deficit repair scheme was not agreed.

High Court Decision

P&O Ferries argued on behalf of the Specified Employers, that the power to amend the MNRPF to introduce a new deficit repair scheme could not now be exercised against the Specified Employers by reason of convention estoppel. This claim failed "as they had not objected to the 2001 Scheme and had made voluntary payments in the belief that obligations to make contributions could no longer be imposed on them".

Court of Appeal Decision

During the appeal, P&O conceded that the removal of the veto provision from the rules, as part of the measures designed to deal with the deficit in 2001, had been valid.

The issues in the CA only related to the interpretation of the trust deed and rules. The CA was not concerned with the propriety of any future exercise of the power.

As the Specified Employers failed to establish that the amendment in 2001 was not binding on them, a different analysis was presented to the CA. The Specified Employers argued that a restriction should be implied into the power of amendment, which would only permit the trustees to introduce such an amendment in the future if it provided protection for the Specified Employers which was equivalent to the original veto power.

Following a review of the general principles of interpretation in the context of occupational pension scheme trust documents, Lady Justice Arden was of the view that the veto provision had been expressly and validly removed and that no "fundamental right which must continue to be given effect as an implied restriction" was conferred on the power of amendment.

The CA rejected the appeal.

Comment

The judgment includes a useful discussion of the general principles of interpretation and their application to pension schemes, looking at a number of important cases including *The PNPF Trust Company v Taylor* and *British Airway Pension Trustee Ltd v British Airways plc*.

It is also the first time that the 2009 Privy Council case *Attorney General of Belize v Belize Telecom* has been applied to pension schemes. The *Belize* judgment analysed the case law on the implication of terms in the context of articles of association and decided that the implication of terms is, in essence, an exercise in interpretation. The CA in this case has broadly followed the approach taken in *Belize*, in which it was held that "the process of implying terms is one of interpretation, not of rewriting the parties' agreement".

We understand that the Court of Appeal decision is being appealed to the Supreme Court. Even if successful, the case concerns interpretation only, not the propriety of making the amendment.