10 June 2013

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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
ECJ: European Court of Justice
HMRC: HM Revenue & Customs
NAPF: National Association of Pension Funds
PPF: Pension Protection Fund
TPR: The Pensions Regulator

HM REVENUE & CUSTOMS

Pensions tax relief - individual protection from the lifetime allowance charge

Published on 10 June (and closing on 2 September 2013), this consultation is about the detail and implementation of an individual protection regime to accompany the reduction in the pensions lifetime allowance.

The Government announced on 5 December 2012 that for 2014-15 onwards the Annual Allowance (AA) would be reduced from £50,000 to £40,000 and the Lifetime Allowance (LTA) would be reduced from £1.5 million to £1.25 million. The reduction to both the AA and the LTA is "an integral part of the Government's deficit reduction plans". Individuals will be able to apply for both Fixed Protection 2014 and Individual Protection 2014, subject to meeting the eligibility conditions.

Fixed Protection 2014

Fixed protection 2014 (FP14) entitles individuals to an LTA of £1.5 million. Any new pension savings made by or on behalf of the individual on or after 6 April 2014 are likely to lead to the loss of FP14. Individuals must apply for FP14 before 6 April 2014. An individual with FP14 with pension savings of £1.4 million at 6 April 2014 will therefore have an LTA of £1.5 million. Any new savings made on or after 6 April 2014 however, would mean that the individual would revert to the standard LTA of £1.25 million and any tax relieved pension savings above £1.25 million would be subject to the LTA charge. In effect, this means individuals with FP14 are likely to need to opt out of active membership of all UK tax relieved pension schemes if they want to maintain this protection.

FP14 would be of particular benefit to individuals who think that the value of their pension savings will continue to grow without making any new savings after 6 April 2014. For example, this may be through investment growth, so that the individual expects their pension savings to be over £1.25 million when they take their benefits. It may also be beneficial to those who are able to renegotiate their remuneration package with their employer to take account of the fact that their employer will no longer be making on behalf of the individual the employer contributions they had previously paid into a pension scheme.

Individual Protection 2014

Individual protection (IP14) will give individuals a personalised LTA based on the value of their pension savings at 5 April 2014 (up to £1.5 million). It will allow individuals to continue pension saving after 5 April 2014 whilst protecting tax relieved pension savings that have accrued up to that date, subject to an overall maximum of £1.5 million. Individuals will have three years from 6 April 2014 to apply for IP14. The option of IP14 would therefore be of particular benefit for those who want to continue saving in their pension scheme after 5

April 2014, albeit that they would normally have a lower LTA than with FP14 and will be subject to LTA charges on the additional savings. IP14 may also be beneficial to an individual whose employer normally contributes towards their pension scheme but, if the individual opted out of the pension scheme, they would not be able to receive the value of those employer contributions in another form such as higher pay. In such cases they may prefer to remain an active member of the scheme and continue to receive the benefit of the employer contributions, albeit that these will be subject to an LTA charge when benefits are taken.

HMRC publishes updates to RPSM

On 6 June 2013 HMRC published minor updates to the Technical pages of the Registered Pension Schemes Manual in relation to:

- the PAYE tax code to be applied to certain lump sum payments; and
- the HMRC equation to be used for commutation factors.

THE PENSIONS REGULATOR

Codes of practice and guidance on pension contributions

In autumn 2012, TPR consulted on changes to its codes of practice on late payment of contributions to occupational DC (No.5) and personal pension schemes (No.6).

On 7 June 2013, TPR published its response to the consultation together with the final guidance and revised codes of practice.

The guidance and revised codes aim to support automatic enrolment by helping to ensure that members of workplace pensions receive the pension contributions they are due. We will publish an Alert on the new codes and guidance shortly.

The draft codes have been laid before Parliament and are expected to come into force in autumn 2013.

In addition, TPR has issued a new quick guide to paying contributions which aims to provide clear information for employers on their responsibility to pay the correct level of contributions into their pension scheme on time.

See our Alert: "TPR consults on revised "contribution" codes and accompanying guidance" dated 3 October 2012.

CASES

Seldon v Clarkson Wright & Jakes (Employment Tribual)

This Employment Tribunal (ET) decision marks the end of a long journey for this case, which considers whether a compulsory retirement provision in a law firm's partnership deed constitutes unlawful age discrimination.

Facts

Mr Seldon was an equity partner in a firm of solicitors, Clarkson Wright & Jakes (CWJ). He was a signatory to a partnership deed (dated 19 March 1992) which provided that each equity partner who had attained the age of 65 was to retire on the following 31 December.

A new partnership deed was signed on 31 December 2005. It was similar to the previous 1992 deed in most respects but permitted an equity partner to remain after the age of 65 with the consent of the other partners.

During 2006, Mr Seldon proposed that he continue to work part-time as a consultant and also stated that he wished to carry on working full-time. However, CWJ did not offer him any post-retirement position.

On 31 December 2006, Mr Seldon ceased to be an equity partner and subsequently brought proceedings before the ET.

The path to the Supreme Court

The ET was satisfied that the compulsory retirement provision was a proportionate means of achieving a legitimate aim. Whilst the Employment Appeals Tribunal (EAT) reached a similar conclusion, Mr Seldon's case was sent back to the ET for a fresh decision as there was no evidence before the EAT to support one of the assumptions in the case (that performance would decline at age 65).

Mr Seldon appealed to the Court of Appeal. The arguments focused on whether an employer can justify age discrimination using its own objectives, or whether, following the ECJ and High Court's decisions in Heyday (the Age UK case on the default retirement age), it must have social policy objectives.

The Court of Appeal dismissed Mr Seldon's appeal, concluding that the need for a social aim in order to justify discriminatory action related only to the UK Government and the age discrimination legislation enacted by it, and not to a private employer. It was therefore sufficient for an employer's aims to be consistent with the Government's social and labour policy. The Court was satisfied that the firm's aims (for example, staff retention, workforce planning and allowing an older and less capable partner to leave without the need to justify his departure and damage his dignity) met this requirement.

Mr Seldon appealed to the Supreme Court.

Supreme Court

The Supreme Court dismissed Mr Seldon's appeal, but found that the ET had not applied the correct test when considering whether CWJ's aims were legitimate.

It stated that direct age discrimination can only be justified by reference to legitimate objectives of a public interest nature, rather than purely individual reasons particular to the employer's situation. Applying this test, CWJ's aims fell within two categories of legitimate objective, intergenerational fairness and dignity.

The case was remitted to the original ET to determine whether the retirement provisions in CWJ's partnership deed were justified in all the circumstances (i.e. was the retirement age a proportionate means of achieving the legitimate aims?)

Final decision of the ET

To reach its decision, the ET weighed up the needs of CWJ against the harm caused by the discriminatory treatment. Taking account of the fact that the lower the retirement age the more harm to the partners who are required to retire, and the higher the retirement age the more harm to the associates who may leave, the ET concluded that there was a narrow range of ages which would achieve the aims of staff retention and workforce planning.

In deciding that a compulsory retirement age of 65 was proportionate, and therefore justified, the ET took into account a number of factors, in particular that:

- the partners had consented to the mandatory retirement age; and
- the default retirement age at the relevant time was 65.

Comment

This case concludes that, at the date of Mr Seldon's retirement in 2006, it was possible for CWJ to objectively justify a compulsory retirement age of 65 in its partnership deed. There has been a recent shift in attitude and practice on working beyond age 65, especially since state pension age is rising for everyone. Decision makers should bear in mind that this case was decided against a backdrop of the existence of a statutory default retirement age (which was phased out between 6 April and 1 October 2011) and a state pension age of 60 for women and 65 for men.

Nevertheless, the decision still serves as a useful indication of the types of aims which will be considered legitimate for the justification of direct age discrimination and demonstrates how an ET will determine proportionality.

The Trustees of the Olympic Airlines SA Pension and Life Insurance Scheme v Olympic Airlines SA (Court of Appeal)

The focus of this appeal was whether there was jurisdiction for a secondary winding-up of Olympic Airlines SA ("OA"). A UK winding-up order was needed to trigger PPF entry.

The PPF

The PPF provides compensation to members of eligible DB pension schemes, when there is a "qualifying insolvency event" in relation to the employer, and where there are insufficient assets in the pension scheme to cover the PPF level of compensation.

Facts

OA's liquidation in Greece is not a "qualifying insolvency event", under section 121 of the Pensions Act 2004, and therefore does not trigger PPF entry for the Scheme. The trustees of the Olympic Airlines SA Pension and Life Insurance Scheme (the "Scheme"), applied to the court for a UK order to wind up OA so that there would be a "qualifying insolvency event" and the members of the Scheme would be eligible for PPF compensation.

EU insolvency law allows secondary insolvency proceedings to be brought which run in parallel with the main proceedings. Secondary proceedings may be issued in the Member

State where the debtor has an "establishment", i.e. "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods".

OA carried on business in England from its head office in London. In addition, it had premises in Manchester and a ticket office at Heathrow. On 17 June 2012 the liquidator informed the trustees of the Scheme that the employment of UK staff would be terminated and OA's contributions to the Scheme in respect of them would cease with effect from 14 July 2010. On 2 July 2010 the liquidator wrote to all 27 employees of OA terminating their employment with effect from 14 July 2010. The services of the General Manager, the financial and purchasing manager and an accounts clerk were retained on an ad hoc basis.

On 20 July 2010, the trustees presented a petition to wind up OA based on the debt it owed to the Scheme under section 75 of the Pensions Act 1995. OA opposed the petition on the basis that it was already being wound up in Greece, where its main interests are situated. It contended that it did not have an "establishment" in the UK for the purposes of EU Insolvency law.

High Court

The Chancellor of the High Court, Sir Andrew Morritt, was satisfied that OA did have an "establishment" in England at the relevant time. Therefore, the court had jurisdiction to order OA's winding up in England.

Court of Appeal

OA appealed the High Court's decision.

Allowing OA's appeal, the Court of Appeal concluded that the internal running down of OA's business was not sufficient to meet the definition of "establishment". This meant there was no jurisdiction for the trustees of the Scheme to commence secondary insolvency proceedings in the UK.

Comment

At the end of his leading judgment, Sir Bernard Rix noted his regret that "this conclusion would leave the beneficiaries of the Scheme unprotected under the PPF".

While the decision makes sense from an insolvency perspective, it is an unfortunate outcome from the perspective of the Scheme's members. Where pension schemes are sponsored by employers that have strong links with other countries, or where the employer is not incorporated in the UK, it is worth considering the likelihood of being able to obtain a UK winding-up order. The analysis in the judgment indicates that this is more likely to be possible if prompt action is taken, as it is more likely that there will be an "establishment" in the UK.