sackers extra

New anti-discrimination laws come into force

1 BACKGROUND

On 1 and 2 December 2003, new anti-discrimination legislation comes into force to prohibit discrimination on grounds of sexual orientation and religion or belief. This is the next instalment of the UK legislation needed to put into effect the European Framework Directive for equal treatment.

The new legislation will require changes for some schemes and greater care in considering dependants' benefits under all schemes. It also raises new questions in the area of trustees' investment duties.

2 SEXUAL ORIENTATION

The Employment Equality (Sexual Orientation) Regulations 2003 (as amended for pension schemes) make it unlawful to discriminate against someone directly or indirectly on the grounds of their sexual orientation in the terms of their employment (including pay and pensions).

To ensure this can be enforced in the pensions context, the legislation will imply a non-discrimination rule into every occupational pension scheme. This means that, with effect from 1 December 2003, trustees must not operate their schemes in a way that discriminates against a member or prospective member on grounds of their sexual orientation. If necessary, trustees must amend scheme rules to ensure they comply (the legislation allows trustees to amend even where they do not otherwise have power to do so).

So will schemes need to be amended?

- If a scheme currently pays pensions or other death benefits to opposite sex unmarried partners, but not same sex unmarried partners, this would appear to be direct discrimination which cannot be objectively justified (only indirect discrimination can). In these circumstances, schemes will need to amend their rules.

SACKER & PARTNERS

Continued
New anti-discrimination laws come into force

- If a scheme only provides a spouse's pension on a member's death, this would on the face of it be indirect sex discrimination (as same sex partners cannot marry). However, the Regulations currently allow benefits to be restricted by reference to marital status (i.e. dependants' pensions payable to spouses only). But the Government may have interpreted the Directive's provisions too narrowly here, as arguably the Directive is only seeking to protect state benefits in this context. As a result, this provision is being challenged by the Unions.

Finally, the Regulations do not alter the Inland Revenue's rules on who pensions can be paid to. So, like any other dependant, a member's same sex partner must be dependent on or financially interdependent with the member. This may not always be a flexible enough test in practice, but schemes are limited by what the Inland Revenue will allow.

3 RELIGION OR BELIEF

The Employment Equality (Religion or Belief) Regulations 2003 (as amended for pension schemes) work in the same way as the sexual orientation Regulations. From 2 December 2003, it will be unlawful to discriminate against someone (directly or indirectly) on the grounds of their religion or belief in the terms of their employment (again including pay and pensions). "Religion or belief" means "any religion, religious belief or similar philosophical belief". As with sexual orientation, a non-discrimination clause will be implied into occupational pension scheme rules, with trustees having a similar power to amend. Again, direct discrimination will not be capable of being justified, but indirect discrimination will.

The consequences of the Regulations are less clear for pension schemes than those relating to sexual orientation. Nevertheless, schemes should carry out a health check to see if their rules contain anything that would breach the new law (e.g. is absence on Christian holidays pensionable but not those of other religions?).

Continued

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One issue for schemes is polygamous marriages. Schemes may need to consider paying benefits to more than one dependant (or adding a power to do so) if, in accordance with his or her religion or belief, a member has married more than one person. Schemes must still be careful however to follow current legal restrictions on who contracted-out benefits are paid to.

Another question is whether the new law could restrict the investments trustees can make.

- It seems unlikely that how a scheme invests will result in discrimination in practice, unless it is a significant disincentive to an employee joining (e.g. his or her beliefs do not permit particular investments). There has to be some disadvantage to an employee, or some violation of their dignity.

- If there is discrimination, it is likely to be indirect rather than direct. So would a scheme be able to objectively justify continuing to invest in the way the employee finds offensive? Existing case law on trustees' investment duties is pretty consistent: trustees are required to invest in the interests of the scheme's beneficiaries which will usually mean their best financial interests.

- What if all or a significant majority of members in a pension scheme specifically request trustees not to invest in a particular way? It is arguable this could override the trustees' general duty. It could also make continuing to invest in the way that was against the employees' beliefs direct rather than indirect discrimination.

- In practice, if few individuals are disadvantaged by the way the scheme is invested, another way of dealing with the issue might be for employers to consider remunerating these employees in a different way.

Continued
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4 CONCLUSION

Claims under the new laws can be brought in the Employment Tribunals. It appears that all members, other then pensioners, can seek a remedy through the Tribunals. The reason for this distinction is probably due to the fact that the initial driver for the legislation comes from a European employment Directive, but it does seem slightly odd that a member could bring a claim up until he or she retires, but not the day after.

Trustees and employers should act now to establish whether there are any current issues under their schemes and, where necessary, amend scheme rules and administration to ensure compliance. Remember, however, that the new rights relate to service from December this year, and care must be taken that changes do not adversely affect rights accrued before then without members' consent.