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SP07

Abbreviations commonly used in 7 Days

Alert/News: Sackers Extra publications (available from the client area of our website or from your usual contact)

CPI: Consumer Prices Index

DB: Defined benefit

DC: Defined contribution

DWP: Department for Work and Pensions

ECJ: European Court of Justice

FAS: Financial Assistance Scheme

GMP: Guaranteed Minimum Pension

HMRC: HM Revenue & Customs

NEST: National Employment Savings Trust

PPF: Pension Protection Fund

TPR: The Pensions Regulator

DEPARTMENT OF WORK AND PENSIONS

Working Paper 107: Processes and costs of transferring a pension scheme: Qualitative research with pension providers and third-party administrators published

As part of its ongoing workplace pension reform research programme, the DWP commissioned a study to better understand the processes and costs involved in transferring an individual's DC pension pot from one pension provider to another. It has now published the findings.

HM REVENUE & CUSTOMS

Qualifying Recognised Overseas Pension Schemes (QROPS)

On 21 March 2012, the Government published regulations that changed the QROPS tax rules with effect from 6 April 2012.¹ As a result, pension schemes now have to meet different conditions to be (and to remain) a QROPS.

HMRC has updated its list of QROPS to remove schemes which do not appear to meet the new conditions. The removal of schemes is subject to further review and some schemes that are currently listed may yet report that they need to be removed. HMRC therefore warns that there may be more frequent removals of pension schemes from the list in future.

CASES

Ms C v WBB Minerals Final Salary Pension Scheme (22 March 2012)

This interesting decision from the Pensions Ombudsman concerns an employer's attempt to exclude bonus payments from members' "gross earnings" for the purposes of the calculation of their pension benefits.

Facts

Ms C became a member of the Scheme in January 2002.

Under the Scheme, the calculation of "Final Pensionable Earnings" was made using "Gross Earnings". "Gross Earnings were defined as: *gross earnings from the Employers excluding benefits in kind, cash alternatives to benefits in kind and amounts paid on or in*

¹ For details, see 7 Days dated 26 March 2012

*connection with the termination of the Member's employment and **such other amounts paid to the Member on or after 1 January 1999 as may from time to time be agreed between the Member and the Employer...***. (our emphasis)

Ms C was eligible to participate in an incentive scheme which could generate bonuses of up to 25% of her basic salary. In all but one of her annual bonus notices from her employer there was a statement that the bonus payment was taxable, but not pensionable. The letter which did not contain this statement was silent on the issue.

In 2007, Ms C became a director of the Scheme's trustee. As a consequence, she became aware that the Scheme's definition of "gross earnings" did not exclude bonuses. She raised a grievance with her employer complaining (among other matters) that she had been led to believe that her bonus payments were not pensionable under the Scheme rules.

Ms C resigned in July 2008 and queried the exclusion of her bonuses from the calculation of her final pensionable pay.

In September 2008, a deed of amendment was executed which amended the definition of "gross earnings" so as to exclude all bonus payments from 1 January 2002. However, the trustee did not attempt to argue that this retrospectively modified Ms C's benefits as she had already ceased to be an active member of the Scheme.

Decision

The key issue was whether, for the purposes of the definition of "gross earnings", there was an agreement between Ms C and her employer that bonuses should be excluded.

The employer argued that Ms C's retention of the bonus payments meant that she had accepted that they were not pensionable. However, the Ombudsman noted that an employee will only be taken to have impliedly agreed to the variation of his/her contract where the change has immediate practical implication. The pensionable status of her bonuses only had practical implications for Ms C when her benefits fell to be calculated, i.e. when she retired or left the Scheme. The Ombudsman therefore concluded that her silence before 2008 could not be taken as agreement to the exclusion of bonuses from her "gross earnings".

The Ombudsman was satisfied that there was no evidence of an agreement between Ms C and the employer that bonuses should not be pensionable. Furthermore, the Ombudsman found it hard to see how a payment under the incentive scheme could be made conditional on a variation being made to the pension scheme when the two were separate contractual entitlements. He commented that, had the bonus payment been made subject to an express condition that a term of the pension scheme would be varied, then it was possible that Ms C would not have been able to argue that the variation was ineffective. But, on the facts, this was not what had happened.

Ms C's complaint was therefore upheld and the Scheme's trustee was directed to arrange for her benefits to be recalculated on the basis that her bonuses were pensionable.

Comment

This decision is a useful reminder to employers and trustees to ensure that their actions tie in with any requirements of the scheme rules.

Raithatha v Williamson (High Court)

The High Court has ruled that the pension benefits of a bankrupt, who is entitled under the rules of the scheme to draw his pension, but who has not yet done so, can be the subject of an Income Payments Order (IPO) under the Insolvency Act 1986² (the Act).

Background

Mr Williamson was one of two directors and shareholders of Phoenix Contracts (Leicester) Limited (Phoenix), a quasi-partnership company. In late 2007, the relationship between the two broke down and, in January 2009, the other director/shareholder, Mr Shepherd, issued a petition³ claiming that Mr Williamson should be ordered to purchase his shares in Phoenix. A court order to this effect was made in September 2010 and for the costs of the action. Shepherd presented a bankruptcy order for those costs in November 2010. Of Williamson's debts of £1,249,653, £1,215,043 was owed to Shepherd.

The Insolvency Act 1986 and Income Payment Orders

When a bankruptcy order is issued against an individual under the Insolvency Act, a trustee in bankruptcy (the trustee) is appointed. The trustee will then arrange for the sale of the bankrupt's assets. If debts remain following the sale, an Income Payments Order (IPO) may be issued by the court, requiring the bankrupt to make monthly payments from their income (for example, their salary), for a period of three years.

While state pension benefits will not be claimed from a bankrupt's estate, other pension benefits may be claimed in certain circumstances. Since 29 May 2000, a bankrupt's rights under a registered pension scheme have not been considered as an asset for bankruptcy purposes as they are excluded under section 11 of the Welfare Reform and Pensions Act 1999. However, the trustee in bankruptcy can claim any benefits that the bankrupt is receiving, including a cash lump sum, before they are discharged from bankruptcy.

In this case, as the sums collected by the trustee were insufficient to discharge Williamson's debts, the trustee applied for an IPO.

Can pension benefits not yet drawn be the subject of an Income Payments Order?

The main application in this case related to Williamson's pension benefits, the majority of which were aggregated in a personal pension arrangement. The rules of this arrangement provided that the minimum age for drawing down a pension is 55 years. At the time of the hearing, Williamson was 59. Williamson had not elected to take his benefits as he was in work and had no intention of taking his pension in the foreseeable future.

As Williamson had not made an election to draw his pension, the court had to consider whether it could compel him to do so, or authorise the trustee to exercise that power for him. In particular, the court looked at whether the pension entitlements which a bankrupt is entitled to receive, but has not yet elected to receive, constitute a "payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled"⁴, and therefore constituted income by reference to which it was entitled to make an IPO.

Decision

The court held that "a bankrupt does have an entitlement to a payment under a pension scheme not merely where the scheme is in payment of benefit but also where, under the rules of the scheme, he would be entitled to payment merely by asking for payment."

² s.310

³ s.994 Companies Act 2006

⁴ s.310(7) Insolvency Act 1986

In reaching this conclusion, the judge considered that the question as to whether Williamson could be compelled to take his benefits depended on "the proper interpretation of the words in the context of the statute". He noted that the power of the court to make an IPO under the Act is expressly to be made "despite anything in s.11 or 12 of the Welfare Reform and Pensions Act 1999".⁵ The judge was of the view that it was not possible to interpret these words as though they read "despite anything except the right of the bankrupt to make an election....".

Although the judge initially found the argument put forward for Williamson, that there was no entitlement to a payment because there was no express election, "to be an attractive argument", he concluded that it was not the intention of the bankruptcy legislation to create a distinction between a person whose election to take their pension had preceded his bankruptcy and a person who had not yet elected to take their pension. This, he found, would "provide an anomaly which is difficult to justify".

The judge also found that there was no breach of Williamson's right to property under the European Convention of Human Rights, nor any discrimination on grounds of age.

Comment

This decision is surprising, given the general understanding that a pension which has not been put into payment cannot be accessed by a trustee in bankruptcy. It should be noted, however, that the decision relates to personal pension arrangements, under which the consent of a third party (such as the employer or trustees in an occupational pension scheme) is not required for the individual to draw their pension.

We understand that Williamson has been granted leave to appeal.

⁵s.310(7) Insolvency Act 1986