

Public sector briefing

May 2015

Highlighting the latest developments in public sector pensions



Welcome

Welcome to the first of our revamped Public Sector briefings which highlight topical news on public sector pensions issues from a legal viewpoint.

It's a busy time for the LGPS, now subject to new governance requirements, and with the Pension Regulator's Code of Practice in relation to public service schemes also in force. There are many new requirements to get to grips with. Particularly notable is that public sector schemes were required to establish a Pension Board by 1 April this year, and must hold their first board meeting by 1 August.

In this briefing, we highlight four governance related issues, as well as the recent Galaxy case which has implications for LGPS decision makers. With the new flexibilities and freedom available to pension savers, we flag the consistently hot topic of pensions liberation which is an increasingly popular area for member queries and one that requires more vigilance than ever. We also highlight the Government's Response to Consultation on LGPS rules published on 24 April 2015.

Although there is a lot of new guidance and regulation to get to grips with, we have lots of expertise and experience of advising in relation to Regulator Codes and guidance so do contact us if you need any help.

In the meantime, we hope you enjoy this briefing, and welcome your feedback.

Four key issues

Local Pension Boards

For better or worse, LGPS sections are required to have established Local Pension Boards no later than 1 April 2015. Each Administering Authority should have approved the establishment of a Local Pension Board including arrangements for the Board's composition and terms of reference.

We are now in a key period when the newly established boards will become operational within a reasonably practicable period over the coming quarter (LGPS Advisory Board guidance suggests no more than a four month period between establishment and getting the Boards up and running). The Local Pension Board's remit is to "assist" Administering Authorities in

compliance with Regulations. The newly created Boards will need to establish systems and procedures for ensuring that they are properly discharging their functions.

There is much to be done on new Boards and a lot of guidance from the Pensions Regulator and the LGPS Advisory Board to absorb. Boards will need to address the knowledge and understanding requirements. LGPS Boards are required to be conversant with pensions law and with a range of other regulatory materials. Establishing a policy and framework for meeting this requirement should, in our view, be at the top of their agenda.

Four key issues cont.

Pensions liberation

The issue of pensions liberation continues to result in a significant amount of work for transferring schemes. Members are attracted by the idea of accessing their funds early, and may be tempted or persuaded into trying to do so via vehicles which turn out to be fraudulent. Authorities face enormous pressure to protect members from losing large amounts of their retirement savings, but it can be an extremely difficult job to determine whether or not a receiving scheme is a bona fide scheme or a fraudulent scheme.

The Pensions Ombudsman has received a significant number of member complaints in relation to pensions liberation transfers, both from members whose transfers have been processed (and who have subsequently lost money in fees and tax) and from members whose transfer requests have been refused by their schemes. A small number of decisions have been released, the majority of which relate to cases where the receiving

arrangements were not occupational pension schemes within the definition in legislation and therefore no transfer could properly be made to them. However, we are still waiting for decisions to demonstrate what, if any, compensation will be ordered where transfers have been refused by transferring schemes purely on the grounds that they thought the receiving scheme was a scam.

The Pension Liberation Industry Group has published a code of good practice – applicable to both private and public sector schemes – which should be referred to when considering a potential pensions liberation case but it remains an extremely difficult area for schemes to navigate. Authorities should ensure that they have proper processes and strategies in place for tackling transfer requests and responding appropriately.

Transfers and appropriate independent advice

LGPS members have a statutory right to a transfer of their benefits to another occupational pension scheme or personal pension scheme.

The Government has introduced reforms to permit greater ‘freedom and choice’ to DC pension savers, and LGPS members may be amongst those wishing to look to move their DB benefits into DC vehicles from which they will be able to take advantage of some of these flexibilities. In conjunction with the new freedoms, the DWP has created legislation to protect members wishing to transfer benefits from DB to DC schemes. These protective restrictions also apply to the LGPS. The new regulations require Councils to check that a member has received “appropriate

independent advice” from an authorised adviser (registered with the FCA) in relation to DB to DC transfers or conversions, unless the total value of the member’s DB benefits under the pension scheme is £30,000 or less.

Under the LGPS Regulations, the administering authority operates the discretion, and so will be responsible for checking whether members wishing to transfer have taken the appropriate advice. Extra care will also be required here to guard against pensions liberation.

Response to consultation

The Government’s Response to Consultation on Local Government Pension Scheme rules was published on 24 April 2015.

As part of the reforms to public sector pensions provision, the Local Government Pension Scheme Regulations 2013 and the Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014 came into force in April 2014.

Over the last 12 months of application of these regulations by employers and pension administrators, a number of areas needing improvement and clarification have been identified (for example, clarifications regarding the treatment of members on child-related leave, and reserve forces leave). The consultation

raised suggested changes with the wider LGPS audience. The Government also called for views on what flexibilities might be offered around exit payments, after earlier representation about the legislation governing payments on employer cessation. The Regulations now ensure that any liabilities that remain outstanding with employers in the scheme can be called for where there are no active contributing members and a period of grace is allowed (the administering authority may suspend the requirement for an exit payment in specific circumstances where the relevant employer is likely to employ an active member within a period of no more than three years).

Spotlight – Galaxy case



Facts

Earlier this year the High Court overturned a Durham County Council decision to dispose of some land for redevelopment. The case (*R (Galaxy Land Ltd) v Durham County Council [2015] EWHC 16 (Admin)*) has generated interest because of the High Court's comments on the balance of responsibility between Council decision makers and the officers who report to them. It may be of particular interest to officers serving on pensions investment committees who, like the officers in the Galaxy decision, will deal with complicated, high value decisions often involving the use of specialist professional advisers.

The case turned on perceived deficiencies in a report prepared by Council officers, which the Council cabinet had then relied on. The proposals were complicated and involved collaborating with other stakeholders to develop land through special purpose vehicles; various agents, intermediaries and advisers were involved as well as in-house expertise. Shortcomings in the report were found to be sufficient to invalidate the important Council decision that had relied on it, and LGPS decision makers and their executives may wish to review their practices in light of the Court's comments.

Judgment

The judge in the case observed that a Council cabinet did not need to be appraised of everything which was within the knowledge of the officers, whose role it is to digest material and to bring to bear their expertise (which Cabinet members would not have). He noted "The Cabinet can rely on the officers' fair summary of relevant matters and their balanced evaluation of the implications. If the officers have given proper consideration to different arguments and then come to a conclusion there is no necessary error should the report not refer to the different contentions but only to the conclusions reached."

However, in overturning the Council's decision, the Court found material shortcomings in the officers' report, including the fact that "obviously relevant" issues had not been raised. The judge also noted that the report appeared to ignore expert advice containing "pungent" criticisms of the proposals.

What can we take away from the case?

1

Governance counts

Governance should be about outcomes; about reaching the right decision. It is also about showing how decisions were reached and documenting proper process. In the Galaxy case, problems arose in the documenting of the process and in the preparation of the report.

2

Get advice and use it carefully

The Galaxy report was censured for failing to address criticisms of the proposals which had been raised by the Council's advisers. Commercial and legal advice is crucial in complex areas. If such advice highlights concerns, those issues do need to be addressed. Reports to the ultimate decision makers should provide enough detail to describe what issues have arisen and what decisions the officers have taken.

3

It's also the decision maker's responsibility

As well as criticising the report, the Galaxy ruling strongly implies that the Cabinet should have picked up on gaps in the report. It is always the job of a decision maker to question a recommendation and to be sufficiently cognisant to identify whether they have all the information they need.

Contact

Sackers is the leading law firm for pension scheme trustees and employers. Over 50 lawyers focus on pensions and its related areas, including our public sector experts who provide practical and specialist help on legal, regulatory and governance issues within the public sector.



Michaela Berry
Partner and Head of
Public Sector
D 020 7615 9546
E michaela.berry@
sackers.com



Fuat Sami
Partner
D 020 7615 9584
E fuat.sami@sackers.com



Ralph McClelland
Associate Director
D 020 7615 9532
E ralph.mcclelland@
sackers.com



Lauren Jackson
Associate
D 020 7615 9541
E lauren.jackson@
sackers.com

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| Pension Disputes seminar – transfers | 23/06/2015 | Breakfast seminar (09.00am – 10.30am) An interactive discussion on pension transfers, designed to share advice and practical tips on a range of transfer issues from the everyday through to pension scamming. |
| Pension Disputes seminar – transfers | 25/06/2015 | Lunchtime seminar (12.30pm - 2.00pm) An interactive discussion on pension transfers, designed to share advice and practical tips on a range of transfer issues from the everyday through to pension scamming. |
| Quarterly Legal Update | 16/07/2015 | Breakfast seminar (9.00am – 10.30am) The latest legal and regulatory developments in the pensions world. |
| Quarterly Legal Update | 19/11/2015 | Breakfast seminar (9.00am – 10.30am) The latest legal and regulatory developments in the pensions world. |

Sacker & Partners LLP
20 Gresham Street
London EC2V 7JE
T +44 (0)20 7329 6699
F +44 (0)20 7248 0552
E enquiries@sackers.com
www.sackers.com

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