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Essential Pensions News

Updater

September 2016

Essential Pensions News covers the latest pensions developments each month.

Chancellor’s autumn statement on November 23, 2016

HM Treasury has announced that the Chancellor, Philip Hammond, will deliver his first Autumn Statement on **November 23, 2016.** We will report in detail any proposed changes affecting pension provision.

VAT and pension schemes: HMRC announces further extension of the transitional period until December 31, 2017

HMRC’s latest Brief 14 (2016), published on **September 5, 2016**, is a revised version of Brief 17 (2015), originally issued in October 2015. Brief 14 (2016) confirms the extension to **December 31, 2017** of the transitional period during which employers may seek to change existing arrangements to maximise their potential for deduction of VAT incurred on pension fund management costs. HMRC states that it intends to publish guidance “later this year”.

As we reported in our detailed client briefing of December 2014, HMRC had outlined in Brief 43 (2014) the effect of the decision in *PPG Holdings BV* on VAT deductibility. HMRC allowed a transitional period for use of the existing VAT treatment, which was subsequently extended to December 31, 2016. Our April 2015 update outlined HMRC’s most recent guidance, and explained the extent to which tripartite contracts (between service providers, employers and scheme trustees) would be accepted as demonstrating that the service provider’s supplies were made to the employer, potentially allowing the employer to deduct the VAT element of the cost.

HMRC's Brief 14 (2016) confirms the further extension to the transitional period, during which the existing simplification measure allowing employers to obtain an input tax deduction for 30 per cent of the VAT element on single invoices covering administration and investment management services, to **December 31, 2017**.

HMRC states that its most recent extension is due to unexpected complexity in reconciling the new rules with pensions and financial services regulations, accounting rules and emerging case law. HMRC will consider towards the end of 2017 whether another extension is needed. Taxpayers that have already restructured to accommodate the new rules may revert back to the old rules if they wish. HMRC warns that adopting alternative structures to accommodate the new rules could have regulatory and corporation tax implications.

View the updated version of Brief 17 (2015).

Comment

Most schemes will welcome the renewed extension to the transitional period, as HMRC is clearly finding it difficult to decide on its finalised approach. The problem of VAT deduction in relation to pensions costs has proved difficult to reconcile, and there is now the additional complexity of the Brexit decision to take into account, although HMRC's latest Brief does not make explicit reference to the referendum vote.

Trustees, employers and providers may be relieved that they need not now take immediate action on their VAT arrangements, given the further year's grace. Although preliminary advice should be taken on maximising the employer's VAT deduction (if it has not already been sought), potentially fundamental changes may be left until HMRC issues definitive guidance.

We will be updating our detailed briefing on this topic in due course.

HM treasury publishes consultation on introducing a pensions advice allowance

Of general interest is the publication on **August 30, 2016** by HM Treasury of a consultation paper on introducing a pensions advice allowance. The deadline for responses to the consultation is **October 25, 2016**.

In the March 2016 budget, the Government stated that it would consult on introducing a pensions advice allowance. This consultation follows the recommendation by the Financial Advice Market Review (FAMR) that savers should be allowed to access tax-free a small part of their pension fund to redeem against pre-retirement advice. The aim is to encourage more people to access financial advice before retirement.

In the consultation, views are sought on the proposed design for the allowance. Among other things, the Treasury proposes that the allowance will be:

- Limited to £500 per use. HM Treasury is considering permitting pension-holders to use the allowance more than once

- Used for adviser charges for financial advice on retirement. The payment must be paid directly from the pension scheme to the financial adviser
- Restricted only to fully regulated advice, with guidance-only services being excluded
- Subject to existing FCA charging rules and statutory restrictions on charging
- Available to pension-holders before the age of 55
- Redeemable against all fully regulated advice services, including automated advice models.

HM Treasury is not proposing that pension providers should be required to offer the allowance, although it is seeking views on how to encourage the majority of DC schemes to offer the allowance. Questions posed in the consultation paper include the earliest age under 55 from which the allowance should be available, how to maximise access to the allowance in schemes where adviser charging facilities are currently not offered, and how best to publicise the allowance.

View the consultation paper.

Comment

While this is generally good news for consumers, there will need to be safeguards against fraudsters posing as financial advisers, or investors accessing their savings in £500 tax-free chunks. Monitoring the use of the allowance across multiple schemes with different providers may prove difficult. However, the allowance provision may encourage more people to take pre-retirement advice and thus improve retirement outcomes. It is important that the allowance should be available well before age 55, so that people have realistic choices when they start to consider retirement and a chance to continue working and saving if necessary.

Government announces Pensions Dashboard launch in March 2017

Of interest to all schemes and their members is the announcement on September 12, 2016 by HM Treasury that a Pensions Dashboard prototype will be launched in Spring 2017. The Dashboard was first announced in the Chancellor’s March 2016 Budget, with the original deadline set for 2019.

The Association of British Insurers (ABI) is one of 11 initial contributors, which include pension providers and administrators, with the ABI being responsible for development of the site.

The wider pensions industry recognises that one of the inevitable side effects of auto-enrolment is a huge rise in the number of defined contribution (DC) pension pots which individual savers will accumulate over the course of their working lives. The eventual aim of the Pensions Dashboard is to provide a one-stop site enabling savers to see all their pension savings together, including State pension entitlements and any savings held in defined benefit schemes.

However, that utopia is some way off. The prototype will include only a small fraction of all DC pots - those administered by the initial 11 contributors to the site - with additional providers and administrators signing up to the project in due course. The Government recognises that legislation may be necessary to ensure all providers engage in future.

Comment

The idea of the Dashboard has been welcomed as a huge step forward in ensuring pension savers can keep track of their benefits, and make well-informed decisions for the future.

However, there are several challenges to be overcome, not least the technological complexity of the project as a whole, and deciding how the vast amount of data will be presented. The inherent differences in the rules of so many pension schemes may prove difficult to display in any meaningful way. For example, should the Dashboard simply provide the figure for an individual's total pension savings, or should details be included of specific guarantees, investments and charges applying to the separate savings elements?

It is possible that even when members are given the option to see the value of all their pension savings in one place, they may still not understand how best to use that information to optimise their retirement benefits.

PPF updates guidance for insolvency practitioners

Of potential interest to schemes providing defined benefits is the Pension Protection Fund's (PPF's) update of its guidance for restructuring and insolvency professionals and its booklet on the PPF's approach to employer restructuring.

The guidance sets out the criteria that should be incorporated into any proposal made to the PPF in relation to an employer restructuring. The PPF notes that following recent high-profile cases such as *Kodak*, *Monarch* and *Halcrow*, its role in restructuring transactions has received greater scrutiny and analysis, "*some of which has been inaccurate and occasionally even potentially misleading.*"

In relation to the criteria to be met, the PPF specifies that the party seeking the restructuring must pay the costs incurred by both the PPF and the trustees in delivering the restructuring. These will include "*legal fees for documenting and executing the deal, financial advice and any other costs incurred by the PPF as a result of the transaction, such as … liabilities [under the transfer of undertakings legislation] relating to the staff costs of the pension scheme.*"

In some circumstances, it may be appropriate to put in place a Regulated Apportionment Arrangement (RAA). An RAA is an arrangement that provides for the amount that would have been the withdrawing company's share of the employer debt liability to be apportioned to one or more of the remaining companies participating in the scheme.

Although an RAA may be entered into before, on, or after the time at which the company ceases to participate in the scheme and the employer debt falls due, in the majority of distressed situations the RAA will be agreed before the employer debt is triggered. This is because it will represent a key element of the restructuring package and the company and its directors (and any purchaser or administrator) will want to obtain clearance from TPR and PPF sign-off before initiating the insolvency process.

Malcolm Weir, Head of Restructuring & Insolvency at the PPF said that "*Regulated Apportionment Arrangements are rare and we do not agree to them lightly. We will only support such proposals if they provide a significantly better return for the pension scheme than it would receive through the normal insolvency process. These arrangements can sometimes be controversial, so we feel it is important that people have a better understanding about our approach to them.*"

View the PPF Guidance.

View the PPF Approach to Employer Restructuring.

PPF consults on proposed updates for valuation assumptions

The PPF is proposing to make some updating amendments to the assumptions used for section 143 and section 179 valuations.

The changes are intended to bring the valuation assumptions into line with current pricing in the bulk annuity market. The PPF has published a consultation document that sets out the proposed changes, and invites comments on the proposals by **October 31, 2016**.

View the consultation paper.

Pensions ombudsman announces name change

Of general interest is the announcement on **August 31, 2016** that the Pensions Ombudsman Service has changed its name to The Pensions Ombudsman, abbreviated to TPO.

The change of name aims to simplify the customer journey for pensions-related disputes by adopting a similar branding style to TPO's main partner organisations, the Pensions Regulator (TPR) and the Pensions Advisory Service (TPAS).

GC100: Updated Directors' Remuneration Reporting Guidance

Of general interest is the updated version of the GC100 and Investor Group guidance on reporting of directors' remuneration, including their pension entitlements, on which we first reported in our November 2013 update.

The Guidance assists UK quoted companies with the practical aspects of interpreting and implementing the reporting requirements in The Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendments) Regulations 2013 (the Remuneration Regulations).

The Remuneration Regulations give shareholders a binding vote on companies' remuneration policies, and introduced a range of disclosures such as the 'single total figure' of directors' pay. It is recognised that the binding vote, and the accompanying disclosures, have been successful in increasing the number of interactions and engagements between companies and their investors. In addition, many investors have used the engagements on remuneration matters as an opportunity to raise wider governance matters.

The Group is keen to certify that the Guidance evolves to reflect best practice, while also providing clarity and direction on areas of confusion or contention. The approaching end of the first three-year cycle of shareholder-approved remuneration policies provided an opportunity to conduct a thorough review of the document.

The amendments to the Guidance on pensions entitlements relate principally to those received during the year of a director's departure, which it says should be disclosed in full.

View the updated Guidance.

Draft legislation: DWP - the draft Pension Protection Fund (Modification) (Amendment) Regulations 2017

The PPF is consulting on draft regulations which will increase the compensation limit by raising the cap for long-serving employees. The consultation period ends on **November 9, 2016**, and the changes are expected to come into force on **April 6, 2017**.

The proposed changes are outlined below.

Some schemes that have entered the PPF have a higher than average number of potentially capped members due to working for the sponsoring employer for a significant proportion of their working life. In order to better protect the pensions of such long-serving employees, it is proposed that the PPF compensation cap will be reformed. The intention is that the compensation cap should reflect the fact that people who have worked for a long time for one employer should receive a higher compensation cap because the lost scheme pension is likely to have represented a larger proportion of their retirement savings.

The changes are to be included by amending the Pensions Act 2014. The current compensation cap will remain as the base cap applied to all relevant members of the PPF. The revised "long-service" compensation cap will apply as follows:

- The cap will be increased by three per cent for every full year of service above 20 years, with a maximum of double the standard cap. Service transferred from a previous scheme will count towards the qualifying periods

- The cap will affect any scheme if it begins to wind up or enters the PPF assessment period after the revised cap is introduced

- The long-service cap will apply to individuals already receiving PPF compensation who would have been eligible for increased compensation had the provisions been in place when they started receiving compensation. Those who are in receipt of a payment will, where appropriate, have their payments increased with effect from the April following the legislation coming into force, based on three per cent of their original compensation cap for each full year over 20 years

- The revised cap will also apply to members of schemes winding up outside the PPF with sufficient assets to meet their protected liabilities and

- Where the long service cap would apply, there will be an increase to any terminal illness lump sum paid to anyone in the year up to the date the legislation comes into force. Where the member has died before this date, the terminal illness lump sum will be unchanged but their survivor will be able to benefit from the long service cap.

View the consultation paper and draft regulations.

Finance Act 2016: technical amendments to lifetime allowance provisions included

Of general interest is the progress through Parliament of the Finance Bill 2016. Royal Assent to the Bill was delayed because of the EU referendum, but was finally received on **September 15, 2016.**

The Act includes two previously agreed amendments relating to technical changes concerning the standard lifetime allowance (LTA). With effect from **April 6, 2016**, the standard LTA is reduced from £1.25 million to £1 million for the 2016/17 tax year onwards. There is also a provision for the LTA to be indexed, rising annually in line with the increase in the consumer prices index from **April 6, 2018**.

As we have reported previously, the LTA has been reduced several times since its introduction in 2006, and there are often knock-on effects for other aspects of pensions tax legislation. The agreed, and welcome, amendments certify that the test as to how much LTA is used up reflects the standard LTA in force at the time of the member's death, rather than that in force at the time of the benefit crystallisation event (BCE). The amendments relate to:

- When uncrystallised funds are designated for dependants' or nominees' flexi-access drawdown (BCE 5C) or

- When an annuity is purchased for a beneficiary or dependant (BCE 5D)

- Most of the Act's provisions come into force on **September 16, 2016**, the day after Royal Assent.

Lifetime ISA: Savings (Government Contributions) Bill 2016 published

On **September 6, 2016** the Savings (Government Contributions) Bill 2016 was introduced in the House of Commons. The Bill contains provisions relating to the new Lifetime Individual Savings Accounts (Lifetime ISA) to be introduced in **April 2017**.

As announced the March 2016 Budget, it is intended that the Lifetime ISA will be available to individuals aged between 18 and 40, who will be able to contribute up to £4,000 each tax year. The Government will add a 25 per cent bonus to the amount paid into the Lifetime ISA.

Certain withdrawals from an individual's Lifetime ISA will not trigger a tax charge. The Bill confirms that investors will be able to make withdrawals from their Lifetime ISA once they have reached an age specified in regulations (the Government intends that this will be age 60). Withdrawals will also be allowed for the purposes of certain first-time residential purchases, on terminal ill-health and on transfer to another Lifetime ISA.

Much of the detail about how the Lifetime ISA will operate, including which contributions are eligible for the Government bonus, will be contained in regulations to be made by HM Treasury. The Government intends that the regulations will set the rate of bonus payable on qualifying additions to a Lifetime ISA at 25 per cent and the charge due on some account withdrawals at 25 per cent of the value that has been withdrawn. Bonus amounts will be claimed by plan managers on behalf of investors and paid by HMRC. Regulations will also provide further detail of the circumstances in which a withdrawal will trigger a tax charge.

Comment

The Lifetime ISA has been much criticised. The Treasury's objective is to cut the cost of pensions tax relief, and there has been concern that the Lifetime ISA is intended to replace pensions in the long term.

Some major institutions have said they will not offer Lifetime ISAs in April 2017, as they object to the high charges on withdrawal, with many other banks refusing to commit to the new savings vehicles at this stage.

While at first glance the Lifetime ISA and its potential Government bonus may look like a good deal for younger savers, many do not realise that the sting in the tail is the loss of tax relief that applies to pension savings, making the new product less tax efficient.

Daniel and another v Tee and others [2016]: professional trustees escape liability for trust's £1.5 million investment losses

Summary

The High Court has ruled that two solicitors, acting as professional trustees of a £3.4 million will trust, (and a third solicitor at the firm who was also involved) were not liable for losses suffered by the trust as a result of investments in technology, IT and telecom sector equities when the 'dot.com' stock market bubble burst in 2001.

The claimants argued that the trustees had acted in breach of their duty of skill and care during the period 2000-2002 in their management of the trust and their alleged imprudence in relying on investment advice from a firm of independent financial advisers.

Background

The claimants were the children of Mr. Daniel, and were aged 13 and 16 at the time of their father's death. They inherited the trust funds when they reached age 25.

The defendants were three solicitors at the firm Stanley Tee. The second and third defendants had drafted the will, were executors of the estate and trustees of the will trust. The first defendant was the head of the firm's private client department, and although he was appointed as trustee in 2015 after the alleged investment losses, he had been involved in the investment of the trust funds from an early stage and effectively took on a trustee role.

Between 2000 and 2002, the trustees relied on independent investment advice from Taylor Young, an adviser they had used previously, both in respect of other clients' trusts, and also regarding the personal pension investments of two of the defendants.

The claimants alleged that the trustees were in breach of trust in:

- Failing to take appropriate care in formulating and monitoring the overall investment strategy
- Failing to properly consider diversification or suitability of the investments; and
- Relying too heavily on Taylor Young's recommendations.
- The claimants engaged a financial professional, who calculated that the trust assets would have been worth £3.46 million by March 2002 if they had been invested less heavily in equities. Taking into account lost subsequent growth, the damages sought were almost £1.5 million.

The trustees argued that the losses were not caused by any breach of trust. They also claimed that they had acted honestly and reasonably, and should be excused from any breach of trust under Section 61 of the Trustee Act 1925 (Section 61).

The relevant law

The Court considered the trustees' equitable duties and Section 61:

- **Duty of care** - trustees have a duty to act prudently, meaning they should "*take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide*."
- **Reasonableness** – whether the decisions made were ones which no trustee, complying with the duty to act prudently, could reasonably have made in the circumstances.
- **Section 61** provides that where the Court considers a trustee has acted honestly and reasonably, he may be relieved wholly or partly from personal liability for any breach of trust.

The decision

Breach of trust

The judge accepted that there had been breaches of trust as the trustees had failed to:

- Devise a realistic investment strategy for the trust at the outset.
- Conduct periodic reviews which specifically considered whether the investment strategy remained appropriate to the trust's attitude to risk.
- Adopt a well-balanced and diversified approach to the trust's investments, focusing too heavily on equities and cash, to the exclusion of other forms of investment.
- However, although the claimants had established some breaches of duty, the Court did not accept losses were caused as a result.

Causation
The claimants had failed to prove that the trustees' breaches of trust had actually caused their losses. They had failed to show that the trustees' investment choices over the years had been imprudent, and also that alternative investments would have produced better outcomes. Even when the stock market began to fall, it had not necessarily been an error by the trustees to continue to invest in equities to try to make good the losses.

Reasonableness
The judge considered whether each investment decision was one which no trustee, complying with the duty to act prudently, could reasonably have made in the circumstances. The decision to opt for Taylor Young's recommended growth portfolio had to be viewed in the context of the economic conditions at the time. While the trustees may have been at fault in believing that such investments were in keeping with the realistic risk strategy of the trust, the judge was not persuaded that "*no reasonable trustee, acting with appropriate prudence*", would have made the same decision.

Delegation
The claimants also alleged that an aspect of the trustees' breach was impermissible delegation. However, the judge found that none of the trustees' dealings with the trust assets had been unauthorised. On the contrary, the trustees had adopted an approach which they believed to be in the best interests of the trust, both regarding the involvement of their more experienced fellow partner, and in following the advice of Taylor Young. There had been no "blanket delegation" of the trustees' duties and no contravention of the prohibitions on delegating trustees' fiduciary discretions.

Alternatively, the judge considered he was able to relieve the trustees from personal liability under Section 61. Although the fact that the trustees were paid for their services was disadvantageous to them, they had worked hard and consistently over a long period, to the best of their abilities, and in reliance on what they reasonably believed to be the competent advice of Taylor Young.

Comment

The judgment offers a useful discussion on the scope of professional trustees' duties, particularly regarding investment advice.

The claimants ultimately failed to show a causal link between the accepted criticisms of the trustees' actions over the years and the eventual financial losses to the trust fund. The Court found that most of the losses were likely to have been sustained even if the trustees had followed a different investment strategy. This lack of causality was key in the Court's decision to use Section 61 to relieve the trustees of personal liability.

The trustees were entitled to rely on the advice of the investment managers and escaped personal liability because they had acted neither imprudently nor unreasonably.

View the judgment.

Pensions Ombudsman: Mr. N (PO-9507) – no duty on employer to tell member about less generous death benefit on change from active to deferred membership status

Summary

The Pensions Ombudsman (PO) has given his determination in a complaint by Mr. N against Dundee City Council and the Scottish Public Pensions Agency.

The PO found that there was no breach of the duty described in Scally by the employer of a member who opted to stop contributions to the Scottish Teachers' Superannuation Scheme (the Scheme) after 40 years of pensionable service, with the result that a much reduced death benefit was payable on her death less than a year later.

Facts

Mr. N's wife, Mrs. N, was employed by Dundee City Council from 1971 and was a member of the Scheme, administered by the Scottish Public Pensions Agency (the Administrator). In November 2012, she opted to end her contributions as she had 40 years' pensionable service, which she believed was the maximum under the Scheme. The opt-out form contained a declaration that the member had read "the guidance" and knew the potential benefits available. Under a section headed "Why should I be a member of the Scheme?", there were six points, one of which stated the Scheme would "pay a death grant if you die before you retire and may also pay children and dependants' pensions subject to qualifying service".

Mrs. N remained a council employee until her death on October 17, 2013, but this was not treated as death in service by the Administrator in calculating the £67,453 death benefit from the Scheme. The Administrator cited the Teachers' Superannuation (Scotland) Regulations 2005 (the 2005 Regulations), which provided that the death benefit payable in respect of a deferred member such as Mrs. N was only 3/80ths of pensionable salary multiplied by the reckonable service completed. If Mrs N had kept up contributions as an active member, under the 2005 Regulations Mr. N would have received a death in service grant equal to three times her pensionable salary, totalling £132,063.

Mr. N's subsequent complaint under the Scheme's internal dispute resolution procedure was rejected by the Administrator. The Administrator also said it had written to Mrs. N in January 2013 to say the maximum pensionable employment was 45 years and she could re-join the Scheme if she wanted, although Mr. N denied she received the letter.

Mr. N complained to the PO that his late wife, who was already ill when she stopped her contributions in 2012, would not have become a deferred member if the council or the Administrator had told her this would greatly reduce any death benefit. He claimed that the opt-out form had led her to believe the death grant would remain unchanged and that a council employee had told him after her death that under its normal practice, the council should have contacted Mrs N to explain the implications of opting out, given her 40 years' service. Mr. N also argued that the council had breached the employer's duty outlined in *Scally v Southern Health Board*[1992] (Scally) and later applied in the PO case of *Bennett*, the determination in which was published in April 2016.

Scally and *Bennett* decisions

In *Scally*, the House of Lords came extremely close to deciding that there is a duty on employers to advise in respect of pension rights and benefits. The case involved a group of junior doctors who were members of the NHS pension scheme. Under the scheme, members had a right to purchase additional years' service on beneficial terms, which then enabled them to obtain enhanced pensions. However, this right had to be exercised within a short period of time, or else the terms became less beneficial. The doctors argued that they had not been informed about their right and therefore had been disadvantaged.

The House of Lords concluded that, in the specific case, it was appropriate to imply a term into the doctors' employment contracts that the employer would take reasonable steps to inform the doctors about their rights. However, the Court did not go as far as stating that the employer had to give advice to the members about the exercise of their rights.

In the April 2016 case of *Bennett*, the PO determined that an NHS employer breached its implied *Scally* duty by failing to inform a new employee in 2000 of the 12-month time limit from joining the NHS scheme for transferring in benefits on a favourable public sector transfer club basis.

The PO upheld a complaint as against the employer's successor, the Department of Health, by a member who was refused a transfer club transfer in 2011, ten years after the time limit expired. The PO held that the conditions for establishing the contractual duty described in *Scally* were met and that the employer breached this duty as it did not take reasonable steps in 2000 to inform its employee of a contractual term in order for her to take advantage of it. In particular, he found that although a scheme booklet the member received in 1994 stated there was a 12-month time limit, she could not reasonably be expected to remember time limits she was told about six years before the transfer.

The PO directed that the member should be offered a transfer credit on the favourable transfer club basis, calculated as available in 2000. The Department of Health must pay the additional costs of this transfer credit over and above a transfer on a cash equivalent basis if required by the scheme.

Determination and consideration of *Scally* and *Bennett*

The PO dismissed Mr. N's complaint. The Administrator had a duty to administer the scheme in accordance with the 2005 Regulations and had done so in paying Mr. N the correct death benefit under those regulations. It had also complied with the statutory requirements for supplying information set out in the relevant regulations, as had the employer.

The opt-out form was clear that if a member opted out of the Scheme, a death in service grant would not be paid on death before retirement. Mrs. N should have queried this with the Administrator or her employer if she was unclear about it.

The PO did not accept Mr. N's claim that the point in the opt-out form under the heading "*Why should I be a member of the Scheme?*" indicated that a death in service grant would still be payable to deferred members who remained employed. While four of the six points listed under the heading could apply to both deferred and active members, two would not apply to deferred members: the point relied on by Mr. N and another concerning the facility to pay extra contributions for additional benefits.

The PO noted that in *Scally*, the House of Lords held that if certain requirements were met, the employer had a contractual duty to take reasonable steps to inform employees of a contractual term in order for them to take advantage of it. Even if the option to opt out of the Scheme were assumed to be a contractual right, the PO held that Mrs. N's circumstances did not meet another of the requirements set out in *Scally*: that she could not have reasonably been expected to be aware of the term unless it was drawn to her attention by the council. Not only did the opt-out form point out the advantages of being an active member, the declaration signed by Mrs. N meant she should have been aware of the relevant information about death benefits for active and deferred members that was readily available via the Scheme website and booklet.

In this context, the PO distinguished his determination in *Bennett*. In that case, the complainant could not reasonably have been expected to remember time limits given in the scheme booklet six years before the relevant transfer, but not made known at the time. In Mrs. N's case, there was no such inconsistency. It was clear from the information given at the time Mrs. N applied to opt out of the Scheme that the death in service grant would not be payable if she died before retirement.

The PO therefore concluded that although Mrs. N may have believed her husband would receive a death in service grant, this was not due to any failing by the council or the Administrator as the relevant information was available to her. He also noted there was no evidence to support Mr. N's contention that the council had a usual policy of advising members who elected to opt out of the implications of doing so.

Comment

The circumstances in which employers are obliged to give information to employees about pension rights have been debated over many years and considered in cases such as *Scally*. In broad terms, it seems from these cases that employers are not obliged to advise members about their pension rights, or highlight potentially detrimental decisions, or inform members of how best to exercise their pension rights. Employers must avoid giving anything that might constitute "financial advice" as they will not normally be authorised to do so under the relevant FCA rules. The determination in *Bennett* marked a rare example where it was held that the relatively narrow criteria for establishing an implied term set out in *Scally* had been fulfilled.

However, although the possible Scally reasoning regarding the application of an employer's implied contractual duty has been raised from time to time, the PO is usually reluctant to rule that the *Scally* duty has been breached. Nevertheless, where the Scally argument is brought up, the PO may determine that there has been maladministration where employers have failed to follow good practice. On this basis, employers should always seek to provide members with full details of a scheme's benefit structure, ensure that these details are clear, and ultimately suggest that members seek independent advice before making financial decisions.

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