ALLEN & OVERY

20 May 2019

Pensions: what's new this week

Welcome to your weekly update from the Allen & Overy Pensions team, bringing you up to speed on all the latest legal and regulatory developments in the world of occupational pensions.

Pension increases ruled invalid: *BIC v Burgess* | TPR compliance and enforcement bulletin | Employer debt – no deemed segregation: *China Shipping* | Master trust update | Auto-enrolment: new TPR spot checks | Latest HMRC newsletter | Trustees fined for valuation breaches: *Vive-Kananda* |

Pension increases ruled invalid: *BIC v Burgess*

The Court of Appeal has overturned an earlier High Court decision, ruling that increases to pensions (in excess of GMPs) were not validly introduced: *BIC v Burgess*. The dispute concerned the application, from 1992, of 5% LPI increases on pensions in payment in respect of pre-April 1997 service. There was no deed of amendment – the only evidence of a decision by the trustees to grant these increases were minutes of a trustee meeting from 1991 and a 1992 announcement to members. Subsequent versions of the deed and rules did not expressly authorise these increases. The High Court ruled that the increases had been validly granted and were not overpayments (see WNTW, 23 April 2018); the Court of Appeal has now allowed the employer's appeal.

The trustees' 1991/1992 actions did not meet the formalities required under the scheme's amendment rule at the time, so the issue was whether the increases had been retrospectively validated. The rules had been substituted in 1993 by a new deed and rules with retrospective effect from 1990: could the 1993 powers (including an amendment power which permitted amendments to be made by 'resolution (in writing)' of the trustees) be relied upon to find that the actions in 1991/1992 had validly introduced the increases?

The Court of Appeal concluded that this was not the case. The saving provision for the 1993 deed and rules prevented past actions from being invalidated but did not validate previous, invalid actions. There was no positive evidence that the trustees had considered the issue and decided to validate otherwise invalid amendments, or even of a common intention with the employer to do so – the mere introduction of the 1993 deed and rules with effect from 1990 was not sufficient. The court would have expected any common intention to validate the introduction of the increases to be reflected in the recitals (or a clause). There was no proper basis for treating the trustees as having exercised powers under the new deed and rules in this way.

The judgment also includes some other points of interest.

First, the court expressed a non-binding, provisional view on what was required by a 'resolution (in writing)' of the trustees (in relation to the amendment power in the 1993 deed and rules). The 1991 minutes referred to proposals to increase pensions and then stated 'it was resolved that the proposed

action be carried out as soon as possible'. The minutes were signed at the next meeting by the chair (who was also the managing director of the employer) but not the other trustees. The Court of Appeal considered that the 1991 minutes only recorded a resolution on future policy, with implementation to follow. If the intention had been for the minutes to immediately alter the rules, the court would have expected to see the text of the amendments set out in a document signed by all of the trustees, and for BIC to have signed the document in its capacity as principal employer (as the amendment power was exercisable with employer consent).

Secondly, the court did not discuss the issue of overpayments – at first instance, Mr Justice Arnold had commented that no statutory limitation period applies to equitable recoupment by trustees, and that a determination by the Pensions Ombudsman (TPO) would not be sufficient to permit trustees to recoup a disputed amount. TPO has recently released a factsheet explaining why he disagrees with the latter point (WNTW, 23 April 2019), meaning there is some uncertainty.

The Court of Appeal's decision is a reminder of the need to document intended changes to a scheme properly and clearly. In reaching its decision, the court emphasised the importance of meeting formalities requirements, and the limits of attempting to re-write history:

> *'The law should lean in favour of validating transactions undertaken by trustees in good faith if it properly can, but it must also recognise that formal requirements have a purpose, and if they are not complied with, the normal consequence is that the intended transaction is of no effect. Had the Trustees and BIC UK directed their minds to the problem, there are various ways in which the position could have been remedied with retrospective effect. Unfortunately, however, no such steps were ever taken; and in their absence, the pre-1997 Increases were never validly introduced.'*

TPR compliance and enforcement bulletin

The Pensions Regulator's (TPR) latest compliance and enforcement bulletin indicates that it is continuing its emphasis on treating DB schemes fairly. In particular, it states that in the last quarter TPR has worked with several employers to increase deficit repair contributions (DRCs) and reduce the length of the recovery plan.

The bulletin reiterates TPR's expectations on the payment of dividends and other shareholder distributions, as set out in its annual funding statement (see WNTW, 11 March 2019), and includes a case study on a scheme with low DRCs and a long recovery plan, deteriorating employer profitability, and 'acute' governance risks (in particular, conflicts of interest and a lack of proper understanding of the covenant). The covenant had been rated as strong but after TPR intervention, this was re-rated to strong/tending to weak, an improved funding package was agreed (plus a range of contingent support), and a professional chair of trustees was appointed.

The bulletin also mentions that TPR has, for the first time, used its power to appoint an independent trustee primarily on the basis of the lack of competence of the existing board of a DC scheme after a number of governance failures came to light.

Employer debt – no deemed segregation: *China Shipping*

The High Court has ruled that a non-segregated multi-employer scheme could not be treated as segregated for employer debt purposes: *PS Independent Trustees v China Shipping.*

In 2011, the principal employer (JSA) went into administration and sold its assets – there were also two participating employers (the defendants to the claim). The scheme went into winding-up. The issue before the court was whether, for employer debt purposes, the scheme had become a

segregated scheme, or whether the scheme remained non-segregated and the defendants were required to contribute to the deficit. The defendants argued that the scheme was deemed to be a segregated scheme under Part 7 of the Pension Protection Fund Multi-employer Regulations, and should also be treated as such for employer debt purposes. The trustees argued that the conditions for segregation in the PPF Regulations had not been met and that even if these had been, this did not mean the scheme was segregated for employer debt purposes.

Mr Justice Fancourt found in favour of the trustees. Part 7 applies only to schemes where the trustees have an option to segregate in respect of an insolvent employer (not another employer). It does not convert a non-segregated scheme into a segregated scheme; instead it segregates the assets and liabilities attributable to the insolvent employer. In this case, there was no option for the trustees to segregate part of the assets in relation to JSA; the rules provided for the whole scheme to be wound up on JSA's insolvency. The option to segregate related to associated employers. Mr Justice Fancourt also commented that even if Part 7 operated to segregate assets to each of the three employers, this did not meet the definition of a segregated scheme under the Employer Debt Regulations. Therefore, the defendants were liable for the sums claimed (over GBP6 million in total).

Master trust update

TPR has confirmed that it has received a total of 38 applications for authorisation by existing master trusts. A number of applications are still being reviewed by TPR; the list of currently authorised master trusts is available here. TPR has also published a blog post on its expectations of authorised master trusts under the new regime. It will provide master trusts with further information later this year about their contact with TPR, including the provision of information, whether the master trust will be assigned a dedicated supervisor and the expected frequency of contact with TPR.

Auto-enrolment: new TPR spot checks

TPR has begun a series of auto-enrolment spot checks on employers, which will continue over the summer. TPR is targeting employers it suspects of failing to comply with their auto-enrolment duties, and will be conducting inspections and contacting employers by telephone. This includes where incorrect pension contributions are being paid – the minimum rate of contributions for DC schemes increased last month (see WNTW, 4 February 2019 and 8 April 2019).

Latest HMRC newsletter

HMRC's latest Countdown bulletin (no. 45) includes information on a range of clerical and processing issues for administrators dealing with reconciliation processes after the end of DB contracting-out. HMRC will be re-running a number of automated exercises; administrators should review the information provided, including the new submission deadlines, and the circumstances in which administrators will (or will not) need to re-engage with HMRC in relation to Scheme Financial Reconciliation.

Trustees fined for valuation breaches: *Vive-Kananda*

An Upper Tribunal judge has directed that TPR should fine three trustees in relation to failures to take reasonable steps to obtain two successive scheme valuations (note the third trustee was only fined in relation to the latter failure). TPR began engaging with the trustees in 2014, after being notified by the scheme actuary that she had been unable to certify the technical provisions or the adequacy of the schedule of contributions. Several years of communications followed and TPR issued a Warning

Notice in 2018 regarding the failure to obtain the 2013 and 2016 valuations. The Determinations Panel imposed penalties on the trustees, who then appealed to the Upper Tribunal.

The judge directed that two trustees should be fined GBP7,000 each in respect of two breaches and the third GBP3,500 for one breach. he case is an extreme example of trustee behaviour: there was no evidence of any steps taken by the trustees themselves to progress matters. They did not individually engage with TPR, and appear to have left matters in the hands of either the employer or advisers, without taking personal responsibility for ensuring that matters were progressed (and, if they were not, for explaining matters to TPR). This behaviour was ‘clearly unacceptable’ and fell far below the standards expected of a pension scheme trustee.

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