STEPHENSON HARWOOD
pensions law group

Snapshot

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Overview

- Scheme amendment power prevents employer from making changes to active members' future benefits

  In *BBC v BBC Pension Trust Ltd & Anor*, the court held that an amendment power which prevented amendments which would *"substantially prejudice"* the members "*interests*" protected future pensions accrual in the context of the scheme in question. This means that, other than in very limited circumstances, it will be difficult for the BBC to make changes to active members' future service benefits using the Scheme's amendment power.

- Trustee decision to wind up scheme's sponsoring employers approved by High Court

  The case of *Brass Trustees Ltd v Goldstone* emphasises that the court may support a trustee's request to ultimately force the winding up of a pension scheme by petitioning for employer wind up where sponsors fall behind with their financial obligations to the scheme. Such actions are likely to be exacerbated if there is a lack of communication from the employer to the trustee regarding its financial position.

- Shah v The Pensions Regulator – contribution notice amounts based on the detriment to the scheme

  The Upper Tribunal confirmed that there was no need to base the quantum of a contribution notice on any kind of 'but-for' causation or compensatory analysis of loss caused as a result of the act or failure to act. The focus should be on the extent to which the act or failure to act had caused detriment to the prospects of scheme members getting their benefits from the scheme.

- Mansion House proposals

  On 10 July 2023, Chancellor Jeremy Hunt announced the 'Mansion House reforms'. These build on previous consultations and calls for evidence. The Department for Work and Pensions (**DWP**) aims to weave together a coherent strategy to 'boost returns and improve outcomes for pension fund holders whilst increasing funding liquidity for high- growth companies.' Aspects of these proposals will impact both defined benefit (**DB**) and defined contribution (**DC**) schemes.

- Revised DB superfunds guidance

  The Pensions Regulator (**Regulator**) has amended its DB superfunds guidance in order to ease entrance into the market for schemes whilst we await a legislative regime in this area.

In more detail

Scheme amendment power prevents employer from making changes to active members' future benefits

On 28 July 2023, Justice Adam Johnson handed down his judgment in *BBC v BBC Pension Trust Ltd & Anor*, Part 8 proceedings in which the BBC sought clarity as to the scope of the BBC Pension Scheme's amendment power, including specifically the meaning of "*interests*" in the Scheme's amendment power and the ability to amend future pension accrual.

The Scheme's amendment power allowed amendments to future benefits for active members if:

- the Scheme actuary certified that the amendment would not *"substantially prejudice"* the members "*interests*"; and
- if the change would substantially prejudice members' interests, the Scheme actuary confirmed that "*substantially equivalent benefits*" would be provided instead; or
- if a majority of active Scheme members vote for a change at an appropriately constituted meeting.

The court agreed with the submissions made by the Representative Beneficiary's legal team on the interpretation of the word "*interests*". The court found that, in the specific context of the Scheme, the meaning of the word "*interests*" was very wide, so as to include, for example, future pensions accrual. This means that, other than in very limited circumstances – such as where members' interests were not "*substantially prejudiced*' – it will be very difficult for the BBC to make changes to active members' future service benefits using the Scheme's amendment power.

The BBC has been granted permission to appeal on all the grounds on which it lost at first instance. We expect the appeal to be heard in the next 12 months. Stephenson Harwood's pensions disputes team acted for the Representative Beneficiary.

A link to the judgement can be found here:
https://www.bailii.org/ew/cases/EWHC/Ch/2023/1965.html

Trustee decision to wind up scheme's sponsoring employer approved by High Court

In the case of *Brass Trustees Ltd v Goldstone*, the High Court approved the decision of the trustee to issue a petition to wind up the sponsors of a defined benefit pension scheme known as the Biwater Retirement and Security Scheme (**Scheme**). As at December 2022, the Scheme's deficit was around £28.3 million. As at May 2023, the employers owed the Scheme over £39.74 million.

The employers had (broadly) not met their financial obligations to the Scheme since March 2020. This included obligations under the schedule of contributions, outstanding obligations under an agreement to make exceptional contributions and additional funds to the Scheme as well as unpaid insurance and expense contributions. There was concern that over time the financial position of the Scheme would worsen and the compensation payable by the PPF would increase (known as 'PPF drift'). Under the rules of the Scheme, the trustees could only wind up the Scheme, without the principal employer's agreement, on employer insolvency.

Due to the gravity of the decision, the trustees sought the court's blessing to issue petitions to wind up the Scheme's sponsors.

The High Court consented to the winding up of the sponsoring employers. The court was satisfied that the employers had no prospects of meeting their financial obligations to the Scheme. The employers' had also repeatedly failed to provide the trustee, the PPF or the Regulator with information either requested by the trustee or promised by the employer.

In approving the proposal of the trustee to wind up the employers, the court noted that the trustee had adequately taken into account the:

- financial circumstances of the Scheme and likelihood of the employers making good the debts owed to it;
- consequences for the members of the Scheme of the Scheme continuing;
- trustee's duties to protect the Scheme assets; and
- trustee's duty to protect members and beneficiaries.

The trustee had also taken professional advice.

The case emphasises that the court may support a trustee's request to ultimately force the winding up of a pension scheme by petitioning for employer wind up. This is particularly the case where sponsors fall behind with their financial obligations to the Scheme in circumstances where there is no prospect of these employers meeting those obligations in the future. Such actions are likely to be exacerbated if there is a lack of communication from the employer to the trustee regarding its financial position.

Shah v The Pensions Regulator – contribution notice amounts based on the detriment to the scheme

The Upper Tribunal has examined a determination of the Regulator's Determinations Panel to issue a contribution notice under Section 38 Pensions Act 2004 against two directors of a statutory employer that went insolvent and triggered the winding up of a scheme with a deficit of £5.85 million.

The Upper Tribunal dismissed the application, upholding the determination of the Regulator's Determinations Panel to issue a contribution notice of the sum of £3,688,108 after a finding of fact that the target and his nephew had been party to a series of financial transactions that had caused material detriment to a group pension scheme. This quantum was reached by reference to the sale proceeds of shares held by one of the scheme's statutory employers in an Indian joint venture company. The sale proceeds were paid in 2014 to another group company which was not a statutory employer in relation to the scheme. Later that year, the scheme winding up provisions were triggered after its principal employer entered into a CVA as a result of insolvency. At that time, the deficit in the scheme was estimated to be £5.85 million.

The tribunal held that the material detriment basis had been met and it was therefore reasonable to issue a contribution notice.

Importantly, the Upper Tribunal also confirmed that there was no need to base the quantum of a contribution notice on any kind of 'but-for' causation or compensatory analysis of loss caused as

a result of the act or failure to act. The focus should therefore be on the extent to which the act or failure to act had caused detriment to the prospects of scheme members getting their benefits from the scheme. This reaffirms the Regulator's wide scope for setting contribution notice amounts which are not linked to the nature of the act or omission but rather the effect of the detriment to the scheme.

Mansion House proposals

On 10 July 2023, Chancellor Jeremy Hunt discussed the 'Mansion House reforms'. These build on previous consultations and calls for evidence. The DWP aims to weave together a coherent strategy to 'boost returns and improve outcomes for pension fund holders whilst increasing funding liquidity for high-growth companies.' The key proposals are:

- DB superfunds
  The DWP wants to provide a permanent superfund regulatory regime to provide sponsoring employers and trustees with an alternative buy-out option. This offers them a way to manage DB liabilities, so that superfunds can use their scale to invest in assets that support the UK economy. Superfunds will be authorised and supervised by the Regulator. However primary legislation is required, which will take some time.

- Options for DB schemes
  The DWP aims to increase investment in productive asset classes. This includes exploring the provision of more equity capital and finance for businesses in the UK, including start-ups, infrastructure and private equity, as well as longer-term investments, typically in illiquid assets termed as ‘productive finance’.

- Implementation of the DC value for money framework
  Hunt proposed that schemes will have to disclose standardised metrics to a regulatory database. Where a scheme is found to have poor value against peers, it will have a defined timeline to improve. The Regulator will have new powers to enforce wind up and consolidation if it does not. Primary legislation is to come on this point.

- A solution for deferred small pots
  The DWP proposes to introduce a multiple consolidator model for small pots. A small pot will be classified as one of £1000 or less, with no minimum size for automatic consolidation. An industry group will be set up later in 2023 to explore the design and implementation of the default consolidator framework.

- DC decumulation
  The DWP proposes that trustees of DC schemes will have a new duty to offer decumulation services which are suitable for their members. They will have two options: (i) choose the default service offered by the scheme; or (ii) access the products and services available under pension freedoms. This will incur more work for trustees, who will need to offer these services in house or partner with another supplier.

- Extension of Collective DC schemes (**CDC**)
  Hunt proposed setting out a roadmap to encourage CDCs. Through investment and longevity pooling, CDC would be able to improve pensions adequacy for savers whose employers are unable to set up a standalone scheme.

- Trustee skills, capability and culture
  A Government **call for evidence** examines three areas: existing trustee effectiveness; the role of investment consultants in supporting trustees; and the extent to which fiduciary duties may hinder trustees. By enhancing trustee expertise, especially in investments, the DWP hopes that allocations to illiquid assets might increase. It is worth noting that the Government stops short of proposing professional trusteeship as a requirement for all schemes.

According to a Professional Pensions poll, the industry is split on these reforms. Of the 33% who said they did not see the reforms and consultations as a positive move for pensions, several mentioned "interference" from government being a way of getting sidetracked from other tasks, while another said the reforms "require substantial research".

Revised DB superfunds guidance

The Regulator has revised its guidance on DB superfunds. The Regulator recognises that, whilst the DWP has confirmed that it will be legislating in this area, such legislation will take time. In order to assist employers and trustees who wish to take advantage of superfund opportunities in the meantime, the Regulator is updating its guidance by:

- Making it easier for schemes to transfer to a superfund. This includes providing greater clarity over when the Regulator considers a scheme can consider transferring to a superfund and providing more time to demonstrate that the Regulator's expectations for capital have been met;
- Amending the funding expectations by amending the discount rate from Gilts+0.5% to Gilts+0.75% to reflect the changing market conditions;
- Suggesting it will change its approach to profit extraction. It notes there will be further industry engagement regarding this. The Regulator will then issue an update on its position in this area in due course; and
- Providing greater clarity on the Regulator's expectations for the assessment process.

Given the numerous economic changes and challenges since the guidance was first issued in 2020, the superfund regime is yet to take off. However, the Regulator is keen to promote DB superfunds as part of the risk transfer and management options for defend benefit pension schemes. It is one way to improve governance of smaller schemes and also offer economies of scale. The changes to its guidance are intended to ease entrance into the market whilst we await a legislative regime in this area.

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