
***NEW OBLIGATIONS FOR TRUSTEES UNDER THE
PENSIONS (AMENDMENT) BILL 2001***

**Association of Pensions Lawyers of Ireland Conference
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1. Pensions Ombudsman – Implications for Trustees

Section 4 of the Bill introduces a new Part XI. This establishes the office of Pensions Ombudsman and its role.

The Pensions Ombudsman shall have jurisdiction to investigate and determine complaints and disputes relating to occupational pension schemes and PRSAs. For the purpose of this paper I am ignoring the Ombudsman's remit in the area of PRSAs. Part XI is very important to trustees because their actions will be subject to review in relation to disputes or complaints referred to the Ombudsman. Like other parts of the Bill, Part XI is to be fleshed out by regulations and therefore we really only know in outline how the Pensions Ombudsman's role is to function. Hopefully, when regulations are produced they will be issued in draft so we will have an opportunity of reviewing them and making submissions, as we are now able to do in relation to the Bill.

1.2 Categories of Referral

There are three categories of referral:

1. Complaints made by a beneficiary under a scheme who alleges he has sustained financial loss occasioned by maladministration done by or on behalf of a person responsible for the management of that scheme;
2. Any dispute of fact or law that arises in relation to an act done by a person responsible for the management of the scheme that is referred to the ombudsman by a beneficiary; and
3. Complaints or disputes to be prescribed by the Minister for Social Family and Community Affairs with the consent of the Minister for Finance.

(It is interesting to note that the Minister for Finance has a consultation and consent function in many aspects of Part XI. This is presumably because the costs of establishment and running the office of the Pensions Ombudsman are to be borne by the Exchequer).

Not surprisingly persons responsible for the management of a pension scheme cover any trustee or former trustee of the scheme as well as employers. If a person to whom trustees of a pension scheme have delegated certain duties (e.g. administration custody), acts in a manner which results in financial loss due to maladministration under the Bill, it appears that the Pensions Ombudsman has no jurisdiction to entertain the complaint in respect of such a person and issue directions/redress.

The Bill enables a complaint of maladministration resulting in financial loss to be made in respect of maladministration done by **or on behalf of** trustees. This covers such acts by administrators and custodians to whom trustees have delegated these functions. However, such persons are not included as parties to any complaint. (So the ombudsman cannot

made directions to them at the conclusion of an investigation). Instead this role is limited to trustees, employers and persons to be prescribed.

1.3 The Position of Delegates

Ought complaints lie against all parties involved in the running of a pension scheme, not merely the trustees and employers?

Where a trustee's delegate is at fault, ought redress be levied against that person? If not, the effectiveness of the office of the Pensions Ombudsman as a dispute resolution forum may be jeopardised by the difficulties in bringing claims and enforcing determinations.

Is it appropriate for trustees to potentially bear the burden of making good financial loss incurred through the actions of a delegate who was selected with due care and whose actions were supervised to an acceptable degree? Trustees may find it difficult and costly to recover from the delegate.

Disputes of fact or law relating to acts done by trustees or employers may be referred to the Pensions Ombudsman.

Ought disputes covering acts done by trustees' delegates be also capable of referral? Equally, should the Pensions Ombudsman be conferred with jurisdiction to make directions to such persons to enable an appropriate redress determination to be made?

It could be argued that trustees are ultimately responsible (irrespective of what the trust deed says) for their delegates and should bear the responsibility and then recoup from the delegate.

It is important to remember the Ombudsman's role is an investigative one. This, in theory, is different from a court hearing where both sides give their side of the story and one is a plaintiff and the other a defendant. Time will tell if the investigation process will actually be different.

1.4 Procedure

1.4.1 Form of Complaint

Now I am going to look at some issues which may be of concern to trustees under Part XI.

The form of any complaint (relating to financial loss arising from mal-administration) or reference (of a dispute of fact or law by a person responsible for the management of a scheme or PRSA) is to be in writing and in a manner to be prescribed by regulations.

A lot of what follows now is procedure but this will be critical when trustees are "defending" any claim so it is important that attention is paid to the detail of this. For example, potentially if a complaint or reference was made on the wrong format the trustees could challenge the

validity of the complaints. So they will want to examine the nature of the conditions to be prescribed and which must be followed in each case.

1.4.2 Time Limits

Complaints must be made within three years from the date of the act giving rise to the complaint or reference or within such longer period as the ombudsman may allow if it appears there is reasonable grounds to do so and that it would be just and reasonable to extend the period. However, complaints made in respect of acts which occurred three years prior to the commencement of Part XI will not be entertained irrespective of how reasonable they may be.

Part XI is silent as to whether the trustees have an opportunity of rebutting any case that it is reasonable to lengthen the three year time frame. It is hoped that the trustees would have any opportunity of being permitted to give their side of the story to say that the claim is out of time and that the circumstances are not reasonable.

It is envisaged that complaints and disputes cannot be entertained unless the internal dispute procedure within a scheme has been followed. Regulations are to issue which will explain how the internal dispute system is to operate within a scheme. Presumably, these will override existing arrangements. Also of relevance is how provisions dealing with the referral of disputes to arbitration will be affected by Part XI.

1.4.3 Reduction of Ombudsman's Jurisdiction

Section 131(6) precludes the ombudsman from making an investigation or determination of a complaint or a dispute in three circumstances. These are:

- (a) If at the time of the complaint or referral there are proceedings before any court relating to the matter; or
- (b) If the scheme (or PRSA) has been excluded from the jurisdiction of the Pensions Ombudsman by regulations; or
- (c) If and to the extent that the complaint or dispute or any matter arising in connection with complaint or dispute is of a description that it is excluded from the jurisdiction of the ombudsman by regulations.

The later two categories are noteworthy. Which schemes will be excluded? Will they be schemes which are in the public sector and which are excluded from some regulatory provisions in general, for example those pension schemes relating to the Defence Forces must follow their own redress procedures prior to a claim being made under certain parts of the Employment Equality Act, 1998. It will be interesting to see how the ombudsman's jurisdiction to deal with claims will be reduced by regulations.

1.4.4 Conduct of an Investigation

Where an investigation occurs the trustees will want to know how this is to be conducted and what procedures are going to be followed and, in particular, they are likely to want to see how the general provisions of natural justice will be followed in practice.

Section 138 empowers the Minister to make regulations in relation to the procedures to be adopted in connection with complaints, reference of disputes and conduct of investigations. Subject to such regulations, the ombudsman will have general powers to make up the procedures. Of course such powers will be subject to case law, administrative law and overriding principles of natural justice.

Section 138(3) indicates that where the ombudsman proposes to conduct an investigation into a complaint or a dispute referred to him he must give any person who is responsible for the management of the scheme and any other person against whom allegations are made in the complaint or reference an opportunity to comment on any allegations contained in the complaint or reference. (This would cover trustees delegates who are not currently envisaged as being a party to a complaint).

Also, the Pensions Ombudsman has jurisdiction to determine whether any person may be represented by counsel, solicitor or otherwise in an investigation by him. However, if he prevents the person from seeking or from being able to claim representation by a lawyer his actions are possibly open to judicial review.

It is likely he would only refuse to permit someone to have representation if their role was limited to giving some incidental factual evidence in an investigation.

1.5 Ombudsman's Powers

Also relevant to the trustees is the provision (Section 137(1)) which says that for the purpose of investigation the Ombudsman may require any person who, in his opinion, possess information or has any document in his power or control that is relevant to the investigation to furnish this; he can also ask people to attend before him for that purpose and they must. He is to have for the purpose for the investigation all the powers, rights and privileges invested in a High Court judge in respect of the examination of witnesses (Section 137(2)).

Whilst Section 137(4) prohibits a person from obstructing or hindering the ombudsman in performing his functions or doing anything which would amount to contempt of court were the ombudsman a court with such powers, the section does not expressly make this an offence.

So the ombudsman's powers might be a bit toothless. However under Section 3 of main the Act, if the trustees, auditor or actuary of a scheme contravene a provision of the Act they are guilty of an offence (carrying fines of up to £1,500 or 1 year's imprisonment on summary conviction and £10,000 or 2 year's imprisonment on conviction on indictment).

Such summary offences may be prosecuted by the Board. So it's theoretically possible that the Board could prosecute trustees for inadequate cooperation with the Pensions Ombudsman in his investigation.

It would seem better for the ombudsman's enforcement machinery for obstructive witness etc. to be outside the Board's remit entirely. The powers of tribunals under the Tribunals of Inquiry (Evidence) Acts 1921-1998 have been seen recently to be effective in practice and it might be appropriate for the ombudsman to have adequate powers to enable his functions to be effectively carried out. The general catchall terms of Section 131(8) which gives him such powers as are necessary for or incidental to the performance of his functions do not appear to be enough.

Once the investigation has concluded what happens next?

1.6 Determinations

Section 139 provides that the ombudsman must make a determination in relation to the complaint or dispute, and may in the determination give to the parties concerned such directions, as he considers necessary or expedient for the satisfaction of the complaint or the resolution of the dispute. Interestingly, a direction shall not require either:

- (a) an amendment of the rules of the scheme; or
- (b) the substitution of his decision for that of the trustees in relation to the exercise by the trustees of a discretionary power under the rules of the scheme (Section 139(2)).

I am not sure what exactly what is meant by the fact that his direction cannot require a rule amendment. Does this mean that his powers cannot be implemented in such a way which would run counter to the scheme rules. Or, on the other hand, does it mean that if he orders the trustees to pay a benefit, which is not authorised under the scheme rules, his direction is overriding. If the latter is meant, and I presume this is the case, because his direction is likely to require the trustees to pay money otherwise than as authorised under the trust deed and rules. But the trustees do not, on the face of the draft legislation, obtain any discharge or exoneration from breaching the rules of the scheme in this manner.

I suppose if a technical breach of trust were pleaded by members, trustees' defence would be to point to the Ombudsman's ruling.

Paragraph (b) is interesting. This means that the trustees' exercise of their discretions cannot be set aside by the ombudsman. It also means that if the exercise by the trustees of a discretionary power was apparently on its face totally wrong the claimant would be better off to have brought proceedings in the High Court or the Circuit Court (depending on values) as that court would be able to overturn the wrong decision (following the Hastings – Bass principle).

When making the determination the ombudsman is entitled to order financial redress, and any other redress, which he considers appropriate. It cannot exceed the actual amount of loss of benefit or loss under the scheme. His determination must be in writing and communicated to the parties. He can publish the information and for the purpose of the law of defamation this publication shall be privileged.

The form of the determination, which issues in relation to the award of redress, is worth considering. Where the determination is directed to the trustees of the scheme and they are required to pay a certain benefit or payment of money that the form will need to indicate that the money shall be payable out of the resources of the scheme. Otherwise there is the potential that the determination might in some way be made against the trustees out of their own resources.

1.7 Appeals to the High Court

These are permitted within 21 days of the ombudsman's determination. There is no provision for a stay on implementing the determination where an appeal has been lodged. Instead, it appears from Section 141, that the Circuit Court can be compelled to order the appellant to implement the ombudsman's determination notwithstanding that an appeal is pending.

It may be preferable that where an appeal is lodged a stay of execution on the ombudsman's determination is appropriate. Otherwise appellants may be discouraged to bring appeals and this will lessen their right of appeal. Also, in the event of the appeal being successful, it may be complex to unravel the implementation of the Pensions Ombudsman's decision. It might be sensible for determinations not to be effective until after 21 days from their date; also, that strict procedural time limits should be put in place for the running of appeals (as in the case of planning appeals) so that the appeal process is not open to abuse as a method of delaying discharge of the ombudsman's determination.

1.8 Failure to Implement Determinations

What happens if a person fails to carry out the ombudsman's determination and ignores it completely?

In those circumstances Section 141 comes into play. An application can be made by the other party to the proceedings (assume, for example, the member who had made the complaint) or the Minister for Social, Family and Community Affairs if he was of an opinion that it is appropriate to do so, having regard to all the circumstances, to the Circuit Court seeking an order directing the offending party to carry out the determination. It is interesting that the Minister has a role here in enforcement.

Also in Section 141(1)(a)(i), the enforcement application to the Circuit Court is contemplated as being made by "the other party concerned". This wording is not defined and it may be that there would be more one party to a determination. The language may require to be redrafted to encompass this point.

When an enforcement order is requested from the Circuit Court it has power to make an order, or to provide for different redress because lapse of time has occurred in relation to enforcing the order. The Circuit Court may also provide the payment of financial redress and direct that “the person concerned” pay Courts Act interest in respect of the period beginning four weeks after the date on which the “decision or determination concerned is communicated to the parties and ending on the date of the order”.

Possibly a technical adjustment to Section 141 (3) is required involving the deletion of the word “decision or”. This implies that the ombudsman is empowered to make decisions and that it was the decision, which was not implemented which gave rise to the enforcement application before the Circuit Court. However section 139 empowers the ombudsman to make a determination. No decision jurisdiction appears to be conferred upon him. (In fact, he is specifically precluded from substituting his decisions for trustees’ exercise of a discretionary power).

1.9 Court Proceedings in relation to the same complaint/dispute

If a claim has been made before the ombudsman and proceeding are separately issued in respect of the same claim or facts of the dispute what happens? Section 136 governs this position.

It provides that if the complaint has been made or a dispute referred to the Pensions Ombudsman and, subsequently, any party commences proceedings in any court against any other party to the complaint or dispute then any party to the proceedings may, at any time after an appearance has been entered and the before delivery of any pleadings or the taking any other steps in the proceedings, apply to the court to stay the proceedings; and if the court is satisfied that there is no reason why the matter in respect of which the proceedings have been commenced should not be investigated by the ombudsman and the applicant was when the proceedings were commenced and still remains ready and willing to all things necessary for the conduct of the investigation, then the court will make an order staying the proceedings.

As mentioned above, the ombudsman is not empowered to investigate or determine any complaint or dispute in respect of which proceedings have already been initiated before any court. The joint effect of the foregoing is that either proceedings are issued before another court and no jurisdiction of the Pensions Ombudsman arises or the ombudsman will first deal with the matter. If proceedings are subsequently issued then they can proceed but an application can be made to have those subsequent proceeding stayed in certain circumstances.

1.10 Trustees’ Powers to Participate in Proceedings

What powers do trustees have under law to defend any proceedings or to rebut any allegations made in respect of their alleged maladministration or in a dispute which results in an investigation by the ombudsman?

This point is especially relevant in the case of trust deeds and rule which do not give trustees an express power to settle claims and compromise actions as is conferred by Section 21 of the Trustee Act 1893.

Where trustees actions are being investigated due to a claim for maladministration involving loss or in a dispute, the trustees have implied powers to rebut the allegations. This is part and parcel of their duties to look after the trust fund. However, when it comes to settling claims etc. Section 21 gives the trustees wide powers to take such actions but it appears they require to be operated unanimously. Consequently, even if a deed confers majority voting, it may be appropriate for amendments to be made to deeds enabling scheme trustees to participate in ombudsman's proceedings, etc. protecting the status quo of majority voting in this area.

1.11 Costs and Expenses

Its extremely unclear what is the extent of trustees' rights to recovery costs in defending their actions in an investigation or dispute section 137 (5) enables the ombudsman to pay travel and subsistence expenses and allowances for compensation for loss of time to persons affected by an investigation and to witnesses, the amounts are to be set out in regulations. This tends to the conclusion that the fund or employer may have to pay the trustees cost in defending their actions. Depending on the level of prescribed sums and allowances and the nature of an investigation trustees may consider challenging section 137 (5) to recover costs in a case where no maladministration is proved.

1.12 Conclusion

In conclusion, it's definite in the future trustees' actions will be investigated by the ombudsman. Should their delegates be capable of being parties to an investigation to whom directions may be made. Ought trustees have a right to give reasons why they think a claim is out of time after three years? The ombudsman seems to need enforcement machinery in case someone does not co-operate in an investigation. If you want a trustees' decision to be set aside, you might be better of going to the High Court directly. Ought there to be a stay when an appeal is lodged against the ombudsman's determination? Check the deed and rules to see what are the trustees' powers to defend actions, be parties to proceedings and investigations. If there is nothing specific, unanimity may be required.

And finally, what will be the procedures set out by the regulations which trustees will need to follow?

The above is a brief look at certain important procedural issues relating to the jurisdiction of the ombudsman and the role of the trustees in disputes before the Pensions Ombudsman. I will now deal with member selection of investments

2 Member Selection of Investments

In a defined contribution scheme context, increasingly, members are being permitted and encouraged to select investments out of a class of investments chosen by the trustees (having taking professional advice). If member selections are imprudent, do the trustees have an obligation under general trust principles and/or under the existing provision of Section 59 of the Pensions Act (statutory duty to provide for the proper investment of the resources of the scheme in accordance with the rules of the scheme) to override the selection?

2.1 Trustees' Standard of Care

What is the trustees' standard of care to their beneficiaries in making investments? In *Cowen v Scargill* (1990), Megarry V.C. reiterated the rule that the standard required of a trustee in exercising the power of investment was to 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.

Trustees of defined contribution plan have concerns that:

- (a) If members appear to make a wrong selection ought they override those selections? or
- (b) Irrespective of whether they do, are they liable if the members selection turns out to be a bad investment?

Section 39 of the Bill introduces a revised Section 59 of the Act. This restates the existing statutory duties and in the context of the investment duty provides an exception.

The exception provides exoneration from liability for trustees in the event that certain "safe harbour" principles are followed. However, the section as drafted, is quite narrow and the extent of the exoneration is limited.

The new regime is elective and not obligatory to adopt but it imposes obligations on trustees once they (and presumably the employer) decide to avail of it.

Where trustees comply with the new safe harbour rules the exoneration only applies so that trustees incur no liability solely by reason of giving effect to the directions of the members which are given in accordance with the rules of the scheme.

2.2 The Mechanics

Let's look now at what the safe harbour rules say.

They envisage that the rules of the scheme enable the trustees to invest the resources of the scheme in accordance with directions given by members. Only to the extent that the rules

provide, and (in compliance with the legislation and regulations to be published) authorise the trustees, is the exoneration available.

The mechanics of member selection must be set out in the rules and the trustees need to comply with four new statutory requirements. These four steps are that the trustees must:

1. determine, in accordance with the rules, the differing types of investments which may be made at the direction of the members;
2. determine, in accordance with the rules, how the resources are to be invested where the members give no direction, i.e. what is the default option?
3. furnish members with prescribed information (the extent of this information is to be set out in regulations) which relates to the type of investments which the trustees may permit the members to select and which relates to the default option;
4. take such steps as are reasonable to ensure that members have any further information which is necessary to enable them to make informed decisions as to selecting investments out of the pool chosen by the trustees.

It is clear that to come within the safe harbour rules the rules of the plan must be amended to dovetail with the statutory exemption.

The rules must give the trustees a power to decide the type of investments which the members are permitted to select.

It's unclear if the rules must spell out in longhand the individual components making up a potential basket of investments on a named basis or whether this can be more general. I assume this provision will become easier to understand when the regulations are published.

For example, this could be a power enabling the trustees to earmark a number of managed funds. It is assumed the investment profile of the funds earmarked would then be communicated to members who would choose one or more funds earmarked. In this way the member would not be enabled to require the trustees to invest in an unsuitable investment. So the trustees would have a large degree of control as is currently the position in practice.

2.3 Extent of Exoneration

The exoneration only arises to the extent the claim would arise as a result of the member's selection.

Exoneration does not extend to the choice by the trustees of investments from which the member makes the selection or the consequences of a default strategy resulting in poor returns.

The trustees might also be open to breach of duty if they agree to a rule change in the first place. For example, suppose the existing investment strategy has worked well but the new regime which is implemented as a result of a rule change results in negative returns, in spite of having been implemented in conjunction with appropriate professional investment advice?

2.4 Conclusion

In conclusion, trustees need to consider whether it is worthwhile adopting the new regime. They will only be able to properly consider this on carefully examining the regs.

3 New duties for trustees when winding up a Scheme

Section 59 D confers new duties on trustees when winding up a scheme on or after 1st January 2002. Regulations are going to flesh out the section.

They are, it seems, to provide that trustees will have a duty within prescribed periods and in a prescribed manner, to notify prescribed persons of the winding up. At the moment there is a duty to notify members but it seems possibly, the types of members will be listed; others to be notified may include unions representing numbers. It appears that the prescribed information will include the existence or likely existence of a surplus after discharge of scheme liabilities.

If there is either a surplus or deficiency in the scheme when it is being wound up neither the trustees nor any participating employer in the scheme is entitled to exercise any discretion as to the payment of surplus or abatement of benefits unless there has been prior consultation and dialogue between the trustees/employer and the members. The dialogue arises where the members are given an opportunity to make observations to the person with power of disposal or abatement and this person must give due consideration to such observations prior to exercising the power.

It also appears that if, in a group situation, the power of disposal of surplus or abatement of benefits rests with a third party who is neither the trustees nor any employer to whose employment the scheme relates, then there is no obligation to follow the dialogue process. This could be relevant in framing new deeds, going forward, where, for example, an overseas employer could have these powers vested in them in a new situation. Alternatively, it could be that an amendment could be made to Section 59 D, which would catch that type of drafting so that dialogue would be required in that circumstance as well. The point to note is that the person who has the power of augmentation or abatement requires to give to give due consideration to the observations but does not necessarily have to follow them. So the inclusion of wording which would give the relevant power to a third party would merely eliminate the dialogue process but may not affect the status quo, per se, if the power was vested in an overseas parent instead of a local employer.

It is extremely important for trustees having powers of disposal of surplus/abatement to follow the procedures necessary to implement their new duties – i.e. they must minute the

fact they have given the information, afforded the members the opportunity to make observations and have duly considered them. Where employers to which a scheme relates have the power of disposal of surplus/abatement they should keep similar minutes of their actions.

4 Bulk Transfers

New duties are provided under Section 59 E in connection with bulk transfers. At present the extent of these duties depends on guess work.

A bulk transfer is a transfer by the trustees of a scheme of money (or other resources) in discharge of their liability under the scheme to provide benefits in respect of a group of members. Transfers may be made to another scheme or PRSA

It is envisaged that regulations will provide that before a bulk transfer is made the trustees of the transferor scheme must provide prescribed information to prescribed persons in prescribed circumstances

If member consent to the transfer has not been obtained “prescribed persons” may be afforded in “prescribed circumstances” the opportunity to make observations to the transferor scheme trustees or to any employer to whose employment the scheme applies and the trustees, or the employer, as the case, may be shall give due consideration to such observations.

The transferee scheme trustees must ensure that prescribed conditions are satisfied and the transferee trustees must provide prescribed information in prescribed circumstances to persons prescribed.

Essentially, the foregoing means that regulations are going to make it mandatory that before a bulk transfer occurs the trustees of the transferor scheme must give information about it to their members and if their consent hasn't been obtained for the transfer they must be given an opportunity to enter into a dialogue with the trustees or the employer. That person must give due consideration to the members observations.

Additionally, other conditions shall require to be met. It has been explained in the Pensions Board website notes on the Bill that this will mean that the regulations will provide that the certification procedure currently operated by actuaries in accordance with their professional requirements will, in fact, be incorporated as a legal requirement.

The receiving trustees will also have new disclosure obligations. Again, the extent of those will be specified in regulations.

The transfers envisaged would appear to cover the usual arrangements where there is a transfer of assets from one scheme to another within the group or the transfer of assets from

one scheme to another pursuant to sale and purchase agreement. Transfer of assets to PRSAs are contemplated in certain circumstances.

Practical issues relate to how long is the consultation process going to take. Hopefully the regs will contain strict deadlines so the consultation process will not affect the consummation of a sale and purchase and/or Revenue approval of interim participation.

When ascertaining what constitutes member consent, will this be 100% consent, 75% consent? Of all members (surely not, but possibly, yes, if a generous share of funds is going across) or only of those affected/

As in the case of windings-up, documentary evidence will need to be kept by the trustees (or employer where relevant) that the procedures have been followed.

I can see the point of the new requirements in the case of Defined Benefit plans but am less convinced of their merit in a Defined Contribution scenario where the full amount of members' accounts are transferred across. In such circumstances the consultation process may be overkill. Also, in a sale situation where leaving employees statutory preserved benefits are being transferred to a new employer's scheme, member consent is usually necessary to transfer their preserved benefits, it almost seems the new regime may cut across this. Interestingly, there is no specific sanction for the breach of these provisions.

5 Look Back

Section 59F deals with "look back". In certain circumstances amendments to scheme rules and the exercise of trustee discretions can be voided. This is the most far-reaching provisions of the Bill.

Any of five trigger events need to occur and be accompanied by a rule change or exercise of a discretionary power, within a certain timescale, making an augmentation which materially alters the balance of interests under the scheme. Regulations will be introduced providing that unless the amendment or exercise falls within four exemptions it shall be invalid.

5.1 Scope of Provision

The section applies to any amendment to the rules of a scheme and any exercise of any discretionary power under a scheme which has the effect of augmenting the benefit of any member or members so as materially to alter the balance of interests between the members, or between the members and the employer or employers.

Rules are defined in section 2 of the Act as meaning the provisions of a scheme, by whatever name they are called.

"Amendment" is not defined but, presumably would catch a trustees' meeting agreeing the alteration of a benefit structure; then, if that transaction was then recorded in a rule change a

couple of months later would the timing from which the event be sourced be the date of the trustee decision agreeing to the rule change or the formal amendment of the rules? The timing point is relevant because it is rule changes and exercises of discretionary powers, as above, which occur twelve months before or six months after certain transactions which are called into question.

5.2 Trigger Events

The trigger events are:

- a. A bulk transfer.
- b. A sale of part or all of a business in which members are employed.
- c. A purchase of all or part of a business in consequence of which action is to be taken in relation to the scheme.
- d. Amending a DB scheme so it becomes DC.
- e. Winding up a scheme.

5.3 Timing

Rule changes/exercise of affected discretionary powers occurring within 12 months prior to all five events and any time after a wind up or 6 months after events a. to d must come within specified exemptions or else they are invalid.

5.4 Exemptions

The exemptions:

- Members affected have given written consent to the amendment; or
- Actuarial certification in terms to be prescribed has been made to the trustees; or
- The trustees are satisfied that the changes were not done with a view to altering materially the balance of interests under the scheme between members or members and the employer and that this only arose because of the trigger event; or
- Regs may provide more exemptions.

5.5 What will the practical effect be of these provisions?

I think every time trustees are contemplating exercising a discretionary power or consenting to an amendment to the scheme rules they must see whether the section applies.

This means they will need to make enquiries of the employer (and minute this fact and the response received). Also, twelve months after the trustees/employer have amended scheme rules or made a relevant augmentation these actions must be reviewed to ensure, with the benefit of hindsight they continue to be valid.

I am now going to look at the different “illegal” consequences of sections 59 D and 59 F in a wind-up situation.

5.6 Breach of Surplus on a Wind-up provisions -v- Look-Back provisions

Section 59D enables regulations to be introduced making it **unlawful** for trustees/ or an employer participating in a scheme to apply surplus in a wind-up situation unless prior consultation with members (whose views must be duly considered) occurs.

In contrast, Section 59F enables regulations to be introduced rendering **invalid** certain rule changes and exercise of discretionary powers which are made to materially alter the balance of interests between members, inter se, or between them and the employer and which only occur due to the wind-up.

The distinction between these two sanctions appears to mean that in the latter situation the trustees commit no offence but the actions are set aside and in the former case the actions being unlawful are void and the trustees have committed an offence punishable by the usual sanctions under section 3 of the Act.

So, it is vital for trustees who have the power of disposal of surplus on a wind up to ensure that they follow the procedures laid down in section 59D regarding consultation with and consideration of employee views.

The advantage of having a provision such as section 59 F on the statute book is that practitioners need no longer be concerned if the principles in UK cases such as *Courage*, *Imperial*, *Hillsdown*, *Barclays Bank* etc would be followed here. One assumes, in any event, that the general principles of modern trust and pensions law applied in the UK by the tribunals and courts would in any event be followed.

The danger is that because section 59F’s provisions are so widely drawn they may catch transactions which it is not intended to cover.

Pensions lawyers will need to be very familiar with the detail of these provisions as they are extremely far reaching.

It is evident that the legislature is aware of the far reaching implications of this provision by the fact that actions taken in good faith in amending rules or exercising discretionary powers are to be immune from prosecution.

Also the recipient of money received in good faith where the transaction is rendered void by the regulations is not required to repay any money.

It is interesting that the exemption extends to member consent to an amendment of the rules but not member consent to the exercise of a discretionary power by the trustees. Possibly the reason for this is due to the fact that augmentations which materially alter the balance of interests as between members are included in the types of outlawed transactions. If members were permitted to consent to the exercise of such powers this could potentially enable a larger class of members feather its own nest at the expense of the smaller class.

5.7 A practical example of a situation which may come under scrutiny

5.7.1 Refund of ongoing surplus

An employer wishes to access surplus within a scheme and take a refund in an ongoing situation in order, perhaps, to keep Retirement Benefits District happy. The power of amendment is silent as to whether it may be used for such purpose. There is no provision prohibiting a refund of ongoing surplus. The amendment power must be exercised by the trustees jointly with the principal employer under the scheme. In return for agreeing to enabling the surplus be made the employer has suggested benefit improvements for members which seem fair and reasonable as far as the trustees can ascertain. None of the five trigger events have occurred in the previous six months.

At first sight it seems that this scenario is totally outside the rigours of the section.

What considerations ought the trustees take into account when deciding if the section applies?

First, the trustees have to ask the employer if a sale or purchase is contemplated which will affect the scheme; might the employer be considering winding up the plan; if it is a defined benefit plan are their plans to convert it to a dc arrangement? Is a bulk transfer contemplated? If any of these events arise the transaction might be regarded as void unless an exemption applies.

Ought the trustees decide to go down the exemption route, just to be on the safe side?

Should they seek member consent? But this might seem rather unnecessary if the trustees are satisfied that the deal proposed is very fair to all concerned. (We await the detail on what is meant by member consent. Is it 100% of affected members, surely not. This would be an unrealistic acceptance level.) Who will bear the cost of explaining to members the reasons for the proposals and follow-up to ensure votes are cast. The financial burden might

fall on the scheme. And what if consent is not forthcoming because the members unrealistically consider that there is more to be bargained for?

In the circumstances it would seem to be inappropriate to seek member consent.

We await the detail of what the scheme actuary may be permitted to certify; hopefully in the circumstances here that in the actuary's opinion the proposals are reasonable taking into account the funding of the scheme.

At the time of the amendment one assumes that the trustees will consider that the changes effected by the amendment were not made to materially alter the balance of interests under the scheme by reason only that a trigger event had or was to take place. So this exemption would appear to be available at the time the amendment is made.

However, in order for this exemption to be fully available the trustees must review the transaction after twelve months to make sure that none of the trigger events actually did occur during that time. If it did then the trustees will need to satisfy themselves that the event was not linked to the refund of surplus.

All the foregoing makes for trustees to be extra vigilant and ensure that a review timetable is adhered to as part of implementing the transaction and that the trustees decisions are carefully recorded to reflect their compliance with the legislation.

6 Conclusion

The new proposals discussed in this paper underline the requirements for trustees to be familiar with the detail of their proposed new statutory duties – including those not covered in this paper. Now, more than ever, they need to be vigilant to ensure they are carrying out their duties properly and to document their decisions as there is an increased likelihood that these will come under the review of the Pensions Ombudsman.

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