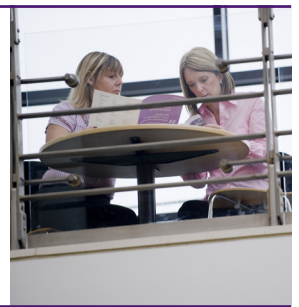


Review

Pensions



Focus on Pensions Disputes

It is evident that current trading conditions are tough. The phrase “unprecedented” has been used by commentators when describing recent economic events so frequently that it is almost in danger of becoming a catchphrase. All sectors of the economy are feeling the impact of the downturn and the pensions sector is no different. It is a sad fact that tough economic conditions invariably lead to an increase in complaints and disputes. In the world of pensions this may be evidenced by increased complaints from members, strained relations between trustees and sponsoring companies or disputes between trustees and their advisers – to identify just a few. We have, therefore, focused on likely areas of pensions disputes in this Review.

We examine the latest cases on the issue of equalisation of normal retirement ages and consider their implications. In light of the recent rise in many schemes’ PPF levy invoices, particularly at a time when cash is tight for sponsoring companies, we also consider how PPF levy calculations can be challenged. Other features in this edition are: trustees’ duties to give reasons for their decisions, retrieval of member files and data from former administrators, moving to a single stage internal dispute resolution procedure, difficulties in successfully claiming negligence against investment managers and the role of mediation in the pensions context. We hope that you find these articles informative and that they provide you with a useful insight into some of the key current issues and opportunities in the pensions disputes arena.

Emma King

National Head of Pensions Disputes
T: +44 (0) 121 222 3103
E: emma.king@hammonds.com

It is a sad fact that tough economic conditions invariably lead to an increase in complaints and disputes.

Stop press

You will have read in the news that a number of local authority pension funds are participating in a class action against RBS in the US. This is a timely reminder that trustees should be liaising with their investment managers to ensure that they are aware of any possible class actions, which relate to stocks within their portfolio so that prompt decisions can be made as to whether their scheme should participate as a claimant in those actions.

The recent equalisation cases – crystal clear or muddied waters?

Equalisation has been an area ripe for litigation ever since the European Court of Justice held, in the 1990 case of *Barber*, that in order to comply with European sex equality legislation, it was necessary for the normal retirement ages (NRAs) of men and women under a pension scheme to be equal. The decision sounds straightforward to comply with but in practice has proven not to be, and *Capital Cranfield Trustees Limited v. Beck* and *Foster Wheeler Limited v. Hanley* are the latest in a long line of court cases concerning equalisation. They aptly demonstrate the difficulties inherent both in seeking to equalise NRAs and in administering a successfully equalised scheme. The cases explore which powers may validly be exercised in order to equalise NRAs and whether a pension can always be split (so that some is paid at the lower NRA of age 60 and the rest at the higher NRA of age 65).



CAPITAL CRANFIELD TRUSTEES LIMITED V. BECK

Here the Court considered whether NRAs had been equalised by means of the employer exercising its power under the scheme's definition of NRA, to determine that NRA would be something other than the "standard" NRAs detailed elsewhere in the definition.

What was the power?

When the scheme was established in the 1970s, the NRAs of men and women were age 65 and 60 respectively. In 1993, the definition of NRA was amended to age 60 in the case of women who joined the scheme before 30 September 1992 and age 65 in the case of any other member, or "such [age] as the Employers shall determine in any particular case and notify in writing to the member concerned". In October 1994, a member announcement to all members who had joined the scheme before 30 September 1992 advised that the "Company as sole trustee" had decided to equalise NRAs at age 65 with effect from 17 November 1994. The announcement did not operate to equalise NRAs as an amendment under the scheme's amendment power, as it did not comply with the prescribed formalities.

Did the announcement equalise NRAs?

The Court held that the announcement did not equalise NRAs, on the basis that the power in the definition of NRA was only to be used in the "particular case" of a member (for example, on joining the scheme) and therefore not in relation to a class of members (here, all members who had joined the scheme before 30 September 1992) or all members. By construing the power more widely, one would create a power which could amend the scheme rules in regard to the important question of NRA but without complying with the safeguards incorporated in the scheme's amendment power.

The Judge commented that even if the definition of NRA had conferred a power to alter the NRA of all members or a class of members, the announcement would still not have been an effective exercise of that power because the announcement was made by an employer in a different capacity, namely its capacity "as sole trustee" of the scheme not as an employer. Additionally, the announcement was only made by one employer, not by both of the scheme's two employers.

The Judge also suggested that there was a "strong and persuasive" argument that the power could only be used at the commencement of a member's employment, not to modify NRA for the future accrual of benefits by existing members (here, all members who had joined the scheme before 30 September 1992).

FOSTER WHEELER LIMITED V. HANLEY

In this case, the Court was asked to interpret an early retirement rule in the context of the requirements of *Barber*. One of the key issues that the Court considered was whether pensions should be split (when the scheme rules did not expressly provide for this).

What did the early retirement rule say?

The case concerned 'Mixed NRA' members i.e. members who had accrued pension by reference to different NRAs at different periods (e.g. before and after equalisation). The scheme's NRAs had been equalised at age 65 in August 1993 and the evidence showed that (as is often the case) female Mixed NRA members were intended to receive their benefits accrued by reference to an NRA of age 60 via the early retirement rule. That early retirement rule purported only to permit retirement before age 65 with employer consent and provided for an actuarial reduction only in respect of any period by which pension was taken before age 60 (in relation to pension accrued prior to April 2003).

It was acknowledged by the employer and the trustees that members with any pension accrued by reference to an NRA of 60 could not be prevented from taking those benefits from age 60,

Capital Cranfield Trustees Limited v. Beck and Foster Wheeler Limited v. Hanley are the latest in a long line of court cases concerning equalisation. They aptly demonstrate the difficulties inherent both in seeking to equalise NRAs and in administering a successfully equalised scheme.



irrespective of consent. That was because the right to a pension from age 60 by reference to which the pension had been accrued and earned could not retrospectively be taken away or circumscribed (both because of the restrictions on the amendment power by which the equalising amendments had been made and as a matter of European law). Any woman with pensionable service before equalisation, and any man with pensionable service in the 'Barber window' from 17 May 1990 up to equalisation, thus had an unrestricted right to some pension from age 60. The question in relation to these members was what to do about any other pension which they had accrued by reference to an NRA of 65 (i.e. the pension accrued by men before 17 May 1990 and by both sexes after equalisation).

Could pensions be split?

It was argued on behalf of the employer that, although the rules purported only to permit a unitary pension (with all accrual coming into payment at one time), Mixed NRA members could lawfully be required to take their NRA60 pension at age 60 and their NRA65 pension at age 65. The Court disagreed, holding that Mixed NRA members were entitled to take their whole pension at age 60 (because the rules only provided for a unitary pension and the NRA60 pension could not be withheld from age 60, despite the purported consent requirement). Further, the Court held that, because of the way in which the early retirement rule had been drafted, Mixed NRA members could take all their accrued benefits from age 60 without any actuarial reduction (save in respect of NRA65 pension accrued from April 2003, as the rules had been amended to allow such a reduction).

The rationale for the Court's decision was that the European Court of Justice had conferred a wide discretion on pension scheme trustees to determine how equalisation should be implemented. It was not the case that allowing NRA60 and NRA65 benefits to be taken separately was the only proper method of implementing the equal pay principle. One therefore had to give effect to what had actually been done to equalise the scheme. As a matter of construction of the rules under English law, having regard to the restrictions on the amendment power by which equalisation was effected, female Mixed NRA members retained a right to take their NRA60 pension from age 60 without consent; and with it all the rest of their accrual, because the rules only permitted a unitary pension. European law merely required male Mixed NRA members to be afforded the same rights in relation to their 'Barber window' accrual. European law did not require a worsening of the rights otherwise provided by the rules for female Mixed NRA members (as a matter of construction of the rules entirely under English law). The rules of the particular pension scheme needed to be modified no further than was necessary to comply with *Barber*. This could be achieved by disapplying the employer consent requirement under the scheme's early retirement rule for male Mixed NRA members just as that consent requirement was disappplied for female Mixed NRA members. It was not necessary to impose a split pension regime.

What are the implications of the *Capital Cranfield* and *Foster Wheeler* cases?

Both cases warrant consideration by employers and trustees. An appeal in *Foster Wheeler* was heard by the Court of Appeal on 17 and 18 March 2009, so it would be prudent to wait until the outcome of the appeal is known before taking any action in reliance upon the High Court's decision. However, some points of note include:

- The *Capital Cranfield* case will increase scheme liabilities if it means that an attempt to equalise NRAs using a power 'inappropriately' was unsuccessful. Furthermore, the decision may call into question other scheme-wide changes purported to have been made in accordance with a power or discretion, rather than using an amendment power. For example, the purported closure of a scheme to new members in reliance upon a power under an eligibility rule may not, in light of *Capital Cranfield*, have been effective.
- If the current practice of a scheme is to pay split pensions, the *Foster Wheeler* decision may also increase scheme liabilities (if NRA60 and NRA65 benefits can be required to come into payment at the same time) unless the rules provide for all early retirement benefits to be

The rationale for the Court's decision was that the European Court of Justice had conferred a wide discretion on pension scheme trustees to determine how equalisation should be implemented.



reduced on a cost neutral basis. Even if a reduction does apply, a requirement to pay the whole of a pension at age 60 may affect the scheme's cashflow to some extent.

- If a scheme's liabilities will increase, trustees should take account of this if the scheme is undergoing a valuation. Outside of the triennial valuation process, trustees could seek to demand increased employer contributions. The decisions increased the *Capital Cranfield* scheme's liabilities by around £1 million and the *Foster Wheeler* scheme's liabilities by up to about £30 million.
- If a scheme offers unreduced early retirement pensions and relies upon a requirement for consent to control the number of unreduced early retirements, there is a risk that consent cannot be withheld in respect of the NRA65 benefits of Mixed NRA members and that in consequence those benefits will be payable at 60 as of right. The employer should consider amending the early retirement rule to allow early retirement pension attributable to future service to be reduced.
- The *Foster Wheeler* employer and trustees agreed that the Court's finding meant that it was not possible to change members' benefit entitlements by introducing a new rule at this stage to allow accrued pensions to be split so as to deny Mixed NRA members access to their NRA65 benefits along with their NRA60 benefits. This point was not considered by the Judge but it is likely that he would have reached this conclusion. It would be possible to amend rules to permit pensions to be split in payment where Mixed NRA members wanted this, provided that this was an additional alternative for such members and not simply an attempt to take away an accrued right to have all accrual unreduced from age 60.
- It is not clear how *Foster Wheeler* will apply to schemes in a Pension Protection Fund (PPF) assessment period. Guidance issued by the PPF prior to the case on dealing with *Barber* window benefits suggests that benefits may be split or may be paid at age 60. Once the outcome of the appeal is known, we expect that the PPF will update its guidance as necessary. If the PPF discards the split pension option, *Foster Wheeler* may reduce the normal pension age (the earliest age at which a member has the right to draw his benefits on an unreduced basis) of members for the purposes of PPF compensation, thereby potentially increasing the compensation to which they are entitled. This should be borne in mind when an audit of the scheme's admissible rules is carried out before/upon entering a PPF assessment period.

Helen May

Associate

T: +44 (0)121 222 3668

E: helen.may@hammonds.com

Nicolas Stallworthy

Nicolas is a specialist pensions barrister at Outer Temple Chambers, who acted for the trustee in *Capital Cranfield Trustees Ltd v Beck* and for a successful class of members in *Foster Wheeler v Hanley* at first instance.

To give or not to give – reasons for trustee decisions

It is a basic principle of English law that trustees do not have to reveal their reasons for reaching decisions nor, generally speaking, do they have to disclose documents relating to the decision making process. The approach in recent court cases and Pensions Ombudsman decisions has challenged this position. The purpose of this article is to examine the legal background and set out the position as it stands today in respect of the disclosure of trustee decision making processes. We will look at the statutory obligations as well as the common law obligations and the view of the Pensions Ombudsman.



STATUTORY OBLIGATIONS

The Occupational Pension Schemes (Disclosure of Information) Regulations 1996 require trustees to make available particular information to scheme members, contingent beneficiaries and certain third parties. These disclosure requirements do not include minutes of meetings and other related trustee documents.

Under the Occupational Pension Schemes (Scheme Administration) Regulations 1996, trustees must keep written records of all their meetings (including sub-committee meetings). All books and records must be kept for up to six years.

The information which must be recorded includes:

- the date, time and place of each meeting;
- details of trustees invited and attendance as well as attendance of non-trustees such as advisers;
- the decisions reached at the meeting;
- whether the trustees have made any decisions since the last meeting. If so, the time, place, date and substance of the decision plus the trustees involved.

The legal requirements under these regulations align with a classic statement of the legal position regarding trustees' duties in this area. Historically the law has differentiated between trustees disclosing their reasons and disclosing documents setting out the decision making process.

CASE LAW

Re Londonderry's Settlement (1965)

This case centred on a private family trust. One beneficiary sought to force the disclosure of documents detailing how the trustees had used their discretion to apportion income and capital. The Court of Appeal decided that unless there was evidence which questioned the equity and good faith of the trustees in the exercise of their discretion, the claimant had no right to force the disclosure of documents regarding the distribution of assets. The Court's refusal to grant disclosure was based on three factors:

- if the trustees' confidential role was to be subjected to investigation as to whether they had done their job properly their role would be seriously undermined;
- forced disclosure of reasons could make a trustee's role in the execution of trusts untenable;
- if the veil of confidentiality was removed it would make the recruitment of trustees difficult, if not impossible.

The Court also pointed out that it would not be common sense to rule that whilst trustees cannot be compelled to disclose their reasons for exercising their discretion, once those reasons were written down, the duty to disclose would be triggered.

Wilson v. Law Debenture Trust Corporation (1995)

It was argued in this case that the decision in *Re Londonderry's Settlement* should not apply to occupational pension schemes where members had to a certain extent "purchased" their benefits via their contributions. The Judge refused the application and upheld the disclosure principle in *Re Londonderry's Settlement*. However, he stressed that the rule against the obligation to disclose reasons was an exception to the principle that absolute beneficiaries are entitled to see the trust documents. He also restricted his judgement to a situation where there was no evidence that trustees had acted improperly. The position would be different if there had been a breach of trust – unless trust documents were subject to professional privilege.

The Court also pointed out that it would not be common sense to rule that whilst trustees cannot be compelled to disclose their reasons for exercising their discretion, once those reasons were written down, the duty to disclose would be triggered.



It is apparent that the Pensions Ombudsman continues to demand a transparent approach between trustees and scheme members when it comes to the disclosure of reasons for discretionary trustee decisions.

Schmidt v. Rosewood Trust (2003)

This was a decision of the Judicial Committee of the Privy Council relating to a private trust established on the Isle of Man. The Privy Council ruled that:

- as part of the Court's underlying jurisdiction over trusts, where necessary it may intervene to allow the disclosure of trust documents to beneficiaries;
- no beneficiary has an absolute right to the disclosure of information or documents; and
- the Court does have the right to decide what may be disclosed and to whom.

Lord Walker stated that "no beneficiary...has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves and third parties. Disclosure may have to be limited and safeguards may have to be put in place".

Despite these qualifications some commentators are of the opinion that trustees will be required to reveal the reasons for the exercise of their discretion. These views have been rejected in a recent Australian case that applied the *Re Londonderry's Settlement* principle. However until the decision in *Schmidt* is tested in a court in England or Wales, its application here remains uncertain and the principle must remain that trustees are protected from any duty to disclose the reasons for their decisions unless ordered to do so by the court.

However, the Pensions Ombudsman has adopted a different approach to this issue and has demanded more transparency on the part of trustees, requiring them to disclose the reasons for their decisions to affected members.

PENSIONS OMBUDSMAN'S DETERMINATIONS

A body of determinations by the Pensions Ombudsman (starting with David Laverick and more recently Tony King) has built up, which reveals that the Ombudsman will not tolerate trustees hiding behind the legal rule in *Re Londonderry's Settlement* when members request reasons for trustee decisions.

Blaney (1998)

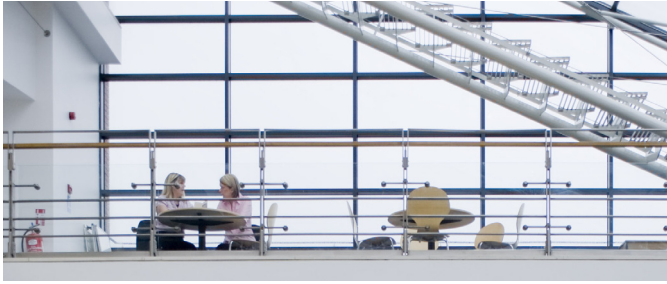
The first time that the Pensions Ombudsman required reasons to be given was in the case of *Blaney*. David Laverick first made his approach to this issue known in his initial annual report saying that he would start from a presumption that it is maladministration for the trustees not to provide reasons for a decision, which may adversely affect the person who seeks such reasons.

Allen (2002)

The case of *Allen* in 2002 concerned a complaint regarding the trustees' rejection of a request for an unreduced early retirement pension. The Pensions Ombudsman commented that there was no legal duty on the trustees to make copies of minutes available. However, he determined that failure to do so could amount to maladministration. He concluded that as a matter of good practice, trustees should provide reasons for their decisions. Subject to the need to protect the rights of privacy of individual members, trustees should make the minutes of meetings available to scheme members.

Headley (2008)

This is a decision of Tony King, the current Pensions Ombudsman, and relates to an ill health early retirement application. Tony King followed his predecessor's reasoning on the question of trustees' duties to give reasons for their decisions. Although he did not uphold the complaint and therefore agreed with the trustees' decision not to award an ill health pension, he nevertheless found them guilty of maladministration for not providing Mr Headley with the reasons for their decision.



It is apparent that the Pensions Ombudsman continues to demand a transparent approach between trustees and scheme members when it comes to the disclosure of reasons for discretionary trustee decisions.

THE DATA PROTECTION ACT 1998

It has been suggested that the rights contained in the Data Protection Act 1998 (the “Act”) could allow members, via a subject access request under the Act, to obtain minutes of trustee meetings, which contain “personal data” about members that was used by the trustees in reaching a decision.

Only personal data can be requested by a member. The right of access to personal data was tested in *Durant v. Financial Services Authority (2003)*. In brief, the Court held that personal data must be biographical in a significant sense and be focused on an individual. Additionally, manual data does not come within the definition of “data” under the Act unless it is stored in a “relevant filing system”. The Court in *Durant* also looked at the definition of a “relevant filing system” and concluded a manual filing system would be caught by the Act if structured or indexed in such a way as to clearly indicate at the outset whether and where information capable of amounting to the personal data of a particular individual could be easily located.

Thus, there are hurdles for the member to overcome before using his rights under the Act.

The test for what is personal data where the information is stored manually is narrower than previously thought, as a result of the decision in *Durant*. However, where trustees maintain manual records by reference to members’ names and record decisions on those files, those records are likely to be in a “relevant filing system” for this purpose. Moreover, the definition of “data” in the Act clearly covers processing using computerised filing systems. As such, where the information forms part of a “relevant filing system” or is stored or processed electronically on a computer, trustees wishing to withhold this data may, instead, have to place a greater reliance on the argument that the information does not sufficiently relate to the individual or include the necessary detail to fall within the definition of “personal data”. Trustees should, therefore, closely monitor how personal information concerning decisions relating to specific members is recorded and stored.

...trustees should pay close attention to the Pensions Ombudsman's attitude towards disclosure, as they are more likely to be faced with an Ombudsman's determination than a court order in the event of a dispute.

HOW SHOULD TRUSTEES PROCEED?

Trustees must decide whether they should routinely record the reasons for their decisions in their minutes/resolutions and whether those reasons should be disclosed to affected members.

If the reasoning involves personal information about specific members then the trustees should closely scrutinise how that personal information is recorded and stored, in view of those individuals’ rights under the Data Protection Act 1998.

Many believe that the routine disclosure of reasons for decisions would inevitably give rise to more disputes and litigation. There is also concern that trustees may be unwilling to act if the quality of their decision making is under constant surveillance - this echoes the concerns voiced by the Court in *Re Londonderry's Settlement*.

Notwithstanding these concerns, trustees should be aware that this issue is usually of relevance in relation to discretionary decisions, for example, ill health early retirement applications and the distribution of death benefits. Any disputes in these cases are more likely to be handled by the Pensions Ombudsman than the courts in view of the fact that the Ombudsman's arena is cost free.

In these circumstances trustees should pay close attention to the Pensions Ombudsman's attitude towards disclosure, as they are more likely to be faced with an Ombudsman's



determination than a court order in the event of a dispute. As findings of maladministration are published, trustees would be prudent to disclose the reasons for their decisions in order to avoid any such reprimand from the Ombudsman.

Emma King

National Head of Pensions Disputes

T: +44 (0) 121 222 3103

E: emma.king@hammonds.com

Challenging the Pension Protection Fund Levy

...employers are now becoming more inclined to challenge the calculation of the levy after the levy invoice has been received. This can be done in one of two ways: by the pension scheme trustees appealing the calculation to the PPF or by the employer appealing the failure score to D&B.

The Pension Protection Fund (PPF) was established in 2005 and the risk based element of the PPF levy was first introduced in 2006 (to sit alongside the scheme based element of the levy). At present, the risk based levy takes into account the pension scheme's funding (when compared to PPF levels of compensation) and the sponsoring employers' insolvency risk (based on a "failure score" calculated by D&B). Ever since the introduction of the risk based element, the PPF levy has given many employers a significant headache and many simply regard it as another tax. Employers' affection for the PPF levy was not helped when, in 2008, the levy scaling factor was suddenly and substantially increased leading to a dramatic rise in the levy for most pension schemes.

This widely held ill-feeling has led to many employers taking steps to reduce their pension schemes' levies. The best way to achieve this is for employers to take action in advance of the annual levy determination, for example, by increasing the scheme's funding level, improving the employers' failure score or by putting contingent assets in place. However, employers are now becoming more inclined to challenge the calculation of the levy after the levy invoice has been received. This can be done in one of two ways: by the pension scheme trustees appealing the calculation to the PPF or by the employer appealing the failure score to D&B.

PPF

If the trustees of a pension scheme believe the PPF levy has been calculated incorrectly, they can raise this with the PPF within 28 days of the date of the invoice. If there is an obvious error that is accepted by the PPF, this route will usually be successful without the trustees having to invoke the formal appeals process. If, however, the PPF does not accept the trustees' arguments, the trustees will need to apply for a formal review.

The first stage of the formal review process is for the PPF to issue a "Review Decision" which can then be appealed to the "Reconsideration Committee". In turn, the Reconsideration Committee's decision can be appealed to the PPF Ombudsman and a determination of the PPF Ombudsman can be appealed to the High Court on a point of law.

Although many trustees may be tempted to do so, there is little point in using this appeals process in order to express general frustration about the magnitude of the PPF levy or the manner in which it is calculated. However, it can be a useful tool where the particular circumstances of the pension scheme or its sponsoring employers do not fall squarely within the general framework for the calculation of the levy. For instance, we are currently assisting a "not for profit" organisation to challenge the levy on the grounds that the PPF has assessed different elements of the organisation separately (giving rise to less favourable failure scores) whereas, in fact, all funding is derived from the central office (which has a much healthier failure score).



D&B

If an employer believes its failure score has been incorrectly calculated, the PPF will not generally get involved, instead insisting that the matter is taken up with D&B. Indeed, as the PPF do not regard the failure score as a “reviewable matter”, according to the PPF it is not possible for a challenge against the failure score to be appealed to the PPF Ombudsman.

As such, the only formal course of action open to an employer in this situation is to follow the internal D&B appeals procedure. This procedure consists of some five stages: starting with a customer services review and ending with a director review. In practice, it would generally seem that an employer must take its appeal to the second or third stage before D&B are likely to make any changes to the failure score. Appeals against the failure score must be brought within 28 days of the date of the levy invoice.

Consequently, if the PPF’s view is correct, the only avenue open to an employer to bring an independently reviewed challenge to the D&B failure score would be by way of judicial review in the High Court. This is a costly and complex procedure aimed at preventing an arbitrary exercise of power by a public or quasi public body.

A significant difficulty encountered by our clients in appealing the failure score is the lack of disclosure of relevant information by D&B. Although D&B’s research might highlight a particular issue that has an adverse impact on the failure score, it can prove very difficult for an employer to obtain any details about that issue in order to verify that the D&B research is accurate. It is, however, worth pursuing this point with D&B because, as we have seen with our clients, D&B’s research does not always turn out to be entirely accurate.

As D&B is simply providing a service to the PPF, it has struck several of our clients as a little odd that there is no formal method by which they can bring disputes with D&B under the PPF’s appeals process. That said, we have seen the PPF involve itself with the calculation of the failure score where there has been an obvious injustice. For instance, where reference had been made by D&B to incomplete accounts during a company reorganisation that ultimately produced revised accounts indicating a strong financial position.

We are assisting an increasing number of clients in challenging their PPF levies and are having significant success in doing so. If you would like to discuss how we could assist you in this regard, please contact Fraser Sparks or speak to your usual Hammonds contact.

Fraser Sparks

Partner

T: +44 (0)20 7655 1222

E: fraser.sparks@hammonds.com

Andrew Powell

Consultant

T: +44 (0)20 7655 1122

E: andrew.powell@hammonds.com

Dispute resolution – Should trustees change to a one-stage procedure?

The Pensions Act 1995 requires trustees of occupational pension schemes to have in place an internal dispute resolution procedure (IDRP) for resolving disagreements in relation to the scheme. Regulations set out further requirements with which the IDRP must comply. Prior to 6



Changes in legislation that took effect on 6 April 2008 removed the requirement for schemes to have a two-stage procedure and also relaxed a number of the timing and information requirements.

April 2008, legislation specified that the arrangements must include a two-stage procedure and laid down strict time limits within which decisions must be given. Changes in legislation that took effect on 6 April 2008 removed the requirement for schemes to have a two-stage procedure and also relaxed a number of the timing and information requirements.

The legislation now provides that trustees may in their IDRPs:

- include time limits for making applications;
- specify how complaints are to be made (i.e. what information is to be provided by the complainant); and
- delegate their decision-making powers to one or more of their number.

In addition, apart from the requirement that contact details for the Pensions Ombudsman and a statement regarding his role in resolving pension disputes must be included in the written decision, the format of the decision is no longer prescribed. Instead of a requirement that the decision be made within two months, the decision must be made within a “reasonable period”. The Pensions Regulator’s Code of Practice on “Dispute resolution – reasonable periods” states that the decision making process should generally be completed within four months of the complaint being received.

While there is no longer a requirement for a two-stage procedure, the IDRPs may provide that a complaint should not be heard by the trustees until the dispute has been decided upon by someone else specified in the procedure. This effectively allows trustees to retain their two-stage procedure, which many have chosen to do. An advantage of the two-stage procedure may be that the first stage (which is often heard by the secretary to the trustees) will “wean out” the non-genuine complaints and go some way to ensuring that only those complaints with merit are brought before the trustees. Similarly, simple, straightforward complaints can be resolved at the first stage without involving the trustees, thereby often allowing the complainant to receive a decision faster than if the complaint was put to the trustees in the first instance.

A perceived difficulty under the old regime, whereby a decision in favour of the complainant at the first stage was not obviously reviewable by the trustees, no longer applies. However, if trustees decide to retain a two-stage process, thought will still need to be given as to the authority given to the stage one decision maker, which presumably will be fairly narrow.

The one-stage procedure has several advantages. In particular, the administrative burden of the IDRPs on the scheme is reduced. Many trustees have felt that the requirement to have the facts and issues of a complaint considered and a written decision provided twice is onerous and time consuming. A one-stage procedure also ensures that trustees are aware of all formal complaints in relation to the scheme. The change to a one-stage procedure clearly also advantages the complainant who may go directly to the Pensions Ombudsman if he is not satisfied with the outcome, whereas previously this could be delayed for some months.

To benefit from both options, trustees may wish to consider amending their two-stage IDRPs to allow them to waive the requirement for the first stage of the process. For example, if the scheme secretary were to notify the trustees of a serious complaint which prima facie had merit, the trustees may choose to hear it themselves in the first instance.

Kate Henry

Lawyer

T: +44 (0)161 830 1161

E: kate.henry@hammonds.com



Can I have my files back please?

THE IMPORTANCE OF GOOD RECORDS

The recent guidance on Record-keeping issued by the Pensions Regulator highlighted the importance of maintaining good records, both in terms of scheme administration and the additional costs which can be incurred if information is missing or inaccurate. Issues in relation to scheme data often only come to light when some scheme change event takes place, such as entry into the PPF, wind up, buy-out or, more commonly, a change of administrator. In the latter case, the new administrator will expect to receive all the scheme documentation held by the old administrator to enable it to take over the administration of the scheme in what should appear to the trustees and members as a seamless transition. For a number of reasons, however, this does not always happen. If that is the case, what, if anything, can the trustees do about it?

It is fair to say that where there have been problems some administrators are reluctant to release documentation and information to trustees or new administrators because they are concerned about errors being discovered and a resulting negligence claim. From the trustees' perspective, however, they are more likely to be concerned about the need to administer the scheme properly going forward, than with a claim against the former administrator, which would be considered only if the problems caused previously were significant enough to make litigation worthwhile. Missing information can vary enormously and take the form of electronic records or hard copy member files. Some data gaps may be obvious immediately on the transfer, whereas others may not come to light until the new administrator has started examining documents to try and answer member queries or prepare benefit statements.

CONTRACT? WHAT CONTRACT?

The first port of call in these situations is the administration agreement. It should include terms setting out the requirements upon termination. However, this often proves to be difficult as it is common for there to be no written agreement particularly where the old administrator has been in situ for many years, or the agreement has been lost by both parties. Even if it is possible to locate an agreement, it may be silent or simply provide that the provision of information and data upon termination is to be the subject of a separate agreement between the parties.

Some assistance may be found in the data protection provisions of the agreement, if they exist. These usually state that, as a data processor, the administrator has to process the data only in accordance with the instructions of the trustees and that it will comply with the security measures set out in the seventh data protection principle under the Data Protection Act 1998. If there is nothing specific in the agreement to point to, however, the trustees have to fall back on their general common law right to the return of documentation which belongs to them.

Ownership of documents is a difficult issue upon which there is little, if any, case law relating to pensions administrators. Drawing an analogy with the world of accountancy, the ownership of a document (which has a wide definition) will likely depend on the capacity in which the administrator is acting and the purpose for which the document is created. Clearly, all documents and information which the administrator acquired on the commencement of the retainer will belong to the trustees. If documents were prepared or received by the administrator as agent for the trustees then these will also belong to the trustees. However, documents prepared by the administrator for its own benefit, such as working papers to enable it to undertake the calculations which sit behind benefit statements, could be classed as the intellectual property of the administrator and,

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as such, may not need to be released. Usually these manual calculations do not transfer to a new administrator, although it is arguable that they are an intrinsic part of the scheme and therefore should do so, on the basis that all member-related documents are trust property.

HAPPILY EVER AFTER?

As a general rule, trustees should not expect to receive absolutely everything held by former administrators and any action taken will depend on the extent of the information which is missing. For example, if there is an issue about the correct level of benefits then the new administrator will need to understand what assumptions were made at the time the original calculations were prepared. However, if it is only calculations that have been filleted from the administrator's files, the new administrator may simply have to rework them and check for any errors.

The standard remedy for lack of co-operation from a former administrator is to threaten an application to court for the delivery up of trust property. These threats, however, usually go no further as, once the reasons for the failure to provide documentation are explored in detail, the issues are almost always resolved on the payment of money to the old administrator in return for its assistance in dealing with queries, along with some sort of undertaking regarding the use of confidential information where appropriate. Potential negligence claims can sometimes be resolved by requiring the former administrator to put right what it did wrong free of charge.

For a well-run scheme, of course, the problems created by inaccurate data should never arise and the new Pensions Regulator guidance on Record-keeping should help to make it less of an issue on a change of administrator in the future. As usual, however, the safest way for trustees to prevent any problems arising is to plan ahead and ensure that they have an agreement in place with their administrator which deals specifically with the issues that can arise on the termination of the relationship and transfer to a new administrator. The current Model Administration Agreement published by the Pensions Management Institute contains some clauses which are a useful starting point in this regard.

Victoria Leigh

Partner

T: +44 (0) 161 830 5058

E: victoria.leigh@hammonds.com

Mediation in scheme funding disputes

This article will deal with subject matter of considerable topicality. I hope to explain how mediation may assist the easy resolution of disputes arising in connection with the funding of defined benefit pension schemes. The scheme specific funding regime requires trustees and employers either to agree or to consult on certain matters relating to future scheme funding linked with and following on from the (usually) triennial actuarial valuation. Where these parties cannot agree, then the Pensions Regulator has considerable powers to intervene, including powers to modify the rate of future accrual of scheme benefits, to set the level of scheme contributions and to determine the period of time over which those contributions must be provided.

It might at first sight appear that the sort of mediative activity which is normally intended to remove the need for long and costly litigation would not apply in a negotiation which does not in this instance have the threat of the courts lurking behind it. The parties can, in theory, throw up their hands if they cannot agree and turn the matter over to the Pensions Regulator. However, it seems that there must be considerable risk in arriving at that position, both as to the uncertainty of the outcome which may be applied by the Regulator, and the damage to the necessary ongoing day-to-



day relationship between the employer and the trustees. It must be the case that the preservation of that working relationship is worth a considerable amount to all concerned. Furthermore, the Pensions Regulator is reluctant to get involved and rarely uses its powers in this regard.

So how does it come to be that parties might consider mediation in these circumstances? First of all, in its Code of Practice on “Funding defined benefits”, the Pensions Regulator suggests that alternative dispute resolution, including mediation, may assist in situations where trustees and employers are unable to reach agreement. When reporting to the Regulator that there has been a failure to agree on certain funding matters, trustees are also expected to state whether they have made use of or considered a professional alternative dispute resolution service.

Secondly, there is a clear track record of successful mediation in regulatory contexts. The Financial Services Authority Mediation Scheme provides a process for a mediator to work with that regulator and the regulated party in attempting to come to an agreement as to whether any penalty should be applied and if so, how that should be dealt with in the context of public accountability. My own experience of that scheme has shown that there are considerable advantages to be gained for all concerned in not having a lengthy public dispute and an imposed solution.

Thirdly, there is of course no law against parties hiring a qualified neutral to assist them in their negotiations, even where those negotiations are not in the context of a commercial or contractual dispute in the normal way, with the High Court in the background. The addition of someone with a recognised competence in mediation to the list of people involved in negotiations can be of enormous assistance. I would like to set out briefly some of the reasons why - using my own experience of the use of mediation in negotiations concerning the renewal of a very significant commercial contract.

The mediator was able to meet privately with the lead negotiator for each interested party (in the pensions context this would be a representative of the employer and a representative of the trustees). These were separate meetings in which the main areas of potential difficulty could be explored. They included not only the commercial considerations, but also those relating to the individual personalities involved and how they did or did not interact with each other.

Following this, a fully briefed team from each side met with the mediator at a neutral agreed venue and set aside the whole day for the purpose of endeavouring to further their conversation and with the acknowledged and agreed intention of producing a heads of agreement by the end of the mediation day.

On the appointed day, the mediator selected various groupings of people for sub-meetings in which matters of strategy, technical content, costing, and so on could be discussed separately, between the people who had the most relevance to the specific topic. By isolating the various levels of conversation it was possible to create potential progress upon which those individuals could then report back to the full team in each case. Any identified areas of personal friction could be avoided.

The mediator, again, coached each team privately as to the sort of presentations it might like to make to the opposing party. In doing so the mediator emphasised the need for consideration of the other side's position, reciprocity of approach, acknowledgement of concession, and various other key elements which are almost invariably part of a positive conversation, leading to an outcome which has a chance of actually working.

In the case to which I refer, failure to agree on the renewal of the contract would have had serious commercial implications for both sides. These were parties who were much better off together

... the inclusion of somebody who has a competence in facilitating communication and even, in private, challenging unreasonable positions, is bound to be of service in achieving the twin goals of avoiding an imposed solution by the Pensions Regulator and maintaining an ongoing relationship between the trustees and the employer.



than apart, but who could not talk to each other effectively and needed help to do so. In the pensions arena it is possible to imagine situations in which there could be a mismatch between the perceptions of the trustees and the employer, in the sense that their own agendas and objectives could appear entirely different. Thus the inclusion of somebody who has a competence in facilitating communication and even, in private, challenging unreasonable positions, is bound to be of service in achieving the twin goals of avoiding an imposed solution by the Pensions Regulator and maintaining an ongoing relationship between the trustees and the employer.

Charles Middleton-Smith

T: +44 (0)20 7655 1482

E: charles.middleton-smith@hammonds.com

Charles is Hammonds' consultant on alternative dispute resolution and is otherwise a full-time practising mediator and a member of In Place of Strife, The Mediation Chambers. www.mediate.co.uk

Investment advice: where does the buck stop?

In our last Insight we discussed the way that liability is apportioned under investment management agreements (IMAs) (see [Pension Fund Investment: Where to Next? October 2008](#)) and how pension schemes can improve their contractual position. With the latest round of trustee meetings revealing, in almost all cases, very poor asset performance, trustees might well be casting further afield and asking if the advice they relied upon in setting their strategies might not only have been better but might have contributed to their losses. However, successfully bringing a claim for poor investment advice is far from straightforward - we examine below the difficulties that trustees will encounter and the hurdles that they must overcome in order to pursue this course of action.

Trustees may begin by looking to their contractual agreements with investment advisers for a remedy. However, investment advisers are very unlikely to give any kind of contractual guarantee or even representation about performance. It is true that there is a trend among the major consultancies and some boutique firms to link remuneration to performance (the so-called "implemented consulting" model, where part of the day-to-day asset allocation is delegated to the consultant). However, this is not yet the norm. Most advisers will be careful in their contractual arrangements and are not going to take a risk for which they are not rewarded. They will also generally cap their liability under their terms of engagement.

The situation is, of course, different if the advice is found to be negligent, but even there trustees would have to show that the standard of care owed to them had been breached (i.e. that no reasonable professional adviser would have made the same recommendations) and that it was this breach which led to the loss. Because virtually all asset classes and therefore nearly all managers will be showing negative returns, establishing a breach of the standard of care for general performance is very unlikely: if every adviser and manager failed to foresee the extent of the markets' decline then the test will not be satisfied.

What about particular investments which went awry? Investors who were exposed to the Bernard Madoff hedge funds are a good case in point, as are any who lost money when Lehman Brothers collapsed. Had Standard Life not compensated investors for losses in its Sterling Cash Fund (which was far more exotically invested than the word "cash" might suggest), it would be another example. They are bound to ask, should my adviser/manager not have known what was going on? Why did some banks, for instance, refuse to invest in Madoff funds or deal with Lehmans as a counterparty?



A similar test to the one described above, would be applied by the courts to a negligence claim brought in these circumstances: was the choice of counterparty so unreasonable that no other adviser would have made it? If this argument fails, however, there may be more scope to argue that the manager or adviser misrepresented the thoroughness of its due diligence processes in counterparty selection. This may require a detailed evaluation of the relevant contract(s) in order to understand what was said to the investors before they contracted.

If there is a potential claim for misrepresentation, it is important to categorise the nature of the misrepresentations first. The remedies sought by a victim of an innocent misrepresentation, where the misrepresentation was believed to be true, will be damages or rescission (i.e. setting aside) of the contract in lieu of damages, but not both. At the other end of the spectrum, the remedy for fraudulent misrepresentation is damages for all losses directly following from the misrepresentation (even if those losses are unforeseen). These losses can also include the loss of potential profits. Damages for fraudulent misrepresentation are awarded on a tortious basis, with the aim of putting the innocent party in the position they were in before the representation was made.

OTHER POTENTIAL TARGETS

Investment advisers are, by definition, expressly engaged to provide investment advice, but trustees deal with many other professionals so it makes sense to ask whether those professionals have any duty to give such advice to their customers. For investment managers such a right to give advice might be expressly covered under an IMA, which is a practical provision designed to assist if, for instance, the terms of some investment restrictions become impossible to comply with because of market movements. However, the wording under an IMA is usually that the manager “may” give the customer advice, not that he must do so. Banks and insurance companies are, if anything, less likely to include any reference to advisory services in their contracts, partly because it is safer (to avoid the risk of mis-selling) to disown the duty or ability to advise in a positive way and partly because they may not be authorised to give such advice (see below).

If there is no express duty, is there any ground to imply a duty to advise? Financial institutions are regulated in the UK by the Financial Services Authority (“FSA”) and are subject to its rules. Key to this issue is the category of investment business for which the firm is authorised, but also the FSA’s general principles for business, which apply to all authorised persons. These general principles include conducting business with integrity and exercising due skill, care and diligence in the process. The FSA principles are supplemented by the Conduct of Business Sourcebook. However, whilst the FSA principles are clear enough, they do not contain a positive duty to advise clients particularly where there is no authorisation to give investment advice, and proving a breach of the principles by an authorised person can be a difficult task. This is because the claimant has two hurdles to overcome, the first of which is showing the loss incurred was caused by the breach and secondly showing that the loss was a type the legislation is intended to prevent.

CONCLUSION

Establishing a claim for poor investment advice, whether given by an investment consultant, investment manager or another party such as a bank or insurer, is not easy. Whilst the natural urge to look for a scapegoat in the current market circumstances is strong, in most cases trustees would be better engaged in making sure they understand the risks in the investment process (such as the choice of a counterparty) and in tightening up the obligations of third parties contractually. This may take the form of more frequent reporting or a closer examination of selection processes.

Clifford Sims

Partner

T: +44 (0)20 7655 1193

E: clifford.sims@hammonds.com

Hammonds

Berlin

Hammonds LLP
Georgenstraße 22
10117 Berlin Germany
Telephone +49 30 7261 68 000
Fax +49 30 7261 68 001

Leeds

Hammonds LLP
2 Park Lane
Leeds LS3 1ES
Telephone +44 (0)113 284 7000
Fax +44 (0)113 284 7001

Manchester

Hammonds LLP
Trinity Court
16 John Dalton Street
Manchester M60 8HS
Telephone +44 (0)161 830 5000
Fax +44 (0)161 830 5001

Birmingham

Hammonds LLP
Rutland House
148 Edmund Street
Birmingham B3 2JR
Telephone +44 (0)121 222 3000
Fax +44 (0)121 222 3001

London

Hammonds LLP
7 Devonshire Square
London EC2M 4YH
Telephone +44 (0)20 7655 1000
Fax +44 (0)20 7655 1001

Munich

Hammonds LLP
Karl-Scharnagl-Ring 7
80539 Munich Germany
Telephone +49 89 207 02 8300
Fax +49 89 207 02 8301

Brussels

Hammonds LLP
Avenue Louise 250
Box 65
1050 Brussels Belgium
Telephone +32 2 627 7676
Fax +32 2 627 7686

Madrid

Hammonds LLP
Plaza Marques de Salamanca 3-4
28006 Madrid Spain
Telephone +34 91 426 4840
Fax +34 91 435 9815

Paris•

Hammonds Hausmann
4 Avenue Velasquez
75008 Paris France
Telephone +33 1 53 83 74 00
Fax +33 1 53 83 74 01

Hong Kong•

Hammonds
Suites 3201-05, 3217-20
32nd Floor Jardine House
1 Connaught Place
Central Hong Kong
Telephone +852 2523 1819
Fax +852 2868 0069

Beijing+

Hammonds Beijing
Representative Office Hong Kong
Suite 1419 - 20
South Tower Beijing Kerry Centre
1 Guang Hua Road
Chao Yang District
Beijing 100020 China
Telephone +86 108529 6330
Fax +86 10 85296116

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