

Why Do Pension Trustees Need To Think About Protection?

The risk profile for pension trustees is increasing. We are already seeing signs of this in terms of the increasing regularity of fines being levied. Indeed, The Pensions Regulator (TPR) now has the power to issue financial penalties of up to £1 million in certain circumstances. Separately, trustees now need to be very conscious of significant fines that can be levied by the Information Commissioner's Office (ICO) for breaches of data protection legislation. This is in addition to any claims that members may bring against trustees for breach of trust or maladministration.

Pension trustees should remember that they have joint and several liability, which means that any one of their number can be held fully financially responsible for liabilities incurred by the trustee board as a whole. Furthermore, pension trustees can potentially be held liable even after they have left office as a trustee. Against this backdrop, it is sensible and appropriate for trustees to think about what collective or individual protection they have in place. Indeed, this is a question commonly asked by potential trustee recruits, before they even take office.

What Trustee Protections Are Available?

There are various layers of protection that a pension trustee can potentially take advantage of. These include:

- Protection under the scheme rules
- Pension trustee liability insurance
- Reliance upon professional advice
- Protection offered by legislation
- A corporate trustee structure

What Protection Can Scheme Rules Offer?

Pension scheme rules normally contain two elements of protection. First, exoneration/exclusion clauses, which specify the circumstances in which no trustee liability will arise. Second, indemnity provisions, which provide for the reimbursement of trustees, either from scheme assets or the sponsoring employer(s), if any non-excluded liability falls upon the trustees, or if they incur costs in establishing that they are excluded from liability.

There are various limits on scheme rule protections, both as a matter of legislation and case law. For example, Section 33 of the Pensions Act 1995 provides that liability for breach of an obligation to take care or exercise skill in the performance of any investment function cannot be excluded under scheme rules.

Also, Section 256 of the Pensions Act 2004 provides that an indemnity from scheme assets will not be available in relation to a fine levied by TPR.

There is also case law establishing that exoneration and indemnity provisions cannot protect a trustee from liability arising from fraud or dishonest breach of trust. It should also be remembered that an indemnity from an employer becomes worthless in the event of the insolvency of the employer.

What Protection Can Insurance Offer?

Two types of trustee protection insurance are available in an ongoing pension scheme scenario. The trustees may fall within the cover provided by a "directors and officers" policy put in place by the sponsoring employer. Alternatively, the trustees may benefit from specific pension trustee liability insurance.

Again, there are various limitations on the extent of the insurance cover permitted. Generally speaking, trustees should only pay insurance premiums out of scheme assets where they have a power to do so and they are comfortable that using scheme assets to provide protection for themselves is consistent with their fiduciary duties.

In addition, Section 256 of the Pensions Act 2004 limits reimbursement of insurance premiums designed to protect against TPR fines or penalties.

There is nothing, however, to prevent the sponsoring employer from paying insurance premiums covering regulatory fines (to the extent that they are legally insurable – see below), provided that the conditions set out in Section 235 of the Companies Act 2006 are met in respect of trustees who are also directors in the sponsoring employer's group of companies. Generally speaking, insurance protection is only available for matters that are "legally insurable". This raises the question of the extent to which regulatory fines (whether from TPR or the ICO) are covered by trustee liability insurance.

What Protection Does Professional Advice Offer?

In some cases, professional advice is required in relation to specific decisions under the scheme rules. For example, it is not unusual to see an employer contribution rule that requires the trustee to have taken actuarial advice. In other cases, professional advice may be required under legislation. For example, Section 36 of the Pensions Act 1995 requires written expert advice in relation to investment decisions.

In any event, the very act of having taken professional advice implies that the trustees have exercised a certain amount of due care and attention in reaching a decision that will help to protect them in respect of any claims against them arising from that decision. If trustee liability arises despite following professional advice, there may also be grounds for a professional negligence claim against the advisor.

What Protection Does Legislation Offer?

Limitation periods under legislation offer a certain amount of protection for trustees in respect of historic matters. The standard limitation period applying to breach of trust claims (except in the case of fraudulent breach of trust or recovery of trust property in the personal possession of trustees) is six years.

In addition, under Section 61 of the Trustee Act 1925, the court may relieve a trustee from personal liability where the trustee has "acted honestly and reasonably, and ought fairly to be excused".

What Protection Does a Corporate Trustee Structure Offer?

In the event that a trustee board is established as a corporate entity, the trustee company will have its own legal identity and would be the target for legal claims, rather than the directors of that corporate entity. There are scenarios where claims can be pursued against directors of a corporate trustee personally, but these tend to require instances of fraud. Where the trustee company is part of the sponsoring employer group, there are restrictions under company legislation about intra-group indemnification.

There are other practical considerations about operating as a corporate trustee, including accounting requirements, Companies House notifications, etc. Other benefits to be had include the ease of signing legal documents and being brought within a group-wide "directors and officers" insurance policy.

Which of These Protections Do Trustees Need?

There is a subtle difference between the protections offered by the different elements discussed above. Generally speaking, if trustees have these in place, they will be protected from personal liability except in cases of dishonest breach of trust or fraud. Any activity by a trustee that falls short of that will normally be covered by one of the protections. There is a certain amount of overlap, and so it may be felt that not all of these protections are necessary. However, many trustees feel that the more layers of protection they have the better in this high risk and increasingly highly regulated environment.

Some Practical Points

Do	Don't
Do check what protections are already provided under the scheme's trust deed and rules.	Don't forget that an indemnity from the sponsoring employer would become worthless in the event of sponsor insolvency – consider additional protections.
Do check the terms of any trustee liability insurance carefully, so you know what is covered – remember that full disclosure of any past and potential claims would need to be made in order for the insurance to be effective.	Don't forget about cover for former trustees when taking out trustee liability insurance – one day you will be a former trustee!
Do explore whether the sponsoring employer would be prepared to pay any insurance premium – this would enable protection to be purchased in respect of regulatory fines, to the extent that such fines are legally insurable.	Don't forget that a claim could be brought against any one trustee for the full amount of any loss to the fund. It is important, therefore, to consider the suitability of the protections on offer and to take advice.

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