ALLEN & OVERY

Pensions: what's new this week

16 November 2020

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

New TPR guidance: protecting schemes from sponsor distress | Pension scams: new TPR campaign, guidance | High Court clarifies operation of Fraud Compensation Fund | ESG and stewardship update | Discrimination: Court of Appeal considers justification, 'cost plus' issues | Covid-19: updated CJRS guidance published | Pensions Academy Online: week commencing 23 November

New TPR guidance: protecting schemes from sponsor distress

The Pensions Regulator (TPR) is **urging** trustees of DB schemes to be prepared for the risk that their sponsor may face financial difficulties, particularly in light of the ongoing economic effect of the Covid-19 pandemic, and potential Brexit-related issues. TPR expects trustees to act quickly to protect members if they identify warning signs of employer distress or insolvency, and has published new **guidance** for trustees on protecting schemes from sponsor distress (plus a **blog post**).

The new guidance covers some familiar points on risk management, governance, monitoring the employer covenant, information flows and the importance of taking appropriate professional advice (depending on the circumstances). It also contains a list of warning signs of sponsor distress; additional guidance and a high-level checklist on actions to take, depending on the financial health of the sponsor, together with illustrative case examples. These cover an employer selling a valuable part of the business, and lenders seeking security ahead of the scheme (also covering mitigation, easements for deficit repair contributions, and enforcement of security by lenders).

TPR has expressly stated that this guidance is aimed at trustees of all DB schemes. Trustees should review the new guidance and consider further (or refresher) advice or training, as appropriate. Please contact your usual A&O adviser for assistance.

Pension scams: new TPR campaign, guidance

TPR has launched a **new campaign** on pension scams – TPR is asking trustees, providers and administrators to **pledge** their commitment to protecting members from scams (including warning members and conducting appropriate due diligence). Most of the actions involved will already be a standard part of trustee processes; TPR has also launched a new **scams module** in the Trustee Toolkit, and updated its **scams guidance** to reflect the pledge and module. We are following up with TPR to clarify what the pledge entails, since well-governed schemes have been highlighting scam risks for several years already.

High Court clarifies operation of Fraud Compensation Fund

The High Court has clarified a number of issues around the operation of the **Fraud Compensation Fund** (FCF) following an application by the Pension Protection Fund (PPF) for guidance: ***PPF v Dalriada Trustees Ltd***.

The PPF operates the FCF, a statutory compensation fund which pays compensation in respect of occupational pension schemes where certain conditions are met (including that the PPF considers that there are reasonable grounds for believing that scheme assets have been reduced due to an offence involving dishonesty, plus conditions relating to the financial status of the 'employer' and the issue of a scheme failure notice). The FCF is funded through a levy on pension schemes. The court has confirmed that claims arising from pension scams may be eligible for FCF compensation and has clarified some key points, including:

1. A company is an 'employer' for the purposes of the FCF if it had one or more directors eligible for scheme membership (whether or not the directors were remunerated), even if it had no contract of employment with anyone in the description of employment to which the scheme relates.

2. Mr Justice Trower was also asked to decide what the term an 'employer's pension liabilities under the scheme' meant, which is also relevant to PPF entry (in the context of a scheme failure notice). He held that it meant any legal liability of an employer to make payments to a scheme which contribute towards the ability of the trustees to fund members' scheme benefits, whether directly or indirectly through the payment of expenses which would otherwise be paid out of the assets of the scheme. It could also include liabilities in respect of fees and expenses where TPR had appointed a trustee.

The PPF has published a **press release** stating that it will work with independent trustees to process several applications for FCF compensation that were awaiting the outcome of this decision (further claims are expected).

ESG and stewardship update

ESG and investment stewardship issues remain high on the agenda for trustees, with schemes preparing implementation statements, and new monitoring and reporting requirements expected. In recent developments:

- **TCFD reporting**: The government has published a **report and roadmap** on its plans to implement the recommendations of the Taskforce on Climate-related Financial Disclosures. The government has recently consulted on its policy proposals for occupational pension schemes (**WNTW**, 1 September 2020). The government is planning to consult in early 2021 on draft regulations imposing requirements on occupational pension schemes, with governance requirements to be imposed from October 2021. This timeline is subject to the timing of Royal Assent for the Pension Schemes Bill, and the consultation process. The roadmap provides a useful overview of developments affecting participants in different parts of the financial services sector. You can read more about the proposals by the Financial Conduct Authority (FCA) to introduce a new Listing Rule requiring TCFD disclosures by large listed companies for reporting periods beginning 1 January 2021 **here**.
- **Split voting in pooled funds**: The Association of Member Nominated Trustees has published a **report** on barriers to the implementation of client voting policies in pooled funds. The report includes a number of recommendations, including for trustees to engage with their investment consultants and fund managers, and for the creation of a new working group (which has the support of the Pensions Minister).
- The Financial Reporting Council (FRC) has published a **Climate Thematic** review of climate-related considerations by boards, companies, auditors, professional bodies and investors, plus a report on **'What do investors want to see?'**. The report includes a number of suggested questions for companies (on governance and management, business model and strategy, risk management, and metrics/targets) which may be useful to trustees considering their approach to climate-related investment monitoring and governance, plus reporting examples.

Our 25 November webinar 'Pension schemes and the sustainability horizon' will guide you through the broader picture of sustainable investment developments relevant to pension schemes, and how trustees can approach this rapidly-evolving area (see final item below for details on how to RSVP).

Discrimination: Court of Appeal considers justification, 'cost plus' issues

The Court of Appeal has concluded that an employer's need to reduce expenditure, and specifically staffing costs, can constitute a legitimate aim (as part of objective justification of indirect discrimination): ***Heskett v Secretary of State for Justice***.

Mr Heskett brought a claim of indirect age discrimination: he complained that the rate of pay progression for his role had been reduced as a result of the policy of austerity in public sector pay, which disadvantaged younger employees. It was common ground that the reduction in the rate of progression had a disproportionate impact on younger employees; the Court of Appeal was considering the issue of justification, and in particular:

- whether the tribunal was mistaken, when considering whether cost was a legitimate aim for the purposes of justifying age discrimination, in holding that there was a valid distinction between costs and an absence of means; and
- whether it was mistaken, when assessing proportionality, in taking into account that there was 'active consideration' of changing an unacceptable pay policy.

The Court of Appeal stated that if the employer's aim (in acting in the way that gives rise to a discriminatory impact) can fairly be described as no more than a wish to save costs, this will not amount to justification. If this is not the case, it is necessary to arrive at a fair characterisation of the employer's aim as a whole, and decide whether that aim is legitimate. An employer may be able to rely, as a legitimate aim, on a real need to reduce or constrain staffing costs, but is still required to demonstrate that the relevant measures represent a proportionate means of achieving that aim.

The Court of Appeal dismissed the appeal. The tribunal was entitled to treat the employer's need to observe the pay freeze constraints as a legitimate aim; and there was no reason in principle why it should not be open to an employer to seek to justify urgent measures on the basis that they represented a proportionate short-term means of addressing a problem, although they could not be justified in the longer term.

The issue of justifying discrimination on grounds of cost alone/costs plus has previously arisen in the pensions context in cases such as ***Cross***, ***Woodcock*** and ***O'Brien***. In this case, the Court of Appeal has sought to move away from potentially 'mechanistic' approaches, to focus on the overall fair characterisation of the employer's aim.

Covid-19: updated CJRS guidance published

Last week we reported on the extension of the Coronavirus Job Retention Scheme (CJRS) until March 2021 – the government has now updated its **CJRS guidance** to reflect the extension. As a reminder, employers will not be able to claim for pension contributions, and will need to pay these in line with scheme rules.

Please contact your usual A&O adviser for assistance if you have any queries about the CJRS.

Pensions Academy Online: week commencing 23 November

Our next Pensions Academy sessions will take place online from 9.30 – 10.30am on the following dates:

- **23 November – So you've had a cyber breach? What to do now**

  You can't completely eliminate the risk of a cyber breach, but how you act in the immediate aftermath of one may have a significant impact on how much damage is done and how quickly you recover. It's also increasingly seen as an important aspect of good governance. Our experts will talk you through how to be ready to respond well to a cyber attack.

- **25 November – Pension schemes and the sustainability horizon**

  The ESG agenda for pension schemes has moved on significantly in the last few years, but there's much further to go and the speed of travel is increasing. With major new monitoring and reporting requirements on the way in relation to climate change and wider sustainability issues, as well as increased governance requirements, we'll show you the bigger picture of how sustainable investment is developing and help you to develop a framework for thinking about the new requirements.

- **27 November – Legal update**

  2021 is shaping up to be a year of change, with significant legal developments for pension schemes on the horizon. We'll help you to shape your agenda for what's ahead.

Please **click here** to register for any of these webinars.

Contact information

Helen Powell
PSL Counsel, London
Tel +44 20 3088 4827
helen.powell@allenovery.com

Ruth Emsden
PSL (Australian lawyer), London
Tel +44 20 3088 4507
ruth.emsden@allenovery.com