

Group Briefing

Autumn 2017

Pensions Update

1. LEGISLATION

1.1 Pensions Acts 1990 to 2015

Section 80(1) of the Pensions Act provides that where a rule of a scheme does not comply with the principle of equal treatment on the gender ground, it shall, to the extent that it does not so comply, be rendered null and void with effect from 17 May 1990. Section 80(3) preserves for pre-1990 benefits an (otherwise null and void) rule relating to retirement ages for a limited period until 31 December 2017 (e.g. where a female active member has pre-1990 benefits which have a different NRD attaching to them than an equivalent male active member, the employers and trustees are permitted to retain that unequal treatment up to 31 December 2017 but after that date the male active pre-1990 benefits must be levelled up to those of his female counterparts). Where an otherwise null and void rule remains in force for pre-1990 benefits in the scheme provisions on 1 January 2018 then the trustees of the scheme will be required to “level up” benefits (i.e. all members regardless of gender will be entitled to the more preferential benefits). This is likely to put a funding strain on any scheme to which it applies. Prior to 31 December 2017, trustees and employers have a final opportunity to confirm or clarify (subject

to any restrictions on the amendment power in the scheme provisions) the treatment of pre-1990 benefits.

1.2 Other legislation:

(a) *Financial Services and Pensions Ombudsman Act (the “PO Act”)*

The PO Act was signed into law on 26 July 2017. This Act merges the offices of Financial Services Ombudsman and Pensions Ombudsman. As the PO Act has not yet been commenced by the Minister, no section of the Act is currently in force.

(b) *The Social Welfare and Pensions Bill 2017*

The Dáil is scheduled returned from summer recess on 20 September 2017. It is anticipated that the Social Welfare and Pensions Bill will continue to progress through the Dáil and we will publish further updates as the Bill progresses.

(c) *Budget 2018*

Budget 2018 was published on 10 October 2017. The State pension (contributory) is being increased by €5 per week from March 2018. The maximum weekly rate for the State pension (contributory) will be €243.30 which results in annual amount of

c. €12,650. The minimum annual pension income in order to transfer benefits to an approved retirement fund is €12,700. The increase in the State pension (contributory) may result in this income threshold being met by more people and may result in a future change to the income threshold for approved retirement funds or that there is no longer a requirement to hold an approved minimum retirement fund.

2. CASE LAW UPDATE

2.1 *IBM United Kingdom Holdings Ltd and another v Dagleish and others* [2017] EWCA CIV 1212

The UK Court of Appeal in the case of *IBM v Dagleish* has allowed IBM's appeal against the decision of the High Court and has dismissed the counter-appeal by the representative beneficiaries of the relevant pension schemes. The case relates to a cost-saving exercise initiated in 2009 by IBM called Project Waltz. The appeal overturns the High Court's decision to elevate members' “reasonable expectations” to a higher level than in previous decisions regarding entitlements.

The Court of Appeal:

- (a) rejected the claim that IBM had breached the Imperial duty of good faith. The Imperial duty of good faith provides that there is an implied term in a contract of employment between the employer and employee such that neither would cause damage to the relationship of trust and confidence between the parties;
- (b) held that while “reasonable expectations” were a legitimate consideration of the employer amounting to “relevant factors”, if they are to be relied upon they must be “equivalent to what is required for a contract or an estoppel” (i.e. there is a high level of proof required);
- (c) found that the High Court had not considered whether the decision of the employer was one which a rational decision-maker would make but had instead incorrectly reviewed the merits of the decision taken by IBM;
- (d) refused the injunction sought by the beneficiaries to prevent the implementation of Project Waltz until a new consultation exercise was undertaken by IBM. The Court of Appeal was, however, critical of the manner in which the consultation had occurred and held that beneficiaries are entitled to claim damages for breach of contractual duty in the conduct of the consultation.

This decision of the Court of Appeal will be of assistance to employers who are undertaking broad changes to their pension schemes. While the Court ultimately refused to grant the injunctive relief sought by the beneficiaries which would have prevented the implementation of Project Waltz, its criticism of the conduct of the consultation process is a cautionary tale for employers and trustees which should be borne in mind when preparing and issuing communications introducing changes to pension schemes.

2.2 Walker v Innospec Limited and others [2017] UKSC 47

The UK Supreme Court has decided that the point at which discrimination

is to be judged is the point at which the pension becomes payable.

The UK Supreme Court overturned the Court of Appeal’s judgment and considered three issues which arose relating to Mr Walker’s membership of the Innospec Pension Scheme (the “Scheme”).

Mr Walker joined the Scheme on 2 January 1980 and retired in 2003. His same sex civil partnership was registered on 23 January 2006 and the civil partners subsequently married. In 2006, the Scheme was amended to take account of civil partnerships, solely in respect of service on or after 2005. Mr Walker brought a claim against his employer and the trustees of the Scheme for unlawful discrimination on the grounds of sexual orientation.

On the first issue, the Court concluded that an exception to the general non-discrimination rule implied into occupational pension schemes provided for by the Equality Act 2010 was incompatible with the Framework Directive. In unanimously allowing Mr Walker’s appeal, the Supreme Court held that the “point of unequal treatment occurs at the time that the pension falls to be paid.” Whether Mr Walker’s partner would be entitled to a spouse’s pension on Mr Walker’s death was a prospective event. The Court noted that had Mr Walker married a woman after retirement, she would be entitled to full benefits and that the possibility of Mr Walker getting married should have been financially accounted for by the Scheme.

The second issue was whether effect must be given to the Equality Act 2010 or whether it should be disapplied. The Court found that since non-discrimination on grounds of sexual orientation is now a principle of EU law, this second issue no longer arose for consideration. The principle is in existence and Mr Walker’s entitlement to a spouse’s pension will be considered at the time it falls to be paid.

The Court decided that as a result of its findings on the first and second

issues, no decision was necessary on the third issue. This related to whether paragraph 18 of the Equality Act 2010 was incompatible with article 14 of the ECHR.

The Court distinguished the CJEU decision in Parris (which related to an employee in Trinity College Dublin) as the rule at question in Parris was not discriminatory as it applied equally to opposite-sex marriages and same-sex civil partnerships. Dr Parris’ inability to meet the qualifying criterion resulted from the lack of provision for same-sex partnerships under Irish law at the time of his 60th birthday. It was for member states to decide both whether to make such provision and whether to make it retrospective.

3. PENSIONS AUTHORITY

3.1 The Pensions Authority publishes statistics for defined benefit schemes

The Pensions Authority (the “Authority”) has published statistics for defined benefit (DB) schemes gathered from the Annual Actuarial Data Returns. The number of DB schemes subject to the funding standard is 628 which is a reduction from 666 schemes in 2015. The total assets of these 628 schemes are €60.8 billion and the liabilities are €58.1 billion. At the end of 2016, there were three schemes in deficit on the statutory minimum funding standard (“MFS”) with no funding proposal and the Authority has begun the process of deciding whether to use its powers under the Pensions Act to direct trustees to reduce benefits or to put those schemes into wind-up.

3.2 Publication of the Annual Report and Accounts of the Pensions Authority

The Authority has published its Annual Report and Accounts and has indicated that:

- (a) compliance supervision work will be its first priority;
- (b) as IORPS II must be transposed into national law by January 2019, it will provide technical support and advice

on the directive to the Department of Social Protection;

(c) it will seek to reduce the number of pension schemes allowing for:

(i) more informed and committed trustees; and

(ii) the Authority to provide more detailed, scheme specific supportive supervision;

(d) it has partnered with the ESRI to conduct a research programme to inform and encourage a national debate about retirement and pensions.

Finally, the Pensions Regulator, Brendan Kennedy, has highlighted a concern regarding trustees meeting their scheme management obligations where the principal employer is acting as the sole trustee of the scheme. The

Regulator also notes the Authority's disappointment with the timeliness and accuracy of the data provided to them by Registered Administrators. Trustees should be mindful of this and ensure that where functions have been delegated to a Registered Administrator, that there is an audit trail in respect of the agreed service levels.

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