

Briefing Note on the Section 75 debt and the Pensions Trust Growth Ed Anderson, July 2008

Introduction

The introduction of the Occupational Pension Schemes (Employer Debt) (Amendment) etc Regulations 2008 with effect from 6 April 2008 continues to highlight potential problems with the Section 75 debt on the employer and the Growth Plan administered by the Pensions Trust.

The new Regulations are welcome as they introduce some clarification and flexibility. Some withdrawal arrangements will no longer need clearance from the Pensions Regulator and the apportionment provisions have been tightened. However it is the new definition of what constitutes an "employment cessation event" that is of most interest to those employers participating in the Growth Plan.

An employment cessation event – the 2005 Regulations

Under the old 2005 Regulations, which also changed the basis of calculation to the more expensive full buyout one, the definition of an employment cessation event was that one occurred in relation to an employer "if he ceases to be an employer employing persons in the description of employment to which the scheme relates at a time when at least one other person continues to employ such persons."

There was therefore debate as to whether the trigger for the statutory debt was for example: -

- (a) when an employer had no active members remaining in its employment or
- (b) when it had no active members in the scheme but it still employed people who fell into the category to which the scheme related or
- (c) As (b) but where the employer had ceased to offer membership of the scheme.

The guidance formerly issued by the Pensions Trust was effectively that (c) was correct. There was a strong view that in fact interpretation (a) was more likely. If (b) or (c) were correct then a further complication would arise as to how widely the category to which the scheme related was to be construed. For example was this continuing to employ anyone engaged in any social, educational, charitable, voluntary or similar work as per the Trust Deed and Rules or was it more employer specific, such as the situation where membership was only offered to one part of the organisation engaged in say educational work and which was then stopped.

The new definition

The new Regulations now define an employer cessation event as when "an employer has ceased to employ at least one person who is an active member of the scheme" and at least one other employer who is not a defined contribution employer does continue to employ at least one active member. A period of grace of 12 months is introduced so that the debt will not be triggered if an employer ceases to have an active member but intends to during that period.

The consultation document and first draft of the new Regulations issued last year suggested that the new definition of an active member was simply to clarify the existing position. The explanatory memorandum to the final version Regulations also states that under the 2005 version the statutory debt was triggered where an employer ceased to have an active member and that the period of grace was being introduced to ameliorate this hardship.

So far so good and this all suggested that the narrowest interpretation (a) above was the correct one and that intended by the government back in 2005. However following the consultation process the draft Regulations were amended and new transitional arrangements were introduced that continue to apply the old definition until an employer ceases to employ a person in the relevant category or again employs an active member. If the old Regulations did mean active members only then that would perhaps have been unnecessary and again this has confused the situation somewhat.

During the consultation process the government did state it would change the draft Regulations to clarify that the new definition was only intended to cover scheme abandonment and did not apply where for example all the employers' ceased future accrual or merged. It did then alter the definition of employment cessation event slightly but the transitional changes arguably go further than necessary for that and they may possibly have been introduced following responses to the consultation, which have unfortunately not yet been published in full, that sought to preserve the argument that interpretation (b) or (c) above was in fact correct under the 2005 Regulations.

Therefore despite the confusion there remains a strong argument that the correct trigger for the statutory debt was and is when an employer ceases to have an active member of the scheme. Employers should be aware of this possibility if they have relied on a wider interpretation previously and for example assumed they have no liability. Equally there may be continuing employers who would wish to challenge the wider interpretation as it has the effect of increasing their liabilities.

Other problems – Growth Plan series 3

In addition other problems remain with the Growth Plan and which have caused much concern amongst participating employers.

Firstly there is the question of whether Growth Plan series 3 is also caught by Section 75 in addition to series 1 and 2. The Pensions Trust has to date excluded series 3 employers and liabilities from the issue. However again this may well not be correct. Section 75 applies to schemes that are not money purchase and the method of converting contributions when made under the series 1 and 2 plans into defined benefits meant they were not money purchase, despite having been described as such. Series 3 was started in September 2001, seemingly to try to get around this by introducing personal funds.

However in the Court of Appeal decision of Aon -v- KPMG in 2005, the Court gave a very strict and narrow interpretation as to what was a money purchase plan, holding that a plan that had benefits calculated only by reference to contributions was money purchase. In that case the introduction of actuarial factors (it being pointed out that money purchase schemes do not need actuaries), the application of bonuses and the potential mismatch between assets and liabilities meant it was not money purchase and Section 75 therefore applied.

Last month in the first instance decision in Bridge Trustees Ltd v Yates and in the context of a winding up, the Court distinguished Aon on the basis that in the Aon case the actuarial factors were integral to the calculation of benefits whereas in the scheme being considered in Bridge they were not and only used at the time a member came to retire.

Despite this latest decision, because series 3 benefits involve the actuary calculating a yearly investment credit and because there is a capital guarantee, the issue does remain whether series 3 is also in fact caught by Section 75. The Pensions Trust is now introducing yet another version, series 4, with effect from 1 October 2008 and again stating that this will now be a "pure defined contribution scheme".

Again any series 3 employers should be aware of the risk that the previous guidance may be incorrect and they too may well be caught by the employer debt provisions. Series 1 and 2 employers will also no doubt again wish to seek clarification that the Pensions Trust is sharing the liabilities correctly.

Mis-selling

Finally there is the issue of whether the Growth Plan has been mis-sold or whether employers have been poorly advised during their participation and if so what remedies are available. The Growth Plan has been described as a money purchase scheme and the application of Section 75 came as a shock to many employers, particularly after the basis of calculation changed from MFR to the full buy out basis in 2005. That change in itself gives rise to questions as to whether participating employers received the correct advice at the time. The government announced its intention to abolish MFR as far back as March 2001. Following the Pensions Green Paper in December 2002, the Regulations changing single employer schemes to full buy out were published in detail in June 2003, although not implemented until March 2004. Many private sector companies took advantage of the delays and loophole regarding multi-employer schemes and those in the not for profit sector may be entitled to ask why they were not receiving the same advice on the implications of the impending changes and otherwise.

All of the above reinforces the importance to employers of taking independent legal advice on their participation in the Growth Plan. It may be that some of these issues cannot be fully resolved without seeking directions from the Court.

Ed Anderson is a partner at Beale and Company Solicitors LLP and specialises in pensions litigation and professional negligence. This summary briefing is not legal advice. You should not rely on it as such and should take advice on your specific circumstances.

For further information please contact:

E: [Ed Anderson](#)

T: +44 (0)20 7240 3474