THE LIMITS OF TRUSTEES' INFORMATION DUTIES TO MEMBERS AND AN UPDATE ON LIFETIME ALLOWANCE PROTECTIONS

Appropriate and timely sharing of information can be critical to making informed financial decisions. In the pensions context, the value of information sharing is recognised by trust law and legislation, which impose obligations on trustees and sponsoring employers to share information with scheme members as a matter of course and upon request.

How wide is this duty to share information with members? This and other related questions were considered in the recent Pensions Ombudsman's decision in *Mayo* (PO-8035).

The Kodak Pension Plan (KPP)

Mr Mayo was a member of the KPP. Kodak Limited (Kodak) was the KPP's sponsoring employer. In January 2012, Eastman Kodak Company (EKC), the US parent of Kodak which had guaranteed Kodak's obligations to the KPP, filed for chapter 11 bankruptcy protection.

EKC's troubles led to the eventual closure to future accrual of the KPP from 31 March 2012. Generous early retirement factors also ceased to apply for early retirement applications made after 26 January 2012 when the KPP closure consultations began.

Throughout 2012 and 2013 the trustees of the KPP (Trustees) discussed the implications of EKC's US chapter 11 filing with EKC and Kodak. Securing benefits for KPP members above the compensation levels available from the Pension Protection Fund (PPF) was also being negotiated. KPP members were kept abreast of developments including the non-payment of substantial contributions by Kodak, claims made by the Trustees against EKC in the US filing and a potential transfer of the KPP to the PPF if a settlement could not be reached with EKC and Kodak.

Early retirement and the Kodak Pension Plan No 2 (KPP2)

In September 2012, Mr Mayo (now a deferred member following the closure of the KPP on 31 March 2012) applied to receive an actuarially reduced early retirement pension of approximately £19,000 per annum from 1 April 2013.

His early retirement application was accepted by the Trustees on 28 March 2013. On the same day, the Trustees agreed the benefit terms for the KPP2 with EKC and Kodak. The KPP2 would commence from 31 March 2014 and would secure benefits for consenting KPP members which were less generous than those available under the KPP but were more generous than PPF compensation levels. A key difference between the KPP and the KPP2 was the actuarial factors used to calculate early retirement reductions. The KPP2 would offer PPF level reduction factors which were more generous than the reduction factors applied under the KPP since 26 January 2012.

Having noted the impact of the change of factors to KPP members, a moratorium was placed on KPP early retirement applications with effect from 29 April 2013, being the date on which the agreement in relation to the KPP2 was announced following PPF and Pensions Regulator agreement. KPP members were given the option to transfer to the KPP2 or remain in the KPP which would enter the PPF and result in benefit cut-backs.

In November 2013, after Mr Mayo had taken his early retirement pension from the KPP, the Trustees announced that the KPP would use the more generous early retirement factors used by the PPF. When he learned that members applying for early retirement after him received the more generous early retirement factors, he unsuccessfully complained under the KPP's Internal Dispute Resolution Procedure (IDRP).

Submissions to the Pensions Ombudsman

Mr Mayo made a number of submissions against the Trustees. The crux of his complaint was that the Trustees had failed to inform him until after he had already retired early on 1 April 2013 that deferring his early retirement pension until November 2013 (the end of the moratorium) would result in a more generous outcome for him.

Mr Mayo's submissions included the following:

- The Trustees should have made appropriate enquiries as to why he had applied for early retirement before exercising their discretion to grant early retirement. They had failed in their duty to act in his best interests by agreeing to pay him an early retirement pension that was calculated on terms that were prejudicial to him.
- While he accepted that the Trustees may not be able to provide full details of the negotiations with EKC and Kodak, they should have given him some indication of the deal that might be struck. He would have most probably deferred taking early retirement from the KPP if the Trustees had informed him that there was even a remote possibility of the KPP providing improved benefits in the future.

- His decision to take early retirement was made under duress as a result of concerns about the KPP that were fuelled by a lot of pessimistic information received from the Trustees.

The Pensions Ombudsman's determination

The Deputy Pensions Ombudsman (DPO) did not uphold Mr Mayo's complaint. She found that the Trustees had not provided misleading or inadequate information about the KPP or KPP2 at the time he had requested his early retirement pension in September 2012. It was clear that in September 2012 there was no way of knowing what the outcome would be. Negotiations were ongoing and the establishment of the KPP2 was not a foregone conclusion with the transfer of the entire KPP to the PPF just as likely.

The DPO found that there was no maladministration on the part of the Trustees for not supplying information about the KPP2 (including information about potentially more generous early retirement factors) in September 2012. It was not clear at this stage whether an agreement would be reached on the KPP2 or whether approval for the KPP2 would be obtained from the PPF and the Pensions Regulator.

The Trustees were held to be under no legal obligation to provide Mr Mayo with advice on whether his decision to take early retirement, a personal financial decision, was suitable for him. Their obligation was to provide him with accurate information about the KPP benefits available at the time he applied for early retirement.

The DPO held that Mr Mayo's decision to take early retirement was ultimately driven by his understandable concern over the security of his KPP pension and not as a result of undue pressure put upon him by the Trustees.

Comment

Following the recent decision in Cherry where the Police Commissioner was found to have a duty to inform an employee about the tax implications of his reemployment, the decision of the DPO clarifies the limits of trustee information sharing obligations.

The nature of pension schemes and revisions to such schemes inevitably give rise to "cliff edges" and disappointed members. Whilst there will be sympathy for the position Mr Mayo found himself in, extending trustees' duties to include making enquires about whether decisions made by members are in their best financial interests would be problematic.

Trustees will welcome the clarity provided by the DPO that their responsibility was limited to providing accurate information about the benefits available at a particular time and not what benefits may or may not be available as part of uncertain future events.

UPDATE – FIXED PROTECTION 2016 AND INDIVIDUAL PROTECTION 2016

The Lifetime Allowance (LTA) reduced from £1.25m to £1m from 6 April 2016. Alongside the LTA reduction, the Finance Act 2016 introduced Individual Protection 2016 (IP16) and Fixed Protection 2016 (FP16) as transitional LTA protections.

HMRC has now published further details on the interim arrangements that will apply for individuals who intend to take benefits between 6 April 2016 and 31 July 2016. The latest guidance provides updated pro forma letters to be used when applying for IP16 and FP16 on an interim basis. Interim applications must be made in advance of drawing benefits.

The new online platform for applying for IP16 and FP16 is expected to go live in July 2016. Individuals applying for IP16 or FP16 on an interim basis, between now and 31 July 2016, should ensure that they apply for a permanent reference number when the online platform becomes available.

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