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DO EMPLOYERS HAVE A DUTY TO TELL EMPLOYEES ABOUT PENSION TAX RULES?

It has long been established that employers must inform employees about the pension benefits that are available to them under applicable pension schemes[1] and any material conditions for their payment. The challenge can be in determining the limits of this duty.

Employers are not required to advise employees about pensions and, indeed, they will generally not be authorised to give financial advice (under FCA rules). A distinction is drawn between advice and information.

The recent Pensions Ombudsman case of *Cherry*[2] highlights another potential distinction: is the duty limited to the terms of the benefits or does it extend to the taxes applicable to those benefits? The Pensions Ombudsman considered that the duty extended to the tax implications.

THE DETERMINATION IN CHERRY

Mr Cherry retired from police service in 2011 with a "protected pension age" of 50 and drew his pension from the Police Pension Scheme. He was re-employed in the same role almost straight away with the result that, under relevant legislation, he lost his "protected pension age". Accordingly, all past and future pension payments to him before the "standard minimum pension age" of 55 are subject to an "unauthorised payment charge".

Mr Cherry sought recovery from his employer of these pension tax charges, on the grounds that his employer should have informed him about the tax consequences of his re-employment.

Recognising that employers are not required to provide advice to employees, the Pensions Ombudsman characterised this as information:

> *"This was about the provision of relevant information to employees about the impact on his or her benefits following re-employment. I find that it was reasonable to expect the Commissioner to have provided the salient information to Mr Cherry about the implications of re-employment as contained in the Home office Circular 007/2006."*

He stated that:

> *"As a responsible employer the Commissioner had a duty of care to inform Mr Cherry of the tax implications of re-employment on his retirement benefits"*

The Pensions Ombudsman ordered the Police Commissioner, as Mr Cherry's employer, to pay to Mr Cherry the amount due to HMRC arising from the loss of his "protected pension age".

A DUTY OF CARE TO INFORM EMPLOYEES ABOUT THE TAX IMPLICATIONS OF THEIR DECISIONS?

The implications of this determination are worrying for employers. Can the decision be confined to its facts, or do employers have a general duty to provide information to employees on the tax implications of their decisions? How far do employers' duties go?

The conditions for protecting a higher lifetime allowance are complex and the lifetime allowance and annual allowance change regularly, catching high earners. The relative tax advantages of drawdown, lump sums and annuities are full of traps for the unwary. The benefit implications of savings are unpredictable. This is difficult stuff but the rules around Mr Cherry's "protected pension age" were hardly less complex.

RAMSEY V HONEYWELL NORMALAIR-GARRETT LIMITED[3]

The determination in *Cherry* can be contrasted with the determination of the Deputy Pensions Ombudsman in *Ramsey* (see our previous eBulletin for more information). This case concerned the pension arrangements of a private sector employer and the reduction in the annual allowance from £255,000 to £50,000 in the tax year 2011/2012. Under the terms of a "Special Arrangement", Mr Ramsey was invited to transfer his defined contribution (DC) pot to his employer's closed defined benefit (DB) scheme on terms that would provide him with a DB pension calculated as if his membership of the DB scheme had never ceased. This provided a material augmentation in the year of retirement. Mr Ramsey's retirement date fell after 6 April 2011, with the result that the augmentation was tested against the new £50,000 annual allowance, resulting in a material tax charge. Mr Ramsey sought recovery of the tax charge from his employer.

The Deputy Pensions Ombudsman held the company had no legal duty to inform Mr Ramsey about the tax changes, summarising the respective responsibilities of the parties as follows:

> *"None of the Company, the Trustee or the Administrator had a legal obligation to contact Mr Ramsey prior to him electing to take his benefits under the Special Arrangement to warn him that he could be subject to a personal tax charge due to changes to the law concerning the annual allowance that come into force on 6 April 2011."*

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[1] Scally v Southern Health & Social Services Board, [1991] All ER 563
[2] (PO- 7096)
[3] (PO- 3290)

RECONCILING CHERRY AND RAMSEY

A significant factor in *Cherry* may have been the existence of the Home Office Circular 007/2006, which summarised the conditions for retaining a "protected pension age" on re-employment after starting to draw a pension before age 55. The Home Office Circular was readily available to the Police Commissioner. Also, the provisions on retaining the "protected pension age" were specific to the Police Pension Scheme and other public sector schemes and not of general application.

Contrast this to Ramsey where the change to the personal tax regime was of universal application and the employer had no special information on the tax position which was not available to the employee. There was on-going correspondence between the employer and HMRC which the Deputy Pensions Ombudsman felt *"suggested that it was not clear to [the employer…] that a personal tax charge would definitely arise for persons electing the Special Arrangement"*.

The availability of a leaflet was also a feature in *Scally*, the leading case on employers' duty to inform, in which the following comment is made:

> *"if the "Easy-to-read guide" and "leaflet STD" had been given to the plaintiffs, whatever the shortcomings of those documents, I do not see how the plaintiffs could have succeeded".*

In *Webber v Department of Education*[4], the High Court refused to accept Mr Webber's change of position defence to the recoupment of overpayments made to him following his re-employment as a teacher. The decision was based on the factual findings that Mr Webber should have been aware of the possibility of an overpayment building up and that *"at the very least Mr Webber 'turned a blind eye' for whatever reason, in the hope that if there was an overpayment building up that it would go unnoticed"*. The knowledge that the court imputed to Mr Webber derived from a generic leaflet (and cover letter) and a further letter provided to Mr Webber which, between them, set out the statutory abatement provisions and informed Mr Webber of the requirement to submit a "certificate of re-employment" whenever his circumstances changed.

[4] [2014] EWHC 4240 (Ch)

DISCHARGING THE DUTY: KEY TAKEAWAYS FOR EMPLOYERS

While the availability of generic information may have been a significant factor in *Cherry,* the Pensions Ombudsman's statement that an employer has *"a duty of care to inform [an employee] of the tax implications"* of his actions creates a precedent, at least at the Pensions Ombudsman, for a wider duty on employers regarding pension tax rules.

It may already be best practice for employers to communicate with staff about tax changes or pass on generic information from advisers. It may be advisable for employers who have the resources to do so, to ensure that tax rules affecting the employer's pension arrangements are brought to the attention of their employees or that the employees are at least directed to seek advice or information elsewhere.

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