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Six of one, half a dozen of another: 12 months in pensions law

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Agenda
12 months in pensions law

- Cases
  - IBM (2014 and 2015)
  - Merchant Navy Ratings Pension Fund (2015)
  - Gleeds (2014)
- End of DB contracting-out
- VAT on pension fund costs

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IBM UK Holdings v Dalgleish [2014/15]

20 April 2015

IBM UK Holdings v Dalgleish [2014/15]

Key facts

- Three scheme change exercises (2004-05, 2005-06, 2009-11)
- US parent pushing IBM UK to close defined benefit schemes (to hit earnings per share target)
- Proposed to close via new employer power
- Members pressed to sign non-pensionability agreements
- Short “window” to take early retirement before existing (generous) terms withdrawn

IBM UK Holdings v Dalgleish [2014/15]

High Court decision

- Member “exclusion powers” were valid and could be used to close schemes to DB accrual but exercise of them was subject to *Courage* restriction in power of amendment

- IBM’s handling of changes breached

  - pensions law duty of good faith towards members
  - employment law duty of trust and confidence

IBM UK Holdings v Dalgleish [2014/15]

High Court decision

- Members were entitled to hold “reasonable expectations” regarding future DB accrual (based on earlier statements by IBM)
- Insufficient case for closure
- IBM had not consulted with an open mind

IBM UK Holdings v Dalgleish [2014/15]

Remedies judgment

- Exclusion notices voidable
- Non-pensionability agreements unenforceable
- Member damages
- Employer required to undo majority of benefit changes
- Appeal?

IBM UK Holdings v Dalgleish [2014/15]

Points to note

- Check for past promises
- Openness/transparency vital
- Approach consultation with an open mind
- Test the business case – is it robust?
- Give members time to consider
- Internal communications are just as important as those with members
- Sanctions for failing to act in accordance with duties of good faith/trust and confidence can be severe

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Merchant Navy Ratings Pension Fund [2015]

20 April 2015

Merchant Navy Ratings Pension Fund [2015]

Key facts

- Non-sectionalised industry-wide multi-employer scheme
- Trustee introduced new employer contribution regime in 2001
- Key terms of regime:
  - liability for employer contributions rested solely on 40 companies employing active members of the Fund as at 1999
  - no contributions required from around 200 employers who stopped employing active members before 1999
  - the Fund was closed to the future accrual of years of pensionable service with effect from 2001, although certain members continued to receive enhanced revaluation of their accrued benefits

Merchant Navy Ratings Pension Fund [2015]

Key facts

- Contributing employers questioned why they should cross-subsidise the pension deficit payments of historic employers (their commercial competitors)
- This led to proceedings in 2009 in which it was held that the Trustee had the power to amend the rules of the Fund so as to introduce a deficit repair regime which required contributions from all employers
- The Trustee asked for the Court's confirmation regarding the terms of the new regime

Merchant Navy Ratings Pension Fund [2015]

Key facts

- The Court had to answer three questions:
  - What duty do pension scheme trustees owe beneficiaries?
  - To what extent can trustees take employers' interests into account when making decisions?
  - For the purposes of the section 75 debt regime, is a scheme "frozen" if members cease to accrue years of pensionable service but continue to receive enhanced revaluation of their benefits?

Merchant Navy Ratings Pension Fund [2015]

Judgment

- What duty do pension scheme trustees owe beneficiaries?
  - Previously understood that a trustee's main duty was to act in the best interests of beneficiaries.
  - MNRPF held that the trustees' duty to act "in the best interests of beneficiaries" is a re-formulation of the duty to "promote the purpose for which the trust was created".
  - Members' "best interests" are decided within the limits of their scheme's rules and the benefits they were intended to receive. In practice, this element of the case marks a change of wording rather than approach.

Merchant Navy Ratings Pension Fund [2015]

Judgment

- To what extent can trustees take employers' interests into account when making decisions?
  - Provided: (a) the primary purpose of securing members' benefits due under the scheme is furthered, and (b) the employer covenant is strong enough to fulfil that purpose, the trustees could (but were not obliged to) take account of employers' interests when deciding the scope of the scheme's deficit contribution regime
  - Trustees were not required to adopt the lowest risk funding regime possible
  - Trustees should be wary of any suggestion that they are now *required* to take employers' interests into account when reaching decisions - this goes beyond the scope of the judgment

Merchant Navy Ratings Pension Fund [2015]

Judgment

- For the purposes of the section 75 debt regime, is a scheme “frozen” if members cease to accrue years of pensionable service but continue to receive enhanced revaluation of their benefits?
  - It was hoped that the judgment might resolve a long-running debate in the pensions industry: were members with a Courage-type final salary link “active” for the purposes of the s. 75 debt regime?
  - The judgment did not address this question directly
  - Conclusions drawn are largely confined to the facts of the case
  - However, there may now be scope to argue that only members who continue to accrue years of pensionable service should be considered “active” for the purposes of the s. 75 debt regime, and so members with a Courage-type final salary link do not fall within this definition

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Briggs v Gleeds [2014]

20 April 2015

Briggs v Gleeds [2014]

Key facts

- Employer = traditional “partnership” (not LLP)
- From 1990, signatures on deeds need witnessing
- 30 amending “deeds” from 1990 – 2006 signed by partners but not witnessed
- Deeds (drafted by non-lawyer advisers) had no space for witness signature
- Problem came to light after change of advisers
- Trustees applied for directions

Briggs v Gleeds [2014]

Key facts

- Massive implications for scheme (and members)
- Potentially invalid changes included:
  - equalisation
  - introduction of member contributions
  - changes to eligibility, accrual rate and pension increases
  - power to change principal employer
  - closure to new DB entrants (and then to DB accrual)
  - introduction of two new DC sections

Briggs v Gleeds [2014]

Key conclusions

- Almost all changes were legally ineffective
- Members not “estopped” from asserting invalidity
- Closure to DB accrual valid under separate contract (supported by pay rise)
- But contract argument failed for earlier changes, where members were faced with “fait accompli”
- Improved pension increases valid as augmentation
- Comments on *Courage*-type restrictions

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End of DB contracting-out

20 April 2015

End of DB contracting-out

Statutory override

- Designed to allow most private sector employers to offset the cost of additional NI payments

- Employer can alter scheme rules to:
  - change future accrual; and/or
  - increase member contributions

- BUT
  - change must be minimum needed to offset NI increase
  - cannot reduce employer contributions
  - cannot be used in respect of “protected persons”

End of DB contracting-out

Statutory override

- Certificate required from actuary appointed by employer
- Confirmation that changes do not go beyond what is needed to offset employer's NI increase
- Actuarial calculations and certificate must meet specific requirements in regulations
- Past date on or after 1 January 2012 can be used for calculations (i.e. most recent valuation data)
- Can strip out margin for prudence from usual funding assumptions, provided adjustments consistent with transfer value basis

End of DB contracting-out

Statutory override

- Trustees must provide information required for calculation within reasonable time
- Usual 60 day member consultation requirement applies
- Power can be exercised at any time up to 5 April 2021
- Changes cannot take effect before 6 April 2016
- Can be used more than once, provided aggregate effect of changes is limited to offset increase in NI payments
- If more extensive changes are needed, another legal mechanism (such as scheme's own amendment power) will need to be used

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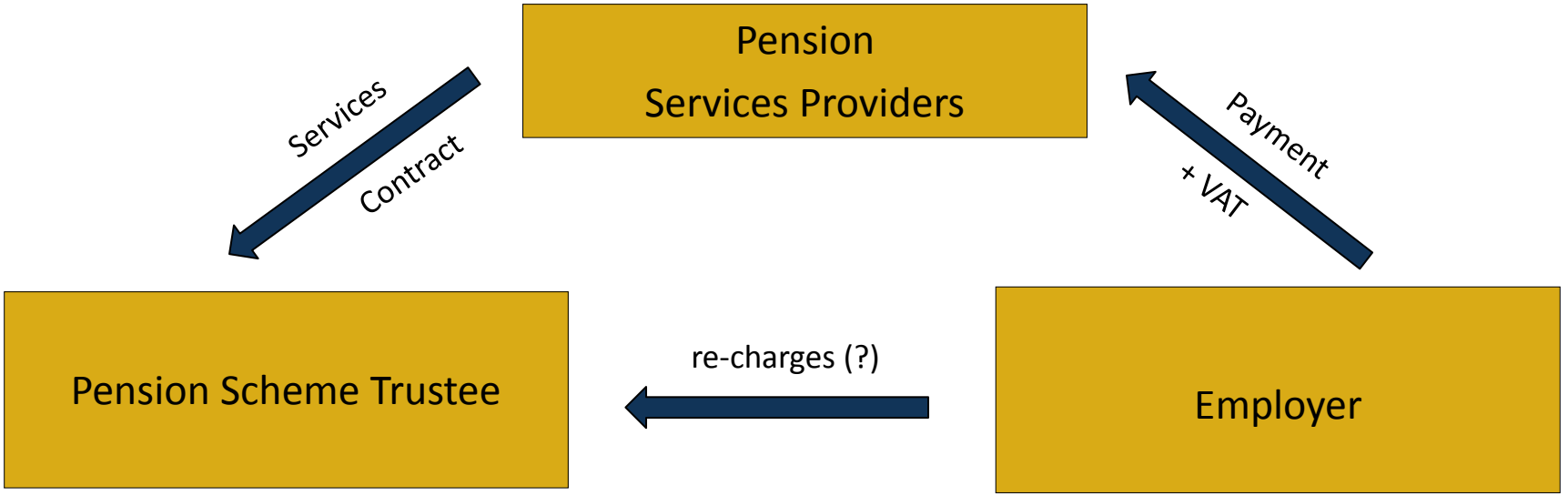
VAT on pension fund costs

20 April 2015

VAT and Pension Costs



VAT and Pensions – The old world

HMRC's Notice 700/17

- VAT on pension fund administration was input tax of the employer
- VAT on pension fund investment activity was input tax of the trustees and not recoverable by the employer
- Combined supplies of investment and administration could be split 70:30 on single invoice

European Case Law

- *Wheels* – defined benefit pension scheme, no VAT exemption
- *PPG* – VAT recovery by employer
- *ATP* – nature of defined contribution type schemes, VAT deductible

Revenue & Customs Briefs

- 6/14 - HMRC withdraw VAT on pensions policy and begin transition away from 70/30 split
- 22/14 & 43/14 - HMRC confirmed VAT is deductible by employer if services are provided to employer and extended the transitional period to 31 December 2015
- 44/14 – HMRC recognised that management of defined contribution type funds should benefit from VAT exemption
- 8/15 - employers may recover the VAT paid on pension fund management services provided to DB pension funds through a tripartite arrangement

The Pensions Act 1995

- Section 47 requires trustees of pension funds to appoint various advisers including: actuaries, lawyers and auditors
- Regulations prescribe certain elements as to the manner and terms of appointment
- Civil penalties for non-compliance or reliance on advisers who have not been properly appointed
- Fund manager appointment can be made “on behalf of trustees”

The options to mitigate VAT costs

- Tripartite agreements
- VAT Groups
- Recharging by employer to pension scheme
- What should employers and trustees be doing?

Expressions of individual views by members of the Institute and Faculty of Actuaries and its staff are encouraged.

The views expressed in this presentation are those of the presenter.