

Current Issues in Funding for Pensions Actuaries – Legal Issues

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Overview of Talk Topics to be covered

- Trustee and employer powers
- Trustees' conflict of interest
- Negotiating with the employer
- Bringing forward actuarial valuations

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Trustee and Employer Powers

- Areas to be covered include:
 - Basic statutory requirement
 - Modification by Regulations
 - Distinction between consultation and agreement

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Basic Statutory Requirement

Section 229 lists matters on which trustees must obtain employer agreement:

- Methods and assumptions
- Statement of funding principles
- Recovery plan
- Schedule of Contributions
- Actuarial Advice (Section 230)

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Modification by Regulations

Trustees are required only to consult with the employer where:

- Contribution rate determined by trustees
- No power to reduce or suspend contributions
- Any other conditions are satisfied

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Modification by Regulations

Where scheme provides for contributions to be determined by the actuary:

- Section 229 applies unmodified (i.e. employer agreement required)
- Actuary must certify contribution rates
- Any other conditions must be satisfied

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Modification by Regulations

Schemes where contributions are determined “by or in accordance with” advice

- Regulations 5 and 8
- Meaning of “in accordance with”
- Stannard –v- Fisons
- Effect on decision making

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Overlapping Requirements for Actuarial Input

- Advice under Section 230
- Complying with conditions under the paragraph 9 Schedule 2 modification
- Recommendations under Regulations 5 and 8
- Certification of contributions

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Distinction between consult and agree

There is no guidance in the legislation

- “More than the mere giving of notice” – Pitmans –v- The Telecommunications Group [2004]
- “Communication of a genuine invitation to give advice and a genuine consideration of that advice” – ex parte Association of Metropolitan Authorities [1986]

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Conflicts of Interest

Areas to be covered include:

- Real or perceived threat?
- When conflict may arise
- Dealing with conflict
- Actuary's conflict

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Conflict of Interest

Real or perceived threat

- Trustee/member conflict
- Trustee/director conflict

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Conflict of Interest

Where conflict may arise:

- Ongoing scheme/closed scheme
- Fiduciary duties
- Sharing information

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Conflicts of Interest Dealing with Conflict

- Two hats
- Removal from discussion
- Trustee sub-committee
- Professional advice
- Resignation
- Independent trustee

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Conflict of Interest Actuary's Conflict

- Employer and trustee
- Expert valuation role
- Informed consent

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Negotiating with the Employer

Areas to be covered include:

- Aims and approach
- Assessing the employer covenant
- Alternative dispute resolution

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Negotiating with the Employer

Aims and approach:

- Try to reach agreement
- Ongoing scheme and employer
- Constructive ongoing dialogue

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Negotiating with the Employer

The Employer Covenant:

“The employer’s financial position and prospects as well as his willingness to continue to fund the scheme benefits”

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Negotiating with the Employer

Assessing the employer covenant:

- Direct information
- Rating agencies
- PPF
- Public domain

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Negotiating with the Employer

Alternative dispute resolution:

- What is ADR?
- Pensions Mediation Service

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Negotiating with the Employer

Where agreement cannot be reached:

- Reduction to future accrual
- Regulator's powers

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Bringing forward a valuation

Areas to be covered:

- Trustee powers and obligations
- Can the trustees force a valuation?

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Bringing forward a valuation

Trustee powers and obligations

- Limited requirements in Regulations
- Code of Practice
- Regulator's statement on funding (May 2006) and moving from MFR

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Bringing forward a valuation

Can trustees force it?

- Generally not as employer agreement required
- Regulator's powers

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Conclusions

- Who makes the decisions?
- Be aware of conflict
- "Partnership approach" in practice

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