Pensions Bulletin 2011/26

16 June 2011

Pensions Regulator settles in Bonas case

The Pensions Regulator has issued a Contribution Notice (CN) against Michel Van de Wiele NV (VdW) in relation to the Bonas Group Pension Scheme. It is for a fraction of the original amount it had been seeking.

The CN power allows the Regulator to intervene when an employer avoids its pension liabilities. A decision by the Regulator's Determinations Panel last year (see Pensions Bulletin 2010/28) was referred by VdW to the Upper Tribunal which ruled earlier this year (see Pensions Bulletin 2011/04).

A full hearing before the Upper Tribunal did not subsequently take place because *"on the facts of this case"* the Regulator decided it would be appropriate to settle with VdW. The settlement reached is that a CN should be issued for £60,000. The rationale was that the directors of VdW minimised the price paid for the business when its subsidiary Bonas UK Limited was put into "pre-pack" administration in 2006 and a newly-formed subsidiary of VdW purchased the business and certain assets, but did not take on the pension liabilities.

The Regulator has also published a report on the Bonas case in which it seeks to clarify the likely effects of Mr Justice Warren's ruling in the Upper Tribunal on future cases brought by the Regulator. The Regulator considers that Mr Justice Warren's comments about the appropriate sum of a CN do not form part of his central ruling and should not be taken out of context as they relate to the particular facts of the Bonas case. Specifically, the Regulator *"does not consider that Warren J meant to restrict, in all cases, the amount of a CN to the detriment suffered by a pension scheme which could be demonstrated to be caused by the specified act or failure to act"*. It goes on to say that the Bonas case will not cause the Regulator to change its approach in relation to its moral hazard powers.

Comment

The Regulator had intended a CN for just over £5 million so it has to put a brave face on the actual outcome (just over £1 million has been recovered by the PPF since the insolvency of the scheme's employer).

The Regulator has little choice but to remain bullish about future use of its powers but privately it must now be unsure of its ground – surely it picked the Bonas case as the first use of its CN powers because it felt certain it was going to "win big" but it can hardly claim an emphatic victory now. Whatever it says in public, in future *cases the Regulator will have to pay much closer attention to the manner in which it arrives at the amount of the CN.*

Unintuitive reading of how annual allowance works for defined benefit schemes confirmed

In our Pensions Bulletin 2011/11 we warned that *"illustrative Annual Allowance (AA) calculations already done for defined benefit arrangements in anticipation of the new regime may need to be revisited"* because of answers that HM Revenue & Customs (HMRC) had given to clarifying questions put to it by the Association of Consulting Actuaries (these can be found here, dated 16 March 2011).

In its Pensions Newsletter 47 issued this week, HMRC has effectively publically confirmed the view it gave before, together with an explanation of its logic.

The question is what counts as a member's pension accrued from time to time while still in service, for AA purposes. HMRC explains that the law says that the calculation is based on the pension (or lump sum where relevant) to which the member would be entitled if drawing pension at the calculation date, but assuming that they had already reached the age at which an unreduced pension would be payable; and explains that this is not necessarily the same as the leaving service pension and could be very different. The interpretation will depend on a scheme's rules' particular wording. The newsletter gives examples of how to approach the calculations – example D highlights their unintuitive nature.

Comment

The Newsletter in one sense is welcome – the industry has been waiting to see how this matter would develop. But it is very disappointing that, despite much lobbying, HMRC feels it cannot change its reading of the legislation, and – if this is indeed what the law as it stands means – that the Government has not chosen to change the law.

The Newsletter highlights that the scheme rules in their entirety could influence the reading and notes that "for example if elements of pre-A day Inland Revenue limits have been maintained ... this could materially change the calculation". Overall the application of the law is potentially very complicated.

Annual allowance pension input periods – clarification and an easement

The Finance Bill introduces two changes to Pension Input Periods (PIPs) (see Pensions Bulletin 2011/16). The legislation is not straightforward to interpret, but HMRC's Pensions Newsletter 47 helps to confirm the following:

- For new arrangements set up on or after 6 April 2011 – the default first PIP if no nomination is made will end on 5 April and subsequent PIPs will be tax years if there continues to be no nomination. "New arrangements" encompasses, for example, new schemes set up on or after 6 April 2011, members joining (any) scheme on or after this date and, in many cases, members newly starting to pay AVCs to a scheme. No change applies to the defaults that are already there for existing arrangements.
- From 2011/12 – for any arrangement – there is more flexibility to align PIPs to, say, the tax year or scheme year by allowing PIPs to be extended to more than a year.

The Newsletter also announces an easement for the first default PIP for new arrangements described above. Nominations to override the default can extend the first PIP to up to 12 months following joining so long as this nomination is made on or before the proposed PIP end date. Without this easement, if a member joined an arrangement on, say, 4 April 2012 there would only be a window of one day to change the first PIP from ending on the default 5 April 2012, to a later end date.

The HMRC Newsletter also covers other topics which have been announced previously and covered in our previous Bulletins.

Pensions Bill progress

Following a delay, reported to be so that the Government can reconsider its plans to raise State Pension Age (see Pensions Bulletin 2011/23), the Pensions Bill is set to move forward once more, with its Commons' Second Reading scheduled for what is a crucial debate on 20 June 2011.

Automatic enrolment checklist for trustees

The Pensions Regulator has issued a checklist for pension scheme trustees providing an overview of their likely involvement with the implementation of automatic enrolment.

The Regulator has previously issued similar material for employers and their advisers (see Pensions Bulletin 2011/22).

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Financial Assistance Scheme – DWP consults on technical amendments

The Department for Work and Pensions (DWP) has launched a consultation on draft regulations which amend aspects of the Financial Assistance Scheme (FAS) including which schemes qualify and how FAS payments are calculated – mainly in respect of survivors and dependants.

The consultation also promises that the FAS regulations will be consolidated, simplified and reduced in length. Consultation ends on 1 September 2011.

Comment

The FAS regulations have become extremely cumbersome as this once simple scheme has had layer upon layer of additional rules added to it. A consolidation of all of this will be extremely welcome for those involved with FAS work – as long as the simplified regulations do not lose any essential material.

This Pensions Bulletin should not be relied upon for detailed advice or taken as an authoritative statement of the law. For further help, please contact David Everett at our London office or the partner who normally advises you.

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