Core Unit 2 – Regulation of Retirement Provision

Assignment 3 Notes

*(Part 3 – Other Relevant Areas of Law and Part 4 – Corporate Transactions)*

*Recommended Time: 1 Hour*

# Give an example of when trustees are likely to encounter sensitive personal data and outline four of the data protection principles.

**5 marks**

Answer should cover:

Trustees are most likely to encounter sensitive personal data when reviewing medical records or reports (generally in the context of ill health pension applications)

The six principles are broadly as follows:

* + personal data shall be processed fairly and lawfully (including in certain circumstances a requirement for data subject consent).
	+ personal data shall be obtained only for one or more specific and lawful purposes and shall not be further processed in a manner which is incompatible with that purpose or purposes.
	+ personal data shall be adequate, relevant, and limited to what is necessary in relation to the purposes for which they are processed.
	+ personal data shall be accurate and, where necessary, kept up to date.
	+ personal data shall not be kept in any form which permits identification of data subjects for any longer than is necessary for the purposes for which the personal data are processed.
	+ personal data shall be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction, or damage, using appropriate technical or organisational measures.

Additionally, the data controller ‘shall be responsible for and be able to demonstrate compliance with’ the six principles set out above.

(Relevant section of the manual is Part 3 Chapter 1.1.3 and 1.1.6

# Outline how the principle of equal pay for equal work for men and woman has impacted on UK occupational pension provision.

**5 marks**

Answer should cover:

The principle of equal pay for equal work for men and women has impacted on:

* + access for men and women into occupational pension schemes; and
	+ benefits provided by schemes to male and female members.

The principle of equal treatment for men and women was incorporated into UK law by the Pensions Act 1995 and is now reflected in the Equality Act 2010. This Act provides that each occupational pension scheme must have read into it a non-discrimination rule and a sex equality rule.

Following the Barber v Guardian Royal Exchange Assurance Company Case, the normal pension ages for men and women under an occupational pension scheme had to be equalised from the date of the judgment in Barber (i.e.. 17 May 1990) unless legal proceedings had been instituted before that date. For most schemes this meant that the rules of the scheme needed to be amended. Many schemes had normal pension ages of 60 for women and 65 for men (in line with state pension ages) meaning that a soman retiring at 60 would be entitled to the full amount of pension she had accrued, whereas a man retiring at 60 would usually be treated as retiring early and therefore have an actuarial reduction applied to his pension. In this context the ECJ referred to women as the advantaged sex. The scheme liabilities were greatly affected. Until the scheme rules were amended, normal pension ages for men and women had to be equalised to those of the advantaged sex.

Relevant section of the manual is Part 3 Chapter 1.4.3 and 1.4.5

# Distinguish between a “pension sharing order” and an “attachment order”.

Answer should cover:

# 10 marks

* A pension sharing order is an order which may be made by the courts in respect of divorces on or after 1 December 2000. The effect of a pension sharing order is that the capital value of the pension is divided between the parties, with the rights of the member being reduced by way of a “pension debit” and the ex-spouse being granted a “pension credit” of the same amount.
* The courts have been able to make attachment orders in respect of an individual’s pension benefits in respect of divorce proceedings started on or after 1 July 1996. An attachment order enables the courts to earmark some or all an individual’s pension benefits to provide maintenance or a capital sum to an ex-spouse. However, the benefit will only become payable when the member’s entitlement to benefits arises under the scheme. These provisions apply equally to divorce and dissolution in relation to same sex marriages
* The main advantage of a pension sharing order over an attachment order is that pension sharing orders offer the opportunity for a clean break, on the basis that the ex-spouse obtains a right, which is independent of the member, to receive benefits from the scheme or to transfer to another pension arrangement. What happens in practice depends on the rules of the scheme.
* Pension sharing orders and earmarking orders are also available on the dissolution of a civil partnership.

(Relevant section of the manual is Part 3 Chapter 1.2)

# The Bribery Act 2010 created four criminal offences. Outline the offences which are potentially relevant for trustees of pension schemes and the penalties for breaching the Act.

**5 marks**

Answer should cover:

Three offences are potentially relevant for trustees of pension schemes:

* + giving a bribe;
	+ taking a bribe; and
	+ the failure of a corporate organisation to prevent bribery by someone associated with it.

The first two apply to individuals; the final offence is a corporate offence

The penalties for breaching the Act are:

* + for an individual on conviction, up to 10 years imprisonment or an unlimited fine or both; or
	+ for a company, unlimited fines which can be imposed on both the company and its individual directors.

Trustees should take a proportionate look at, and assessment of, their likely risks and formulate a bribery policy accordingly. This policy should be reviewed on a regular basis and it is expected such a policy would confirm zero tolerance of any attempts to bribe an individual or acceptance of a bribe.

Relevant section of the manual is Part 3 Chapter 1.7

# Distinguish between a share sale and a business sale.

**10 marks**

Answer should cover:

Corporate transactions can be structured as either a share sale (i.e. the sale and purchase of a company by share transfer) or a business sale (i.e. the sale and purchase of some or all of the assets of a company). Business sales are also referred to as asset sales.

The key features of a share sale are:

* + a seller sells, and a buyer buys, shares in a company.
	+ the sale and purchase agreement is made between the buyer and the owner(s) of the Target’s

shares but the business activity is still owned by the Target – and so, therefore.

* + there is no change in the direct ownership of the Target’s business; and
	+ the buyer may be an individual or another company.

The key features of a business (or asset) sale are:

* + a buyer acquires the assets that make up the business, for example plant and machinery, customer lists or particular product lines.
	+ the sale and purchase agreement is made between the buyer and the owner of the business, who may be an individual or a company; and
	+ because of the sale, some or all the employees employed by the business transfer their employments to the buyer.

(Relevant section of the manual is Part 4 Chapter 1.1)

# Distinguish between a warranty and an indemnity.

Answer should cover:

# 10 marks

**Warranties**

* A warranty is a binding statement of fact given by the seller about a particular aspect of the Target company or business.
* Warranties serve two main purposes:
1. they provide the buyer with a remedy if the statements made about the Target prove to be incorrect. Warranties, in effect, provide a form of retrospective price adjustment. However, claims for breach of warranty will normally be subject to limitations which will be included in the SPA (such as maximum and minimum values on the claim and a time limit on when claims can be made) and to the legal duty for the buyer to ‘mitigate’ its losses. This means that the buyer, once aware of the breach, should try to limit its losses. .
2. they encourage the seller to disclose known problems to the buyer. Such disclosures would

normally be set out in a separate document known as a “disclosure letter”. The seller’s liability under the warranties would normally be limited to the extent that proper disclosure is made against them. The effect of the warranties, therefore, should be to flush out potential problems

# Indemnities

* An indemnity is an undertaking by a party to meet a specific potential legal liability which another party may incur because of a specific event. Indemnities are usually most appropriate to cover specific risks which are of particular concern to the buyer. For example, it is common on a share sale involving a defined benefit pension scheme for the seller to indemnify the buyer against any potential liability which the buyer may incur under section 75 of the Pensions Act 1995 because of the transaction.

# Distinguishing warranties and indemnities

* One of the primary advantages of an indemnity over a warranty is that it will be easier for a buyer to make a claim under an indemnity.
* A claim for breach of a warranty or an indemnity will normally be subject to limitations which will be included in the sale and purchase agreement. This is because to bring a successful claim for breach of a warranty, a buyer would need to show that the warranty has been breached, that the seller did not disclose the existence of the breach and that the buyer has suffered a loss as a result of the breach. Whereas under an indemnity, the buyer only needs to show that the liability covered by the indemnity has arisen and the seller is then required to reimburse the buyer in respect of that liability.
* A claim for breach of warranty is also subject to the legal duty for the buyer to ‘mitigate’ its losses.
* It is commonly thought that the party with the benefit of an indemnity does not need to mitigate its losses. However, the law is not clear on this point.

(Relevant section of the manual is Part 4 Chapter 1.3)

# Outline what type of pension arrangement a purchaser must provide to transferring employees following a business sale where the seller provided a defined contribution occupational pension scheme.

**5 marks**

Answer should cover:

On a business sale, the buyer must provide a certain minimum level of future service pension benefits for transferring employees, where the transferring employees were members of an occupational pension scheme prior to the transaction taking place. In these circumstances, the Pensions Act 2004 requires the buyer to put in place either:

* + an occupational defined benefit pension scheme which meets certain minimum criteria (i.e. the contracting out reference scheme test, benefits worth at least 6% of pensionable pay per year or matched contributions up to 6% of pensionable pay); (i.e. the contracting out reference scheme test, benefits worth at least 6% of pensionable pay per year or matched contributions up to 6% of pensionable pay);or
	+ a defined contribution arrangement **(**which can be an occupational pension scheme or a group personal pension scheme to which the seller is required to contribute or is not required to contribute but has in fact paid contributions) under which the buyer can choose either to match employee contributions up to 6% of pensionable pay or, if less, pay contributions at the same rate that the seller was required to contribute immediately before the transfer.

 In addition, once the buyer’s staging date for automatic enrolment has passed, the buyer must ensure that the automatic enrolment requirements are satisfied in relation to the transferring employees.

(Relevant section of the manual is Part 4 Chapter 1.5.1)