Core Unit 2 – Regulation of Retirement Provision

Assignment 3 Notes

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

*Recommended Time: 2 Hours*

# In relation to the Data Protection Act 2018, list the principles that apply to the processing, storage and use of personal data, and the powers that the Information Commissioner’s Office (ICO) has to enforce those principles.

**10 marks**

Answer should include 5 of the following:

*Powers – 5 from the following (5 marks):*

* conduct assessments or audits to check organisations are complying with the DPA;
* serve information notices requiring organisations to provide it with specified information within a certain

time period;

* serve enforcement notices and ‘stop now’ orders where there has been a breach of the DPA, requiring

organisations to take (or refrain from taking) specified steps in order to ensure they comply with the law;

* issue penalty notices for serious breaches;
* prosecute those who commit criminal offences under the DPA; and
* report to Parliament on data protection issues of concern

*Principles - 5 from the following (5 marks):*

* personal data shall process lawfully, fairly and in a transparent manner in relation to individuals;
* personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those 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 be kept in a form which permits identification of data subjects for no 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.

(Relevant section of the manual is Part 3 Chapter 1.1.5)

# List the common pensions issues that may arise from a share sale and the resultant effect on the Target company’s pension scheme in each case.

**5 marks**

Answer should cover:

* The pension issues arising will depend on the role of the target in relation to its pension scheme;
* Target is sole employer of an occupational pension scheme – pension likely to remain with the Target;
* Target is principal employer of a multi-employer occupational pension scheme – scheme generally remains with principal employer;
* Target is participating employer of a multi-employer occupational pension scheme – scheme generally remains with principal employer;
* Target contributes to a group personal pension plan – obligation to contribute to the GPP will remain with the Target after the sale.

(Relevant section of the manual is Part 4 Chapter 1.4.1)

# Outline the three main ways of dealing with pension benefits on divorce and list the legislative Acts which have provided for changes in the law relating to pensions and divorce.

**15 marks**

Answer should cover:

# Offsetting:

# Total value of pension benefits offset against other assets;

# Offsetting does not vary between UK jurisdictions (unlike the other two methods);

# Simples way to deal with pension benefits on divorce;

* Pension Attachment Order/Earmarking:
  + - Part of the member’s benefit set aside for the spouse;
    - Amount is directed by the Court;
    - Takes effect when member’s benefits come into payment;
    - Pensions and lump sums can both be earmarked in England, Wales & Northern Ireland;
    - In Scotland only lump sums can be earmarked.
* Pension Sharing:
  + - Applicable to divorce proceedings from 1 December 2000 only;
    - Pension Sharing Order sent to scheme administrator who must implement it;
    - Applies to all pension assets belonging to both parties;
    - Some differences between assets used in Scotland.
* Legislation:
* The Matrimonial Causes Act 1973;
* The Family Law (Scotland) Act 1985;
* The Pensions Act 1995;
* The Welfare Reform and Pensions Act 1999;
* The Civil Partnership Act 2004;
* The Civil Partnership Act 2004

(Relevant section of the manual is Part 3 Chapters 2.2.1 to 2.2.7)

# Describe the treatment of pension rights on dismissal, and outline how a pension loss is calculated when an employee who is a member of a defined benefits scheme is compensated for loss of pension contributions following a successful claim for wrongful dismissal.

**10 marks**

Answer should cover:

*Treatment:*

* Individual’s rights on redundancy/dismissal depend on circumstances and details of their employment contract;
* employee successful in a claim for wrongful dismissal in breach of contractual rights will be entitled to be put back into the position he would have been in had his employment contract been properly complied with;
* if the employee is above the minimum retirement age this may mean retiring on pension.

*Pension Loss:*

* a comparison is made between pension rights at the date of leaving and the pension rights that

would have accrued at the end of their notice period;

* the difference is the pension loss, calculated by actuary calculates the value of this difference unless the employee is offered an additional period of service in the pension scheme to cover the notice period;
* Several factors will be taken into account including:
  + any pay rises the employee might have been entitled to during the notice period;
  + the fact that the employee is being paid the money before he would have been entitled to it;
  + any new job the employee may obtain, as this is likely to offer some form of pension thus mitigating the loss;
  + any contributions that the employee would have had to make during the notice period.

(Relevant section of the manual is Part 3 Chapter 1.4.6)

# Outline the relevance of the Bribery Act 2010 to the trustees of pension schemes.

**5 marks**

Answer should cover:

* 3 of the 4 offences under the Act are relevant to trustees:
  + giving a bribe;
  + taking a bribe;
  + failure by a corporate organisation to prevent bribery by someone associated with it;
* Definition of bribe – “a financial or other advantage” and can include corporate hospitality of gifts;
* Corporate offence is only relevant to corporate trustee and requires commercial activity;
* Penalties for breaching the Act:
  + Individual – up to 10 years imprisonment, unlimited fine or both;
  + Company – unlimited fines, can be imposed on both the company and its individual directors.

(Relevant section of the manual is Part 3 Chapter 1.7)

# In relation to a Sale and Purchase Agreement, describe the key features of “warranties” and “indemnities”.

# Outline in the circumstances that would determine the pension warranties and indemnities that a buyer would normally request under an SPA, and list the confirmations that a set of pension warranties would typically include.

**20 marks**

Answer should cover:

* Warranties:
  + binding statement of fact given by the seller about a particular aspect of the Target company business;
  + provide buyer with a remedy if a statement made about the Target proves to be incorrect;
  + in effect, provide a form of retrospective price adjustment.
  + claims for breach of warranty will normally be subject to limitations which will be included in the SPA

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.

* + encourage the seller to disclose known problems to the buyer - in the disclosure letter;
  + seller’s liability under the warranties would normally be limited to the extent that proper disclosure is made against them;
  + effect of the warranties, therefore, should be to flush out potential problems.
* Indemnities:
  + an undertaking by a party to meet a specific potential legal liability which another party

may incur as a result of a specific event;

* + usually most appropriate to cover specific risks which are of particular concern to the buyer
  + 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 as a result of the transaction;
  + primary advantage of indemnity over a warranty – easier for buyer to claim under an indemnity;
  + 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;
  + 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.

* The warranties and indemnities that a buyer would normally request under an SPA will depend upon:
  + the structure of the transaction (i.e., whether it is a share sale or a business sale);
  + the nature of the Target’s pension arrangements and whether the buyer will be assuming any liability for those arrangements as a result of the transaction;
  + the results of the buyer’s due diligence;
  + the respective bargaining position of the parties.
* A typical set of pension warranties will normally include confirmation that:
  + all pension and life insurance schemes in respect of which the Target has a liability to contribute (now or in the past) have been fully disclosed to the buyer;
  + all contributions due to such arrangements have been paid, and paid on time;
  + there are no disputes in relation to the Target’s pension arrangements;
  + the trustees of those arrangements (if any) and the Target have at all times complied with the governing documentation of those arrangements and all applicable laws and requirements;
  + the arrangements (as appropriate) are registered with HMRC;
  + all documentation governing the arrangement, member communications and data has been disclosed.

(Relevant section of the manual is Part 4 Chapters 1.3.1 to 1.3.3)

# Outline the circumstances in which a company should consider seeking clearance from the Pensions Regulator, and the trustees’ involvement in the clearance application.

# Describe the various categories of Type A event, giving examples, and how employers and trustees can mitigate the impact of a Type A event on the scheme.

**15 marks**

Answer should cover:

* Should seek clearance in the relation to events that are “materially detrimental to the scheme’s ability to meet its pension liabilities” (“Type A events”);
* Trustees should be involved in any clearance application as soon as practicable;
* Trustees should be asked to comment on whether or not they support the application and, if so, why;
* TPR will expect trustees to:
  + have had the opportunity to assess the impact of the event
  + consider appropriate mitigation
  + negotiate where necessary, taking appropriate professional advice.
* All Type A events will do one or more of the following either immediately or in the future:
  + prevent recovery of the whole or part of a section 75 debt;
  + prevent a section 75 debt from becoming due or compromising the section 75 debt;
  + reduce the amount of the debt which would otherwise become due;
  + weaken the strength of the employer’s financial covenant in respect of the scheme;
  + 2 categories - employer-related events and scheme-related events;
  + Employer- related event only a Type A event if scheme has a deficit on the highest of the prescribed bases;
* Examples of employer-related events include:
  + a change in a group’s structure;
  + business sales from an employer or wider group;
  + Scheme-related event may be a Type A event, whether or not scheme has a deficit on the prescribed bases;
  + Scheme-related event may have a direct impact on the employer’s legal obligations to the scheme;
* Examples of scheme-related events include:
  + agreements to compromise a section 75 debt;
  + non-payment of all or any part of a section 75 debt for an unreasonable period;
  + an arrangement which has resulted in preventing a section 75 debt from being triggered.
* level and type of mitigation will depend on the nature, circumstances and impact of the event and the scheme’s level of funding;
* Examples of mitigation include:
  + additional contributions to the scheme;
  + a parent company guarantee;
  + a letter of credit to cover employer contributions or the scheme’s deficit.

(Relevant section of the manual is Part 4 Chapter 1.8)

# Describe the meaning of “discrimination”, in the context of employment law.

**10 marks**

Answer should cover:

* Discrimination may be direct or indirect, may also take the form of harassment or victimisation;
* Direct discrimination - where one person is treated less favourably (on the basis of their sex, race, age, etc.) than another person who is in a comparable situation;
* Example - where men and women are paid different amounts for doing the same work simply because of their sex;
* Indirect discrimination - an apparently neutral provision, criterion or practice exists which puts persons of one group (based on their sex, race, age, etc.) at a particular disadvantage compared with persons of a different sex, race, age, etc. and the claimant suffers that disadvantage;
* Example - employer requiring employees to work full-time in order to qualify for certain benefits. Although this might apply equally to all employees, it is likely to have a disproportionate impact on women, as women generally are more likely to work part-time than men;
* Indirect discrimination (and also direct discrimination where it relates to age) which would otherwise be unlawful, will be permitted if it can be objectively justified by the employer, i.e., it can be shown to be “a proportionate means of achieving a legitimate aim”;
* It is unlawful for an employer to discriminate on grounds of sex, race, age, religion or belief, sexual orientation, or disability in the following circumstances:
  + in relation to job applications and selection processes;
  + terms of employment (including pay and benefits);
  + access to opportunities for promotion, transfer, training, benefits, or services; or dismissal.

(Relevant section of the manual is Part 3 Chapter 1.4.2)

# Outline the difference between a share sale and a business sale, in relation to corporate transactions.

**10 marks**

Answer should cover:

*Share sale*:

* the sale and purchase of a company by share transfer);
* a seller sells, and a buyer buys, shares in a company (the ‘Target’);
* 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;
* there is no change in the direct ownership of the Target’s business;
* the buyer may be an individual or another company.

*Business sale*:

* the sale and purchase of some or all of the assets of a company;
* also referred to as asset sales;
* a buyer acquires the assets that make up the business (the ‘Target’), for example machinery, product lines;
* the sale and purchase agreement is made between the buyer and the owner of the Target business, who may be an individual or a company;
* some or all of the employees employed in the Target transfer their employment to the buyer.

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