AN INTRODUCTION TO IRISH PENSIONS LAW

BALLYMUN COMMUNITY LAW CENTRE

THURSDAY 18 JULY 2013

A pension is an income which is payable from retirement until death. An occupational pension scheme is a pension scheme provided by an employer and will be referred to in these notes as a “pension scheme”.

The main piece of legislation that applies to pension schemes in Ireland is the Pensions Act 1990, as amended. This will be referred as “the Pensions Act”.

Do employers have to provide a pension?

No, employers in Ireland are not required to provide a pension scheme. However, they are required to provide access to a Personal Retirement Savings Account (“PRSA”) for:

- all their employees if there is no pension scheme;
- all their employees if there is a death benefit only scheme;
- employees who are not eligible for membership of the employer’s pension scheme at all or within 6 months of starting employment; or
- employees who are eligible for membership of the employer’s pension scheme but are not allowed to make top up contributions, known as “additional voluntary contributions”.

What is a PRSA?

A PRSA is a savings vehicle which is invested by the PRSA provider. PRSA providers are usually insurance companies or investment firms. The main advantages of a PRSA are that members can obtain tax relief on their contributions and they can move it from job to job.

When the member reaches retirement age, s/he can use the PRSA to take a tax free lump sum and buy an annuity with the balance of the fund. An annuity is a stream of regular payments which are paid by an insurance company from retirement to death. Alternatively, if the member meets certain income requirements, they can take a tax-free lump sum and draw down the balance of the PRSA fund as and when they wish (or use it to buy an approved retirement fund for the same purpose), subject to certain Revenue rules.

An employer may choose to contribute to a PRSA on behalf of their employee(s), but does not have to. The employer is required to:

- enter into a written agreement with a PRSA provider (this does not cost the employer);
- notify employees of the availability of a PRSA;
- allow the PRSA provider access to the workplace to set up PRSA contracts with employees;
- make the appropriate deductions from payroll if the employees decides to avail of a PRSA;

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- provide certain information about the PRSA deductions to the employee and PRSA providers.

If an employer provides a pension scheme, are all employees entitled to join?

Not necessarily. However, if an employer provides a pension scheme, it must comply with equal treatment requirements under the Pensions Act. This means that its eligibility rules may not discriminate on any of the equal treatment grounds: civil status, family status, sexual orientation, religion, age, disability, race, membership of the Traveller community. Exceptions apply in relation to the age ground.

The scheme's rules may not discriminate against part-time or fixed-term workers who work 20% or more of the hours of the permanent comparator. This is unless the discrimination is objectively justified.

What's the difference between a "defined benefit" and a "defined contribution" scheme?

A **defined benefit** scheme promises a specific benefit on retirement.

For example, it might promise 1/60th of a member's final salary for each year of their scheme membership. If a member works for 40 years, they will be entitled to 40/60ths (i.e. 2/3) of their final salary every year from retirement until death. In addition to this, defined benefit schemes often provide lump sums and death benefits. Due to improved mortality rates and significant falls in the value of pension scheme funds, defined benefit schemes are becoming less common.

A **defined contribution** scheme does not promise a specific benefit on retirement.

Members and employers contribute to the members' "pension pots", which the trustees invest. On retirement, the member can use their pension pot to take a tax-free lump sum and buy an annuity with the balance of the fund. How much the annuity will cost depends on the annuity rate. This in turn depends upon the life expectancy and gender of the member. In addition, if the member wants to ensure that the annuity will not stop on their death but will last for the benefit of their family, this will increase the price of the annuity.

If a member meets certain income requirements, they can use their pension pot to take a tax-free lump sum and buy an approved retirement fund with the balance of the fund. This is a fund which the member can draw down as when they wish, subject to certain Revenue rules.

Why are pension schemes set up by trust?

Pension schemes are set up by trust for three main reasons:

- It separates the pension scheme assets from the employer's assets;
- It enables the pension scheme to obtain Revenue approval and tax reliefs on employer and employee contributions and investment gain;
- It gives a right of legal action to third party beneficiaries (e.g. spouses, civil partners and children). For example, if a spouse was not paid death benefit in the event of his

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wife's death despite the fact that the pension scheme rules provided for this, he would have a legal right of action against the scheme trustees, whereas he would have no legal relationship with his deceased wife's employer.

What's a trust?

A trust is a mechanism which is said to have developed in the Middle Ages. When knights went abroad to fight in the crusades, they needed their property to be looked after in their absence. So they entrusted a third party (the trustee) with legal ownership of the property for their benefit (as the beneficiary) when they returned from the crusades.

Who's who in a trust?

- The person who passes the property to the trustee is the **settlor**. In a pension scheme, the employer is the settlor.
- The people who look after the property are the **trustees**. A pension scheme usually has at least two individual trustees or one professional company trustee.
- The people for whose benefit the property is entrusted to the trustee are the **beneficiaries**. In a pension scheme, the beneficiaries are the employee members and usually the members' spouses, civil partners and children.

What are the duties of a trustee?

Trustees of pension schemes must comply with trust law, the pension scheme rules, the Pensions Act, the Trustee Act 1893 and Revenue rules.

Trust law has developed through case law handed down by the courts. First and foremost, trustees owe "fiduciary duties" to the beneficiaries. This means that they must act with loyalty and honesty and in the best interests of all the beneficiaries. They must be familiar with the trust documentation; act in accordance with it; safeguard and invest the scheme's assets. When investing pension scheme assets, trustees must take the care of a prudent business man who is investing for the benefit of someone for whom they feel morally bound. They must invest in the best financial interests of the scheme beneficiaries.

Trustees must comply with the Pensions Act. If a pension scheme rule conflicts with the Pensions Act, the Pensions Act is overriding. Trustee duties under the Pensions Act include (but are not limited to): ensuring that employer and employee contributions are received and invested within statutory timeframes; providing for the proper investment of the scheme resources; paying benefits; undertaking trustee training every two years. In a pension scheme, the trust deed and rules sets out the trustees' obligations and powers.

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Why is Revenue approval important?

One of the main advantages of setting up a pension scheme by trust is the tax relief, which applies to employee contributions, employer contributions and capital gains on the fund. The member pays tax when the pension comes into payment. Schemes cannot obtain these tax reliefs unless they have Revenue approval. The Revenue imposes strict rules for approval, which include limits on the benefits payable by a pension scheme. It is important for the Revenue to ensure that the tax reliefs are given to genuine pension schemes and not to mere investment vehicles.

What are the duties of employers?

Employers are party to the trust deed and rules, along with the trustees. They will have different obligations under their trust deed and rules; for example to make contributions on behalf of their employees and to give notice before stopping contributions.

The Pensions Act imposes further obligations on employers. The obligation to provide access to a PRSA in certain circumstances is set out above. In addition, employers must pass on employee contributions (and employer contributions to a defined contribution scheme) to the trustees within 21 days following the end of the month in which they were deducted. They must arrange for trustee training every two years. They are required to ensure that their scheme complies with equal treatment rules.

Can an employer terminate a pension scheme?

Yes. The pension scheme rules will set out how and when an employer can terminate a pension scheme. This is known as a scheme wind-up. The trustees must notify scheme members and the Pensions Board of a scheme wind-up within a certain time-frame and provide the members with certain information. If a defined benefit scheme is under-funded, the trustees must pay out the pension benefits in a certain order, as set out in the Pensions Act.

What am I entitled to know about my pension scheme?

Pension scheme members have various rights to information under the Pensions Act. Some of those rights are detailed below:

- Within 2 months of joining a scheme, members are entitled to information which includes: scheme membership rules; pension benefits; contribution rates; death benefits; whether they can make “additional voluntary contributions” (top-up contributions) and contact details for any enquiries. Any change to this information should be notified to members within 4 weeks of the change. In practice, employers usually give pension scheme members this information by way of an explanatory booklet.

- Members who are still in employment and have not left the scheme are entitled to an annual benefit statement which includes: their normal retirement age; their benefit on

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retirement (in a defined benefit scheme) or their fund value and the likely projected worth of their pension (in a defined contribution scheme); and death in service benefits.

- If a member leaves a job, within 2 months of leaving they are entitled to information which includes: details of their benefits; how to claim them; any applicable options (e.g. leaving the benefit they have accrued in the scheme or transferring it to a scheme with their new employer).

- When a scheme winds up, members must be notified within 12 weeks of the decision to wind up and given information which includes: their options (if applicable) and who is now responsible for paying their pension benefits.

- Members are entitled to other information on request, such as investment options and fees and charges (in a defined contribution scheme); the trust deed and rules; the scheme annual report, leaving service options.

What happens to my pension if I go on maternity leave?

Under the Pensions Act, members who take paid maternity leave (statutory and additional) must be treated equally. This means that their pension scheme membership and any contributions which are payable must continue. Where a member takes unpaid additional maternity leave, whether they continue to accrue pension benefits will depend upon the rules of their pension scheme.

What happens to my pension if I move job?

If a scheme member has been a member for two or more years, the benefit which they have accrued to date is "preserved". This means that they are not permitted to take a refund of it. However, they are entitled to transfer their benefit – for example, to a new employer's pension scheme in Ireland or abroad, a PRSA or what is known as a buy-out bond.[1] The member can ask the trustees to transfer out their benefit within 2 years of leaving the pension scheme (or a longer period if the scheme rules allow it). The trustees must make the transfer requested within 3 months.

Alternatively, the member can leave their preserved benefit in the scheme. They become what is known as a "deferred member". Benefits under a defined benefit scheme will be revalued annually under the Pensions Act. Benefits under a defined contribution scheme will continue to be invested. Deferred members can take their benefit when they come to retirement age.

What happens to my pension if I separate from my spouse or civil partner?

Under family legislation, the Courts have the power to divide up pension scheme assets under what is known as a pension adjustment order ("PAO"). The Court can designate a

[1] Transfers to overseas pension schemes and PRSAs are subject to Revenue rules. A buy-out bond is a pension policy which is usually sold by insurance companies - the member's accrued pension fund is transferred into it and invested.

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certain benefit - for example, 50% of the member spouse's pension - to be paid to the non-member spouse when the member spouse retires. They can make a PAO in relation to retirement benefits and/or death-in-service benefits. The trustees of a pension scheme must comply with a PAO.

When a PAO has been made, it is open to the non-member spouse to apply to the trustees for a transfer amount of any retirement benefit designated to him or her under the order. This means s/he can transfer it, for example, into another pension scheme or into buy-out bond.

What happens to my pension if I die before I retire?

Pension schemes often provide for a benefit to be payable to the member's estate if they die before they retire. This is known as a "death-in-service benefit". It is often a lump sum, up to a Revenue limit of 4 x the member's final salary. Some schemes also provide for a pension to be payable to the member's spouse in the event that the member dies before they retire.

The value of a person's PRSA is payable to their estate if they die.

What happens if a defined benefit pension scheme is underfunded?

Under the Pensions Act, defined benefit pension schemes are required to meet a minimum funding standard. The actuary calculates whether, if the scheme were to wind up on the date of valuation, it would have enough money to pay the benefits due at that point in time.

Schemes which do not meet the minimum funding standard are require to submit "funding proposals" to the Pensions Board. These are recovery plans which the employer and the trustees agree. They outline what steps the scheme is going to take in order to meet the funding standard. In certain circumstances, these steps can include reducing members' benefits.

Other options for employers of underfunded defined benefit schemes are to freeze, close or wind up their scheme:

- freezing a scheme means closing the scheme to new members and freezing current member benefits. This is usually a first step towards winding up a scheme.
- closing a scheme means closing the scheme to new members and only allowing current members to accrue future benefits.
- winding up a scheme means closing down the scheme altogether.

What was the Waterford Crystal case about?

Ten former employees of Waterford Crystal took a High Court case against the Irish State on the ground that Ireland had failed to properly implement a piece of EU legislation.[2] The High Court referred certain questions to the European Court of Justice.

In a previous case taken against the UK[3], the European Court of Justice had decided that EU law requires member states to take measures to ensure that no less than 50% of

[2] Employer insolvency Directive 2008/94/EC.
[3] *Robins* C-278/05

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members' pension benefits are protected in the event of an employer insolvency. The Court held that member states are not obliged to fund the pension benefits themselves - they can require employers to insure the benefits, for example.

The Court found in favour of the Waterford Crystal workers, noting that they would only receive between 16-41% of their pension entitlements. The Court stated that ever since the *Robins* case, member states had been aware of their obligations under EU law. They said that Ireland's financial situation was not an exceptional circumstance which justified a lower level of protection for pension scheme members. This case will now return to the Irish High Court. It is relevant to a "double insolvency" situation – in other words, where a defined benefit scheme is underfunded and the employer goes into insolvency.

What does the Pensions Board do?

The Pensions Board is the regulator of pension schemes. They supervise compliance with the Pensions Act. They have the power to issue on-the-spot-fines and take prosecutions. In recent years the Pensions Board has taken a number of prosecutions against employers who did not pass on employee contributions to the pension scheme. They have the power to inspect and investigate pension schemes to ensure that they are complying with their statutory obligations. They also have the power to make legally binding determinations; for example, on whether a scheme's rules conflict with the Pensions Act.

The Pensions Board gives information about pension schemes and PRSAs to the public. It does this through guidance notes and information booklets, which are available at www.pensionsboard.ie. In addition, they run an information line on a lo-call number 1890 656565, which is open Monday to Friday from 9-5. They also provide free online trustee training.

What does the Pensions Ombudsman do?

The Pensions Ombudsman deals with complaints from pension scheme members and people with PRSAs about financial loss they allege to have suffered as result of maladministration. Examples of maladministration would include mistakes, delays, failure to administer pension scheme rules properly. He also deals with disputes of fact or law in relation to pension schemes and PRSAs.

The Pensions Act requires all pension schemes to have an internal dispute resolution procedure in place, which anyone with a complaint should use before taking their complaint to the Pensions Ombudsman. He has the power to make legally binding determinations about complaints made to him and to award compensation.

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