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Section 37D of the Pension Funds Act ("the Act") – withholding of benefit payments

Although pension benefits are considered to be sacrosanct, Section 37D of the Act permits the Trustees to deduct compensation payable to the Employer where the employee has caused damage to the Employer due to theft, dishonesty, fraud or misconduct. To enforce the provisions of Section 37D if a member does not admit to causing damage to the employer due to theft, dishonesty, fraud or misconduct in writing , the Trustees need to have the power to withhold payment of the benefit until the matter has been resolved by a competent court. There are however, certain preconditions:

- The Rules of the retirement fund must include provision for the Trustees to withhold payment of the benefit;
- The Employer must have a prima facie case against the member – i.e., the Employer must have enough factual evidence of wrong-doing on the part of the employee to prove his case, even if it could later be refuted by a court;
- The Trustees must investigate the circumstances themselves and not merely take the word of the Employer before they withhold payment.
- The Trustees may not withhold an amount that exceeds the extent of the damage suffered by the Employer.

The decision of the High Court in the case of SA Metal Group against Jeftha and others is indicative of how seriously the second last point is taken both by the courts and the Pension Funds Adjudicator ("the PFA").

In this case, the benefit had been withheld for four years after the employee's dismissal. The PFA's determination had directed the fund to release the pension benefit and pay statutory interest, on the basis that there was insufficient proof of a *prima facie* case to support withholding of the benefit, and that the Trustees had rubber stamped the Employer's request to withhold payment of the benefit without doing proper investigation and hearing the member's point of view. The High Court upheld the PFA's determination and further censured the Trustees of the fund concerned (the Alexander Forbes Retirement Fund) for having failed to fulfil their fiduciary duties with the degree of impartiality and independence required in terms of Section 7C of the Act.

Comment

Withholding of a pension benefit can be highly prejudicial to the member. The Trustees must be vigilant and conduct a thorough investigation of the circumstances. Employers should never unilaterally withhold payment of a pension benefit without involving the Trustees.

POPIA Update

The Protection of Personal Information Act ("POPIA") was enacted in 2013, but has not yet been promulgated by the State President. Once the legislation is promulgated, organisations will have a year to align their procedures with its provisions. However, organisations need to be prepared for POPIA to become effective since the implications of non-compliance are serious. The main measures organisations need to implement are the following:

- Appointment of an Information Officer – if this is not done, the CEO is the Information Officer by default;
- Set in place policies and procedures to prevent a breach of POPIA;
- Ensure cyber security;
- Prepare for what action will be taken if a breach of POPIA occurs

Vicarious Liability of the Employer Under POPIA

An employer, as the responsible person in terms of the POPIA legislation can be held vicariously liable for a negligent or malicious action on the part of a staff member.

POPIA operates on the principle of strict liability, in that in terms of Section 99 (1) a data subject has a statutory right to institute a civil claim against the responsible party (the Employer) irrespective of whether there was intent or negligence on the part of the Employer. The defences available to the

Employer under POPIA are limited to those set out in Section 99 (2) of POPIA and are the following:

- Vis major
- Consent of the data subject (the plaintiff)
- Fault of the plaintiff;
- Compliance with the section breached was not reasonably practical
- The Regulator has granted exemption under Section 37 of POPIA.

Comment

Defences available to an Employer under the Common Law are much wider, including the defence that the employee was 'acting on a frolic of his own' or acting against an express order. Under POPIA, even if the Employer has taken all necessary steps to ensure compliance with POPIA, he can still be held vicariously liable for the actions of an employee unless he can invoke a defence under Section 99 (2).

Section 37C and the definition of dependency

Two recent decisions of the Financial Services Tribunal are of interest:

Gunpath versus the Pension Funds Adjudicator ("the PFA") and Momentum (Funds at Work).

The deceased had no spouse or children although he was survived by a father and three sisters. The Fund paid the benefit to the estate. One of the three sisters challenged this decision and claimed dependency on the basis that the deceased had made payments into her bank account. The PFA supported her claim, but for some reason Ms Gunpath decided to approach the Tribunal. The Tribunal noted that the payments made by the deceased varied greatly in amount, were very few and were made at widely spaced intervals. The Tribunal ruled therefore that the payments were acts of generosity on the part of the deceased and did not create an obligation requiring Ms Gunpath to be maintained by the deceased. The matter was referred back to the PFA for reconsideration.

Krean Naidoo versus the PFA and others.

Mr Naidoo was the spouse, but he was not financially dependent on the deceased and was also estranged from the deceased at the date of death. The Fund paid the benefit into the estate of the deceased. Mr Naidoo lodged a complaint with the PFA on the grounds that he had a claim to the benefit as the legal spouse of the dependant. However, the PFA agreed with the Fund's decision to pay the benefit to the estate. Mr Naidoo approached the Tribunal who ruled that the starting point was to consider whether Mr Naidoo was a legal dependant. Thereafter, however, they had a discretion on whether to include him in the distribution of the benefit. Although the Tribunal agreed with the determination by the PFA, the matter was again referred back to the PFA for reconsideration.

Comment

The wording of Section 37C of the Act seems to indicate that the Trustees do not in fact have a discretion if a deceased member is survived by one legal dependant:

"If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit ***shall*** be paid to such dependant or, as may be deemed equitable by the fund, to one of such dependants or in proportions to some of or all such dependants."

In making the ruling, the Tribunal took into account the particular circumstances of the case – ie that Mr Naidoo was gainfully employed and that he had been estranged from his deceased spouse for several years. They stated further that the object of the Act was to ensure that dependants were not left destitute.

However, – the use of the word "shall" in the extract from Section 37C quoted above implies the Trustees are required to pay the benefit to the only dependant once they have established that he or she qualifies as such and do not have any discretion. Where more than one legal dependant is identified, the Trustees may apply discretion with regard to the allocation to the identified dependants. The Trustees would then consider the extent of each dependant's financial dependency on the deceased. It may be that we have not heard the last word on the matter.