

# TRUSTEE AS WATCHDOG: *can an employer 'walk away' from their pension scheme obligations?*

BY BRIAN BUGGY



Occupational pensions are not gratuitous gifts of an employer – they are deferred pay, the entitlement to which accrues to a member during their employment (there is clear Irish and European authority for this). Recent press coverage of pension scheme failures in Britain and in Northern Ireland means that employees may well be properly concerned about the overall security of the pension promise made by their employer.

## SECURITY

The protections afforded by legislation are different depending upon whether the pension scheme is a defined benefit (DB) scheme or a defined contribution (DC) scheme.

Under recently implemented legislation Section 58A of the Pensions Act inserted in that Act by the Pensions (Amendment) Act, 2002, amounts deducted from employees' salary or wages and employer contributions to DC schemes must be remitted to the trustees of the relevant plan within 21 days following the end of the month in which the deduction is made. Effectively, employer contributions to such schemes must be paid not less frequently than monthly. Further, disclosure must be made to employees of the amounts deducted and remitted. The legislation permits this disclosure to take place through the employee's payslip.

This new statutory obligation only applies in relation to employer contributions to DC schemes. It should put members and trustees of DC schemes in a good position to monitor compliance by their employer with its contribution obligations.

Whilst the obligation to remit employee contributions also applies to DB schemes, employers who sponsor DB schemes continue to be obliged to pay their contributions in accordance with the trust documentation governing the scheme. This

documentation will invariably contain rules setting out how employer contributions are to be determined and paid. Also, they will include provisions which permit the employer to terminate its liability to contribute.

## SHORTFALLS

The possibilities of a recovery of funds due to a pension scheme differs between DC schemes and DB schemes and between solvent employers and insolvent employers.

In a DC scheme the benefit promised by an employer to a member is a stated contribution. The ultimate benefit to the member will be the value of his or her retirement fund (produced by those employer contributions and contributions that the member may make) and what that amount may purchase.

A "shortfall" as such cannot exist in a DC scheme and what we are really talking about is unpaid contributions. In such a scheme a shortfall could only result from a failure by the employer to remit contributions which had been deducted from employees' salary or wages or a failure by the employer to pay over contributions which it should have paid. In either event the employer is solvent, the contributions are due and payable and should be recoverable from the employer by the trustees by civil suit. Also, such failure will be a breach of the new statutory provisions and liable to prosecution by the Pensions Board.

Under a DB scheme a member is promised a benefit by reference to length of service and final salary. In funded DB schemes, contributions must be made by the employer (and usually by employees) to meet the costs of those benefits. In such a scheme a "shortfall" can arise for a variety of reasons. If there is a shortfall, the ability of the trustees to obtain payment to make up

that shortfall will depend on the provisions of the scheme and whether or not the employer is solvent. In the media over the past 12 months there has been a constant stream of stories relating to company pension schemes which have found themselves in difficulty because of the continued stock market falls.

In the event that the employer is insolvent, it may be possible for the trustees to obtain recovery of unpaid contributions from the Department of Enterprise, Trade and Employment through the Insolvency Fund. However, where the employer is solvent, if a shortfall arises and contributions are not technically "payable" under the trust documentation (perhaps because no demand has been made for payment by the trustees), it may be open to an employer to terminate liability to contribute without any obligation to make up or contribute towards a shortfall. In such event as the employer is not insolvent, there is no possible claim on the Insolvency Fund.

## CONCLUSION

It may be difficult, in practice, for trustees of a DB scheme to know if the employer intends at some date to terminate its liability to contribute to the scheme. If an employer is entitled under the trust documents to do this without notice, and such provisions are common, then trustees must be vigilant to ensure that appropriate contributions are maintained.



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