

PENSIONS LAW

Clarity on conflicts

There should be no room for confusion. Nigel Carman* argues that trustees must act in one capacity only.

Anyone who has anything to do with the management or administration of a pension fund will be aware of the duties imposed on the board of the fund by s7C of the Pension Funds Act. Relevant to this article, they will be aware of the duty which this section imposes to 'avoid conflicts of interest' (TT June-Aug).

They will also no doubt be aware of Circular PF 130 and its injunction that the board and the principal officer should appreciate that the proper resolution of any conflict of interest is necessary for promoting the credibility of the governance of fund; and that it enhances the trust of both members and beneficiaries as well as any stakeholders.

Yet experience shows that the duty to avoid conflicts of interest is often poorly understood. PF 130 is not particularly helpful. It tells us:

In such circumstances the legislation is clear: the primary obligation of a board member is to act in the best interests of the fund and the members and beneficiaries. Where a board member finds himself/herself in a . . . conflict of interest situation one should act without regard for one's personal interests or those of the entity or persons through which he or she was appointed.

Rosemary Hunter et al in The Pension Funds Act: A Commentary is more helpful:

A board member may not place him- or herself in a position in which he or she has, or may have, a personal

interest which conflicts, or may possibly conflict, with his or her duty to exercise loyalty to the fund. This duty . . . is akin to the duty to exercise an independent discretion.

The key to a proper understanding of what constitutes a conflict of interest is to be found in the last sentence of the passage quoted i.e. the reference to the duty to exercise an independent discretion. A conflict of interest is objectionable because it poses a risk or threat to the duty to act independently in the best interests of the fund.

In the pension fund world, conflicts of interest arise and are faced by many of the stakeholders: employer-appointed members of the board in relation to their employer; member-elected trustees in relation to their electing constituency; sponsoring employers in relation to their own financial and commercial interests; professional advisers in relation to other interests or connection they may have; and service providers in relation to the products they may wish to sell. This article focuses on conflicts of interest arising in the board itself and, in particular, on the so-called 'structural' conflict of interest.

The duty to act independently and with an unfettered discretion is not mentioned in s7C of the Act or in the Financial Institutions (Protection of Funds) Act, the most frequently quoted statutes on the subject of the board's fiduciary duties. And yet it is undoubtedly part of our law.

The principle is found in trust law, in company law and as early as 2001 in the Pension Funds Adjudicator



Carman . . . duty of independence

determination in *Tobin v Motor Industry Pension Fund*. In 2007, Freund AJ handed down the important judgment in *PPWAWU National Provident Fund v The Chemical, Energy, Paper, Printing, Wood & Allied Workers Union*.

This was a case which concerned the lawfulness and enforceability of a resolution by the union seeking to impose obligations on trustees elected or appointed by the union or its members to manage benefit funds established by the union. Amongst other things, the resolution instructed ‘*the shop steward trustees to take mandates from union members of the funds on all matters that affect them.*’

After reviewing relevant case law and legislation in SA and the UK, the court held that the resolution was indeed contrary to law and unenforceable. The judge wrote:

The obligation in terms of clause 10 on members’ trustees, if given effect to, requires them not only to ascertain the views of the union but also to implement such views insofar as this lies within their power as trustees. The irresistible inference, in my view, is that the resolution purports to require employee trustees who belong to the union to execute instructions given to them by the union (in the form of “mandates”) and has the effect that, if they fail to do so, they are to be subjected to disciplinary processes. In my view, this is

irreconcilable with the trustees’ fiduciary obligation to exercise independent judgement.

The obligation to exercise independent judgment rests equally on trustees who may have been appointed by the sponsoring employer. As the judge wrote:

None of the trustees represent the party which appointed them when they take decisions regarding the fund’s affairs, nor may they place the views or interests of such party above the interests of the fund or its members.

So how are we to deal with the structural conflict of interest which the Act introduces by requiring every fund to have a board consisting of at least four members, 50% of whom the members of the fund must be entitled to elect? Inevitably, the remaining 50% are appointed by the employer.

The law seems clear. Trustees will act contrary to their common law and statutory duties if they act as an agent for, or in accordance with, a mandate given either by the employer or by groups of members by whom they are elected, and if they do not exercise an independent and unfettered discretion. They must act independently in the best interests of the fund and its members and beneficiaries.

Then, the powers and authority vested in the trustees are vested in them jointly as a body. If the employer or members of the fund wish to advocate a particular position or motivate for a particular decision, they should surely do so themselves and not ask or instruct any trustee to do so in their place.

To ask the trustee to act in two different capacities is a fundamentally compromised position. The trustees should therefore invite the employer or members concerned, represented by people who are not members of the board, to address the board as ‘outside’ stakeholders and to motivate their requests accordingly.

Only in this way will the threat to the independence of trustees and the inherent structural conflict of interest be avoided. ■

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