



# Pension Schemes Act 1993

## 1993 CHAPTER 48

### PART IX

#### MODIFICATION AND WINDING UP OF SCHEMES

##### *Modification*

#### **136 Applications to the Board to modify schemes (other than public service schemes)**

- (1) On an application made to them in respect of an occupational pension scheme or a personal pension scheme by persons competent to make such an application, the Board may make an order—
- (a) authorising the modification of the scheme with a view to achieving—
    - (i) any one or more of the purposes specified in subsection (2); or
    - (ii) any one or more of such other purposes as may be prescribed; or
  - (b) modifying the scheme with a view to achieving any one or more of those purposes.
- (2) The purposes referred to in subsection (1)(a)(i) are—
- (a) to enable the scheme to provide for the transfer of accrued rights (including any transfer credits allowed under the scheme) to another scheme (whether an occupational or personal pension scheme) with a view to the acquisition, for those whose rights are transferred, of rights under the other scheme in connection with change of employment or otherwise, and for the allowance of transfer credits;
  - (b) to enable the scheme to be one to which section 163 applies or to have included in or removed from it provisions designed to avoid the effect of the rules of law relating to perpetuities;
  - (c) without prejudice to section 139(2), to comply with the voluntary contributions requirements;
  - (d) to enable the trustees or managers of the scheme, or others concerned with or having rights under it, to enter into alternative arrangements having regard to any provision of this Act, or of any other Act (passed or to be passed)

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amending or replacing any such provision or making provision for similar purposes; or

- (e) in the case of an occupational pension scheme only, to enable the scheme—
  - (i) to be so treated that an employment to which it applies may be contracted-out employment by reference to it;
  - (ii) to qualify for the approval of the Inland Revenue for the purposes of Chapter I of Part XIV of the Income and Corporation Taxes Act 1988 or to provide benefits enhanced up to the limits suitable in a scheme for which such approval is sought;
  - (iii) to provide for accrued rights to benefit (whether in payment or not), so far as payable out of the resources of the scheme, to be surrendered by beneficiaries (at their option and not otherwise, so long as the scheme remains in force and is not being, or to be, wound up) in exchange for other rights assured by means of one or more policies of insurance or annuity contracts, or by other means; or
  - (iv) without prejudice to section 139(2), to comply with the preservation requirements or the equal access requirements.
- (3) An order under subsection (1)(a)—
  - (a) shall be framed so as to confer the power of modification on such persons as the Board think proper (who may include persons who were not parties to the application made to the Board); and
  - (b) shall include such directions as the Board think appropriate, having regard to the purposes of the order, indicating the modifications which they consider to be called for.

### **137 Persons competent to make applications under s. 136**

The persons competent to make an application under section 136(1) in respect of a scheme are—

- (a) the trustees or managers of the scheme;
- (b) any person other than the trustees or managers who has power to alter any of the rules of the scheme;
- (c) in the case of an occupational pension scheme only, any person who is an employer of persons in service in an employment to which the scheme applies; and
- (d) such other persons as regulations may specify, in relation to any category of schemes into which the scheme falls, as being proper persons to make such an application in respect of a scheme of that category.

### **138 Further provisions concerning the Board's powers under s. 136**

- (1) The Board shall not entertain an application for an order by them under section 136 unless they are satisfied that the purposes of the application—
  - (a) cannot be achieved otherwise than by means of such an order; or
  - (b) can only be achieved in accordance with a procedure which—
    - (i) is liable to be unduly complex or protracted, or
    - (ii) involves the obtaining of consents which cannot be obtained, or can only be obtained with undue delay or difficulty.

- (2) Subject to subsection (1), the Board may on such an application make (with the consent of the applicants) any one or more such orders as are specified in section 136(1) and may exercise any of their powers to make such orders from time to time.
- (3) The extent of those powers is not limited, in relation to any purposes for which they are exercisable, to the minimum necessary to achieve those purposes.
- (4) The Board shall not make an order under section 136(1) unless they are satisfied that it is reasonable in all the circumstances to make it.
- (5) The Board shall not make any such order under that section as would, or might in their opinion, result in any existing or prospective entitlement of a member of the scheme, in respect of a period before the coming into force of the order or of any modification which the order authorises, being diminished or curtailed without his consent, unless they are satisfied that it is in the interests of the generality of members that the order should be made.
- (6) In considering whether or not to make an order under that section, the Board shall have regard—
  - (a) to the structure and character of the scheme and the benefits provided by it;
  - (b) to the provisions of this Act and Chapter I of Part XIV of the Income and Corporation Taxes Act 1988; and
  - (c) to all the circumstances in general.
- (7) Regulations may provide that in prescribed circumstances subsections (4) and (5) shall not apply to occupational pension schemes or shall apply to them with prescribed modifications.

### **139 Other functions of the Board as respects modification of schemes**

- (1) If in the case of a scheme to which section 53 applies the Board are not satisfied as to the soundness and adequacy of any investments held for the purposes of the scheme (so far as relevant to the considerations of section 24(1)), they may by order—
  - (a) modify the scheme's rules, or
  - (b) direct the scheme's trustees or managers to take such steps as the order may specify,with a view to ensuring that the guaranteed minimum pensions under the scheme are adequately secured to its beneficiaries, both present and future.
- (2) If the Board determine under section 134 that a scheme does not conform with the preservation requirements, the equal access requirements or the voluntary contributions requirements they shall, either at the time of issuing their determination or as soon afterwards as they think expedient—
  - (a) by order direct the trustees or managers of the scheme or any other persons who have power to alter any of its rules to exercise such powers as they possess for modifying the scheme with a view to bringing it into conformity with those requirements (including in their order such directions as they think appropriate to indicate the modification appearing to them to be called for); or
  - (b) if there is no person with power to modify the scheme as required by the Board, by order authorise the trustees or managers, or other persons named in the order (and, in particular, in the case of an occupational pension scheme, any employer of persons in service in an employment to which the scheme applies) to make that modification; or

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- (c) themselves by order modify the scheme with a view to bringing it into conformity with the requirements in question.
- (3) The Board may exercise their powers under subsection (2) in relation to any scheme in respect of which they have issued a determination under section 134, and may exercise the powers together or separately.

#### **140 Effect of orders under ss. 136 and 139**

- (1) An order under paragraph (a) of section 136(1) may enable those exercising any power conferred by the order to exercise it retrospectively (whether or not the power could otherwise be so exercised) and an order under paragraph (b) of that section may modify a scheme retrospectively.
- (2) An order under paragraph (a) of section 139(2) may require persons to exercise a power retrospectively (whether or not the power could otherwise be so exercised), and an order under paragraph (b) or (c) of that section may operate retrospectively.
- (3) In this section “retrospectively” means with effect from a date before that on which the power is exercised or, as the case may be, the order is made, but—
  - (a) in the case of an order under section 136(1), that date shall be such date as may be proposed for the purposes of this subsection by the persons applying for the order; and
  - (b) in the case of an order under section 139(2), that date shall not be a date earlier than the operative date for the requirements.
- (4) In subsection (3)(b) “the operative date for the requirements” means—
  - (a) in the case of the preservation requirements, 5th September 1973;
  - (b) in the case of the voluntary contributions requirements—
    - (i) as respects a personal pension scheme in so far as it is comprised in an annuity contract, 1st July 1988, but otherwise 4th January 1988, and
    - (ii) as respects an occupational pension scheme, 6th April 1988; and
  - (c) in the case of the equal access requirements, 6th April 1978.
- (5) Any modification of a scheme made in pursuance of an order of the Board under section 136(1) or 139(2)(b) or (c) shall be as effective in law as if it had been made under powers conferred by or under the scheme.
- (6) An order under section 136(1) or 139(2)(b) or (c) may be made and complied with in relation to a scheme—
  - (a) notwithstanding any enactment or rule of law, or any rule of the scheme, which would otherwise operate to prevent the modification being made;
  - (b) without regard to any such enactment, rule of law or rule of the scheme as would otherwise require, or might otherwise be taken to require, the implementation of any procedure or the obtaining of any consent, with a view to the making of the modification.

#### **141 Modification of public service schemes**

- (1) Nothing in the previous provisions of this Part applies to public service pension schemes but, subject to the provisions of this section, the appropriate authority shall, in relation to such a scheme, have power to make such provision for the modification of the scheme as could be made by an order of the Board under subsection (1)(b) of

section 136 with a view to achieving any of the purposes mentioned in subsection (2) of that section in the case of a scheme other than a public service pension scheme.

- (2) In this section “the appropriate authority”, in relation to a scheme, means such Minister of the Crown or government department as may be designated by the Treasury as having responsibility for the particular scheme.
- (3) The powers of the appropriate authority under this section shall be exercisable by means of an order—
  - (a) directly modifying the scheme (without regard, in the case of a scheme contained in or made under powers conferred by an enactment, to the terms of the enactment or any of its restrictions); or
  - (b) modifying an enactment under which the scheme was made or by virtue of which it has effect.
- (4) Any such order shall contain such incidental, supplementary and transitional provisions as the appropriate authority considers to be required for the purposes of the order, including provisions adapting, amending or repealing any such enactment as is referred to in paragraph (a) or (b) of subsection (3).

### *Winding up*

## **142 Powers of the Board to wind up schemes**

- (1) On an application made to them in respect of an occupational pension scheme or a personal pension scheme by persons competent to make such an application, the Board may make an order directing or authorising the scheme to be wound up on grounds specified in subsection (2).
- (2) Those grounds are that, having regard to any provision of this Act, or to any other Act (passed or to be passed) amending or replacing any such provision or making provision for similar purposes, the scheme—
  - (a) ought to be replaced (in whole or in part) by a different scheme, or
  - (b) is no longer required.
- (3) An order of the Board under subsection (1) authorising a scheme to be wound up shall include such directions with respect to the manner and timing of the winding up as the Board think appropriate having regard to the purposes of the order.
- (4) Sections 137 and 138 and subsections (5) and (6) of section 140 shall apply with the necessary modifications in relation to an application or an order under subsection (1) as they apply in relation to an application or, as the case may be, an order under section 136(1), taking references in those subsections to modification as references to winding up.
- (5) If in the case of a scheme to which section 53 applies the Board are satisfied that the guaranteed minimum pensions under the scheme are not, and cannot be, adequately secured to its beneficiaries, they may by order—
  - (a) require the scheme to be wound up in accordance with such directions in that behalf as may be contained in the order; or
  - (b) direct the trustees or managers to take such steps for the winding up of the scheme as the order may specify.

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- (6) On a winding up in pursuance of an order under subsection (5) the same powers shall be exercisable by the Board in relation to the scheme's winding-up rules as are exercisable by them under section 53(4) and (5) in relation to other rules.

### **143 Winding up of public service schemes**

- (1) Nothing in section 142 applies to public service pension schemes but, subject to the provisions of this section, the appropriate authority shall, in relation to such a scheme, have power to make such provision for the winding up of the scheme as could be made by an order of the Board under subsection (1) of that section in the case of a scheme other than a public service pension scheme.
- (2) The powers of the appropriate authority under this section shall be exercisable by means of an order directing that the scheme be wound up and including directions with respect to the manner and timing of the winding up.
- (3) Subsections (2) and (4) of section 141 apply to an order under this section as they apply to an order under subsection (1) of that section.

### **144 Deficiencies in the assets of a scheme on winding up**

- (1) If, in the case of an occupational pension scheme which is not a money purchase scheme, the value at the applicable time of the scheme's liabilities exceeds the value of its assets, then an amount equal to the excess shall be treated as a debt due from the employer to the trustees of the scheme.
- (2) If—
- (a) a relevant insolvency event occurs in relation to the employer; and
  - (b) the debt mentioned in subsection (1) has not been discharged at the time that event occurs,
- then, for the purposes of the law relating to winding up, bankruptcy or sequestration as it applies in relation to the employer, that debt shall be taken to arise immediately before that time.
- (3) In this section—
- “the applicable time” means—
    - (a) if the scheme is being wound up before a relevant insolvency event occurs in relation to the employer, any time when it is being wound up before such an event occurs; and
    - (b) otherwise, immediately before the relevant insolvency event occurs; and
 “the employer” means the employer of persons of the description or category of employment to which the scheme relates.
- (4) For the purposes of this section a relevant insolvency event occurs in relation to the employer—
- (a) in England and Wales—
    - (i) where the employer is a company, when it goes into liquidation, within the meaning of section 247(2) of the Insolvency Act 1986; or
    - (ii) where the employer is an individual, at the commencement of his bankruptcy, within the meaning of section 278 of that Act; or
  - (b) in Scotland—

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- (i) where the employer is a company, at the commencement of its winding up, within the meaning of section 129 of that Act; or
  - (ii) where the employer is a debtor within the meaning of the Bankruptcy (Scotland) Act 1985, on the date of sequestration as defined in section 12(4) of that Act.
- (5) The value of a scheme's assets and liabilities for the purposes of subsection (1) shall be determined in accordance with regulations and such regulations may provide that, in calculating the value of the scheme's liabilities, any provision of the scheme which limits the amount of its liabilities by reference to the amount of its assets is to be disregarded.
- (6) This section is without prejudice to any other right or remedy which the trustees may have in respect of the deficiency in the scheme's assets.
- (7) A debt due by virtue only of this section shall not be regarded—
  - (a) as a preferential debt for the purposes of the Insolvency Act 1986, nor
  - (b) as a preferred debt for the purposes of the Bankruptcy (Scotland) Act 1985.
- (8) The provisions of this section and of any regulations made under section 153(5) modifying this section override any provision of a scheme to the extent that it conflicts with this section or those regulations.