

White Paper Conferences, September 2021

PENSIONS - CRIMINAL SANCTIONS

Speaker:
Jonathan Fisher QC



AGENDA

- The question - How potent is the Regulator's beefed-up power to impose criminal sanctions?
- From 1 October 2021, the new powers enable The Pensions Regulator (TPR) to investigate and prosecute any person who avoids an employer debt, anyone who does (or doesn't do) something which would prevent pension scheme members from receiving their benefits in full, and anyone who does not comply with a contribution notice issued under Section 38 of the Pensions Act 2004.

THREE NEW CRIMINAL OFFENCES

The new offences, introduced by sections 106 and 107 of the Pension Schemes Act 2021, are:

- (1) Avoidance of employer debt (section 58A, Pensions Act 2004).
- (2) Conduct risking accrued scheme benefits (section 58B, Pensions Act 2004).
- (3) Failure to comply with a contribution notice (section 42A, Pensions Act 2004).

The first two offences are controversial. Anyone prosecuted by TPR for these offences faces up to 7 years in prison and an unlimited fine.

TPR already has power to impose a contribution notice under section 38 of the Pensions Act 2004 where such conduct has occurred. Failing to comply with a contribution notice is punishable by an unlimited fine (and not imprisonment).

SECTION 38 EXTENDED POWER

Sections 58A and 58B both strengthen and broaden TPR's powers: firstly, by allowing it to impose more severe penalties on those already caught by section 38, and secondly by enabling it to impose those penalties on people who are not caught by section 38.

Hitherto, section 38 permitted TPR to issue a contribution notice to a 'person' that was, or was connected with, a scheme's sponsoring employer.

The new offence does not contain a similar restriction, and so 'person' for these purposes can include the sponsor, a person connected with the sponsor, the trustees and their respective advisers.

However, it is the new offences in sections 58A and 58B which have caused greatest concern.

SECTION 58A

The new offence is committed where a person does an act or engages in a course of conduct which:

- prevents the recovery of the whole or any part of a debt due to the scheme under section 75 of the Pensions Act 1995, or
- prevents that debt becoming due, or
- compromises or otherwise settles that debt, or
- reduces the amount of that debt which would otherwise become due.

The prosecutor must also show that the person intended the course of conduct to have such an effect, and the person did not have a reasonable excuse for doing the act or engaging in a course of conduct.

SECTION 58B

In the case of the offence of conduct risking accrued scheme benefits, the offence is committed where a person does an act or engages in a course of conduct that detrimentally affects in a material way the likelihood of members receiving their accrued scheme benefits.

The prosecutor must also prove that the person knew or ought to have known that the act or course of conduct would have that effect, and the person did not have a reasonable excuse to act in the way they did.

COURSE OF CONDUCT

- A course of conduct may include an omission to act (section 58A(3), 59B (3)).
- But what constitutes “a course” of conduct?
- There is no statutory definition, and no pointers in the TPR guidance.
- The courts may draw on other areas of law, although essentially it is a factual issue to be determined in each case.
- Aiding and abetting a person who does an act or engages in a course of conduct will also be captured.
- Professional advisers have a potential exposure.

A DEBT

- A debt includes a contingent debt (section 58A(5)).

AFFECTS IN A MATERIAL WAY

What constitutes “a material way”?

In deciding whether the material detriment test is met for the purposes of the offence under section 58B, TPR will take the same approach as when considering issuing a material detriment Contribution Notice under section 38.

TPR has stated it will take account of the matters set out in section 38A(4) of the Pensions Act 2004, Code of Practice 12 (Circumstances in relation to the material detriment test).

Ref: Draft TPR policy: Our approach to the investigation and prosecution of the new criminal offence, March 2021.

INTENTION

There has been some suggestion that the reckless turning of a blind eye to conduct which depletes a pension fund will be sufficient for the offence to be proven. But this is questionable.

Effectively, a prosecutor must show that a person deliberately set out to deplete the pension fund.

It may be difficult if not impossible to show that a person intended the act or course of conduct would deplete a pension fund without showing that this was the desired outcome.

In these circumstances, the question will arise as to whether there is a reasonable excuse for such an act or course of conduct.

REASONABLE EXCUSE

There is no statutory definition of reasonable excuse.

In other areas of criminal law, it tends to be interpreted narrowly.

Unlike other areas of criminal law, it is for the prosecutor to show the absence of a reasonable excuse. Proving the existence of a negative beyond reasonable doubt is not an easy task to accomplish.

For example, “reasonable excuse” will be in play –

- (1) where the detrimental impact on a pension fund is an incidental consequence of some other arrangement, or
- (2) where steps to mitigate the damage have been put in place, or
- (3) where no viable alternative could have avoided the detrimental impact.

INSOLVENCY PRACTITIONER

Are insolvency practitioners at risk of criminal prosecution?

Sections 58A and 58B do not apply where the act or course of conduct is performed by an insolvency practitioner acting within the scope of that appointment (sections 58A(4); 58B(8)).

Note: this is not a defence but an exemption.

Restructuring plans and compromise arrangements which avoid a pension liability should benefit from proof of the “absence of reasonable excuse” requirement.

Depending on the circumstances, it may be wise for insolvency practitioners and accountants to take legal advice before proceeding with a restructuring or compromise arrangement if there is a consequential impact on a pension fund.

TPR DRAFT GUIDANCE

“We recognise that professional judgement may differ, however in most instances, a professional person, acting in accordance with their professional duties, conduct, obligations and ethical standards applicable to the type of the advice being given, is likely to have a reasonable excuse. The applicable duties, obligations and standards will ordinarily depend on the professional discipline and oversight by the appropriate regulatory body”

CLEARANCE STATEMENTS

Under section 42 of the Pensions Act 2004, a person can apply to TPR for a clearance statement in relation to their Contribution Notice power.

Although there is no clearance format for the criminal offences, this is a useful procedure.

When granting clearance, TPR issues a statement to the effect that in the circumstances described in the application it would not be reasonable to impose liability on the applicant under a Contribution Notice.

ENFORCEMENT

- Prosecution is limited to TPR, Secretary of State for Work and Pensions, DPP and with his consent.
- Likely to be confined to most serious cases.
- History of non-criminal specialist authorities bringing criminal prosecutions is not good. Resource issues, absence of accumulated experience etc.

POTENCY OF NEW CRIMINAL OFFENCES?

- In answer to the question, how potent are the new offences, the answer is that they have been enacted *in terrorem*, but they will not be easy to prove.
- In a small number of egregious cases of pension fraud, they may be used – although a prosecutor will almost certainly continue to be tempted by other fraud offences where the potential sentences are much greater.
- Genuine arrangements to restructuring a business should not be jeopardised by the new criminal offences. Indeed, if a business proceeds to flourish, the pension fund will be a beneficiary and not a victim of the restructuring arrangements.

Jonathan Fisher QC

Bright Line Law

jf@brightlinelaw.co.uk

Also practicing from:

Red Lion Chambers

jonathan.fisher@18rlc.co.uk

Clerk: Mark Bennett

+44 (0)20 7520 6000