



June 2003

BRIEFING

Pension schemes: paying trustees

Employment, pensions & benefits: briefing 88

Executive summary

This briefing considers whether pension scheme trustees can be paid and, if so, whether they should be paid. Issues include whether paid trustees have a higher duty of care (and consequent increase in personal liability) and whether it is in the interests of the members that trustees be paid.

'In general, paying trustees for the performance of their duties is good practice'. This was one of the conclusions reached by Paul Myners in his March 2001 report *Institutional Investment in the United Kingdom: a Review*. In his view, this would help to:

- foster a culture in which pension fund management is carried out in a business-like manner; and
- address the problem of lack of investment expertise among trustees of occupational pension schemes.

The government's response to this review indicated that, to the extent that trustees are retaining responsibility for investment matters, they are fulfilling a complex and important role and that, at the very least, serious consideration should be given to paying trustees for fulfilling the role.

However, a recent poll has indicated that out of the FTSE 50 companies, only one (Imperial Tobacco) pays its employee trustees¹. Some companies pay an external trustee and fewer pay an independent trustee chairman.

Legal considerations

The two main legal considerations that arise in relation to paying trustees (or directors of a trustee company) are:

- can the trustees be paid; and, if so
- should the trustees be paid?

Can the trustees be paid?

The employer can, of course, pay the trustees out of its own resources (subject to some of the practical

considerations discussed below).

If, however, their fees are to be paid out of the assets of the pension scheme, the position is more complex.

The general law position is that a trustee has no right to be paid for his time and efforts. The reason given in the case law for this is that if a trustee were paid, his interest in doing as much paid work as possible would prevail over his fiduciary duty of undivided loyalty to the beneficiaries.

The general rule is modified, however, if the trust deed contains an express power to remunerate the trustees.

There is now an implied power under the Trustee Act 2000 for trustees to be paid for services (but generally only if acting in a professional capacity).

Does the trust deed contain power to pay trustees?

If the trust deed does not contain an express power to pay trustees for their services (as distinct from reimbursing their expenses), the scheme rules will need to be amended to insert such a power. If the change requires trustee consent, the trustees will need to consider very carefully why such a change would be for a proper purpose.

This is a similar issue to payment of insurance premiums for trustees. It may be possible to justify payment of trustees on the basis of encouraging people to act as trustees – but some evidence may be needed that otherwise appropriate people are not willing to serve. See, for example, the Scottish case of *Dollar Academy v Lord Advocate* (1995).

¹ FTfm survey, Financial Times, 6 January 2003.

Should trustees be paid?

Even where there is an express power to pay trustees, the question remains as to whether it should be used.

Benefit to scheme

The trustees would need to be able to show some benefit to the scheme as a result of the payment (particularly in a money purchase scheme, where the payment will reduce not only members' security but also their benefits). This might be hard to do, particularly if there is a willing and able supply of volunteers in the workforce. One possible quid pro quo is incentivising trustees to obtain better qualifications and paying them only when they do so.

Higher duty of care

However, paid trustees may well have a higher duty of care in exercising their powers and discretions and indemnity/exoneration clauses would need to be checked to see whether they are sufficient for the increase in liability (see for instance Brightman J in *Bartlett v Barclays Trust Co* (1980) Ch 515); in any event this may be academic in view of the proposed new statutory duty of care for trustees and Law Commission proposals on trustee indemnity/exoneration clauses.

Disclosure

It would be prudent for trustees to disclose the payment to members as soon as possible. Payments would need to be shown in pension scheme accounts and possibly also in company accounts (if trustees are also directors).

Structure of payment

Care should be taken to ensure that the payment is structured only as compensation for the role of trustee. If it is too closely connected with investment services provided, there is a danger that there may be a breach of the authorisation requirements of the Financial Services and Markets Act 2000.

Practical issues

A number of practical questions arise.

- Employee trustees already have a right in law (under the Employment Rights Act 1996) to paid time off to carry out their duties in relation to their employer's scheme. Employers may be unwilling to pay more.

- There is no useful guidance on what an appropriate level of payment would be. How then should any payment be structured? Should non-management trustees be paid more to compensate for the higher pay for the same time given to management trustees? How should pensioner trustees be compensated? Would it be on an annual basis (similar to non-executive directors) or, for example, on an hourly basis?
- Should there be a two-tier trustee board (ie some trustees with requisite qualifications being paid and some not)?
- Would a higher duty of care and consequently an increased personal liability for paid trustees be likely to deter potential member-nominated trustees from volunteering to act as trustees?
- There may be some impact on the cost of trustee liability insurance because of the potentially higher duty of care of paid trustees. Would the trustees be expected to pay for their insurance out of their fees?
- Tax implications should be considered. Payments will generally be chargeable to tax (under what was Schedule E) and the PAYE deduction system will need to operate.
- Finally, schemes should check with the Inland Revenue that they agree to scheme assets being used to pay trustees, though it seems unlikely that the Revenue would consider this to be an improper purpose.

Conclusion

As with many pensions issues, the question of paying trustees is not as straightforward as it may at first appear. Any decision to pay trustees should be considered in the context of a proper purpose – what is in the best interests of the members. In other words, payment should result in a benefit to the scheme.

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