# LEGAL OPINION

## Background

The Pension Fund was initially informed by the printers that the active annual benefit statements were enclosed on the Saturday 25$^{th}$ August and posted either on the Saturday or Monday 27$^{th}$ (this was then amended to Tuesday 28$^{th}$ as Monday was a bank holiday)

The Pension Fund queried the non-arrival of the statements as the members had not received the statements by the 5$^{th}$ September. The Pension Fund was then advised by the printers as follows:

"We have established the reason for the delay in your mailing- when we present larger jobs to the postal supplier, we give them accompanying paperwork. For your job, we did not hand this paperwork over due to an admin failure at this side.

The postal supplier should have contacted us when we didn't present this, but instead they kept hold of the mail and did not query it.

Therefore, they have confirmed that they are going to process the mail today and therefore it should land on doormats around Monday 10$^{th}$.

Please accept my apologies for this. I hope that this does not cause you any issues with statutory dates for supplying this info to your customers."

There was clearly an error on the part of the printers. The active statements arrived on the doorsteps on the 8$^{th}$ September.

## Advice

The Pension Fund's obligation is found in Regulation 89 of The Local Government Pension Scheme Regulations 2013

*Regulation 89.—(1) An administering authority must issue an annual benefit statement to each of its active, deferred, deferred pensioner and pension credit members.*
*(2) Subject to paragraph (3), the statement must be issued no later than five months after the end of the Scheme year to which it relates.*

*(3) A statement must be issued before the end of the five month period mentioned in paragraph (2) where a member makes a request in writing to the administering authority, unless that authority is unable to comply with the request because relevant data is not available.*
*(4) The statement for an active member must be provided in accordance with section 14 of the Public Services Pensions Act 2013(b).*
*(5) The relevant date is 31st March before the date that the statement is issued, or such later date as the authority may choose.*

Section 14 of the Public Services Pensions Act 2013 deals with Information about benefits and is not relevant for the purpose of this advice.

The members received their statements on 8th September and there was a breach of regulation 89. The question is should the Pension Fund report the breach to the Pension Regulator?

The reporting requirements:
Section 70 of the Pensions Act 2004 imposes a reporting requirement on a trustee (amongst others) of an occupational pension scheme, where that person has reasonable cause to believe that a duty which is relevant to the administration of the scheme and imposed by legislation has not been complied with and the failure is one which is of "material significance" then he must give a written report to the Pension Regulator.

The Pension Regulator has issued guidance on reporting breaches of the law. What makes the breach of material significance depends on:

(i) The cause of the breach.
(ii) The effect of the breach.
(iii) The reaction to the breach.
(iv) The wider implications of the breach.

(i) The cause of the breach
Where the breach was caused by:

- dishonesty;
- poor governance, inadequate controls resulting in deficient administration, or slow or inappropriate decision-making practices;
- incomplete or inaccurate advice; or
- acting (or failing to act) in deliberate contravention of the law.

(ii) The effect of the breach

The Pensions Regulator's objectives are to protect the benefits of pension scheme members, to reduce the risk of calls on the Pension Protection Fund, and to promote the good administration of work-based pension schemes.
The following are likely to be of material significance to the regulator.
In relation to protecting members' benefits:

- substantially the right money is paid into the scheme at the right time;
- assets are appropriately safeguarded;
- payments out of the scheme are legitimate and timely;
- defined benefit schemes are complying with the legal requirements on scheme funding;
- trustees of occupational pension schemes are properly considering their investment policy, and investing in accordance with it;
- contributions in respect of money purchase members are correctly allocated and invested.

the breach is likely to be of material significance to the Pensions Regulator.

(iii) The reaction to the breach
The Pensions Regulator does not normally regard a breach as materially significant where the trustees or managers (or their advisers and service providers) take prompt and effective action to investigate and correct the breach and its causes, and, where appropriate, to notify any members whose benefits have been affected.
However, where, after a breach is identified, the trustees and their advisers or service providers involved:

- do not take prompt and effective action to remedy the breach and identify and tackle its cause in order to minimise risk of recurrence;
- are not pursuing corrective action to a proper conclusion; or
- fail to notify members whose benefits have been affected by the breach where it would have been appropriate to do so;

then the breach is likely to be of material significance.

(iv) The wider implications of the breach
The wider implications of a breach should be taken into account when assessing which breaches are likely to be materially significant to the exercise of the Pensions Regulator's functions. For example, a breach is likely to be of material significance where:

- the fact that the breach has occurred makes it appear more likely that other breaches will emerge in the future because the trustees (or the manager) lack the appropriate knowledge and understanding to fulfil their responsibilities; or
- other schemes may be affected, for example schemes administered by the same organisation where a system failure is to blame.

Where a breach has occurred it must be reported as soon as reasonably practicable. It is important that procedures are in place to allow reporters to make a judgement within an appropriate timescale as to whether a breach must be reported.

What is reasonably practicable depends on the circumstances. This will depend on the seriousness of the suspected breach. In cases of immediate risk to scheme assets, the payment of members' benefits, or where there is any indication of dishonesty, the Pensions Regulator does not expect reporters to seek an explanation or to assess the effectiveness of proposed remedies but only to make such immediate checks as are necessary. The more serious the potential breach and its consequences, the more urgently these necessary checks should be made.

In cases of potential dishonesty, the reporter should avoid, where possible, checks which might alert those implicated. In serious cases, reporters should consider contacting the Pensions Regulator by the quickest means possible to alert the regulator to the breach.

Although there was a breach of the Regulations the members did receive their statement albeit late. There have been no dishonesty, poor governance, inaccuracy in the information provided or deliberate breaches of the law. This was more of a clerical error. The Pension Fund has put in place remedies to ensure this breach does not happen again. I understand that for the 2019 active Annual benefit statement will be published on the member self-service portal that is accessed via by the pension website by the due date.

Conclusion.

Based on the guidance issued by the Pension Regulator the breach is not one that is materially significant and therefore the Pension Fund does not have to report it.

**31/10/18**
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