

Surpluses on Winding Up

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“Refunding” surplus to the employer:

The ability of any employer to benefit from a surplus on winding up will turn on:

- The terms of the winding up power; and
- The terms of the power to put the scheme into winding up.

Follow us:



Terms of the winding up power

The 5 possibilities:

1. Surplus payable to employer
2. Trustee discretion to augment benefits, residual surplus payable to employer.
3. Trustee duty to augment benefits to Revenue limits, residual surplus payable to employer.
4. As 3. but with prohibition on return of surplus to employer. Restriction on using POA to return surplus to employer.
5. No explicit provision dealing with any surplus or residual surplus - resulting trust.



The importance of the power to put the scheme into winding up

- Usually winding up can only be triggered by employer unilaterally or with employer's agreement.
- Employer may be unwilling to trigger winding up where no benefit to it e.g. in situations 2 (trustee discretion to augment), and 3, and 4 (duty to augment benefits).

Agreements to divide surpluses as ‘price’ for winding up.

Situations 2 and 3:

- ‘Bird in the hand’ justification.
- *Hilldown Holdings* [1997] 1 All ER 862.
- Desirability of court “blessing” .

Agreement to divide surpluses as 'price' for winding up.

Situation 4:

- Agreement between employer and trustee not possible ?
- Agreement between employer and members as a bf compromise of a dispute?
- Necessity of court order.



Distributing surplus without prior agreement

- Situations 1, 3, and 4 (duty)
- Situation 2 (discretion):
 - Trustee discretion in theory very wide.
 - Need to take into account relevant considerations and ignore irrelevant ones.

Relevant considerations

- Source of surplus e.g. -
 - Size of surplus vs employer deficit repair contributions?
 - Investment performance?
 - Past contribution holidays?
- The benefit structure e.g.-
 - Have rules discriminated against certain members?
 - Impact of past inflation on the real value of benefits / surplus?
 - Rule changes - has switch to CPI prejudiced members/ added to surplus?



Situation 5 – Resulting Trust

- *Air Jamaica v Charlton* [1999] 1 WLR 1399:
 - Resulting trust benefitted employer and members.
 - Very different economic background in 1999
 - Very unusual facts.
- *Re abrdn pension trust* [2023] 061 PBLR (013):
 - Surplus divided by agreement. Trustee sought court blessing.
 - Difficult case – juggles blessing application v declaration of rights under resulting trust.
 - Not binding in England & Wales.

Thank you