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PENSIONS AUTO-ENROLMENT: UNINTENDED CONSEQUENCES OF REGULATION AND  
PRIVATE LAW REMEDIES

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**A. INTRODUCTION**

The introduction of auto-enrolment (AE) into workplace pensions in 2012<sup>2</sup> requires employers to enrol workers into a pension. Employers have significant discretion in this process and rely on the financial services industry to ensure compliance with AE minimum standards. Employers may not always have pension expertise and will engage pension providers for advice on establishing compliant pension arrangements or modifying existing schemes to use for AE. Whilst this policy benefits many, my empirical research<sup>3</sup> has identified a number of negative consequences flowing from the

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<sup>2</sup> Pensions Act (PA) 2007 C22, PA 2008 C30

<sup>3</sup> A Wyper "The Social Costs of Auto-Enrolment in Workplace Pensions and Possible Remedies" (2016)(Unpublished PhD Thesis, On File with Edinburgh University Library)

introduction of AE. For example, employers choosing poorly performing schemes, insufficient protection of free choice and poor default positions replacing active decision making, all of which result in poor value for some employees. The parties' interests may not always be aligned. Despite the minimum criteria, there can be significant variations between fund costs and scheme quality as private sector pensions are frequently used for compliance. Whilst the ability of employees to opt-out provides legitimacy for the regime, the form of implementation and use of defaults erodes the exercise of choice and there are no provisions to encourage engagement and active decision-making by individuals. In addition to this, inadequate advice impacts on the effects of AE for many. For some this means that they pay in less overall than they would have if they had voluntarily chosen to contribute to a plan.<sup>4</sup>

This paper explores whether further statutory change to the AE regime is required or whether existing private law remedies, with a focus on Scots law, afford sufficient remedy for those suffering loss. If fiduciary, agency, contractual or delictual obligations arise from the AE relationship then this may provide adequate remedy. This paper will consider whether fiduciary duties are owed to employees, particularly by the employer (as an agent) to the employee, and the extent of duties owed under the contract of employment.

## **B. FIDUCIARY DUTIES IN THE CONTEXT OF THE EMPLOYMENT RELATIONSHIP**

Employers may owe fiduciary duties to the employee in respect of the method of implementing its employer AE obligations, in a similar way to the duties owed to scheme members by occupational pension scheme trustees.<sup>5</sup> However, the position in relation to contract based schemes, such as group personal pensions often used for AE, has always been governed by contract. In a personal pension policy the contract is agreed between the individual and the pension provider on the provider's terms. With AE, there has been a blurring of the lines where the employer chooses a provider, the contractual terms, enrolls the employee into the arrangement and then deducts contributions from salary. The employee may change the investment, contribution amount or choose to leave but cannot vary the contractual agreement other than by leaving the plan. The product provider generally writes the contract terms as "take it or leave it contracts."<sup>6</sup> My question here is whether fiduciary duties are

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<sup>4</sup> Bubb & Pildes "How Behavioural Economics Trims its sails and why" (2014) 127(6) Harv L Rev 1593-1678 at 1618, Choi *et al* "Saving for Retirement on the Path of Least Resistance" available at <https://www.hks.harvard.edu/fs/bmadria/Documents/Madrian%20Papers/Saving%20for%20Retirement%20on%20the%20Path%20of%20Least%20Resistance.pdf> (2001 updated 2004)

Madrian & Shea "The Power of Suggestion: Inertia in 401(k) Participation and Savings Behaviour" (2001) The Quarterly Journal of Economics 116(4) 1149-1187 at 263, C Sunstein "Empirically Informed Regulation" (2011) 78 U Chi Law Rev 1349-1429

<sup>5</sup> Arising under trust law and from PA 1995 C26 & PA 2004 C35

<sup>6</sup> The Law Commission "Fiduciary Duties of Investment Intermediaries" June 2014 Law Com No 350 at 8.6

owed by employers, product providers or advisors to the employees in the AE compliance process, almost as *de facto* investment intermediaries as envisaged by the recent Kay review.<sup>7</sup> Fiduciary duties may arise from the nature and obligations of the AE relationship, particularly under agency which creates both fiduciary and non-fiduciary obligations.

#### (1) When do Fiduciary Obligations Exist Generally?

Fiduciary duties and the circumstances in which they arise can be difficult to identify.<sup>8</sup> The “trustee” must promote the interests of the beneficiaries, avoid conflicts of interest and not profit from the trust. Any consideration of fiduciary duties needs to identify to whom the duties are owed, what the duties are and in what respect the breach occurred<sup>9</sup> and there are dangers of extending law by analogy.<sup>10</sup> In establishing the fiduciary relationship one party is always dominant and another subordinate.<sup>11</sup> Vulnerability and reliance in contract may justify supervision of the relationship, but not imposition of the requirement of one party to act loyally in the other’s interests.<sup>12</sup> The employee is particularly vulnerable in AE as he has no right to contribute to the process of choosing a pension product or provider. Asymmetries of power have created an “emerging trend to insist upon disclosure”<sup>13</sup> but this may not justify exacting loyalty from one party to the other in the relationship.<sup>14</sup>

The exercise of power by one party over the other or exercise of discretion or judgement might also define the fiduciary relationship.<sup>15 16</sup> In AE the employer has complete discretion in respect of product provider and benefits. The issues of trust, confidence, power, inequality and dependency demonstrate the roles of the parties in the relationship. However, there are many instances of inequality in contractual dealing which do not equate to fiduciary obligations as one party has not relaxed self-vigilance.<sup>17</sup> Financial advisors are one of the recognised categories of fiduciary agents<sup>18</sup> but this is because the financial advisor voluntarily assumes the obligation. In the employment relationship, the employee relies on and trusts the employer to act in his best interests when dealing with his pension. Information asymmetries may then lead to the conclusion that the employer owes fiduciary duties to

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<sup>7</sup> (2014) Law Com n6, The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf) at 65-67

<sup>8</sup> P Birks “The Content of Fiduciary Obligation” (2000) 34(1) *Isr Law Rev* 3-38 at 8

<sup>9</sup> *SEC v Chenery Corporation* (1943) 318 U.S. 80, 85-86

<sup>10</sup> Birks n8 at 35

<sup>11</sup> P Miller “The Fiduciary Relationship” in Gold & Miller *Philosophical Foundations of Fiduciary Law* (2014) at 1 & 73, J Murray “Conceptualizing the Employer as Fiduciary: Mission Impossible?” in Bogg *et al The Autonomy of Labour Law* (2015) at 353

<sup>12</sup> P Finn “Contract and the Fiduciary Principle” (1989) 12 *UNSWLJ* 76-97 at 94

<sup>13</sup> Finn n 12 at 78

<sup>14</sup> Finn n 12 at 83

<sup>15</sup> P Miller “A Theory of Fiduciary Liability” 2011 Vol 56 *McGill L J* 235 at 262

<sup>16</sup> L Smith “Can We Be Obligated to Be Selfless?” in Gold n11 at 158

<sup>17</sup> Finn n 12 at 94

<sup>18</sup> J Edelman “The Role of Status in the Law of Obligations” in Gold n11 at 38

the employee in this respect. Such duties might then be qualified or limited by information provided to the employee by the employer. Control of the assets of the other party may also be an indicator of fiduciary status and this may arise in a wide range of business contexts, including contractual relationships, which may specify differing terms. Then “a question arises about the way in which fiduciary obligations may be imposed alongside the obligations spelled out in the contract.<sup>19</sup>”

(a) Status

Fiduciary duties are often presumed where a particular relationship or status exists<sup>20</sup> and the law now includes many relationships; which can make identification of a fiduciary relationship difficult and heavily dependent on the given facts.<sup>21</sup> Some question the approach of using status to define obligations,<sup>22</sup> arguing instead that the undertakings of the particular matter are key. Others argue that this contractual approach is incorrect with fiduciary obligation sometimes operating in “opposition to intention.<sup>23</sup>” The status of the parties in any case will provide evidence of the nature of undertakings.<sup>24</sup>

The question of whether the pension product provider or the employer’s financial advisors owe any fiduciary obligations to the employee also arises. This could be in the act of providing information to employees or otherwise dealing with pre or post contract issues. For AE, contractual terms are generally agreed between the employer and the provider/advisors and this might lead to an expectation of fiduciary duties owed by the advisor to the employer. Contractual provisions may seek to specifically exclude this and it will depend on the nature of the relationship. If the advisor or provider deals with employees this may also constitute a fiduciary relationship. It is sometimes assumed that all those acting in an advisory capacity are fiduciaries of their clients<sup>25</sup> but it is not clear what the position is in relation to putative clients (the employees) in the AE situation. There are dangers in relying on status for implication of terms because the same status can describe many different types of relationship<sup>26</sup> and some tasks within the relationship may not be fiduciary.<sup>27</sup> For example, a financial advisor undertakes to provide advice and will be considered a fiduciary but a tied advisor may not be where he provides only information and not advice. The nature of undertakings, here the provision of advice, taken with the status forms evidence of the extent of the fiduciary obligations. In addition to the giving of advice, it is suggested that there must be an element of discretion being exercised to establish that the advisor is a fiduciary. A financial firm may owe

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<sup>19</sup> F & C Alternative Investments (Holdings) Ltd v Barthelemy and another (No 2) [2011] EWHC 1731 (CH) at 650

<sup>20</sup> J Edelman n18 at 30

<sup>21</sup> J Edelman “When do fiduciary duties arise?” 2010 L Q R 126(April) 302-327 at 305

<sup>22</sup> Gold n11 at 3

<sup>23</sup> D DeMott “Beyond Metaphor: An analysis of fiduciary obligation” 1988 Duke L.J 879-924 at 887

<sup>24</sup> J Edelman n18 at 34

<sup>25</sup> P Miller n11 at 83

<sup>26</sup> J Edelman n18 at 37

<sup>27</sup> P Miller n11 at 83, Hodgkinson v Simms [1994] 3 SCR 377

fiduciary duties where the firm moves beyond “mere salesman.”<sup>28</sup> It is clear from my empirical study<sup>29</sup> that there are misunderstandings about the role of product providers and advisors and whether information or advice is provided. Consequently, both employers and employees may be able to demonstrate that the provider of information was relied on and trusted as an advisor undertaking fiduciary responsibilities as advisor rather than merely acting as a salesman.

The employment relationship can give rise to fiduciary duties<sup>30</sup> but this does not mean that the relationship is fiduciary in nature.<sup>31 32</sup> Increasing examples of senior managers owing the employer fiduciary obligations<sup>33</sup> might lead to the conclusion that the employer could also owe fiduciary obligations to the employee in some circumstances. However, the operation of the employment law relationship where the parties do not subjugate their own interests to the other may prevent such a finding<sup>34</sup> and it is unlikely that the entire relationship is fiduciary in nature. The most important component is the relationship of trust and confidence, with loyalty a key duty.<sup>35</sup> Whilst mere employment does not create fiduciary obligations, the duties can exist where they arise from particular contractual obligations and within the constraints of the contractual relationship.<sup>36</sup> Facts may disclose fiduciary obligations within the employment relationship on an *ad hoc* basis.<sup>37</sup> A fiduciary may not be a fiduciary for all purposes. This would allow a finding that the employer is a fiduciary in respect of choosing the AE scheme but not in other respects.<sup>38</sup>

The asymmetry in information and power in the employment relationship demonstrates the employee’s vulnerability which might indicate fiduciary obligations are owed to the employee.<sup>39</sup> However the mutuality in the relationship means the employer is entitled to have regard to its own interests rather than simply considering those of the employee and this mutuality is different to the fiduciary relationship.<sup>40</sup> There are aspects of financial control in deductions of pension contributions but these are often not specified in the contract of employment. The holding of assets in this way may characterise this part of the relationship as fiduciary by agency, discussed further below.

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<sup>28</sup> Bathurst Regional Council v Local Government Financial Services Pty Ltd (No5) [2012] FCA 1200 [2324]

<sup>29</sup> A. Wyper n3

<sup>30</sup> Reading v Attorney General UKHL 1 [1951] AC 507, Stoelwinder v Southern Health [2001] FCA 115 at 39, Hospital Products Ltd v United States Surgical Corporation 1984 156 CLR 41

<sup>31</sup> University of Nottingham v Fishel, (2000) EWHC 221 (QB), IRLR 471, Samsung Semiconductor Europe v Docherty, (2011) CSOH, 32, 2011 SLT 806

<sup>32</sup> D Brodie “The Employment Relationship and Fiduciary Obligations” (2012) Edin L R 16(2) 198-209 at 200

<sup>33</sup> Anderson Smyth and Kelly Customs Brokers v World Wide Customs Brokers 1996 7 WWR 736, Collidge v Freeport [2007] EWHC 1216 (QB)

<sup>34</sup> D Brodie n32 at 208

<sup>35</sup> V Sims “Is Employment a Fiduciary Relationship?” (2001) 30 I L J 101-110 at 102

<sup>36</sup> University of Nottingham v Fishel, (2000) EWHC 221 (QB), IRLR 471

<sup>37</sup> Credit Lyonnais Bank Nederland NV v Burch [1996] EWCA Civ 1292

<sup>38</sup> Beach Petroleum v Kennedy 1999 48 NSWLR 1, 188

<sup>39</sup> D Brodie (2012) n32 at 209

<sup>40</sup> V Sims n35 at 103

## (b) Contractual Undertaking

Rather than considering status as the key factor, the alternative approach is to consider the nature and extent of undertakings although case law often establishes the relationship first.<sup>41</sup> The contract will provide the “contextual framework in which the question [which fiduciary obligations apply in the context] arises”<sup>42</sup>. The contractual relationship in this way moulds the fiduciary obligations<sup>43</sup> like implied terms construed in return for other voluntary undertakings. The key is whether there has been a voluntary assumption of responsibility<sup>44</sup> for some matter. Fiduciary duties, where they arise, are like supporting duties, protecting non-fiduciary duties,<sup>45</sup> likened to “legal polyfilla<sup>46</sup>” which can be moulded to fill gaps but are not the whole structure. In other words, fiduciary obligations are there to ensure proper performance of contractual obligations.

Single-minded loyalty<sup>47</sup> might be the key defining indicator of fiduciary duties. From loyalty follows the duties to: act in good faith; not profit from the trust; not expose himself to conflict of interest and not act in such circumstances without the informed consent of the principal.<sup>48</sup> It has been argued that it is the particular way that the fiduciary exercises judgement which encapsulates the duty.<sup>49</sup> Smith’s argument about judgement is very persuasive for AE, where the employer exercises judgement and discretion when choosing and designing a pension to invest the employees’ contributions. It is the position of power, held by the employer, which may limit the effect of contractual exclusions. The fiduciary duties are imposed because of the social and economic power wielded by employers.<sup>50</sup> A key element of this is the deduction of employee contributions from salary which the employer is then entrusted to invest on behalf of the employee. In holding the employees’ assets and using discretion and judgement to invest them it is difficult to imagine that the employer does not owe a duty of some kind but whether this is fiduciary in nature is unclear because of competing employer interests.

If the undertakings were contractually agreed, without the imposition of AE, it would seem to be a voluntary fiduciary undertaking but the fact that the undertakings are imposed by the AE legislation rather than voluntarily assumed may prevent such a finding.

## (2) Consequences of Fiduciary Obligations

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<sup>41</sup> J Edelman (2010) n21 at 311

<sup>42</sup> F & C Alternative Investments (Holdings) Ltd v Barthelemy and another (No 2) [2011] EWHC 1731 (CH) at 650, Hospital Products n30 at 97

<sup>43</sup> Hilton v Barker Booth & Eastwood [2005] 1 WLR 567

<sup>44</sup> Edelman n21 at 309

<sup>45</sup> M Conaglen “The nature and function of fiduciary loyalty” (2005) 121 LQR 452-480 at 471

<sup>46</sup> Law Com (2014) n6 at 1.20

<sup>47</sup> Bristol and West Building Society v Mothew (1988) CH 1 at 18

<sup>48</sup> A Gold “The Loyalties of Fiduciary Law” in Gold n11 176-194

<sup>49</sup> L Smith “Can We Be Obligated to Be Selfless?” in Gold n11 141-158 at 151

<sup>50</sup> S Freeman “Women at Work: The Broken Promise of Flexicurity” (2004) 33(4) ILJ 299 at 301

The duty to act in the best interests of beneficiaries can be vague and it can be unclear from contractual or other evidence of the undertakings as to what is expected by the parties.<sup>51</sup> The performance of obligations in good faith also depends on circumstances.<sup>52</sup> Whilst it is possible that the employer or its advisors may owe fiduciary like duties to the employees, in respect of choice of AE scheme and provision of information, this does not make them fiduciaries in law. Many of the indicators of a fiduciary relationship are in evidence in the AE situation but it is uncertain whether the courts would find that employers owe a general fiduciary obligation to employees in complying with AE. Even if this was to be established it is unclear what this duty would require. Providers or advisors may also owe fiduciary obligations if they have undertaken the role of advisor to the employee as well as to the employer.

### C. EMPLOYER AS AN AGENT

Even if there is no general fiduciary relationship, it can be argued that in taking charge of arranging the pension contract, choosing provider, deducting contributions from the employee's salary and making decisions about when to change providers or schemes in future, the employer acts as an agent of the employee. The power of the agent (employer) in this instance, is to enter into and act under a legally valid contract on behalf of the principal (employee).<sup>53</sup>

Where employers use a trust based scheme for AE, the employer does not contract with a provider on behalf of the employee but facilitates admission to a scheme and the employee can deal directly with the scheme administrator. The scheme trustees will then owe fiduciary duties to scheme members. However, where a personal pension arrangement is used, the employer contracts on behalf of the employee to take out the personal pension contract but will also contract with the provider separately in relation to the plan administration. The product provider or financial advisor may act as the employer's agent in providing information and assistance to employees on its behalf, although standard contractual terms with the provider may exclude agency obligations in this context.

The contract of employment is will usually make reference to pension and AE in general terms to maintain flexibility but agency may arise without formal contractual terms. Facts and circumstances may be averred to prove the existence of the agency relationship.<sup>54</sup> In Scotland, agency can be demonstrated without a written agreement if it can be shown who the parties are, where and when the contract was entered and the terms of the contract.<sup>55</sup> In England there is no requirement for a contract

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<sup>51</sup> Nicholls "Trustees and Their Broader Community: Where Duty, Morality and Ethics Converge" (1995) 9(3) TLI 71-77 at 74, Edelman n21 at 323-324

<sup>52</sup> F&C Investments n42 at 655, Conaglen n45 at 463

<sup>53</sup> P Miller n11 at 79

<sup>54</sup> L Macgregor "Defining Agency and its scope" in DiMatteo *et al Transatlantic Perspectives on Commercial Contract Law* (2015) at 4

<sup>55</sup> Rodewald v Taylor [2010] CSOH 5 para 33, L Macgregor *The Law of Agency in Scotland* (2013) at 35



to establish agency and so the facts must establish that one party consented to the exercise of authority to act.<sup>56</sup> This distinction between Scottish and English law may result in different consequences and remedies being available in Scotland as a consequence of the implementation of UK wide Pensions legislation. The issue of consent is key in English cases, which do not require a contract and the difficulties of proof of contract arise in Scotland.

### (1) The Agency Relationship

The generic terms in the contract of employment regarding pensions and lack of contractual instruction by the principal (employee) are not fatal to a finding of agency, by consent or under contract, as the employer is responsible for implementing AE under statute and contracting on behalf of the employee in the context of the employment law contract. Even where there are instructions in recognised agency situations, these are often incomplete.<sup>57</sup> In Scotland, non-consensual agency might be established where the power ceded to the agent is sufficient to establish the relationship, like implied terms in the contract. The creation involves “the grant of legal powers to the so-called agent, and the creation of correlative liabilities in the principal.”<sup>58</sup> However, more recent emphasis on the contractual nature of agency in Scotland means that consent is more likely to be inferred to create the contract rather than saying it is a non-consensual contract of agency<sup>59</sup>. Rather than creating a general agency it can be argued that the employee cedes power to the employer for AE to contract with pension providers on his behalf and that the employer has control of the employee’s assets (deductions from salary as contributions). This ceding of power is evidence of tacit consent to the contractual agency relationship and may be used in Scotland to imply the terms of agency to the transaction. However, the nature of AE being imposed by statute may go against a finding of consensual agency.

The employee may be said to have granted authority to the employer to contract with any pension provider it chooses although, with AE, the employee is simply advised of AE and he has no right to opt-out until after the contract is concluded. The employee has no say in the choice of provider and the employer’s unfettered power may go against a finding of agency.<sup>60</sup> However, if we consider other examples of agency, such as the lawyer acting as agent for the client, many decisions will be made without the client’s express consent and the client may lack knowledge to properly supervise the actions of the agent. The employer is not completely controlled by the principal’s wishes and must also follow other rules and requirements. Agents are still subject to legal limits of what may be

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<sup>56</sup> Watts & Reynolds Bowstead & Reynolds on Agency (2010) 1-1001, L Macgregor (2013) n55 at 17

<sup>57</sup> D DeMott “The Fiduciary Character of Agency” in Gold n11 at 323

<sup>58</sup> Hohfield “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale LJ 16-59 at 46

<sup>59</sup> Arising like an implied term in the contract. L Macgregor n55 at 2-21

<sup>60</sup> D DeMott “Defining Agency and Its scope” in DiMatteo *et al Comparative Commercial Contract Law: A tale of Two Legal Systems* (2015)

undertaken on behalf of the principal and for AE the employee cannot ask the employer not to auto-enrol him as this is required externally by operation of the AE legislation. The characterisation of the relationship by the parties themselves is also significant but not determinative.<sup>61</sup>

The employer is unlikely to be a general agent for the employee in all matters but a specific AE agency might be implied in respect of the specific purpose of choosing a pension scheme for AE where there is evidence to support the inference.<sup>62</sup> Implication will depend on the indicators or reliance and undertaking of responsibilities<sup>63</sup> and whether trust and confidence is reposed.<sup>64</sup> This may be important for employees who rely on the relationship with the employer to ensure the best decisions are made. If there is an implied agency in the specific role of the employer selecting a pension scheme for AE this may increase the communication requirements requiring employers to give employees more specific information and warnings.

## (2) Consequences of Agency

An agent has implied authority to perform those actions required to execute the agency agreement<sup>65</sup> but as there are likely to be no contractual terms for AE, all the terms will be implied.<sup>66</sup> If it can be implied that the employer acts as an agent does this mean that particular standards would need to be adhered to in choosing the provider, scheme and making decisions about changes in future? In addition to fiduciary duties, agents also owe separate non-fiduciary duties which may be just as significant as the fiduciary duties<sup>67</sup> namely; the duty to follow instructions; to exercise skill and care; duty not to delegate and duty to account. In English law the fiduciary duties may give rise to a claim in equity but the lack of equitable remedies in Scotland makes the distinction less important.<sup>68</sup> For AE, the employee cannot give instructions to the employer as the employer is required to implement AE under statutory obligations. For non-gratuitous agency, such as this, the agent must “act with that diligence and discretion which a man of prudence uses in his affairs.<sup>69</sup>” The employer does not act here as a professional agent but must demonstrate such diligence and discretion in actions.

Consequently, it could be argued that employers must demonstrate that they acted with care in making choices about pension provider, selecting pension plans and benefits and administering the arrangement. The employer may decide not to spend money on advice and pick any provider or scheme that comes to hand without any thought. If the employer were making a similar decision for

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<sup>61</sup> D DeMott n60 at 12

<sup>62</sup> Batt Cables Plc v Spencer Business Parks Ltd (2010) S.L.T 860 at 866

<sup>63</sup> Batt Cables n62, McWilliam v Norton Finance [2015] EWCA Civ 186

<sup>64</sup> McWilliam n63 at 40-41

<sup>65</sup> JM & JH Robertson v Beatson, McLeod & Company Ltd (1908) SC 921

<sup>66</sup> L Macgregor (2013) n55 at 84, 88-93

<sup>67</sup> L Macgregor n55 at 160

<sup>68</sup> L Macgregor n55 at 30

<sup>69</sup> J Erskine *An Institute of the Law of Scotland III* (1695-1768) at 3, 37

itself more care might be exercised. Failure to exercise the same care when choosing an AE plan could then be a breach of the agent's standard of care toward the principal as implied in the agency contract. The cost of obtaining advice on the continuing compliance with AE might also prevent an employer changing scheme or provider even if the existing scheme offers poor value compared to other products. In the employment relationship the employer has a legitimate interest in considering its business needs as well as the needs of the employee and this may prevent a finding that the employer acts as an agent in relation to AE. In an agency relationship, the fiduciary duties and non-fiduciary duties of care might assist the employee in claiming for loss arising from poor decisions by the employer as his agent. The facts and circumstances of the agency relationship can limit the scope of obligations; and agents have long been recognised as acting for single transactions or as special agents in Scotland, which further restricts fiduciary and non-fiduciary obligations.<sup>70</sup> Courts have imposed fiduciary duties in ad hoc relationships to deal with the agency problem (failure to contractually anticipate all the obligations and opportunism in asymmetrical relationships) using concepts such as influence, trust and confidence and superiority to justify the inference.<sup>71</sup>

In the case of the employer acting to contract with a provider for the employee, the fact that the employer also holds the employees' assets (deductions from salary as contributions) may be significant. The deductions remain the employee's money but are dealt with by the employer (possibly as agent). Where the money is deducted and paid into an occupational pension scheme then this is held in trust for the beneficiaries of the scheme and the funds are entirely separate from both employer's and employee's funds. However, where a personal pension contract is used, the funds are paid over to the product provider and are held as assets in a policy in the name of the employee. The deductions and payment process are regulated by the AE legislation and require timeous payment and accounting to the employee but it is the employer who is responsible for ensuring calculations are correct and making the salary deductions and transfers.

Agents are also obliged to impart knowledge to the principal so information given to the employer by the provider should be passed on.<sup>72</sup> In AE the product provider is often contracted by the employer to provide the employees with information and support in relation to AE and it is not clear what role the provider takes on as they are party to contracts with both the employer and the employee. Most providers will offer strict standard terms excluding any liability as an agent or otherwise.

Many indicators of agency are present in AE with the employer enjoying superiority in the relationship, the employee reposing trust in the employer and the employer being ceded power to manage the employees' money and select a pension provider and plan. However, the difficulty in

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<sup>70</sup> Sao Paolo Alparagas SA v Standard Chartered Bank (1985) S.L.T. 433 at 436

<sup>71</sup> R Sitkoff "An Economic Theory of Fiduciary Law" in Gold n11 197-208 at 200

<sup>72</sup> D DeMott "The Lawyer as Agent" (1998-1999) 67 Fordham LR 301-326 at 307

identifying the terms of the agreement and the fact that the undertakings arise from statutory obligations, rather than consent, may go against a finding that the employer acts as an agent in this regard. It might be difficult to demonstrate that the employer has chosen to undertake its duties but this is not fatal to any claim. The facts surrounding the AE relationship look like a case of agency giving rise to fiduciary and non-fiduciary obligations owed by the employer to its employees. However, it is not sufficiently clear to say with certainty that a legal remedy exists under this head and clarification on the extent of employer's responsibilities is needed.

#### **D. CONTRACTUAL OBLIGATIONS ARISING FROM THE CONTRACT OF EMPLOYMENT**

Even if there is no fiduciary or agency obligation, the contract of employment may create additional contractual obligations in compliance with AE beyond the statutory minimum. Employees derive benefits for occupational pension schemes from the contract of employment<sup>73</sup> and so its terms are crucial to considering the extent of any obligations. However, employment contracts often say little about pensions, instead referring to member booklets and information given as part of the statutory AE information requirements. The contract of employment is the control mechanism in the relationship<sup>74</sup> and courts have been willing to use fiduciary obligations to correct imbalances and abuse of power,<sup>75</sup> although the relationship as a whole is unlikely to be fiduciary in nature. Employers may be obliged to monitor its pension plan as part of the mutual trust and confidence obligation but this is unlikely to require monitoring the suitability of investments in contract based schemes.<sup>76</sup> This section considers whether the contract of employment requires the employer to execute its obligations under AE in a particular way to ensure that the employees' interests are paramount. *Imperial*<sup>77</sup> would suggest that this is unlikely. However, even without a general fiduciary obligation, there may be express or implied contractual obligations and these are discussed below.

An employee owes a duty of loyalty to his employer but this does not equate to a fiduciary obligation,<sup>78</sup> the contract of employment does not place the same duty of loyalty on the employer and the implied term of mutual trust and confidence does not perform exactly the same function.<sup>79</sup> A fact

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<sup>73</sup> *Mettoy Pension Trustees Ltd v Evans* 1990 1 WLR 1587

<sup>74</sup> *V Sims* n35 at 106

<sup>75</sup> *Autoclenz Ltd v Belcher and Others* [2011] 4 ALL ER 745

<sup>76</sup> *Law Comm* (2014) n6 at 156

<sup>77</sup> *Imperial Group Pension Trust v Imperial Tobacco* [1991] 1 W.L.R. 589

<sup>78</sup> *University of Nottingham v Fishel* (2000) IRLR 471, *Samsung Semiconductor Europe Ltd v Docherty*, [2011] S.L.T 806

<sup>79</sup> *J Murray* (2015) n11 at 347

based approach might lead to findings of fiduciary obligations in some cases<sup>80</sup> and the employer's self-interest "is not inconsistent with more limited fiduciary duties."<sup>81</sup>

### (1) Implied Terms

Where there is no explicit undertaking in contract, terms may be implied where this would be what the reasonable person would think "the instrument means."<sup>82</sup> The courts may imply terms which "can sometimes leap over their basic principle"<sup>83</sup> [in contract] to protect the worker. On this basis, implied terms may be read into the AE undertaking whereby the employer exercises discretion, such as the discretion to choose a pension provider or whether to change provider, or this might instead justify statutory change to correct the "inadequacy of the ordinary private law."<sup>84</sup> For example, the House of Lords implied terms into junior doctors' contracts of employment to provide that they would be advised of pension changes which they could not be expected to know about.<sup>85</sup> However, the ratio on this point was very precise and great care was taken to prevent the widening of any employer obligations<sup>86</sup> in general terms. This recognises the different bargaining positions of the parties and has been followed in subsequent decisions.<sup>87</sup>

The contract of employment contains a reciprocal duty of good faith which extends to powers exercised by the employer in relation to the pension scheme.<sup>88</sup> Good faith is a distinct and differing obligation from a fiduciary duty in that it will not usually require one party to place another party's interests above its own interests and the intention in a course of action is irrelevant.<sup>89</sup> In the Imperial case, the company had a clear interest in the operation of the scheme, as it would bear excess costs, and so a fiduciary obligation could not be implied as that would require the employer to consider only the members' interests.<sup>90</sup> However, an implied obligation of good faith could be read into the contract to apply to "The exercise of his rights and powers under a pension scheme as they do to the other rights and powers of the employer."<sup>91</sup>

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<sup>80</sup> J Murray n11 at 351

<sup>81</sup> J Murray n11 at 348

<sup>82</sup> Attorney General of Belize v Belize Telecom Ltd (PC) (2009) 1 WLR 1988-1998 at 1993 approved in PDPF GP Ltd v Santander UK Plc (2015) WLR 1839062 and Marks and Spencer plc v BNP Paribas Securities Services (SC(E)), [2015] 2 WLR 1843 at 1852

<sup>83</sup> Davies & Freedland "Employees, Workers, and the autonomy of labour law" in *Legal Regulation of the Employment Relation* (2000) Davies *et al* at 276

<sup>84</sup> H Collins "Justifications and techniques of legal regulation of the employment relation" in Davies *et al* n83 at 4

<sup>85</sup> Scally v Southern Health and Social Services Board (1991) ICR, 771

<sup>86</sup> Scally n85 at 781

<sup>87</sup> Pensions Ombudsman case (April 2013) (PO-680) Major R Farrimond

<sup>88</sup> Imperial n77 at 589

<sup>89</sup> L Macgregor (2013) n55 at 124

<sup>90</sup> Imperial n77 at 597

<sup>91</sup> Imperial n77 at 597

So whilst the employer has the right to consider its own financial interests, the implied obligation of good faith ensures that decisions must not be undertaken in a way which undermines trust and confidence.<sup>92</sup> If the employer is considered to be an agent of the employee, the duties are so comprehensive that an additional duty to act in good faith is unnecessary.<sup>93</sup> However, if there is no agency then it is necessary to consider the extent of any good faith obligations arising under the contract of employment. The discretion to choose or change provider and set contribution levels come under this umbrella of employer discretion to be exercised in good faith.

(a) Mutual Trust and Confidence

Trust and confidence has been considered in relation to the provision of information to employees/members and can cause difficulties. The narrow provisions of Scally have not been widened and the onus remains with employees to ensure information is considered with no obligation on employers to ensure it is read or to warn employees of consequences of actions.<sup>94</sup> If the relationship was categorised as fiduciary then a positive obligation by the employer to disclose any negative consequences from the proposed action would exist. There is a close connection between fiduciary obligations and the implied term of trust and confidence but trust and confidence has a different and distinct meaning. Namely, that the parties do not conduct themselves in a way which is likely to destroy the relationship of trust and confidence between them.<sup>95</sup> The purpose of the implied term is to facilitate the proper functioning of the contract and protect the employment relationship. This recognises that the employment relationship is distinct from commercial relations and operates to prevent exploitation of workers<sup>96</sup> and it is particularly important to guard against abuse in the exercise of discretionary powers by the employer.<sup>97</sup> The employer's motives are irrelevant.<sup>98</sup>

“What is significant is the impact of the employer's behaviour on the employee rather than what the employer intended.”<sup>99</sup>

The duty of trust and confidence has been used by the courts to compel employers “to conduct themselves in a proactive manner by imposing a standard of care.<sup>100</sup>” Scally is authority for the principle that the employer is under no duty to exercise reasonable care in respect of the economic well-being of employees, but contrasts with the Visa case<sup>101</sup> from which it appears that a similar

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<sup>92</sup> Imperial n77 at 599

<sup>93</sup> L Macgregor (2013) n55 at 124

<sup>94</sup> University of Nottingham v Eyett (1999) ICR 721 at 724 and at 728

<sup>95</sup> V Sims n35 at 103, Mahmud (Malik) v Bank of Credit and Commerce International S.A (1997) I.C.R. 606 at 611

<sup>96</sup> D Brodie “Mutual Trust and the Values of the Employment Contract” (2001) Vol 30 (March) ILJ 84-100 at 85

<sup>97</sup> D Brodie n96 at 93

<sup>98</sup> Mahmud (Malik) n95 at 623

<sup>99</sup> D Brodie “The Heart of the Matter: Mutual Trust and Confidence” (1996) Vol 25 (2) ILJ 121-136 at 121

<sup>100</sup> D Cabrelli “The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle” (2005) 34(4) ILJ 284-307 at 285

<sup>101</sup> Visa International Service Association v Paul 2004 IRLR 42

factual situation might result in a successful claim “for recovery of economic loss for a failure of the employer to inform based on a repudiatory breach of the duty of trust and confidence.<sup>102</sup>” Here the breach of the implied duty of trust and confidence occurred when the employer failed to advise the employee about a post that she thought would suit her.

The question here is whether a lack of care in the selection of provider or fund could allow recovery for economic loss based on a breach of the trust and confidence obligation. The law may be willing to supply omissions in the employment contract to an extent not seen in other areas of contract<sup>103</sup> and so the courts may imply this or it might require to be amended by further AE legislation. The implied obligation of mutual trust and confidence may be constrained by specific contractual provisions or statute and, where this concerns a discretionary power exercised by the employer, may also be subject to the implied duty to take reasonable care.<sup>104</sup>

The court in *Johnson*<sup>105</sup> held that the growth of the use of the implied obligation should be restricted to operate within legislative policy. Brodie calls for consideration of this dual regulation<sup>106</sup> and highlights the reluctance of courts to provide a remedy in tort where one has been laid down by statute.<sup>107</sup> Brodie finds that there is tension between this restraint and the *Scally* case in which it was held that the failure to provide information gave rise to a breach of contract. However, part of the *Scally* claim failed on the basis that statute already provided for a remedy of failing to provide written particulars. Brodie asks “If the intention of Parliament was to deny a remedy in tort, why allow one in contract?<sup>108</sup>” For AE, enforcement is largely reserved to the Pensions Regulator but the legislation does not deal with form or method of implementation, other than providing minimum scheme requirements and technical failings. One can conclude that form of implementation is unspecified avoiding the dual regulation issue. The implied term may also be restricted by contract and it is also possible that even negligent acts will not constitute a breach of the implied term if it does not seriously undermine trust and confidence<sup>109</sup> although they may constitute a breach of the implied term to exercise reasonable care. It is not clear whether poor decisions relating to choice of provider, fund or switching could ever undermine trust and confidence to the extent required to establish breach of mutual trust and confidence although it might be easier to establish a breach of the exercise of reasonable care.

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<sup>102</sup> D Cabrelli n100 at 289

<sup>103</sup> B Watt “Regulating the employment relationship: From rights to relations” in Collins *et al Legal Regulation of the Employment Relation* (2000) 335-346 at 342

<sup>104</sup> D Cabrelli (2005) n100 at 298

<sup>105</sup> *Johnson v Unisys* (2003) 1 AC 518

<sup>106</sup> D Brodie “Mutual Trust and Confidence: Catalysts, Constraints and Commonality” (2008) 37(4) ILJ 329-346

<sup>107</sup> For example under the Employment Tribunals Act 1996

<sup>108</sup> D Brodie (2008) n106 at 330

<sup>109</sup> *Hagen v ICI Chemicals and Polymers Ltd* (2002) IRLR 31

### (b) Good Faith

A court should not impose its view of what is fair where the documentation is extensive and detailed but the general expansion of the implied term of good faith continued in Scotland<sup>110</sup> although “there is no general rule that a commercial contract requires to be fair.”<sup>111</sup> However, where the contract in question is a relational one,<sup>112</sup> like a contract of employment, then the argument in favour of a general implied term requiring good faith is stronger. It may require the employer to objectively justify any exercise of discretion<sup>113</sup> and exercise “in accordance with the implied obligation of trust and confidence.”<sup>114</sup>

The court is not entitled to substitute its own view of what a reasonable decision is but instead considers the rationality of the decision made and whether the process is flawed by failure to consider relevant facts or consideration of irrelevant ones.<sup>115</sup> On this basis, the employer choosing a scheme for AE must exercise the decision in a way that demonstrates that the process is rational and is in keeping with the obligation of trust and confidence. The bystander might ask whether the employer has a duty under the contract of employment to take care in choosing the provider. The parties may agree as they had assumed this was the case. However, the parties may not intend a special level of care to be taken and the employer might argue that only the minimum required to comply with the AE legislation would be included in the contract. Whilst the employer has a right to consider its own interests in making these decisions, the factors such as trust, asymmetries of power and information, reliance and expectation will all be evidence of the expectations of the employee as a party to the contract. The increasing significance of good faith in contractual performance of employment contracts may require the employer to demonstrate that discretionary powers were exercised rationally.<sup>116</sup>

### (c) Duty to Advise

Under AE there are specific information requirements requiring employers to give workers certain key information.<sup>117</sup> The employer retains responsibility for providing this information, even if it contracts with a pension provider to provide the information,<sup>118</sup> and this could create some tensions. The standard employer/provider contract may exclude the pension provider’s liability for loss arising from its failures in this regard leaving the employer responsible to the regulator and potentially in

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<sup>110</sup> *Grove Investments Ltd v Cape Building Products Ltd* (2014) CSIH 43

<sup>111</sup> *@SIPP Pension Trustees v Insight Travel Services Ltd* [2016] S.L.T. 131

<sup>112</sup> *Johnston* n105 at 488

<sup>113</sup> *Clark v Nomura International* [2000] I.R.L.R. 76 (Q.B.)

<sup>114</sup> *Braganza v BP Shipping Ltd and another* (2015) 1 WLR at paragraph 32

<sup>115</sup> *Braganza* n114 at paragraphs 52-54

<sup>116</sup> A Bogg “Good Faith in the Contract of Employment: A Case of The English Reserve” (2010-2011) 32 *Comparative Labour Law and Policy* J 729-772 at 756

<sup>117</sup> *Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations* (SI 2010/772)

<sup>118</sup> The Pensions Regulator “Detailed guidance for employers: Information to workers: The new duties” available at: <http://www.thepensionsregulator.gov.uk/docs/detailed-guidance-10.pdf> at 6



respect of civil claims by employees. Technical failures to comply with the AE legislation will be enforced by the Pensions Regulator, but in requiring the employer to provide information to employees this could place the employer in the position of being seen to offer advice, depending on the nature of information given. This would explain the fear and reluctance of employers to discuss pension benefits beyond the basic information given.<sup>119</sup> If the employer tries to provide a better quality scheme which allows the employee access to its own financial advisor this might be construed as giving advice which could leave it open to claims in delict/tort.

Claims might arise on the basis of poor information about choices, contributions or in respect of the employer's decisions relating to the provider itself. It seems unlikely that a contractual claim in respect of failure to provide the statutory required information would be successful as that would fall within the remit of the Pensions Regulator under AE. However, knowledge of others is not an objective test and, if a positive finding of fiduciary duties is made, the employer would have to consider regularly whether the form and content of information given was enough for the principal to make decisions. The Deputy Pensions Ombudsman recently<sup>120</sup> considered accuracy of information and whether requests were for advice or information. Referring the member to an intranet site without further guidance was deemed inadequate and, as she had relied on inaccurate information, she was to be reinstated in the pension scheme. This determination does not sit comfortably with Scally as the member had the information she needed but it highlights the difficulties of balancing providing adequate information and providing advice.

Other determinations found no general duty on an employer to provide information or advice to employees to prevent economic loss, emphasising the specialist nature of advice.<sup>121</sup> The employer had not assumed any responsibility to provide advice and liability in tort, under a duty of care, could only succeed where there was an express or implied contractual duty to provide advice. Following Scally, any claim in tort is bound to fail if there is no contractual obligation to advise.

My empirical research<sup>122</sup> demonstrates that employers are cautious about providing information that might be construed as advice which results in more generic information being provided. Employees were unsure about whether advice or information was provided. The question of information versus advice was considered recently<sup>123</sup> where the pursuers argued that bank employees had given advice in relation to an interest swap agreement. The contractual basis of the agreement made it clear that the bank was not providing advice and correspondence advised the individuals to seek their own

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<sup>119</sup> Even if there is no contractual or fiduciary obligation to give advice, if there is clear reliance and the party still gives advice or information then they may accept a legal duty of care for this information or advice see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465

<sup>120</sup> Pensions Ombudsman complaint (Mrs Oona Perret) November 2014 PO-3750

<sup>121</sup> *Outram v Academy Plastics Ltd* (2001) ICR 367 at 372-373

<sup>122</sup> A Wyper n3

<sup>123</sup> *Grant Estates Limited (in liquidation) v Royal Bank of Scotland plc* (2012) CSOH, 133

professional financial advice. The contractual terms did not set up an advisor/client relationship, even if the clients treated it as advisory and relied on it this. Reliance was not reasonable in the face of the contractual agreement.<sup>124</sup> The fact that the parties had signed the agreement meant they were bound by its terms even if they had not read them. Product providers usually exclude such liability by specifying that only information, not advice, is provided.

The employment contract is likely to be silent on the issue and it will be a matter of fact to determine if the information given by an employer makes it clear that the relationship is not advisory or whether it might be reasonable for employees to rely on the information as advice. Lack of specification of the standards to be followed by the employer in implementing AE may also be fatal to any claim based on the existence of agreement between the parties.

#### (d) Duty to Avoid Economic Loss

Economic loss was considered recently where advice was sought and given with assurances and reliance on the advice resulted in loss.<sup>125</sup> Mr Lennon could not sue for breach of contract as he was a member of the police force and had no contract of employment. Instead he sued in tort in respect of economic loss arising from a breach of duty of care arising from an assumption of responsibility by a personnel officer for a pension transfer. Although the personnel officer was not a professional advisor, she had special knowledge and led Mr Lennon to believe that he could rely on her which was sufficient to attract the duty to give advice.<sup>126</sup> The duty of care arises from an express assumption of liability for a particular matter, which was relied upon.<sup>127</sup>

The implied term to prevent economic loss where there is no undertaking of advice, is unlikely to be inferred contractually on the basis that it is too significant an extension of the existing law and “impose an unfair and unreasonable burden on employers.<sup>128</sup>” This public policy constraint of unreasonable burden on employers may also prevent a finding that employers are obliged to do anything other than the AE minimum. Where the employer assumes responsibility for the giving of financial advice then it is under a duty to take reasonable care in the giving of advice. However, that it is quite different to imply that the employer is obliged to provide such advice or to generally safeguard the employee’s well-being. With the simplification of schemes to reduce costs, advice may not be available in future. Employees may ask more questions of the employer but these will go unanswered as employers and HR representatives are now very wary of answering questions which might be construed as advice. This means that whilst there may be a remedy for poor advice, employers may choose not to respond to questions and instead refer employees to the product

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<sup>124</sup> Grant Estates n123 at paragraph 76

<sup>125</sup> The Commissioner of Police of the Metropolis v Lennon [2004] EWCA Civ 130

<sup>126</sup> Lennon n 125 at 28

<sup>127</sup> Lennon n125 at 34

<sup>128</sup> Crossley v Faithful & Gould Holdings Ltd [2004] ICR 1615 at 1629

provider. The product provider may also disclaim any responsibility to answer questions or advise (particularly at the pre-contract stage) and this leaves the employee with an information gap, the effects of which are exacerbated by AE. It was considered unnecessary to include provision for financial advice in AE but it is clear that in failing to obtain advice some individuals will suffer as a consequence of the regime. Employees would have to understand this and then pay for advice which acts as a barrier to understanding and engagement and can also be described as a further cost of the regime.

## (2) AE Compliance

The PA 2008<sup>129</sup> sets out the compliance provisions for AE and reserves jurisdiction on compliance matters to the Pensions Regulator but provides<sup>130</sup> that nothing in this chapter “affects any right of action arising apart from these provisions.”<sup>131</sup> These are the basic technical requirements relating to implementation of AE. The question remains whether an employer could meet the basic statutory requirements in terms of compliance and scheme quality and nevertheless be open to a claim under obligations owed as fiduciaries, agents or under implied contractual obligations. This might arise because of the lack of care taken in choosing a scheme, decision making process when having to change scheme to meet new quality standards or in choosing a provider. The Pensions Regulator may investigate breaches of compliance by employers and issue enforcement notices or require payment of contributions. Whilst enforcement of the basic implementation of AE is reserved to the Pensions Regulator, questions which relate more generally to the contract of employment or relationships may still be considered under private law. In considering whether the mutual trust obligation is breached by an employer being careless in discretionary decisions it is important to remember that the employer has a legitimate business interest in implementing AE in a cost effective way for its business. The Pensions Ombudsman may also be asked to consider such issues but, at present, it is unclear if a remedy would exist in the circumstances described above.

The information requirements may put employers in a difficult position if they do not get the correct balance between giving enough information to inform employees without giving employees the impression that they have undertaken to provide advice. Brodie talks of the importance of fair procedure in relation to such matters as pay reviews and this may also apply to decisions made in relation to AE. Even if the results could have been better for employees if alternate decisions were made, if the employer can demonstrate a fair process for the decisions made then it will be less likely

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<sup>129</sup> PA 2008

<sup>130</sup> PA 2008 s34(2)

<sup>131</sup> Defined as those arising in sections 2-11 of the PA 2008.

to breach the obligation.<sup>132</sup> As a minimum, I would argue that employers should be able to demonstrate that a fair process has been followed when making discretionary decisions under AE.

### **E. DUTIES OWED BY THE PENSION PROVIDER OR ADVISORS**

The position in relation to contract based pensions is complicated and depends on factual circumstances and documentation. Whilst providers may influence the interests of members, this in itself is insufficient to create a fiduciary obligation owed by the provider and contractual terms which support member's expectations are required, as discussed above.<sup>133</sup> There are difficulties in applying this contractual model in AE as it is the employer which engages with the provider at the pre-contract stage to establish the employee's personal pension contract with the provider. After enrolment, the employee has a personal pension policy with the provider and can enforce its terms, change contributions or funds. Whether fiduciary duties are owed to the employee depends on whether advice is given.<sup>134</sup> Often the provider is not involved in the advisory process at all and an independent advisor is employed to find a scheme for the employer. The advisor will be contracted to provide advice to the employer on a suitable scheme which complies with AE within particular parameters of cost or quality as directed by the employer. In this situation the advisor may owe duties to the employer which are contractual and fiduciary but is unlikely to owe these to the employee unless the provider has engaged in providing direct advice to employees. Duties to employees are limited to those contained in the personal pension policy.

My empirical research<sup>135</sup> demonstrates that employees may be unsure about the role of the advisor. If advice is offered from a professional advisor then a duty of care under the law of delict may exist<sup>136</sup> but this requires the pursuer to demonstrate that there is an industry practice, that this has not been applied in this case and that the course taken is one which no professional of ordinary skill would have taken. The FCA Conduct of Investment Business Handbook (COBS) might be used to support such a claim.<sup>137</sup> However, the employee would have to demonstrate that the advisor owed him a duty which was breached. This would be difficult as the employee would need to demonstrate that the advisor had assumed responsibility for the employee without any contractual undertakings or special relationship.<sup>138</sup> In AE, where information is given it will usually include a disclaimer to the effect that the advisor is only offering information which would go against any suggestion that the advisor

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<sup>132</sup> D Brodie (2008) n106 at 341

<sup>133</sup> Law Comm (2014) n6 at 159

<sup>134</sup> Law Comm (2014) n6 at 187

<sup>135</sup> A Wyper n3

<sup>136</sup> Hunter v Hanley 1955 SC 200

<sup>137</sup> Loosemore v Financial Concepts (2001) Lloyd's reports P.N. 235, D Cabrelli "The Liability of Asset Managers in Scots Law" in (2012) *The Liability of Asset Managers* D Busch and D DeMott

<sup>138</sup> Hines v Sturge LLP (2011) SLT 2 at 21, White v Jones [1995] 2 A.C. 207

assumed responsibility. Even if responsibility is proved then the employee would still need to demonstrate that the breach of duty caused the loss alleged.

It may also be the case that, where the claimant is someone other than the party being given direct advice, the middle party may be responsible for negligent advice. For example, the employer may be liable if it passes on advice to the employee that it has received from its own advisor but courts are reluctant to impose such duties<sup>139</sup> and would likely approach fiduciary duties in the same way. Information given directly to employees by advisors is governed by the FCA rules.<sup>140</sup> However, the UK explicitly provides a remedy for breaches suffered by private persons under the Financial Services and Markets Act (FSMA) 2000.<sup>141</sup> It has been argued that COBS will form strong evidence of required standards and that private law duties of agency and delict will be breached where there is a failure to comply with COBS prior to conclusion of a contract.<sup>142</sup> The analogy with the AE scenario is that the pension provider or advisor may owe obligations under COBS to the employees in the period prior to conclusion of the contract effecting the personal pension.

## F. CONCLUSIONS

This paper has considered whether private law provides an adequate remedy for those who suffer loss as a consequence of the AE regime. Pension changes may be accompanied by complex information and loss or detriment may arise from the provision of information and advice and the exercise of employer discretion under AE. If employers are found to owe particular standards of care when exercising discretionary decisions under AE, this might improve both the default positions and the level of engagement of employees. The asymmetric information and power in the AE relationship may result in a finding that the employer acts as a fiduciary or agent in respect of the AE decisions it makes for the employee. If pension providers and advisors engage with employees during this process they may also owe duties to the employees. Vulnerability, exercise of discretion, management of affairs by one party, status of the parties and contractual provisions may all indicate the existence of a fiduciary obligation. Whilst the whole employer/employee relationship is unlikely to be categorised as fiduciary, some aspects may be. The employment contract is likely to be silent on much of AE, but terms may be implied to infer duties. Even if there is no finding of fiduciary duties, the employer may act as an agent for the employee in arranging his AE pension which would require the employer to demonstrate that care was taken in exercising discretionary decisions; such as choice of provider, default funds and plan structure.

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<sup>139</sup> Law Commission (2014) n6 at 204

<sup>140</sup> Law Commission n6 at 199

<sup>141</sup> FSMA C8 previously under section 150 and now under s 138D, , Section 138D Actions for Damages

<sup>142</sup> D Cabrelli (2012) n137 at 15-15

The contract of employment may also require the employer to fulfil its AE duties to a particular standard. The implied duties of mutual trust and confidence and good faith may impose a standard of care in respect of AE compliance. There is no obligation on the employer to provide advice to employees but where this is proffered then this may prove actionable in delict where there is a failure in the duty of care in providing that advice. Employees may also have a direct right of action against the pension provider or professional advisors if it can be established that they failed to comply with the FCA handbook in some way in their dealings with the employee.

Where a policy produces negative effects then there should be a means of redress, either by the courts, as outlined here, or by extension of the AE regulations by Pensions Regulator guidance or further statutory codification. Whilst it may be possible to argue that these duties are present and create obligations, it is not clear and the costs involved in bringing such claims may also be prohibitive. Further statutory amendment to the AE legislation, outlining the extent of duties and processes in the implementation of AE, would provide clarity and certainty. Without such clarification it is possible that, in twenty years' time as people start to draw these benefits, claims may emerge which are problematic for employers and employees alike.