

PENSION CASES SUPPLEMENT

I. IMPLIED DUTY OF GOOD FAITH: HIGH COURT DECISION IN BRADBURY

A. OVERVIEW

1. On 15th May, 2015, the High Court (Warren J.) upheld the Pensions Ombudsman's determination ([Pensions Bulletin 14/01](#)) that the overall conduct of the BBC, when it imposed a cap on increases to pensionable salary, did not give rise to a breach of its implied duty of good faith.
2. Mr. Bradbury ("B") had appealed against the Ombudsman's decision on the basis that the Ombudsman had failed to look at the overall position, instead considering only whether the individual factors B had identified amounted to a breach in themselves.

B. FACTS

1. The BBC Pension Scheme rules prohibited introduction of a cap on pensionable pay without trustee consent. The BBC introduced the cap contractually in reliance on **South West Trains**. B complained to the Pensions Ombudsman that the BBC's actions were in breach of Section 67 of the Pensions Act 1995 in that they adversely affected accrued rights.
2. The Ombudsman rejected B's complaint on the basis that it was pensionable salary at the date of the modification rather than the date of retirement which was relevant for Section 67 purposes. The term "accrued rights" in Section 67 did not refer to future pension rights that the member would accrue if they continued

in membership and the rules of the scheme were unchanged.

3. The High Court (Warren J.) turned down B's appeal on 23rd May, 2012. But B had additionally raised on appeal the question of whether the BBC's actions amounted to a breach of the implied duty of good faith. Since this point had not been addressed by the Ombudsman, Warren J. could not deal with it, although he did observe that such a claim was unlikely to succeed.
4. The Ombudsman determined (on 23rd December, 2013) that the BBC's actions did not amount to a breach of the "Implied Duties" (the implied term of trust and confidence and/or the implied term of good faith) arising from B's contract of employment. The Ombudsman followed Warren J's observations closely. The decision to impose the cap was not irrational or perverse or one that no reasonable employer in its position would have adopted, judged against the background of alternatives which other employers were adopting.
5. Nor were the BBC's actions likely to seriously damage the relationship of trust and confidence in terms of the legal test, which the Ombudsman described as "severe" and to be judged objectively.

C. HIGH COURT DECISION

1. B had relied on 4 factors in support of his argument there had been a breach of the Implied Duties:
 - 1.1 improper coercion based on the way in which the BBC sought to achieve the cap by way of contract, rather than by way of scheme amendment,

- 1.2 collateral purpose, namely to produce a greater turnover among older staff,
 - 1.3 age discrimination, and
 - 1.4 lack of proper consultation.
2. The High Court (Warren J. again) held that the Ombudsman had been entitled to reject B's case in respect of all 4 factors, separately and collectively. Although an employer's duty of trust and confidence could be breached by its actions cumulatively, it would require a "very strong case indeed" for a number of disparate objections (even though they arose out of the same conduct) to give rise, when taken together, to a breach of the Implied Duties when none of the objections by itself gave rise to such a breach.
 3. Warren J. said "... *the question whether the conduct of an employer which might otherwise give rise to a breach of the implied term is without reasonable and proper cause must take account of the particular state of affairs and the situation in which the employer finds himself; the conduct must be a response to that state of affairs and situation. It must be a response which resolves the tension, so far as is possible, between, on the one hand, the courses of conduct open to the employer to meet the situation which it faces and, on the other hand, acting in a way which does not cause undue detriment to the employee..... It is not necessarily incumbent on the employer to take the course most favourable to the members and, indeed, not all members might favour the same course. It must then, save perhaps in exceptional cases, be for the employer to choose which course to take.*"
 4. In arguing that the BBC's conduct amounted to a breach of the Implied Duties, B had raised a new point on appeal, namely that the BBC's actions amounted to a disappointment of Reasonable Expectations, as defined by Warren J. in **IBM** ([Pensions Bulletin 14/06](#)) as an expectation as to what would happen in the future engendered by the employer's own actions, which gave employees a positive reason to believe that things would take a certain course.
 5. In this case Warren J. found that there may have been mere expectations (not engendered by the BBC) held by B, but disappointment of such expectations was "a weak basis, and in my judgment an inadequate basis" on which to assert a breach of the Implied Duties.
 6. Warren J. noted, that although the point could not be taken on the basis that it had not been run before the Pensions Ombudsman, even if it could have been, the evidence did not establish any Reasonable Expectations as per IBM.
- Comment:** This decision, which confirms the legality of using an extrinsic contract to effect a change to pension benefits that could not be effected by a rule amendment, is helpful to employers in a similar position. Of note is Warren J's recognition of the BBC's particular circumstances, where "*something radical*" was required and "*inaction was not an option*".
- ## II. IBM: EARLY RETIREMENT POLICY
1. On 18th May, 2015, the High Court (Warren J.) issued judgment on a point arising out the IBM "Project Waltz" litigation. The point related to the effectiveness of a change to IBM's early retirement policy.
 2. Before Project Waltz, IBM had a practice of encouraging employees to retire early on advantageous terms (the "**old ER policy**"). One aspect of Project Waltz was the introduction of a new early retirement policy on less favourable terms (the "**new ER policy**"), effective from 6th April, 2010. Early retirement was offered under the old ER policy to members in a 2 month "early retirement window" available before the new ER policy came into force.
 3. In the main judgment, Warren J. held that the new ER policy was contrary to IBM's **Imperial** duty, as members had a reasonable expectation that the then current policy would not change until 2014.

4. In the remedies judgment, Warren J. held that the new ER policy could not be relied on by IBM in relation to an eligible early retirement member who would have been able to benefit under the old ER policy if it had remained in force. A refusal or deemed refusal of consent to early retirement for such a member who had left service was, or was part of, a breach by IBM of both its **Imperial** duty and its contractual duty of trust and confidence. The old ER policy continued to apply to all members who left service before 31st March, 2014 and in relation to all of their pension.
5. But Warren J. held that IBM was not constrained from adopting and implementing the new ER policy at any time after 31st March, 2014, subject to appropriate notice being given.
6. The latest decision relates to whether:
 - 6.1 a further decision was required by IBM to adopt the new ER policy, and
 - 6.2 it was necessary for notice to be given of that new policy before implementation.
7. Warren J. held that it was open to IBM after 31st March, 2014 to decide to implement the new ER policy. Further, IBM's conduct after that date was consistent with such a decision having been made.
8. IBM was not required to specify a period before which the new policy would not take effect and which would allow for a member to rely on the existing policy for the period of the notice.
9. But IBM was obliged to communicate the new ER policy to members after 31st March, 2014 since it had not, before that date, done so prospectively. As a consequence, as at the date of the judgment, no new ER policy had yet been validly introduced.
10. The application for leave to appeal the main and remedies judgments was heard on 8th June, 2015. At the time of writing there was no news, although it is likely that judgment will be reserved.

III. NO REQUIREMENT FOR SHAREHOLDER APPROVAL FOR TOP-UP SCHEME: GRANADA V LAW DEBENTURE

1. On 28th May, 2015, the High Court (Andrews J) held that a secured unapproved unfunded retirement benefit scheme ("UURBS") did not require prior shareholder approval under Section 320 of the Companies Act 1985.
2. Granada challenged the validity of the UURBS, set up in 2000 for executive directors whose earnings exceeded the then-applicable earnings cap in the main approved company's scheme.
3. Granada's objective in bringing the proceedings was to recover gilts, now worth in excess of £40 million, which had been charged as security for its contractual obligations in respect of the UURBS, which it intends to continue to honour.
4. The Court held that there was no requirement for shareholder approval under Section 320; the directors had not acquired a non-cash asset falling within that Section. Their right to compel the trustee to enforce the security or the top up obligations did not amount to an interest in or right "over property".

Comment: Although the Companies Act 1985 was replaced by the Companies Act 2006, the new legislation includes provisions mirroring Section 320. The judgment (unless appealed) resolves a difficult issue on which Counsel have, in the past, given conflicting opinions.

IV. GOVERNMENT ACTUARY'S DEPARTMENT'S FAILURE TO REVIEW COMMUTATION FACTORS WAS MALADMINISTRATION: OMBUDSMAN'S DETERMINATION IN RELATION TO MR. MILNE

A. OVERVIEW

1. On 13th May, 2015, the Pensions Ombudsman published his determination in this case (PO – 1327) upholding M's complaint that

he suffered loss by virtue of the Government Actuary's Department ("GAD") failure to review commutation factors from 1998 to 2006 applicable to the calculation of the lump sum M was entitled to receive from the Firefighters' Pension Scheme on retirement aged 50.

2. The Ombudsman also found that GAD had delayed introducing the new factors when discussions started in 2005 and had taken into account irrelevant considerations when deciding whether to implement changes to the commutation tables.
3. The Ombudsman ordered GAD:
 - 3.1 to notify the scheme administrator of the appropriate factor, with the scheme then being required to adjust the lump sum to reflect the correct factor, and
 - 3.2 to compensate M for the loss of use of money, and any tax liability.

B. BACKGROUND

1. M's complaint was the subject of previous litigation when the Ombudsman rejected a preliminary point advanced by GAD that the Ombudsman had no jurisdiction to investigate M's complaint because GAD was not an "administrator".
2. An application for judicial review of the Ombudsman's decision was rejected by the High Court on 15th June, 2012 and by the Court of Appeal on 22nd July, 2013. This meant that the investigation into M's complaint could commence.
3. The complaint followed a 2009 High Court decision, in relation to the Police Pension Scheme, that GAD had a statutory duty arising from the scheme rules to produce commutation tables for the purpose of ensuring commutation payments bore "actuarial equivalence" to the surrendered portion of the pension at the time of retirement, and to review those tables on a periodic basis as appropriate.
4. The regulations considered in the Police Federation case were almost identical to those relating to the Firefighters' Pension Scheme so that many of the findings made by the High Court by analogy applied to the Firefighters' scheme and to M's complaint, and the Ombudsman was therefore bound by them.
5. Historically, tables of actuarial factors were reviewed by GAD in connection with the Police Pension Scheme and the Firefighters' Scheme around the same time, as most of the benefit provisions are the same and similar considerations and assumptions largely applied. Reviews were carried out in 1982, 1986, 1994 and 1998.
6. During the 1990s, Government departments became clients of GAD, commissioning reviews for the payment of a fee. GAD operated on the basis that responsibility to order the review of the commutation tables, and to publish those tables, lay with the relevant Government department.
7. A review of commutation factors was discussed between GAD and the Department in late 1993 and GAD concluded at that time that new tables did not need to be produced.
8. In 1998, in response to a query from the Department as to whether the tables should be reviewed, GAD suggested a review in 3 years' time. In fact the 1998 review was the last review undertaken in relation to the scheme until 2006, notwithstanding correspondence during that period between the Department and GAD on possible changes.

C. DETERMINATION

1. Although, under the new funding arrangements, GAD considered that it had to wait to be commissioned by the Departments to prepare tables, the Ombudsman held this was incorrect; the responsibility for commissioning a review and for instigating a revision of the actuarial tables lay with the GAD; a change in administrative arrangements was not capable of altering this statutory function.

2. The Ombudsman found it hard to understand why GAD had allowed its position to be undermined in such a fundamental way. The fact that no one else questioned the new approach was not evidence of the reasonableness of GAD's decision to adopt that approach. Arriving passively at a way of acting that was inconsistent with the law was not "taking a wrong view", an action which Robert Walker J. had identified as not necessarily amounting to maladministration.
3. The Ombudsman ordered that M be put in the position he would have been in had the reviews taken place i.e. had his cash sum been calculated using the factor that would have applied to him on his retirement. It was for GAD to decide what that factor would be. GAD should notify the relevant scheme administrator of this and the scheme should make the correct payment.
4. But the Ombudsman refused M's request that GAD should pay M's actuarial fees; in his view the actuarial analysis was not in fact necessary as the case did not turn on the reasonableness or otherwise of GAD's actuarial judgment.

D. OMBUDSMAN'S STATEMENT

1. On 15th May, 2015, the Ombudsman published a press release noting that, strictly, the decision only applied to M but that the Ombudsman hoped that all affected bodies would swiftly take steps to deal with the position of other affected retired firefighters and police so that it would not be necessary for individuals to pursue complaints before the Ombudsman.
2. He advised affected individuals to wait to see whether the Ombudsman's determination would be appealed; if not, it is up to the various bodies to decide how to deal with all other cases. The Ombudsman may publish further information on its website when it knows whether there will be an appeal.

3. The determination potentially affects any police and firefighters who retired between 1998 and 2006 although the Ombudsman noted that it does not follow that a review will result in a different factor and a higher cash sum, particularly in the early years.

Comment (1): This is an example of failure to follow due process for reviewing commutation factors leading to a costly recalculation of factors for a large number of affected members. The Ombudsman's finding that a failure to review commutation factors when under a duty to do so can amount to maladministration is relevant to non-statutory schemes (i.e. the usual occupational pension scheme set up under trust) where the trust deed and rules provide for commutation factors to be determined by the scheme actuary.

Comment (2): It is important that factors are reviewed periodically, using the process specified in the trust deed and rules.

Comment (2): In light of the post-Budget 2014 flexibilities, it is important to be clear about the distinction between transfer value factors and lump sum commutation factors where they differ (and to make sure the differences have been specifically considered by the trustee (if the trustee is the person who determines the commutation factors under the trust deed and rules)).

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