

**Pensions law team – April 2019**

## What trustees and sponsors need to know from recent case law

Key case law discussion

The courts have offered essential guidance to sponsors and trustees in a number of cases over the past 12 months. This briefing discusses some of the most 'need to know' case law developments. Please do not hesitate to contact the Stephenson Harwood pensions law team via your usual contact or at [pensions@shlegal.com](mailto:pensions@shlegal.com) if you would like to discuss any of these issues further.

### **Guaranteed minimum pensions (GMPs) must be equalised**

The *Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank PLC* was a landmark ruling handed down in October 2018, with a supplementary judgment being handed down in December 2018.

These judgments made clear that:

- trustees must amend their scheme rules to counter the effects of unequal GMPs;
- unless the employer agrees, trustees must equalise using the method that interferes the least with the employer's funding obligations; and
- arrear payments will be due from 1990, unless scheme rules provide for forfeiture after a fixed period (typically 6 years). Interest is payable on arrear payments.

Please see our [briefing](#) for more detail on these judgments.

#### **Comment:**

Trustees and sponsors need to discuss the method they wish to use to bring about GMP equalisation. In addition, thought needs to be given to immediate practical considerations. These include how to deal with transfer out requests and serious ill health and trivial commutation applications. Please see our [briefing](#) for the Stephenson Harwood pensions law team's view on how to deal with these matters. It is also expected that further clarification will follow with a consequential hearing that will deal with some of the issues that were parked in the main judgment, for example regarding the treatment of past transfers out and how to approach de minimis payments.

### **The exercise of a unilateral power of amendment by a trustee may be deemed invalid if not exercised for a proper purpose**

In *British Airways plc v Airways Pension Scheme Trustee Ltd*, the trustee benefitted from a unilateral power of amendment. It exercised that power to introduce a rule allowing the trustee to grant discretionary pension increases, and subsequently exercised that power. The court decided that the governing documentation of the scheme meant that the trustee's function was to administer the scheme and not to 'design the benefit structure'. The trustee had, in the court's view, used the amendment power for an improper purpose. As a result, the introduction of the discretionary increase power was set aside.

#### **Comment:**

Trustees should reflect carefully on exercising a power, even where that power is explicit. The BA case demonstrated that trustees may not be able to take certain actions, even where they have a power that purports to let them do so. The trustee is appealing the decision to the Supreme Court with the hearing listed for July 2019. This is, therefore, an area to watch.

## Whether the index used for pension increases or revaluation can be changed will vary from scheme to scheme depending on the rules

Where scheme rules provide that the index used for pension increases or revaluation can be altered, the ability to adopt an alternative index in a particular circumstance will depend upon the correct interpretation of that rule.

A steady body of case law is developing in this area and 2018 saw the courts provide further guidance. Stephenson Harwood advised on the two most recent and high profile cases in this area.

In the case of *Buckinghamshire and others v Barnardo's and others*, the rules provided that the measure to be used for indexation was the Retail Prices Index (**RPI**) "or any replacement adopted by the Trustee...". The Supreme Court held that this did not provide the trustee with the power to choose an alternative index unless and until RPI was replaced as an officially published index.

In *British Telecommunications plc v BT Pension Scheme Trustees Limited and another*, the rules permitted an alternative index to RPI to be used for calculating pension increases if RPI had ceased to be published or had become "inappropriate". The Court of Appeal held that it had been open to the court below to conclude that RPI had not become an inappropriate index and, therefore, it was not open to the sponsor to apply a different index. BT is seeking permission to appeal this decision.

For background on this topic and further details on the case law in this area, please see our briefings on the [Barnardo's](#) and the [BT cases](#).

### Comment:

If trustees and/or sponsors are considering altering the index used for pension increases or revaluation, the rules of their scheme should be carefully considered and legal advice sought. Whilst case law can offer useful guidance for schemes which purport to allow an alternative index to be used, each case is fact specific. It is likely that the case law in this area will continue to develop. Given the recent involvement of the Stephenson Harwood pensions law team in this area, we are well placed to provide any guidance you may need on the interpretation of your rules.

## The six year limit for recovery of overpaid pensions may not apply if overpayments are to be recovered by way of recoupment

The recovery of an overpaid pension is usually limited by a statutory six-year limitation period. However, in the decision of *Burgess v BIC UK Ltd* the court commented that if overpayments were to be recovered by equitable recoupment, this six year limitation period would not apply. Under recoupment, trustees recover overpayments by making deductions from future pension payments.

The court considered, however, that if the amount of the set-off is in dispute, recoupment can only be exercised if the obligation to repay has become enforceable under an order of a competent court. In the *Bic* case it was held that the Pensions Ombudsman would not constitute a competent court for these purposes, but an order of the County Court would.

The Court of Appeal heard an appeal of this case earlier this year, although the point on time limits applicable to recoupment was not in issue. The trustees were represented by Stephenson Harwood.

### Comment:

If trustees are seeking to recover overpayments, the equitable remedy of recoupment may be available even if the usual six year time limit has expired. However, the court suggested in *Bic* that there may be additional procedural steps that have to be taken before recoupment can be used. In addition, the court's view that the six year limitation period does not apply to recoupment was 'obiter' (as, on the facts of that case, it was held that there was no overpayment that could be reclaimed). As a result, this view will not bind future courts, but may be an indication of how the issue will be approached.

## The burden of proof for justifying age discriminatory practices is a high one

Direct age discrimination can be justified if it is a proportionate means of achieving a legitimate aim.

The Government attempted to rely on this justification in respect of the directly age discriminatory transitional arrangements that had been introduced in respect of the Judicial Pension Scheme and firefighters' pension schemes in the conjoined appeals of *Lord Chancellor and another v McCloud and another*; *Secretary of State for the Home Department and others v Sargeant and others*. In essence, these arrangements offered protection to members who were closer to retirement (and therefore older) and therefore favoured members based on age. One of the arguments put forward by the Government was that older members had less time to adjust their financial planning, and therefore required additional protection.

The court found that the discriminatory practice could not be justified. In particular, the Government had not offered any evidence that protecting members closest to retirement was a legitimate aim. A moral decision to protect older members because it 'felt right' was not "good enough". For more information, please see our [briefing](#) on this case.

### Comment:

Any attempt to justify discriminatory practices should be backed up by supporting evidence and be more than assertions and generalisations. Where directly discriminatory practices are occurring, "the burden of proof of the legitimacy of a claimed aim is a high one".

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