

Pensions law team – April 2019

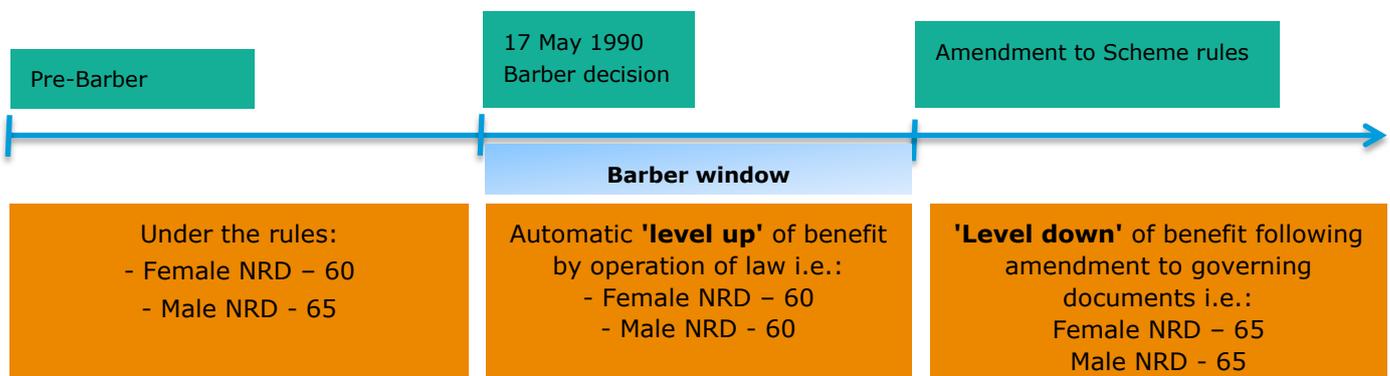
Is retrospective equalisation possible?

The Advocate General's Opinion in the case of *Safeway v Newton*

Since the EU decision of *Barber* in May 1990, occupational defined benefit pension schemes have been grappling with effectively equalising their normal retirement dates (**NRDs**) for male and female members. In the case of *Safeway v Newton* the Advocate General has given its opinion that retrospective equalisation is not permissible, as many already suspected.

Background to equalisation

Historically, male and female members often had unequal NRDs in occupational defined benefit pension schemes. Usually, male members had a higher NRD than female members. It has been commonly understood that, since the European decision of *Barber* on 17 May 1990, this practice was unlawful discrimination. As a result, since 17 May 1990 and until schemes amended their rules to provide male and female members with equal NRDs, the NRD of the disadvantaged sex (usually the male) was automatically changed to that of the advantaged sex. This usually resulted in a more expensive outcome for schemes and as a consequence, they then generally amended their rules to provide both sexes with an equal, but later, NRD. The period between the *Barber* decision and a scheme amendment to reflect equal NRDs is known as the 'Barber window'.



Safeway v Newton

Facts

The Safeway Pension Scheme (the **Scheme**) had unequal NRDs of 65 for male members and 60 for female members. The *Barber* decision automatically caused these to change to age 60 for both male and female members from 17 May 1990 until the Scheme was amended to provide otherwise. The Scheme purportedly amended NRDs as follows:

- September 1991 - an announcement was issued to members stating that NRDs would be equalised at age 65 for male and female members and that this would take effect from 1 December 1991;
- 1 December 1991 - a further announcement was issued to members confirming that NRDs would be equalised at 65 from that date; and
- 2 May 1996 - the Scheme's governing documentation was amended to reflect NRDs of 65 for male and female members with retrospective effect to 1 December 1991.

The question raised in the *Safeway* case was whether the change of NRDs to 65 was effective with effect on and from 1 December 1991, or when the amendment was finally introduced on 2 May 1996.

Domestic hearings

The High Court and the Court of Appeal held that, under the Scheme's power of amendment, an amendment to the Scheme's governing documentation could only be made by deed. The announcements made in September and December 1991 could not, therefore, have amended NRDs under the Scheme with effect on and from 1 December 1991.

The amendment power did, however, allow for amendments to be made with retrospective effect. The question was, therefore, whether the 2 May 1996 amendment was valid retrospectively so as to change NRDs to 65 with effect on and from 1 December 1991 or whether the amendment could only have prospective effect on and from 2 May 1996.

At first instance, Warren J argued that the amendment could not have increased NRDs retrospectively to 65 during the *Barber* window as that breached the principle of equal treatment in (what was) Article 119 of the Treaty of Rome. However, the Court of Appeal was concerned that, if Warren J's approach were correct, it could have the effect of making what were defeasible (i.e. retrospectively amendable) rights under domestic law into indefeasible (i.e. fixed) rights as a result of EU law.

The Court of Appeal determined that this was a matter of EU law and therefore referred the question to the Court of Justice of the European Union (**CJEU**).

Opinion of the Advocate General

The Advocate General has proposed that the CJEU responds to the referral by stating that the EU prohibition on levelling down of benefits during the *Barber* window applies whether or not the domestic rules of the pension scheme allow NRDs to be amended retrospectively. The Advocate General noted that:

"the defeasible (amendable retrospectively) or indefeasible (fixed) nature of the right...is immaterial to the application of the prohibition...on levelling down, which lasts so long as the *Barber* window remains open".

On this reasoning, the amendment could not have had retrospective effect back to 1 December 1991. The *Barber* window therefore remained open until the amendment was made on 2 May 1996.

Comment

Whilst the Advocate General's opinion is not binding on the CJEU, it is expected that the Court will follow it. Given the fundamental principle of equal pay within EU law, the opinion is probably unsurprising. It also acts as a useful reminder to schemes to ensure that any equalisation was effectively introduced prospectively and in accordance with the amendment power of the governing documentation of the scheme.

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