

Pensions law team – October 2019

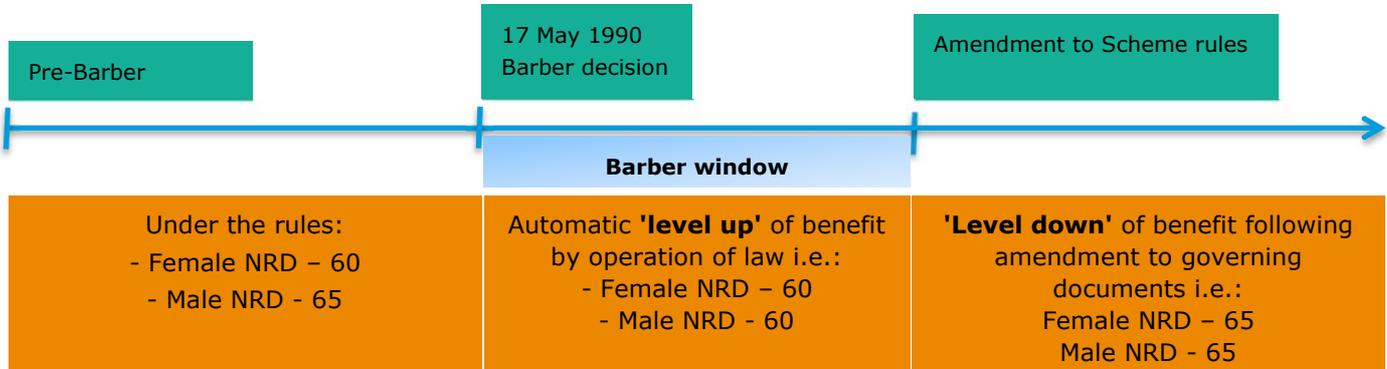
Retrospective equalisation – a possibility?

The CJEU’s decision 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 CJEU has somewhat muddied the waters in this area suggesting that in certain situations, retrospective equalisation may be permissible.

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 proposed that the CJEU respond 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.

Judgement of the CJEU

The CJEU was not bound to follow the decision of the Advocate General.

The CJEU held that, once discrimination has been found to exist (for example through unequal NRDs for male and female members):

- the application of the equal treatment principle must be immediate and full and cannot be made subject to conditions which maintain discrimination, even on a transitional basis; and
- the principle of legal certainty must be observed (in particular, in cases which entail financial consequences) such that the individuals concerned know precisely their rights and obligations.

The steps taken to equalise NRDs before the 1996 deed did not satisfy these conditions as the rules of the scheme could not be validly amended without a deed.

However, the CJEU did not go so far as to hold that retrospective equalisation could never be possible. It noted that:

"...it is settled case-law that as a general rule the principle of legal certainty precludes a measure implementing EU law from having retroactive effect...That said...it is possible measures seeking to end discrimination contrary to EU law may, exceptionally, be adopted with retrospective effect provided that, in addition to respecting the legitimate expectations of the persons concerned, those measures are in fact warranted by an overriding reason in the public interest".

In this case, public interest might allow retrospective equalisation where it was "...necessary to prevent the financial balance of th[e] pension scheme from being seriously undermined". The CJEU did not have any evidence before it to suggest that allowing retrospective equalisation in this case was warranted by an overriding reason in the public interest – it left it to the national court to confirm that was the case.

Comment

In contrast to the decision of the Advocate General, the decision of the CJEU has muddied the waters in the area of retrospective equalisation. It was generally accepted that equalisation could not be achieved retrospectively. However, this decision now seems to cast some doubt on that premise and suggests that, in some circumstances (albeit they may be limited), retrospective equalisation may be possible. Those schemes which have an amendment power that allows retrospective amendments and which may previously have attempted to equalise retrospectively, may now consider revisiting whether they could fall within the "financial balance" exception. However, the case offers scant guidance as to the extent of that exception.

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