

Indexation under the BT Pension Scheme: the Court of Appeal's decision

The Court of Appeal has handed down its decision in the most recent instalment in the case law determining when pension schemes can switch indices for the purposes of indexation. In the BT case, the court determined that under the terms of the BT Pension Scheme (**the Scheme**), the Retail Prices Index (**RPI**) remained the appropriate index to use. Stephenson Harwood acted for the representative beneficiary.

Background

Legislation requires that in defined benefit occupational pension schemes pensions in payment are increased (known as indexation). The purpose of this is to protect pensions from the effects of inflation. Primary legislation does not, however, specify the inflation index that must be used for these purposes. Instead, the Secretary of State makes an annual order to specify the rate that can be used. Historically, these orders have specified RPI as the relevant index against which to calculate indexation. This, however, changed in January 2011. Since then, the relevant index that has been applied in the annual orders has been the Consumer Prices Index (**CPI**).

Generally, the use of CPI rather than RPI as the relevant index would produce lower rates of indexation, and therefore be cheaper for the relevant scheme to provide. For this reason, many schemes are keen to understand if they are able to switch to CPI (or any other alternative index).

Check the rules

Given this background, pension scheme rules often refer explicitly to "RPI" as the index to be used to calculate the correct level of indexation. As CPI was introduced through orders issued by the Secretary State rather than as a legislative override, whether a scheme can move away from RPI depends upon the specific wording of their scheme rules:

Rule	Able to move away from RPI?
Rule hard-wires that index to be used is RPI	Not without a rule change (and only for future service)
Rule provides that index to be used is that set out in the order issued by the Secretary of State	CPI will automatically apply as specified in annual orders
Rule provides that index to be used can be changed in certain circumstances	Use of alternative index depends upon the interpretation of that rule. The BT case fell into this category

The Scheme

The Scheme rules provide that increases to pensions in payment are to be by reference to RPI "...or if this ceases to be published or becomes inappropriate,

such other measure as the Principal Company [BT], in consultation with the Trustees, decides".

It was common ground that once it was determined that RPI had become inappropriate, it was for BT, in consultation with the trustees, to determine what other cost of living index should be used.

The Court of Appeal, following the decision of the High Court, held that determining whether RPI was "inappropriate" was a question of objective fact and

was to be determined by the court where the trustees and BT could not agree.

On the evidence, the Court of Appeal decided that the High Court Judge was entitled to come to the decision that RPI had not become inappropriate and the appeal was therefore dismissed.

Other court decisions

There has been a wealth of case law in this area. Most of the decisions focus on schemes which, like the Scheme, have rules which permit the index to be changed in certain circumstances. Some key examples include:

Case	Rule	Ability to move away from RPI?
Danks and others v Qinetiq Holdings Ltd	"Index of Retail Prices...or another suitable cost of living index selected by the trustees..."	✓
Arcadia Group Limited v Arcadia Group Pension Trust Ltd	"...the Government's Index of Retail Prices or any similar index satisfactory for the purposes of HMRC"	✓
Thales UK Ltd v Thales Pension Trustees	If RPI is not published or if "...its compilation is materially changed...the nearest alternative index..." shall be applied	X
Barnardo's v Buckinghamshire and others	"...the General Index of Retail Prices published by the Department of Employment or any replacement adopted by the Trustees without prejudicing Approval".	X (unless RPI was officially replaced)

What now?

The BT decision has come hot on the heels of the recent Supreme Court decision of Barnardo's, where Stephenson Harwood acted for the trustees. In the absence of a legislative override for private sector defined benefit pension schemes, it looks like the case law in this area will continue to evolve.

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