Sackers extra

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SOZ

Abbreviations commonly used in 7 Days

Alert/News: Sackers Extra publications (available from the client area of our website or from your usual contact)
DB: Defined benefit
DC: Defined contribution
DWP: Department for Work and Pensions
ECJ: European Court of Justice
FAS: Financial Assistance Scheme
HMRC: HM Revenue & Customs
NEST: National Employment Savings Trust
PPF: Pension Protection Fund
TPR: The Pensions Regulator

LEGISLATION

The Occupational Pensions (Revaluation) Order 2011

The 2011 Revaluation Order has been laid before Parliament and will come into force on 1 January 2012. As in 2010, the Order uses the September to September Consumer Prices Index figures. It will also apply to schemes that use the statutory method for making increases to pensions in payment.

The Order specifies the minimum required level of revaluation for pension rights (excluding Guaranteed Minimum Pensions) for deferred pensioners' benefits in accordance with section 84 (and Schedule 3) of the Pension Schemes Act 1993. The percentage for the revaluation period 1 January 2011 to 31 December 2011 is 2.5%.

Further information can be found in the explanatory memorandum which accompanies the Order.

FINANCIAL REPORTING COUNCIL (FRC)

Targeted questions for users of actuarial information

The FRC has published a series of questions which, it suggests, users of actuarial information may wish to ask themselves and their actuaries. Three sets of questions are targeted at particular user groups and cover specific areas of work.

The questions on pension scheme funding set out a number of areas of focus for trustees in connection with the scheme funding process. These include planning for the actuarial valuation, the discount rate, mortality and other assumptions.

FRC Press Release

HM TREASURY

Autumn Statement 2011

The Autumn Statement was delivered on 29 November 2011. Against the backdrop of the continuing economic crisis, the Chancellor, George Osborne, announced a number of measures aimed at maintaining economic stability and enabling the Government to meet its fiscal targets.

Of particular interest to occupational DB pension schemes are the proposed changes to the tax rules relating to employer asset-backed contributions (ABCs). The Government has confirmed that it will introduce provisions in the Finance Bill 2012 (to amend the Finance Act 2004) which are designed to ensure that the value of tax relief given to employers accurately reflects - but does not exceed - the amount of the payments received by schemes under ABC arrangements. However, it remains keen to preserve as much flexibility as possible for employers to continue using ABCs to manage pension deficits.

The legislation, which has been published in draft, will take effect from 29 November 2011 ensuring that no excessive tax relief arises in respect of new ABC arrangements set up on or after that date. Transitional provisions will apply to existing ABCs that have already received tax relief to ensure that the correct amount of tax relief is given by the end of an arrangement.

The Chancellor also confirmed that:

- the next round of increases to State Pension Age will see it rise to 67 by 2028;
- the basic state pension will be uprated in 2012 in line with its “triple lock” guarantee, i.e. the highest increase of earnings, prices and 2.5%; and
- the Government plans to work in partnership with pension schemes to provide additional investment for UK infrastructure.

For more information, please see our Alert: "Autumn Statement 2011" dated 1 December 2011.

Reform of the Private Finance Initiative (PFI)

On 1 December 2011, the Government launched a Call for Evidence on reform of the PFI.

The Treasury notes that the Government is committed to continuing sustainable investment in the assets it needs to deliver public services, while ensuring that this investment is cost effective and that the taxpayer is getting maximum value for money.

The Call for Evidence explains that central to the development of a new model are the objectives of long-term value for money for the taxpayer, more effective use of private sector innovation and skills, reducing costs, improving flexibility and increasing transparency. One of the Government’s aims in this regard is to access a wider range of financing sources, including encouraging a stronger role to be played by pension fund investment.

HM Treasury Press Release

CASES

The Staff Side of the Police Negotiating Board and others; Piper and Others v Secretary of State for Work and Pensions and others

In a judgment handed down on 2 December 2011, the High Court has dismissed an application for judicial review of the Government's decision to switch from RPI to CPI as the measure for increases to public sector pensions. The unions have announced that they will appeal the judgment.

Background

In the Coalition Government's first Budget in June 2010, it announced it intended to use the Consumer Prices Index (CPI) rather than the Retail Prices Index (RPI)[1] as the measure for applying increases (both for deferred pensions and pensions in payment) to public sector pensions from April 2011.

Judicial review proceedings were commenced in the High Court by public sector unions and others, to challenge the switch from RPI to CPI.

The claim was brought on four distinct grounds:

1. The switch to CPI was not consistent with statutory obligation - CPI is not an index which the Secretary of State was entitled to adopt;

2. Irrelevant considerations and improper purpose - the decision to switch from RPI to CPI was taken having regard to irrelevant considerations or for an improper purpose;

3. Legitimate expectation - there had been a series of representations made to relevant trade unions representing public sector workers and to public service employees and pensioners to the effect that RPI would continue in the future to be adopted as the method for determining the relevant up-rate in pension benefits; and

4. Sex discrimination - the Secretary of State did not comply with its statutory duty under the Sex Discrimination Act 1975 (SDA) to have due regard to the need to promote the equality of opportunity between men and women, and failed to have regard to the fact that the effect of the changes would have a particularly marked adverse impact on women, who constitute a significant proportion of pensioners.

The Judicial Review

The application for judicial review was dismissed.

1. Was CPI an appropriate index?

The Court rejected the claimants' arguments that CPI is not a permissible index for the Secretary of State to adopt. Among other things, it found that CPI has become a well established method of assessing the relative increase in prices.

Elias LJ, who gave the leading judgment, found that both CPI and RPI are readily available to the Secretary of State as possible measures which he can use for the increase in the general level of prices. He went on to say that: "if it appears to the Secretary of State that this is a proper way to ensure that pensions retain their value, without pensioners receiving either too much or too little, we can see no reason why he should not adopt that index."

2. Irrelevant considerations

The claimants' argued that it was improper for the Secretary of State to have taken into account economic considerations when he decided to switch to CPI.

Elias J found that it was clear that Parliament had intended that the Secretary of State should be entitled "to use any measure which lay readily to hand and which appeared to him to be suitable". He went on to note that "for many years, RPI was the main index in

[1] CPI measures the change in a fixed basket of products and services. RPI is based on a fixed basket of retail goods, including some housing costs – particularly mortgage payments

the field, and so the obvious candidate; but since 1996 RPI and CPI have both been reasonable candidates either of which might be chosen".

Elias LJ concluded that the Secretary of State was entitled to adopt any method, provided he was satisfied that it is a fair and genuine method "so that it can legitimately be said that it achieves the objective of protecting the purchasing power of the relevant benefits and pensions". This is the case, even where his reason for preferring that method "is that it draws less on the public purse".

McCombe LJ did not agree with Elias LJ's decision in this respect and gave a dissenting judgment. His view was that it was impermissible for the Secretary of State to take into account public expenditure as the "primary and substantial reason" for the switch.

3. Legitimate expectation

Four main reasons were given by the claimants which rendered it "unfair or an abuse of power to go back upon the general understanding that RPI would be used for the up-rating review":

- benefit statements and explanatory literature made reference to the fact that benefits would be up-rated from time to time by reference to RPI;
- assumptions were made by both sides in the course of negotiations with trade unions, that RPI would be the yardstick for uprating;
- individual scheme members who bought into public service schemes and those paying for augmented benefits did so on the basis of actuarial calculations assuming the use of RPI for statutory uprating purposes; and
- past practice led to an assurance that pensions would continue to be uprated by CPI in future.

Elias LJ concluded that, despite this evidence (and in line with the earlier Prudential case[2]) the legitimate expectation claims did not "get off the ground" but even if they had, "such an expectation can be overridden if the wider public interest requires it".

4. Sex discrimination

There is a public sector sex equality duty which requires the Secretary of State to consider the impact of any change on women. But again, Elias LJ found that the impact on women had been considered and that this ground was not made out.

Comment

This is an important case on the switch from RPI to CPI and it unsurprising that it concludes that the Government's imposition of CPI on the public sector was lawful. The private sector have also been watching this case with interest as any decision here could impact on the switch from RPI to CPI in the private sector.

In theory, with the recent finalising of the legislative amendments in the Pensions Act 2011 and now with a decision in this case, all parties should be able to move forward on this issue. However, we understand that the case is going to be appealed, meaning a further period of uncertainty.

[2] *Prudential Staff Pensions Limited v The Prudential Assurance Company Limited and others* [2011] EWHC 960 (see Sackers Quarterly June 2011 for more information)

O'Brien v Ministry of Justice (ECJ)[3]

The Advocate General of the ECJ has delivered her opinion in a case in which a part-time member of the UK judiciary claimed the same pension benefits (pro-rated) as for a full-time member. The crucial factor here was to determine whether there was a comparable full-time worker and whether they performed "the same essential activities". The AG concluded that they did.

The next stage in the process is for the ECJ to consider the issue.

Background

The EU Framework Directive on Part-time Work[4] (the Framework Agreement) applies to "part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State".[5] It prohibits the less favourable treatment of part-time workers, in respect of employment conditions, than comparable full-time workers, unless the difference in treatment can be objectively justified.

In the UK, the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the Regulations) allow part-time workers to challenge less favourable treatment which is on the ground of their part-time status if it cannot be objectively justified. These Regulations implement the Part-Time Workers Directive, which aims to give effect to the Framework Agreement.

The Regulations only apply to "workers" and do not apply to any individual in his capacity as the holder of a judicial office who is remunerated on a daily fee-paid basis.[6]

Facts

Mr O'Brien is a barrister and Queen's Counsel. He was also appointed as a recorder in 1978 (a part-time judge working at the Crown Court) and, as such, was paid on a fee basis for each day's sitting or working day.

All part-time judges are entitled (where appropriate) to sick pay, maternity or paternity pay and similar benefits during service. Full-time judges and salaried part-time judges are entitled to pensions on retirement. However, fee-paid part-time judges have no entitlement to a pension on retirement.

Mr O'Brien claimed a pension, pro-rata, to that of a full-time judge who essentially performed the same kind of work.

The Court was asked to consider:

- if it is for national law to determine whether or not judges as a whole are "workers" within the meaning of the Framework Agreement or if there is a Community norm by which the matter must be determined; and
- if judges are considered to be "workers", can national law discriminate between full-time and part-time judges or between different kinds of part-time judges in the provision of pensions.

[3] ECJ Case C-393/10

[4] Council Directive of 15 December 1997 (97/81/EC) Concluded by UNICE, CEEP and the ETUC

[5] Directive 97/81/EC

[6] Regulation 17

Opinion of the Advocate General (AG)

The AG concluded that the question of whether judges are to be regarded part-time workers is a matter to be determined by national law and noted that there is no single definition of "worker" in EU law.

However, although this is a decision for Member States, the AG observed that the Framework Agreement imposes certain limits on their discretion.

The fact that judges are classified as "holders of office" was not sufficient in itself to deny them employment rights stemming from the Framework Agreement. The UK Government had argued that the independence of the judiciary was a basis for removing judges from the scope of the Framework Agreement. But the AG was of the view that this was not an appropriate criterion for excluding a professional category from the scope of the Framework Agreement.

In relation to second question, the AG was of the view that national provisions which discriminate between full-time and part-time judges were contrary to the Framework Agreement. There could be no arbitrary distinctions between various types of part-time work that infringe the general prohibition on discrimination, where the difference in treatment is not objectively justified.

The AG considered that the crucial factor in determining whether there was a comparable full-time worker was whether they performed "the same essential activities". The parties submitted at the hearing that recorders and full-time judges do have the same functions. Although the UK Government had argued that full-time judges and recorders were not in a comparable situation because they have different careers, the AG considered this only to be relevant "at best" in considering whether a difference in treatment could be objectively justified –this was a matter for the UK court to determine.

The UK Government's other arguments - that the fact that fee-paid judges are able to continue their other careers in the legal profession or academia, whilst salaried part-time judges are not able to do this; and that any fee-paid judge is free to apply for a position as a salaried part-time judge - were not sufficient measures in themselves to justify the difference in treatment.

Comment

The next stage in this case is for the ECJ to decide whether or not to follow the AG's opinion (in practice, the ECJ often does).

If the ECJ does follow the AG's opinion in this case, it will then be up to the Supreme Court to determine whether judges as a category are within the scope of the Regulations and, if so, whether regulation 17 can be objectively justified or if it must be set aside.

Although the impact of this decision is confined to those holders of a judicial office who are remunerated on a daily fee-paid basis, it serves as a reminder to schemes of the general obligation not to discriminate against part-time workers.