

Pensions law – the week in review

18 May 2009

AT A GLANCE

PENSIONS OMBUDSMAN

- Corporate and Business Plan published for 2009-2012

PENSION PROTECTION FUND

- Section 179 guidance revised

CASES

- Rolls Royce PLC v Unite the Union (Court of Appeal)

1 PENSIONS OMBUDSMAN (PO)

1.1 Corporate and Business Plan published for 2009-2012

The PO (which incorporates the Pension Protection Fund Ombudsman), has published its latest Corporate and Business Plan.

The Plan reviews themes identified in last year's business plan and sets out the PO's intended activities for the next three years, with its main focus on the coming year. The PO, Tony King, notes that significant progress has been made towards clearing an existing backlog of cases. Among its aims, by 31 March 2010 the PO intends to have no more than 20 cases in hand at a time that are more than 12 months old (an improvement on the 2008/09 goal of 50 cases at 31 March 2009).

The Plan also notes that some aspects of the PO's process have been revised, including: simplifying and shortening formal decisions, and introducing more flexibility into the investigation process.

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To access the PO's Corporate and Business Plan, please click on the link below:

http://www.pensions-ombudsman.org.uk/Publications/docs/Corporate_Plan_2009.pdf#zoom=100

2 PENSION PROTECTION FUND (PPF)

2.1 Section 179 guidance revised

The PPF has published a new version (version G5) of its guidance for undertaking a valuation in accordance with section 179 of the Pensions Act 2004. (The PPF will take into account the results of a s.179 valuation when calculating a scheme's risk based levy.)

The guidance has been updated to:

- reflect the fact that s.179 valuation information is now provided to the PPF via the Pension Regulator's electronic system "Exchange"; and
- to incorporate changes required by recent legislation, such as the change in the cap on revaluation of final salary benefits in deferment for post 5 April 2009 accrual.

The new version of the guidance will be effective for valuations with an effective date on or after 1 April 2009, or for valuations which are signed after 1 October 2009.

To access the latest version of the guidance, please click on the link below:

http://www.pensionprotectionfund.org.uk/section_179_guidance_version_g5_may_2009.pdf

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3 CASES

3.1 Rolls Royce PLC v Unite the Union (Court of Appeal)

The Court of Appeal (CA) has confirmed that the inclusion of a length of service criterion in a redundancy selection framework is justifiable and in keeping with the Employment Equality (Age) Regulations 2006 (the Age Regulations).

Background

Two collective agreements for “redeployment and redundancy” had been entered into between Rolls Royce (the Employer) and the Trade Union for employees at the Employer’s Derby and Hucknall factories. (As these were essentially the same, only one was specifically considered, and they are collectively referred to here as “the Agreement”).

The Agreement included an assessment framework which was designed to ensure that the redundancy selection process was “fair in general terms and fair to the individual”, with the intention that a restructuring could be implemented “flexibly and peaceably”. The process provided for five measured criteria: achievement of objectives; self motivation; expertise/knowledge; versatility/application of knowledge; and wider personal contribution to the team. Points were awarded under each of these heads, as well as for each year of continuous service. Those employees with fewest points could be selected for redundancy.

The employer (perhaps unusually), argued that taking long service into account in this way amounted to indirect age discrimination which could not be justified, whereas the Union contended that it was lawful.

High Court Decision¹

At first instance, the judge held that having a redundancy policy which was perceived as fair and which could be executed “peaceably” was a legitimate aim. Loyalty and experience, which might not otherwise “be fully taken account of in the measurement process”, were likely to be fairly indicated by length of service.

¹ For a more detailed summary of the first instance decision, please see 7 Days dated 10 November 2008

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The judge also found that the application of the length of service criterion amounted to the award of a benefit (as it could lead to the retention of employment which would otherwise be lost), and consequently fell within the exemption in the Regulations for the provision of certain benefits based on length of service.²

Court of Appeal Decision

The CA (by a two to one majority) also found for the Union.

The Employer's appeal focussed largely on its view that, in considering whether the selection process which included a length of service criterion could be justified, there had been no consideration of whether the measure was "*proportionate*" as a means of achieving a legitimate aim.

Although Lord Justice Wall agreed that the question of proportionality had not been addressed by the High Court, he was able to find that the inclusion of a length of service criterion was a proportionate means of achieving a legitimate aim. This was because length of service was only one of a number of factors which would be applied in the event of the selection framework being invoked, and, of itself, was not determinative.

Lord Justice Wall also found that it was reasonable for the Agreement to "reconcile the different perspectives of company and union in order to produce a selection process which is fair" and that the length of service criterion was "entirely consistent with the overarching concept of fairness".

The CA also confirmed the High Court's view that having an objective of rewarding loyalty and achieving "a stable workforce in the context of a fair process of redundancy selection" was a legitimate aim.

² Regulation 32

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However, it should be noted that while the CA was happy to determine these matters of construction in terms of the lawfulness of the Agreement, the Employer's selection framework has yet to be tested in practice. This means that the door has been left open to potential claimants to the employment tribunal, to raise arguments of unfair dismissal or unfair selection process in future.

Comment

While this case will primarily be of interest in the employment law context, it is part of a useful bank of knowledge being built up on justification in the context of the Age Regulations.



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