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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

ACTUARIAL PROFESSION

Enhanced transfer values and pension increase exchanges: Briefing for pensions actuaries

On 17 November, the Institute and Faculty of Actuaries (the Institute) issued a briefing for pensions actuaries on enhanced transfer value (ETV) and pensions increase exchange (PIE) exercises.

The note outlines the actuary's statutory role in ETV and PIE exercises and sets out some of the points raised in meetings with policymakers.

The Institute hopes that trustees and employers will involve actuaries in helping scheme members get a fair deal, whether they opt to take up the ETV offered or not. But it also notes that it "cannot force employers or trustees to use actuaries beyond their statutory role nor can [it] take on any quasi "policeman" role in this area". It goes on to note that its role is to educate actuaries in this area and to remind them of their responsibilities under the Actuaries' Code.

HM REVENUE & CUSTOMS

HMRC Notice: Input tax on funded pension scheme expenditure

HMRC published revised version of Notice 700/17 on 15 November 2011 for employers and trustees on claiming input tax on funded pension scheme expenditure.

The revised guidance includes changes made to ensure that the technical content remains up-to-date and relevant. It has also been restructured and rewritten to improve readability.

PENSIONS POLICY INSTITUTE (PPI)

Pensions Primer Updated

The PPI's Pensions Primer has been updated as at 17 November 2011.

The Primer, which is designed for people wanting to learn about UK pensions policy, gives a detailed description of the current pensions system in the UK, as well as some of the archaeology of these layers.

CASES

HR Trustees v Wembley PLC and another

The High Court has confirmed the validity of an alteration made to the rules of an occupational pension scheme, despite a failure by the trustees to comply with all the administrative steps required by the power of amendment.

Background

This case concerns the Wembley 1989 Pension Scheme (the Scheme), an insured scheme administered by Legal & General.

In 2000, the trustees sought to amend the Scheme's pension increases rule, so that benefits accrued on or after 6 April 2000 would increase at the Retail Prices Index (RPI) subject to a maximum of 5% per annum, instead of the flat rate of 5% which applied previously.

The Scheme's amendment power required:

- authorisation of any amendment by the principal employer;
- the trustees "to declare any such alteration or addition to the rules in writing under their hands"; and
- individual notification to affected members in writing.

The amendment power was also subject to the proviso that accrued benefits were not to be affected by the change.

Facts

At a meeting of the trustees in November 1999, they agreed that pension increases should be capped with effect from 6 April 2000. In January 2000 they further agreed to amend the Scheme rules to reflect this change. Their decisions were recorded in the respective trustee meeting minutes.

At a further meeting on 5 July 2000, a document headed "Scheme Amendment Authority", which set out the intended changes to the rules, was signed by the trustees who were present at the meeting (representing four out of five of the then trustees). At that meeting, a draft announcement to members informing them of the change to pension increases was also approved. The announcement was issued later that month to "all relevant members".

It was common ground that the amendment would ultimately take effect from 5 July 2000 (i.e. when it was signed), meaning the proviso to the amendment power was not breached.

The final trustee who was missing from the meeting was not asked to sign the amendment. In her evidence before the Court this was considered to be an "administrative oversight".

A claim seeking directions from the High Court in relation to the validity of the July 2000 amendment was issued in January 2011.

High Court Decision

Mr Justice Vos, concluded that although the power of amendment was exercisable by the employer, the trustees were required to make a declaration to this effect.

In this case, the declaration was not effective because it had not been signed by all of the trustees and it did not meet the correct form for making amendments in that it should be in writing "under their hands". The wording in the rules was clear and it was not possible to construe them as meaning that signature by a majority of the trustees would suffice. However, Vos J considered the failure of the fifth trustee to sign the amendment was "simply an administrative error", leading him to describe this as "a classic case in which the maxim of equity can and should properly be applied". He went on to say that "law and equity would be made to look ridiculous if it were powerless to correct what has been an obvious administrative error like the one made in this case."

Having been told of the change to the Scheme rules, the members had never expected to continue to accrue rights on the previous basis - they therefore had no reason to feel aggrieved.

For these reasons, Vos J applied the equitable maxim that "equity looks on that as done which ought to be done". As a result, he declared that he would make an order to provide the amendment to be valid from 5 July 2000.

Comment

This unusual decision provides a useful summary of the law and cases relating to the application of equitable maxims.

When making any amendment to a provision in a pension scheme's trust deed and rules, it is crucial to check the particular requirements of the amendment power.

Copple and others v Littlewoods PLC and others

The Court of Appeal (CA) has rejected an appeal against the decision of the Employment Appeal Tribunal (EAT). In doing so, it has confirmed that the remedy available in the UK courts for female part-time employees excluded from their employer's pension scheme is compatible with EU law.

Background

Under the Equal Pay Act 1970 (and now the Equality Act 2010), it is unlawful for an employer to exclude part-timers from its occupational pension scheme.

Prior to 1 April 1990, part-timers were excluded from the pension scheme operated by Littlewoods PLC (the Scheme). Between 1 April 1990 and 1 July 1995, eligibility was opened up in stages depending on hours worked. The Scheme was finally opened to all on 1 July 1995.

In the key case on part-timers' rights, *Preston v Wolverhampton Healthcare NHS Trust No.3*[1], it was established that part-timers should have been able to join their employer's scheme from the later of the date they commenced employment and 8 April 1976 (the date from which the ECJ judgment in *Defrenne v Sabena*[2] took effect, providing that Article 119 of the EC Treaty[3] for equal treatment of the sexes can be relied upon in national courts by individuals suing private companies).

EAT decision

The EAT concluded that most of the claimants in this case were not entitled to a declaration of retrospective access to the Scheme. This was because, although they had been unlawfully excluded, they had suffered no loss as they would not have joined even if they had been able to do so (referred to as the "opt-out" principle).

Three of the claimants successfully demonstrated that they would have joined the Scheme, had they been eligible to so. However, the EAT confirmed the Employment Tribunal's decision that it was not appropriate to extend the declaration of retrospective access beyond the period during which the claimants were excluded from the Scheme. Once part-time employees became eligible for admission, their not joining was down to personal choice rather than discrimination.

Court of Appeal Decision

The CA upheld the EAT's decision.

The CA found that where different access rules are applied for part-time and full-time employees without justification, this is discriminatory. The remedy available in these circumstances is that a court or tribunal has a discretion to grant a declaration that the employee is to be admitted to the scheme in question. This was, in the court's view, compatible with EU law.

The CA also concluded that:

- granting retrospective access to those who had chosen not to join would put them in a better position than full-time employees and would be contrary to the principle of non-discrimination; and

- retrospective access should not (in general) be granted to part-time employees beyond the period during which the Scheme was closed to them.

The appellants further argued that the Employment Tribunal had imposed too high a burden of proof on those employees who had sought to establish that they would have joined the scheme had they been eligible to do so. Elias LJ rejected this argument, relying on his previous observation that "failure to join when eligible will often be powerful evidence in support of the inference that the woman would not have joined even when she had been eligible to do so". On the basis of existing authorities, he held that "the fundamental question is whether on the balance of probabilities the woman would have joined during the closed period, and all the evidence bearing on that question must be considered".

Comment

This confirmation from the CA is clear: retrospective access to pension scheme membership is not extended beyond the date on which part-timers became eligible for admission. Part-timers who did not join the pension scheme at their first opportunity will not be able to change their minds retrospectively.

[1] [2004] ICR 993

[2] *Defrenne v Sabena (No.2)* [1976] ECR I-455

[3] Now Article 157 of the Treaty on the Functioning of the European Union