

High Court decision on failure to obtain a s37 confirmation



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Introduction

On 16 June 2023, in the case [Virgin Media v NTL Pension Trustees II Limited \(and others\)](#), the High Court ruled on the correct interpretation of historic legislation governing the amendment of contracted-out DB schemes.

Key points

- The court found that section 37 of the PSA93 (“section 37”) renders invalid and void any amendment to the scheme’s rules which related to section 9(2B) rights, in so far as it was introduced without the required written actuarial confirmation that the scheme would continue to satisfy the relevant statutory standard after the amendment was made.
- The decision is relevant for schemes which were contracted-out on a DB basis from 6 April 1997.
- Overall, our view is that the decision does not expose any new risks for schemes. The issue will be whether schemes can demonstrate that they complied with section 37 when changes were made.
- We consider that any investigations into historic documents should be proportionate, taking into account the interests of scheme members as a whole.

Background

With effect from 6 April 1997 until contracting-out on a DB basis ended on 6 April 2016, contracted-out schemes had to satisfy an overall quality test known as the “reference scheme test” in relation to contracted-out rights known as “section 9(2B) rights”. Whether that test was met had to be assessed and certified by the scheme actuary.

Section 37 of the PSA93 provided that the rules of contracted-out schemes “cannot be altered” in relation to section 9(2B) rights, except amendments of a “prescribed description” made in “prescribed circumstances”, set out in regulations.

From 6 April 1997, Regulation 42 of the Occupational Pension Schemes (Contracting-out) Regulations 1996 (“the Regulations”) permitted alterations to be made to section 9(2B) rights in salary-related contracted-out schemes where:

- the trustees have “informed the actuary in writing of the proposed alteration”
- the actuary has “considered the proposed alteration and has confirmed to the trustees in writing” that the actuary is satisfied that the scheme would continue to satisfy the relevant statutory standard if the alteration were made (“a Section 37 Confirmation”), and
- the alteration does not otherwise prevent the scheme from satisfying the requirements for a contracted-out scheme.

The Regulations have since been amended, but the parties in this case agreed that the effect of Regulation 42 at the relevant time was to require alterations to section 9(2B) rights to be preceded or accompanied by a Section 37 Confirmation.

“Section 9(2B) rights” were defined in the Regulations as, broadly, “rights to the payment of pensions and accrued rights to pensions (other than rights attributable to voluntary contributions)” under a contracted-out scheme, attributable to pensionable service after 6 April 1997. The regulations were later amended, with effect from 6 April 2013, to specifically refer to both past and future service rights.

Facts

The case concerned the validity of a second definitive trust deed and rules dated 8 March 1999 (“the 1999 Trust Deed and Rules”) in relation to the National Telecommunications Limited Pension Plan (“the Plan”), a contracted-out DB scheme.

The 1999 Trust Deed and Rules sought to reduce the rate of revaluation of deferred benefits under the Plan. Crucially, no Section 37 Confirmation had to date been located for the 1999 Trust Deed and Rules, and the case was determined on the assumption that it was not obtained.

A third definitive trust deed and rules dated 21 June 2010 (“the 2010 Trust Deed and Rules”) closed the Plan to new members, and, for existing members, provided for revaluation of deferred benefits to continue on the same basis as under the 1999 Trust Deed and Rules. A copy of the Section 37 Confirmation was available for this deed.

Due to a fetter in the Plan’s amendment power, the claimant and the trustees agreed that the reduction in the rate of revaluation could only apply to future accrual of benefits from the date of the amendment. The claim therefore concerned pensionable service between 8 March 1999 (the date of the 1999 Trust Deed and Rules) and 21 June 2010 (the date of the 2010 Trust Deed and Rules). If the changes to the 1999 Trust Deed and Rules were ineffective, benefits accrued during that period would improve at an estimated cost to the Plan of around £10m.

Judgment

The judge considered the versions of the legislation in force during the relevant period, and found that:

- amendments to the rules of a contracted-out scheme which related to section 9(2B) rights were void and ineffective to the extent that the amendment was introduced without the Section 37 Confirmation. The legislation was “plain and unambiguous” in this respect

- the words "section 9(2B) rights" included both past service rights and future service rights. Taking into account the wording of the legislation and the Regulations as a whole, the judge dismissed the principal employer's argument that the Regulations did not protect future service benefits until they were amended in 2013, and
- there was nothing in the legislation to limit the effect of section 37 to alterations that would or might have an adverse effect. It applied to all alterations to section 9(2B) rights.

The judge in the case understood that the decision would inform "further factual enquiries" as to whether a Section 37 Confirmation was obtained for the 1999 Trust Deed and Rules.

Actions for trustees

Overall, our view is the decision doesn't expose any new risks for pension schemes. The requirement for a Section 37 Confirmation for amendments relating to reference scheme benefits was well known, and decisions should have been taken at the time changes were being made as to whether or not it was triggered.

The legislation did not require confirmation to be given in any particular form, so the Section 37 Confirmation could have been wrapped up as part of advice given at the relevant time. A deed making specific reference to a Section 37 Confirmation (or not as the case may be) will not necessarily be conclusive either way.

We consider that whether or not a Section 37 Confirmation was given is part of the wider question of whether all the necessary formalities (eg execution requirements, section 67 certificate) were satisfied when a scheme amendment was made. Unless a particular query or concern prompts a general review of scheme amendments, we do not believe trustees are obliged to look into this issue as a matter of course.

If you have particular concerns following this decision and / or would like to understand the potential impact for your scheme, please speak to your usual Sackers contact.