Welcome

This is the Linklaters Pensions Dispute Resolution Group’s Case Law Update.

The aim of this publication is to provide a look back and commentary on recent cases that have come before the courts and to look ahead to some of the key decisions on the horizon.

Please do not hesitate to get in touch if you would like to discuss any of the issues mentioned below or indeed any contentious issues on which the Linklaters Pensions Dispute Resolution Group may be able to assist.

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What level of award will the Ombudsman make for distress and inconvenience?

Key points:

> The normal range of awards from the Pensions Ombudsman for non-financial injustice should be £500 - £1,600.

> Factors which should be taken into account in awarding amounts above this include the number of instances of maladministration, the period over which it persisted and the ease with which it could have been corrected.

In *Smith v Sheffield Teaching Hospitals NHS Foundation Trust*, Mrs Smith appealed a determination of the Pensions Ombudsman that maladministration she had suffered had not caused her financial loss, and that she should be awarded only £500 in compensation for distress and inconvenience.

Mrs Smith was a member of the NHS Pension Scheme, and had expected to qualify for ‘Special Class Status’ which would enable her to retire at age 55 with a full pension. One of the conditions for this status was that a member was employed as a nurse, physiotherapist, midwife or health visitor for the whole of the last five years of pensionable employment.

On her taking up a new role which did not qualify for Special Class Status, Sheffield Teaching advised Mrs Smith on the requirements for retaining the status, but failed to inform her that she would need to spend the whole of the last five years of pensionable employment in a Special Class Status post. Several years later, Mrs Smith enquired about the Special Class Status and was told that she would have to be back in her role for at least a week before applying for her pension. The five year minimum requirement was not mentioned.

Mrs Smith returned to her healthcare support worker position shortly before her 55th birthday. She took her pension a few months after her 55th birthday, but received a lower amount than she had expected as she did not qualify for Special Class Status. Mrs Smith complained that she had been given incorrect information, and had she been told a lower pension would be payable, she would have remained in work.

The Ombudsman found that Mrs Smith had relied on the information she had been given but had not suffered financial loss. However, the Ombudsman awarded £500 for the distress the incorrect information had caused her.
On appeal, the High Court dismissed the appeal against the finding that there was no financial loss. The Court held that whilst not everyone would have reached the same conclusion as the Ombudsman, the finding could not be described as lacking any evidential foundation or as perverse or irrational.

In relation to the amount awarded for distress and inconvenience, the Court considered the Pension Ombudsman’s Guidance on Redress for Non-financial Injustice which said that redress for non-financial injustice was likely to range from £500 - £1,000. A previous case in 1999 had held that only in exceptional circumstances would awards exceed £1,000.

The Court observed that £1,000 in 1999 would have a present value of around £1,625 in 2017, and that there had been a recognised general shift in attitudes to make higher awards. In view of the number of instances of maladministration; the ease at which the correct position could have been obtained; and the 6 year period over which incorrect information was provided, the Court awarded Mrs Smith £2,750 for distress. The Court also held that the top end of the normal band of Ombudsman awards for non-financial injustice should be increased from £1,000 to £1,600.

This increase in the level of Ombudsman awards should be borne in mind by trustees when considering offers of compensation for members in response to complaints through the IDRP.
How does the PPF compensation cap apply to transferred in benefits?

Key points:

> In applying the PPF compensation cap, if a member has transferred in benefits from an unconnected scheme:

– where the member is given a fixed pension, it will be treated as a separate benefit; and

– where the member is given added years, it will be treated as part of a single benefit.

Beaton v the Board of the PPF was an appeal from the PPF Ombudsman by Mr Beaton, against a finding by the Ombudsman that the compensation cap on PPF benefits should apply to his benefits in aggregate. Mr Beaton had accrued benefits in the Fenchurch Group Pension Scheme (the “Fenchurch Scheme”) and the Bowring Group Staff Pension and Assurance Fund (the “Bowring Scheme”). He took a cash equivalent transfer value of his benefits in the Bowring Scheme in return for a fixed pension in the Fenchurch Scheme of around £47,000 at age 65. The Fenchurch Scheme was transferred into a successor scheme called the Lambert Fenchurch Staff Pension Scheme (the “Lambert Scheme”) and Mr Beaton continued accruing benefits in the Lambert Scheme.

In 2005, the principal employer of the Lambert Scheme went into administration and the PPF assumed responsibility for the Scheme. At this time, Mr Beaton was entitled to the fixed pension of £47,000 originally earned from service in the Bowring Scheme (the “Fixed Pension”) and pension based on his service and final salary in the Fenchurch and Lambert Schemes (the “Final Salary Pension”). In calculating Mr Beaton’s PPF compensation, the PPF aggregated the Fixed Pension with the Final Salary Pension, applying the compensation cap to the entire amount. Mr Beaton claimed that the cap should have been applied separately to the Fixed Pension and Final Salary Pension.

The relevant legislation provides that compensation should be restricted by the cap if:

> a benefit under the scheme (“benefit A”) exceeds the cap;

> benefit A is attributable to the person’s pensionable service and at the same time as becoming entitled to compensation in respect of benefit A, the person also becomes entitled to compensation in respect of other benefits attributable to pensionable service under the scheme or a connected scheme (“benefit B”) and the aggregate of benefit A and benefit B exceed the cap;

> benefit A is attributable to a pension credit from a transferor and at the same time as becoming entitled to compensation in respect of benefit A, the person also becomes entitled to compensation in respect of other benefits that are under the scheme or a connected scheme or attributable to a pension credit from the same transferor (“benefit C”) and the aggregate of benefit A and benefit C exceed the cap.
Whilst the Fenchurch Scheme and the Lambert Scheme were connected as they had the same employer, the Bowring Scheme was not connected to either.

The PPF Ombudsman had found that as the transfer from the Bowring Scheme had only been made because Mr Beaton had pensionable service in the Fenchurch Scheme, it could be said to be attributable to his pensionable service in the Fenchurch Scheme. As a result, Mr Beaton's benefits should be aggregated.

The High Court allowed Mr Beaton's appeal, and held that his Fixed Pension was attributable to pensionable service in the Bowring Scheme, not the Fenchurch Scheme. This was on the basis that the normal meaning should be given to the words "attributable to his pensionable service under the scheme", of benefits built up as a result of service while an active member of a scheme. The fact Mr Beaton could only take the transfer value because he had joined the Fenchurch Scheme did not make the Fixed Pension attributable to pensionable service in that scheme. The Court acknowledged that this would mean that members who accepted added years in return for their transfer value would have their benefits aggregated but those who took a fixed pension would not.

This case will have limited application, since it is only relevant for schemes entering the PPF. However, it shows the substantial difference in the compensation a member may receive depending on the form of benefits awarded following a transfer in.
When can an employer set off the proceeds of fraud against a member’s pension benefits?

Key points:
> Set-off was only available in line with the express terms of the Scheme Rules.
> The language should be given its literal meaning, even if it gives rise to an anomaly.

In London Borough of Enfield v Jossa, the High Court considered an appeal by Enfield from the Pensions Ombudsman in relation to the recovery of money owed to the employer due to fraud.

Mr Jossa was a member of the Local Government Pension Scheme, with pension benefits valued at around £475,000. While employed in local government, he dishonestly caused 104 payments to be made from his employer’s bank account to his own. He was made redundant and after leaving employment Mr Jossa was caught and sentenced to 4 years’ imprisonment for the fraud. Judgment was entered against him for around £500,000, but the debt remained outstanding.

After discovery of the fraud, the Trustee of the Scheme wished to withhold Mr Jossa’s benefits. The Scheme Rules provided that the employer could recover a monetary obligation from a member’s benefits where the member:
> left the employment in which he was a member in consequence of a fraudulent act in connection with that employment;
> incurred a monetary obligation to his employer; and
> was entitled to benefits under the Scheme.

Enfield sought to invoke this provision, but the Ombudsman decided the set-off was not available as the Scheme Rules said the member must have left employment ‘in consequence’ of the fraudulent act, whereas Mr Jossa was made redundant before the fraud was discovered.

The High Court dismissed the appeal, and found that the wording should be given its literal meaning. Enfield had argued that the provision should be applied if someone left in consequence of the fraud or would have done so if the misconduct had been discovered in time. While the Court acknowledged that it was a fundamental principle that no one should be allowed to profit from their own wrong, the Court considered the draftsman deliberately addressed the circumstances in which a remedy of set-off would be available against a person who had committed fraud. The Court held the provision was intended to draw the line where the express words indicated.

This case shows that even where there are policy grounds for a wide construction of Scheme Rules, the Court will not always go beyond the face of the Rules, particularly where the literal meaning is clear.
Can a scheme be validly equalised by an announcement to members?

Key points:

> If an amendment power requires amendments to be made by deed, an announcement will not be sufficient to amend the scheme rules.

> The question of whether a power of amendment can be exercised retrospectively before the introduction of section 67 of the Pensions Act 1995 should be referred to the European Court of Justice.

Safeway v Newton was a Court of Appeal decision relating to the equalisation of normal pension ages (NPAs) for men and women. This relates to the European Court of Justice decision on 19 May 1990 in the Barber case, that it was unlawful discrimination for pension schemes to provide for different NPAs for men and women.

Following the Barber decision, Safeway issued an announcement to members of its scheme explaining that the trustees had decided to equalise NPAs at 65 for men and women, with effect from 1 December 1991. The scheme was administered on this basis from December 1991, but no amending deed was signed until 2 May 1996. The amending deed was stated to have retrospective effect from 1 December 1991.

The scheme’s power of amendment provided as follows:

"The Principal Company may at any time and from time to time with the consent of the Trustees by Supplemental Deed executed by the Principal Company and the Trustees alter or add to any of the trusts powers and provisions of the Scheme… and may exercise such powers so as to take effect from a date specified in the Supplemental Deed which may be the date of such Deed or the date of any prior written announcement to Members of the alteration or addition or a date occurring at any reasonable time previous or subsequent to the date of such Deed so as to give the amendment or addition retrospective or future effect as the case may be”.

The High Court held that the amendment power could not be exercised by an announcement to members and the EU principle of equal treatment prohibited retrospective levelling down, even where the scheme rules permitted this.

The Court of Appeal agreed that the power of amendment could only be exercised by deed and not by written announcement. However, the question of whether the power of amendment could be exercised retrospectively was a question of EU law which needed to be referred to the Court of Justice of the European Union.

The issue in this case is that, as a matter of English law, from December 1991 until May 1996, members had only a defeasible right to an NPA of age 60. If the power of amendment could not be exercised retrospectively in this context, it would give men better pension rights than women during the relevant period (i.e. an indefeasible right to an NPA of age 60). This appears to conflict with the principle that the rights of the
disadvantaged class during the relevant period (here, men) need only be brought up to the same level as those of the advantaged class (women) (i.e. in this case, giving both only a defeasible right to an NPA of age 60).

It is worth noting that the amendment in this case was made before Section 67 of the Pensions Act 1995 (which restricts the ability to make retrospective amendments) came into force on 6 April 1997.

This case offers hope to some schemes which purported to equalise NPAs by way of an announcement to members and only made a formal amendment to the scheme rules at a later date. However, this will depend on the decision of the European Court of Justice.
Has RPI become inappropriate?

Key points:

> To conclude RPI had become inappropriate, it was not enough that RPI was less appropriate than an alternative index.

> The de-designation of RPI as a national statistic and the fact that it has been superseded by CPI in some contexts were not enough to make it inappropriate for pension increases.

The **BT plc v BT Pension Scheme Trustees Limited** case was another case where the Court was asked to decide whether the wording of the scheme rules allowed a switch from RPI to CPI.

The Court considered the meaning of two forms of wording, both of which are different to the forms of wording which have previously been considered by the Courts. The first form of wording allows for a switch if RPI “becomes inappropriate”, while the second allows for a switch if RPI is “so amended as to invalidate it in the view of the Principal Company as a continuous basis for purposes of calculating increases”.

The first form of wording provided as follows:

> "The cost of living will be measured by the Government’s published General (All Items) Index of Retail Prices or if this ceases to be published or becomes inappropriate, such other measure as the Principal Company, in consultation with the Trustees, decides."

In relation to this form of wording, the Court held that:

> the employer does not have the power to determine whether RPI has “become inappropriate” – instead, it is a question of objective fact and, in the absence of agreement between the employer and the trustee, is to be determined by the Court;

> in order for RPI to have “become inappropriate”, RPI must have become inappropriate (and not just less appropriate than any alternative index) for the purposes of calculating pension increases payable to scheme members; and

> the following matters and events, whether by themselves or in combination, were not such as to have caused RPI to have “become inappropriate” within the meaning of the relevant rule:

- the impact on the formula effect (which causes RPI to be consistently higher than CPI) of a change to the collection and use of clothing prices in 2010;
- the decision by the United Kingdom Statistics Authority in January 2013 to “freeze” the formula used in calculating RPI (although “routine” changes continue to be made to the calculation);
- the de-designation of RPI as a national statistic in March 2013;
- the creation (in 2013), and subsequent abandonment (in 2016), of RPIJ;
– statements by the National Statistician that RPI is a flawed measure of inflation; and
– the fact that RPI has been superseded by CPI in a number of contexts.

The second form of wording provided as follows:

“If the General Index ceases to be published, or is so amended as to invalidate it in the view of the Principal Company as a continuous basis for purposes of calculating increases, the Principal Company shall substitute such other index or appropriate basis of comparison as it shall in consultation with the Trustees decide”.

In relation to this form of wording, the Court held that:

> the scope of the wording is significantly narrower than the “becomes inappropriate” wording considered above – the rule is not engaged at all unless there has been an amendment to RPI (i.e. a direct change to the way RPI is calculated). Further, it is not any amendment that is required, but an amendment which invalidates RPI as a continuous basis for the purposes of calculating increases; and

> the matters and events listed above, whether by themselves or in combination, are not sufficient to permit the employer to form the view that RPI has been “so amended as to invalidate it as a continuous basis for calculating pension increases”.

This case may be of interest to trustees and employers considering whether their scheme rules permit a switch from RPI to CPI, particularly if those rules contain similar wording.
Does a prohibition on amendments prejudicially affecting the ‘rights of any member’ include the right to future accrual?

Key points:

> The reference in the prohibition to the “rights of any member” only meant rights which have accrued as a result of past service at the time of the amendment.
>
> This wording did not prevent the introduction of a power allowing termination of future accrual, but it should be interpreted in line with the restriction in the previous termination power.

The case of *Wedgwood Pension Plan Trustee Limited v Salt* concerned notices served by the participating employers to stop future accrual and break the final salary link.

The participating employers in the Wedgwood Group Pension Plan served notices in 2006 terminating their liability to contribute to the scheme. The notices were served under Rule 62(a) of the 2001 Rules, which allowed participating employers to stop contributing by giving written notice to the trustee. Rule 62(a) replaced Rule 48 of the 1995 Rules, which allowed participating employers to stop contributing only if they found it “impracticable or inexpedient” to continue participating in the scheme.

The amendment power was subject to a restriction that:

”no alteration modification or addition shall be made which shall prejudice or adversely affect any pension or annuity then payable or the rights of any Member”.

The trustee applied to the Court for directions as to whether the notices had the effect of closing the scheme to future accrual and breaking the final salary link.

The Court decided that “the rights of any member” means the rights which have accrued to a member as a result of past service at the time the amendment was made (and those accrued rights include the final salary link). Importantly, however, it does not cover benefits which might be obtained as a result of future service with the employer.

This means that Rule 62(a) was validly introduced to the extent that it allowed future accrual to be terminated by written notice. However, the lack of any requirement under Rule 62(a) that the participating employers find it “impracticable or inexpedient” to continue contributing did prejudice or adversely affect the rights of any Member by making it easier for the participating employers to break the final salary link.

Instead of deciding that the introduction and exercise of Rule 62(a) was invalid, the Court was able to construe Rule 62(a) so that it provided the additional protection previously provided by Rule 48. This meant that a notice could only be validly served if the participating employers would have found it “impracticable or inexpedient” to continue contributing.

On the facts, the Court found that (i) the principal employer would have exercised the amendment power to introduce Rule 62(a) even if it had realised the need to comply with the restriction and (ii) there was evidence to the effect that the participating employers would have found it inexpedient to continue to participate in the scheme.

On this basis, the notices were effective both to stop future accrual and break the final salary link.

This case is a useful reminder to trustees and employers of the need to carefully examine the amendment power when amending scheme rules.
Where scheme changes are introduced, will transitional provisions based on age, be age discrimination?

Key points:

> It may be possible to show there are legitimate aims in applying transitional protections for benefit changes to certain categories of members based on age.

> The transitional protections must be a proportionate means of achieving those legitimate aims, which is likely to be more difficult to establish.

> Both the legitimate aims and whether they are proportionate will need to be considered on the facts of a specific case.

Ministry of Justice v McCloud and Sargeant v London Fire and Emergency Planning Authority were two decisions of the Employment Appeal Tribunal about transitional provisions which applied on the introduction of new career average public sector pension schemes in 2015.

New career average public sector pension schemes were introduced in 2015 for (amongst others) judges and firefighters, replacing the old final salary pension schemes. Transitional provisions applied on the introduction of the career average schemes which, for the judges, meant that:

> active members who were born on or before 1 April 1957 had full protection – they remained entitled to continuing active membership of the final salary scheme;

> active members who were born between the 2 April 1957 and 1 September 1960 were entitled to tapering protection – they would cease to be active members of the final salary scheme and become members of the career average scheme on a date between 31 May 2015 and 31 January 2022; and

> active members who were born after 1 September 1960 were not entitled to any protection – they ceased to be active members of the final salary scheme and became members of the career average scheme on 1 April 2015.

The question was whether the transitional provisions were a proportionate means of achieving a legitimate aim. In both cases, it was accepted that the younger judges and firefighters had been treated less favourably than the older members who had full or tapering protection because of their age. On the face of it, there was therefore age discrimination. The question was whether the transitional provisions were a proportionate means of achieving a legitimate aim. If they were, there would be no age discrimination.

The Employment Tribunal (“ET”) had found in the judges’ case that the government had failed to show its treatment of the claimants was a proportionate means of achieving a legitimate aim. By contrast, a differently constituted ET decided in the firefighters’ case that the treatment of the claimants was a proportionate means of achieving a legitimate aim.
The Employment Appeal Tribunal ("EAT") has now decided in the judges’ case that the ET was wrong to conclude that the government had not established a legitimate aim. This was because the ET had failed to take into account “a complex of moral and political” reasons as revealed by “a plethora of documentation from different sources”. However, the ET’s decision on the question of proportionate means could not be faulted. As a result, the decision that the government had failed to show its treatment of the claimants to be a proportionate means of achieving a legitimate aim was correct.

In the firefighters’ case, the EAT decided that the ET was right to conclude that the government was pursuing legitimate aims. However, the ET failed to apply the correct level of scrutiny in considering whether the transitional provisions were a proportionate means of achieving the government’s legitimate aims. The case will therefore be returned to the ET for consideration of whether the transitional provisions were a proportionate means of achieving the legitimate aims of the government.

In light of these decisions, employers and trustees should consider carefully before putting in place transitional protections for benefit changes which exempt groups of members on the basis of age.
Looking ahead

May 2018
Appeal to be heard in the BA case
Trustee duties in relation to awarding discretionary pension increases.

June 2018
Supreme Court hearing in Barnardos
Concerns the switch in index from RPI to CPI.

Early 2018
Judgment expected in the Wandel & Goltermann Retirement Benefit Scheme
Concerns the valid execution of deeds.

Early / mid 2018
Judgment expected in Box Clever
Concerns an appeal against a financial support direction by TPR.

July 2018
Hearing date for Lloyds Banking Group case
Concerns GMP equalisation.
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