Laying down the law

Pension lawyers provide a round-up of some of the key pensions cases of 2019

DLA Piper pensions partner, Tamara Calvert

BIC UK Ltd V Burgess

Summary

This was a decision of the Court of Appeal in relation to whether certain pension increases were properly paid under the BIC UK Pension Scheme.

Minutes of a February 1991 trustee meeting referred to proposals to address the surplus in the scheme by increasing pensions in payment by the lower of RPI and 5 per cent. The increases were announced to members and started being paid from 6 April 1992, but were not documented in the scheme's deed and rules. In 2011, the employer challenged the payment of increases in respect of pre-1997 benefits and these increases were suspended in March 2013.

In April 2018 the High Court held that a valid amendment had not been made to the scheme rules in 1991 because the minutes were not signed by all relevant parties and so did not satisfy the formalities of the amendment power. However, the court held that the execution of a new Definitive Deed in 1993 but expressed to take effect from August 1990, was effective to amend the rules retrospectively from 1991.

The Court of Appeal disagreed, and held that the pre-1997 increases could not have been validly granted pursuant to any enabling powers in the 1993 Deed and Rules. The Court of Appeal stated that had the trustees and the employer directed their minds to the issue of the pre-1997 increases, there were various ways in which the position could have been remedied with retrospective effect, but no such steps were taken and therefore the increases were never validly introduced. It concluded that the solution adopted by the High Court "went a step too far and involved the re-writing of history to an impermissible extent".

The Court of Appeal did not, however, consider the issue of recovery of past overpayments. The High Court had held that where overpayments were recouped from future pension instalments, the six-year limitation period did not apply. However, no recoupment is possible if there is a dispute as to the amount of the overpayment, until repayment is ordered by a competent court. The High Court did not recognise the Pensions Ombudsman as a 'competent court' for this purpose. The Pensions Ombudsman office has issued a statement making clear that it does consider itself to be a competent court.

Importance

This case gives clear authority for the fact that history cannot be rewritten, and an invalid exercise of an amendment power cannot be retrospectively validated by the subsequent introduction of a "validating" power.

McCloud and Sargeant

Summary

In 2018, the Court of Appeal held that transitional provisions in the Firefighters' Pension Scheme and the Judicial Pension Scheme, which provided a more favourable level of benefits for those members closest to retirement age, constituted unlawful age discrimination and could not be objectively justified.

In July 2019, the Supreme Court denied the government leave to appeal the decision. It will therefore be remitted to the Employment Tribunal to determine the remedy.

In a statement made shortly after the Supreme Court's decision, the Chief Secretary to the Treasury said that the government respects the court's decision and "will engage fully with the employment tribunal to agree how the discrimination will be remedied". The statement also reports that, as transitional protection was offered to members of all the main public service pension schemes, the government believes that the difference in treatment will need to be remedied across all those schemes.

Importance

This case will have a significant financial impact for the government, with estimated additional costs of around £4 billion a year if benefits for younger members are 'levelled up' to be the same as those for older members. It is also a reminder that all schemes need to treat members equally, or be prepared to adduce evidence to justify any differential treatment that affects one age group more than another.

British Airways

Summary

The High Court recently blessed a settlement between British Airways and the trustee of the Airways Pension Scheme, bringing to an end a hard-fought six-year legal battle.

The dispute related to a decision by the trustee to amend the scheme rules to allow itself the power to award discretionary pension increases. BA challenged both the validity of the

amendment, and the exercise by the trustee of the power in November 2013.

BA was unsuccessful in the High Court and appealed. The Court of Appeal, in a majority decision, held that the trustee had acted contrary to the proper purpose of the amendment power. The trustee was given leave to appeal to the Supreme Court, and BA applied for permission to cross-appeal on a specific issue of interpretation of the scheme rules. However, the parties have agreed instead to settle the claim.

In making its decision, the High Court held that the correct test is whether the trustee's decision to settle the claim and compromise the litigation is a rational one that a reasonable body of trustees could have reached.

Importance

This case confirms the longstanding principle that it is for trustees to decide what is in the best interests of the scheme, subject only to the test of rationality. The courts will not seek to interfere in trustee decisions properly taken.

Corsham v Police and Crime Commissioner For Essex & Ors, Hazell v Chief Constable Of Avon and Somerset Police & Ors

Summary

This was an appeal to the High Court of a determination of the Pensions Ombudsman. The complaint was brought by a member of the Police Pension Scheme who was entitled to a protected pension age for tax purposes, meaning he could draw his benefits before age 55 without it being an unauthorised payment. He was re-employed in a civilian role within one month of his retirement as a police officer, resulting in the loss of his protected pension age. Several other complaints of the same nature were considered at the same time.

The Pensions Ombudsman held that the employer's duty to inform employees about contractual rights did not apply in the circumstances of the case. Some of the members appealed to the High Court.

The High Court agreed that no duty arose on the Chief Constable to inform members that re-employment within a month would prejudice their right to take a pension before age 55 without tax penalties. However, the High Court allowed the appeal against one of the Police and Crime Commissioners on the basis of negligent mis-statement. At the time in question the police authority (the predecessor to the commissioner) was responsible for administering the scheme and was acting as scheme administrator for Finance Act 2004 purposes.

The police authority had written to the relevant members stating that their retirement lump sum would be tax free but not stating that the tax-free status could also be lost in certain cases of re-employment.

The High Court concluded that, on the facts of the case, the police authority actually knew that these individuals were being re-employed shortly after retirement and ought to have known of the legal position under the Finance Act 2004. The commissioner was therefore liable to the individuals for the losses suffered because of the tax charges.

Importance

This case is helpful to employers in supporting the line of cases that there is no duty to inform employees of their contractual rights. However, it is also an important reminder to scheme administrators and trustees to ensure that member communications are accurate and not misleading, and to take care when specific relevant facts are known in relation to particular members.

Baker McKenzie knowledge lawyer, Victoria Thompson-Hill

Pensions-Sicherungs-Verein VVaG v Gunther Bauer

Summary

This case was referred by the German courts to the European Court of Justice (the ECJ) and involved a pension scheme member suing the German equivalent of the Pension Protection Fund in connection with an unpaid portion of his pension following his employer's insolvency. The Advocate General (the AG) made a recommendation to the ECJ in relation to the case in June this year but full judgment is awaited.

In his opinion, the AG recommended that Article 8 of the EU Insolvency Directive be interpreted as requiring Member States to put in place measures which protect members' pension benefits in full on an employer insolvency. This recommendation goes significantly further than the previous position following the Hampshire case, if followed by the ECJ.

Importance

If the ECJ follows the AG's recommendation and imposes an obligation on Member States to put in place full pension protections for members on employer insolvency, then the required amendments to the existing PPF compensation levels may have other, far-reaching, consequences, including in the areas of PPF levy payments and scheme funding obligations. In its 2020/2021 levy consultation document, the PPF commented that the current balance between the level of compensation offered by the PPF and the cost of providing such compensation would shift significantly if the ECJ rules in line with the AG's view and that this would be a situation that would need careful consideration by the government. However, timing is key here, dependent on whether the final ECJ judgment is released after the UK leaves the EU.

KeyMed v Hillman and another

Summary

In the High Court case of KeyMed v

Hillman, the court was asked to rule on a number of claims brought by KeyMed against two of its directors, who were also scheme members and trustees of the company's pension schemes. One of the most interesting claims brought as part of this litigation was a claim that, in their capacity as trustees of the pension schemes, the two defendants had breached their duty to the employer. KeyMed alleged that they had breached this duty by establishing executive pension arrangements for themselves and by the setting of unduly conservative investment and funding strategies.

The court found trustees do not owe a fiduciary obligation to the employer in the fullest sense, but that it is proper to consider the interests of the employer so long as they do not conflict with the interests of the members or the purposes of the pension scheme (usually, as in this case, the provision of benefits to members).

Importance

The extent to which trustees can (or should) take an employer's interests into account when acting as trustees can be a difficult area for trustees to navigate in practice. It is not a topic that the courts are often asked to look at, so this decision is of interest to both trustees and employers of DB schemes.

In coming to his conclusion, the judge in this case may have been influenced by the fact that the claim regarding breach of the defendants' fiduciary duties as trustees was part of an attempt by KeyMed to fix the defendants with liability for unlawful conspiracy. This, in turn, was suggested to be partly the result of a serious breakdown in the relationship between KeyMed and the directors prior to the litigation being brought by KeyMed, culminating in an employment claim being brought against KeyMed by one of the defendants. However, the conclusion reached by the court in this case is generally consistent with the approach which was taken by the High Court in the MNRPF case.

Granada Rental & Retail Ltd vs The Pensions Regulator (commonly referred to as the 'Box Clever' case)

Summary

In the latest instalment of the Box Clever case, the Court of Appeal ruled in June that it was reasonable for the Upper Tribunal to have found in favour of The Pensions Regulator when it imposed a financial support direction (FSD) on ITV and several of its subsidiaries in 2011 in respect of the Box Clever Group Pension Scheme.

The regulator's approach was almost entirely vindicated by the Court of Appeal, as the court found against the targets of the FSD in each of the three areas that were subject to the appeal: (1) the question of whether the relevant provisions of the Pensions Act 2004 could have retrospective effect (the joint venture at the centre of the regulator's investigation took place in 2000/2001, whereas the FSD powers were only given to the regulator from 2004); (2) the extent to which the targets had a sufficient legal connection with the scheme employers at the relevant time to be subject to the FSD powers; and (3) whether it was reasonable for the regulator to impose the FSD.

Importance

It is interesting and relevant for both trustees and employers that the court agreed that the regulator could legitimately take into account events that took place prior to 2004 in its assessments, notwithstanding that it found that this retrospectivity aspect of the case had to be considered by the regulator as a factor going to the reasonableness (or not) of imposing the FSD. Finally, it is interesting, in terms of how the regulator may approach future cases (particularly against the backdrop of its increased powers), that the court referred to a key threshold question for the regulator, in deciding whether to exercise its powers, as being whether it would be fair for a funding deficit to be picked up by the PPF/scheme members or by the target companies under an FSD; this might pose a significant risk for potential targets to manage in practice.

Safeway Ltd v Andrew Richard Newton and Safeway Pension Trustees Ltd

Summary

The ECJ handed down its decision in October in relation to the ongoing Safeway equalisation dispute. The case for the ECJ concerned the question of whether EU law permits the retrospective levelling up of pension ages (i.e. levelling down of benefits) to equalise normal pension age during the 'Barber' window (from 17 May 1990 until formal equalisation under the scheme's rules).

The ECJ, agreeing with the AG's opinion that, unless the need for a retrospective change can be objectively justified, such retrospective levelling down in the context of equalisation is not permitted under EU law, even where a pension scheme's power of amendment expressly allows changes to be made. The question was referred by the Court of Appeal as part of the ongoing litigation involving the Safeway Pension Scheme. The case will now revert to the Court of Appeal.

Importance

The ruling represents a setback for the Morrisons group (which took over the Safeway business in 2004). The ECJ's ruling does not, however, prevent the Court of Appeal finding that the retrospective amendment in this case was, in fact, objectively justified, with the ECJ stating that "it is possible that measures seeking to end discrimination….may, exceptionally, be adopted with retroactive effect provided that, in addition to respecting the legitimate expectations of the persons concerned".