

There have been a number of headline grabbing court cases involving pensions in recent months. In this article we summarise four cases and highlight what the rulings mean for occupational pension plans in general.

On a different note, it will not come as 'news' to any of our readers that the London Olympic Games are now upon us. To give our publication a topical theme we also highlight some disputes of Olympic proportions. Do you agree with the outcomes?

Olympic Case 1: Frederick Lorz was one of 19 runners to compete in the 1904 Marathon in St Louis. He hitched a lift in his manager's car for 11 miles of the race.

Ruling: Disqualification. Gold medal awarded to the athlete who finished in second place (who had been assisted by strychnine but not by transport).

Pensionable salary capping

In the *Bradbury v BBC* case¹, the High Court held that a contractual agreement to impose a cap on pensionable salary can be effective, without any requirement to amend pension plan rules.

In this case, the BBC, like many other sponsors of defined benefit pension plans, was faced with a growing need to reduce its pension liabilities. It undertook a consultation process with its employees who were members of the BBC Pension Scheme (the "Scheme") and gave them three options.

1. To remain in their current section of the Scheme, but with any future pay increases limited to 1% for the purpose of calculating pensionable salary.
2. To opt out of their current section and join a new career average section of the Scheme, in which the 1% cap would not apply.
3. To opt out of the Scheme completely and join the BBC Life Plan, a DC arrangement.

Mr Bradbury, whilst deciding to elect for the second option and therefore not being subject to the 1% pensionable salary cap, nevertheless complained to the Pensions Ombudsman about the capping of pensionable salary in this way. The Pensions Ombudsman dismissed Mr Bradbury's complaint. The case subsequently came before the High Court as an appeal by Mr Bradbury against the Pensions Ombudsman's decision.

Outcome

The Court held that a contractual agreement to impose the pensionable salary cap is effective, notwithstanding the provisions of the Scheme's trust deed and rules, provided that there is no breach of the employer's implied duty of trust and confidence.

We suspect that many employers will be breathing a sigh of relief after this ruling as the practice of restricting salary increases for pensions purposes is not uncommon. The question of whether all employers have undertaken this practice in a manner that is consistent with the implied duty of trust and confidence is a separate issue. Whilst Mr Bradbury described the process that the BBC had undertaken as "a travesty of trust and decency", the Judge did not need to determine whether the BBC had breached its duty of trust as this issue had not been dealt with by the Pensions Ombudsman. However, the Judge's comments suggest that the BBC would have a sound defence. We do not yet know whether Mr Bradbury will raise a new complaint to the Pensions Ombudsman or bring further court proceedings on this point.

Indexation and revaluation

"...the questions are whether the member with a pension in payment has a present entitlement to a pension that will be increased at RPI every year, and whether the member with a deferred pension now has an accrued right to revaluation on the basis of RPI, where he takes his pension in the future".

In the *QinetiQ*² case the High Court considered whether a pension plan whose rules provided that pension benefits would be increased in line with: "the Index of Retail Prices published by the Office of National Statistics or any other suitable cost-of-living index selected by the Trustees" could:

- move from RPI to CPI as a suitable cost of living index for revaluation in deferment and increases to pensions in payment for pensions attributable to past service without breaching section 67 of the Pensions Act 1995; and

1 John Bradbury v British Broadcasting Corporation [2012] EWHC 1369 Ch.

2 Caroline Linda Ann Danks & 7 Others (as trustees of the QinetiQ Pension Scheme v (1) QinetiQ Holdings Ltd (2) Martin Shaun Pocock [2012] EWHC 570 (Ch)

- if so, whether the Trustees could exercise their power to choose an index other than RPI so that different indices apply either for different purposes or in relation to different periods of time.

The Court held that:

- the switch to CPI for increases to pensions in payment and the revaluation of deferred pensions did not breach section 67 because the members only have a right to pension increases and revaluation at RPI “or any other suitable cost of living index”; and
- it would be possible to use multiple indices in respect of different periods of time or for different purposes.

Implications

The decision in this case has been the subject of much debate within the pension industry. Of course each case will turn on its own facts although where pension plan rules are wide enough to confer a discretion on trustees to select a different index then there is now a good argument to suggest that trustees may exercise this discretion without breaching section 67. However, there will be other factors to consider and pension plan trustees should always be mindful of their fiduciary duties and seek legal advice before making a decision to adopt CPI. It is worth noting that the reason for the Trustees’ decision in the *QinetiQ* case was to reduce the plan’s substantial deficit which was calculated at £191 million.

The *QinetiQ* case is not subject to an appeal so only time will tell as to whether its principles will continue to be applied by the courts.

Olympic Case 2: Polish pole vaulter, Wladyslaw Kozakiewicz, was accused of making an obscene gesture to the crowd in the 1980 Moscow games after winning a gold medal.

Ruling: The official response of the Polish government: the gesture was an involuntary muscle spasm caused by his exertion. (Hmmm. We are not totally convinced! Check out the photographic evidence on Wikipedia to see if you agree.)

Pensions and Bankruptcy

In a potentially far reaching decision, the High Court ruled in the case of *Raithatha v Williamson*³ that an Income Payments Order could be made against a bankrupt member of a personal pension plan where that member had reached the age at which he could draw his pension but had not yet elected to do so. This casts doubt on the established premise that pension benefits are protected from creditors until such point that they come into payment.

The Welfare Reform and Pensions Act 1999 provides that: “Where a bankruptcy order is made against a person on a petition presented [after 29 May 2000], any rights of his under an approved pension arrangement are excluded from his estate.” This applies to registered pension plans, whether occupational or personal. However the effect of the Insolvency Act 1986 is to put pensions in payment (apart from GMPs) within the reach of the Trustee in Bankruptcy. Although an Income Payments Order can be made once a pension is in payment it is doubtful that the Government intended the legislation to be interpreted in a way that would compel a member to draw his pension.

Effects

Although this case relates to a personal pension plan, it will be of interest to trustees of occupational pension plans, who will have considered that the rights of members would be safe from a Trustee in Bankruptcy. If the courts can issue an Income Payments Order, effectively compelling a bankrupt member to being drawing his pension, questions arise around the age from which this could apply. Occupational pension plans are normally constructed so as to give a member a right to take his pension benefits from his Normal Pension Age (which is commonly age 65). Most plans also allow a member to take early payment of his pension from age 55, but this is often subject to the consent of the trustees and/or employer. The consent issue may offer a barrier to an Income Payments Order but this is untested territory.

The case is subject to appeal and hopefully the appeal will provide clarity.

Pensions and TUPE transfers

The *Procter & Gamble* case⁴ is the first substantial ruling on what constitutes so-called ‘Beckmann liabilities’ since the cases of *Beckmann* and *Martin* in the early 2000s.

The Transfer of Undertakings (Protection of Employment) Regulations provide that where a company acquires the business of another company, the transferee employer ‘steps into the shoes’ of the transferor employer with regard to certain employer duties, rights and liabilities but with the significant exclusion of rights relating to occupational pension plans. These rights are limited to rights relating to ‘old age’, ‘survivorship’, and ‘invalidity’ (terms that have not been satisfactorily defined). As a result of *Beckmann*, the precise scope of this exclusion has been in doubt. The areas of greatest concern have related to pension rights on early retirement, and rights on redundancy. The *Procter & Gamble* case casts some light on these issues and considers what constitutes ‘old age’ benefits. However, as the case is subject to appeal, no firm conclusions can yet be drawn.

3 Mr Situl Devji Raithatha (as Trustee in Bankruptcy of Michael Roy Williamson) v Michael Roy Williamson [2012] EWHC 909 Ch

4 The Procter & Gamble Company v Svenska Cellulosa Aktiebolaget and SCA Hygiene Products Manchester Limited [2012] EWHC 1257 (Ch).

Key points of the judgment:

- A discretionary benefit (such as an early retirement benefit subject to employer consent) still falls within the principal effect of TUPE: the transferred employees have a right to be treated fairly when the application for a discretionary benefit is considered.
- Liabilities for early retirement benefits that are met by the transferring employee becoming a deferred member of the transferor's pension plan do not transfer. It cannot be a requirement that the employee gets the full benefit from both the transferor's pension plan and the transferee (the "smiling pensioner" argument).

Consequences

In broad terms, the consequence is that the transferee employer is liable for early retirement benefits payable up to Normal Pension Age, to the extent that these are not otherwise covered through deferred membership of the transferor's pension plan.

In practical terms however, given the appeal, at this point in time the case may not be of much assistance to either the transferor or the transferee where a TUPE transfer is to occur. Transferees seeking to avoid any risk will still look for an indemnity to cover Beckmann liabilities. Additionally, a number of questions remain unanswered, for example, what liabilities would transfer if the transferor's pension plan were to fail?



Olympic Case 3: In the 1976 Montreal games, Boris Onishchenko of the USSR constructed a special fencing épée, which allowed him to record a 'hit' on his opponent by pressing a secret button.

Ruling: Disqualification. Punishments included: threat of expulsion via hotel room window by the Soviet volleyball team; personal scolding from President Leonid Brezhnev; dismissal from the army; fined and stripped of all sporting honours. (He later became a taxi driver in Kiev.)

Further information

For further information on the implications of any of the above cases please contact any of the partners listed or your usual contact in the Squire Sanders pensions team.

Catherine McKenna

Partner

T +44 113 284 7045

E catherine.mckenna@squiresanders.com

Wendy Hunter

Partner

T +44 20 7655 1119

E wendy.hunter@squiresanders.com

Ian Forrest

Partner

T +44 121 222 3418

E ian.forrest@squiresanders.com

Charmian Johnson

Partner

T +44 161 830 5047

E charmian.johnson@squiresanders.com

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

© Squire Sanders.