

## TWO KEY PENSIONS CASES ON THE DUTIES OF TRUSTEES AND EMPLOYERS: *IBM V DALGLEISH AND MNRPF V STENA LINE*

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### **IBM V DALGLEISH**

#### **The consequences of breaching the duty of trust and confidence**

Agreements reached under a breach of the duty of trust and confidence are voidable. Employees may also claim damages.

The breaches related to:

- ◆ so-called “non-pensionability agreements”, agreements to treat pay rises as non-pensionable despite the provisions of the pension scheme rules;
- ◆ notices to exclude members from the pension scheme;
- ◆ an employee consultation on proposed scheme changes; and
- ◆ withdrawal of favourable early retirement terms.

The decision follows the High Court’s decision last year in which IBM was found to have breached its contractual duty of trust and confidence to its employees in making changes to its defined benefit pension scheme. To be exact, IBM was found to have breached both its implied contractual duty of trust and confidence to its employees and the “Imperial duty of good faith” applicable to employers in relation to their exercise of powers under a pension scheme.

The facts of the case were key. There had been a series of changes to pension terms and in securing the support of employees for one cycle of changes, assurances had been given that created “reasonable expectations” that no further changes would be made within a certain period. In particular, the employees had reasonable expectations that defined benefit accrual would continue, that the link to final pay would be maintained and that certain favourable early retirement terms would also continue during this period. Breaches arose by going back on those assurances thereby thwarting those expectations, and by failing to disclose the true reasons for proposing changes in the associated employee consultation.

What was uncertain following last year’s decision was the consequences of these breaches.

In this latest judgment, the court held that the arrangements, which might otherwise have been effective, were unenforceable against the employees and that the trustees should also disregard them. As a point of principle, employees could also claim damages if they suffered any loss.

In particular:

- ◆ the “non-pensionability agreements” were unenforceable as having been procured by a breach of the duty of trust and confidence. The members were entitled to keep the pay rises granted under the non-pensionability agreements. Further, these pay rises were fully pensionable;
- ◆ the exclusion notices were voidable at the option of the members so that they could ask to be treated as having remained in active membership and any further change would require further notices and a further consultation by the employer;
- ◆ the new early retirement policy could not be relied on against those who would have been eligible under the old early retirement policy and who remained entitled to retire under its terms;
- ◆ both voluntary and compulsory redundancy constituted “retirement” within the terms of the scheme’s rules; and
- ◆ voluntary retirement constituted retirement with the employer’s consent.

### **MNRPF V STENA LINE**

#### **Trustee duties to employers and the implications of final salary linkage**

Two key points of wider relevance emerge from this case regarding the rather unusual industry-wide, non-segregated pension scheme for ratings in the Merchant Navy.

#### **Trustees can have regard to the interests of employers if members are sufficiently protected**

This applied when setting employer contributions under a unilateral trustee power. While it was agreed by all parties that the purpose of the power to set contributions was to ensure the members’ benefits could be paid and that the trustees should pursue the members’ best interests in exercising this power, the trustees wished to set contributions in a manner that they considered fair to the various employer groups. They proposed to spread the funding burden between both current employers and historic employers, removing the cross-subsidy arising from current employers funding benefits related to the historic employers. They proposed to do so even though they could instead have further minimised the risks of underfunding by imposing contribution obligations solely on the strongest employers.

The court held that:

- ◆ the trustees were entitled to take account of the current employers' interests in removing the cross-subsidy;
- ◆ the trustees were not required to adopt "the most risk free funding regime"; and
- ◆ the duty to act in the best interests of the members is not a stand-alone duty but just an aspect of the duty to exercise trust powers for their proper purpose.

Interestingly, this aligns the duties of the trustees with the recent amendments to the Pensions Regulator's objectives, which now include an objective to minimise any adverse impact on the sustainable growth of the employer in relation to pension scheme funding.

#### **Special revaluation is not enough for active membership**

The decision also clarifies when a defined benefit pension scheme is deemed to be "frozen" for statutory purposes. This topic has been widely debated for many years and has important implications for both schemes and their sponsoring employers.

The court was asked to confirm:

- ◆ whether all members had ceased to be in "pensionable service" when it closed to future accrual in 2001 (so that the MNRPF became a "frozen" scheme for statutory purposes); or
- ◆ whether the fact that an enhanced revaluation rate applied after that date for members who remained in seagoing employment resulted in such members remaining in "pensionable service".

The court concluded that the MNRPF ceased to have active members (members in "pensionable service") when benefit accrual ceased and therefore became a "frozen" scheme at that time. The enhanced revaluation provided to members while in seagoing employment was deemed to be an incidental right relating to accrued benefits and as such was already earned by reference to service completed before the scheme closed to accrual in 2001.

Many schemes that have closed to future accrual have provided enhanced revaluation or a final salary link for members who continue in service following the closure. While this case does not directly address final salary linkage, it provides strong indication that a final salary link is not enough for a scheme to be treated as having active members.

This will be of significant interest to many sponsoring employers of multi-employer schemes who need not now be concerned about triggering section 75 debts when they cease to employ their last final salary linked member.

#### **Caution for employers**

Additional points determined in the MNRPF litigation are that:

- ◆ it was permissible for the trustee to amend the scheme rules to create a power to set employer contributions where none previously existed; and
- ◆ it was permissible for the trustee to amend the scheme rules to remove the right of employers to give notice to withdraw from the scheme.

While unilateral amendment powers are rare, this could affect former participating employers in multi-employer schemes if they have not been fully discharged.

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