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OCTOBER 2024



The last three months

Appeal dismissed in *Virgin Media* case

The Court of Appeal [dismissed](#) the employer's appeal in the *Virgin Media* case, upholding a key conclusion of the High Court: that actuarial confirmation was required for amendments to benefits for future service as well as past service.

By way of background, there were special statutory requirements for amendments to post-April 1997 benefits under contracted-out salary-related schemes. The Court considered the requirements as they stood from April 1997 to April 2013. During that period, under the relevant Regulations:

- amendments could not be made to section 9(2B) rights unless the scheme actuary confirmed in writing that the scheme would continue to satisfy the statutory standard (or reference scheme test); and
- "section 9(2B) rights" were defined as rights to pensions in payment and accrued rights to pensions, so far as attributable to contracted-out employment after April 1997.

The question before the Court of Appeal was whether those requirements applied to amendments to future service benefits as well as past service benefits. The Court decided that they did, reasoning as follows:

- Terms used in the contracting-out legislation had to be interpreted in the light of the legislation's general scheme and purpose.
- Under the general scheme of the legislation, the actuary was central to the operation of the statutory standard. It would be surprising if amendments for future service could be made without the actuary's involvement.
- The test in the Regulations ("would continue to satisfy the statutory standard") appeared to be forward-looking, concerned with the value of benefits to be earned in the future.
- At first sight, the "section 9(2B) rights" definition appeared to cover past service benefits only. "Accrued rights" do not usually include future service benefits. However, when the Regulations were first made, a different definition was used, which did include future service benefits. The definition had been changed shortly before the Regulations came into force. Bearing in mind the general scheme of the legislation, the change could not have been intended to cut down the scope of the Regulations, such that they would no longer protect future service benefits.

- In view of the above, "accrued rights" must (unusually) have meant rights which had already been earned or which would be earned in future.
- Accordingly the requirement for actuarial confirmation extended to amendments for future service, as the High Court had said.

The appeal did not revisit two other conclusions of the High Court:

- that a failure to obtain actuarial confirmation, where required under the legislation, rendered the relevant amendment void; and
- that the requirement for actuarial confirmation applied to all amendments to section 9(2B) rights, not just to adverse amendments.

The Court of Appeal decision also left open the question of whether a void amendment could become valid when the actuary next recertified the scheme, the point not being in issue in these proceedings.

Court of Appeal rules on BBC amendment power

The Court of Appeal [dismissed](#) an appeal as to the scope of the BBC Pension Scheme's amendment power.

The power included a proviso, whereby amendments which affected the "interests" of active members could be made only if specified conditions were met.

The BBC argued that the interests protected were only benefits already earned, based on pensionable service and pensionable salary as at the date of the amendment.

The Court of Appeal disagreed, determining that "interests" was a deliberately simple, broad and open-textured word. Upholding the [first instance decision](#), the Court said that interests, for the purpose of the proviso, included not just benefits earned by past service, but also:

- the link between past service benefits and final pension salary; and
- the ability to accrue benefits for future service.

The Court of Appeal made clear that its decision did not disturb the 2017 [Bradbury](#) judgment relating to the same pension scheme. Notwithstanding the wide reading of the proviso, the BBC had a power, in respect of certain members, to decide what part (if any) of a pay rise would be pensionable, a power that could, in effect, be used to break the final salary link.

BHS directors ordered to pay £110m for misfeasance

In [July's PDQ](#), we reported that the High Court had found two former BHS directors liable for wrongful trading and trading misfeasance.

In a subsequent judgment, the Court held that a third director was similarly liable, and should pay £21.5m in respect of wrongful trading.

A [further judgment](#) determined liability in respect of trading misfeasance. The Court held that two directors were jointly and severally liable for a total of £110m. (The other director had by that stage reached a settlement with BHS's liquidators.)

Pension Schemes Bill to confirm Ombudsman is a "competent court"

The King's Speech promised a Pension Schemes Bill. The [background memorandum](#) indicates that the Bill will (among other things) confirm that The Pensions Ombudsman is a "competent court". This will ensure that trustees do not need a court order in order to enforce Ombudsman determinations as to the recovery of overpayments.

Ombudsman to roll out expedited determinations

The Pensions Ombudsman published an [update](#) as to the new operating model discussed in July's PDQ.

The Ombudsman has been piloting expedited decision-making in cases where the answer is felt to be clear - for example, where an incorrect benefit statement was supplied, but no loss arose from the error. Under the expedited process, a caseworker will issue an initial decision. If any party does not accept the decision, they may ask for the matter to be referred to the Ombudsman, who will issue a final determination if he agrees with the caseworker's view. The expedited process is typically 18 months quicker than a full adjudication.

The pilot has been a success, so the expedited process will now be rolled out. Expedited decisions will not normally be published, so the Ombudsman is exploring how "industry-wide learnings" might be shared. Separately the Ombudsman has suggested that it might publish factsheets about common legal issues, to facilitate the resolution of complaints via schemes' dispute resolution procedures.

Elsewhere in the Courts

Disclosure: We [reported](#) on a High Court ruling as to the circumstances in which documents held by a third party are within a litigant's "practical control", and are therefore caught by disclosure obligations. The judgment illustrates that the existence of a contractual agreement to provide assistance may be a significant factor.

Witness statements: The courts continue to hold parties to account where their witness statements fail to comply with the requirements of Practice Direction 57AC - with potentially severe consequences. We [discussed](#) two recent examples.

Retained EU law - interpretation: Provisions have been brought into force to encourage UK courts to depart more readily from pre-Brexit CJEU case law. The provisions, contained in the Retained EU Law (Revocation and Reform) Act 2023, were discussed in our [blog post](#).

Class actions: The boundaries of the "opt-out" representative action regime continue to be tested. The High Court recently rejected an attempt to claim for compensation for 116,000 delayed or cancelled flights, on the basis that there was no common issue as between members of the class. The court also described as "problematic" the question of whether the representative claimant would have authority to receive any damages payable to the class and deduct payments to its litigation funders and lawyers. Read our comments [here](#).

Looking forwards

Validity of amendments – TPT case

A case as to the validity of historic amendments to TPT (an industry-wide pension scheme) will come before the High Court next year. We understand that the hearing is listed for February 2025, and will consider, among other things, questions arising from the *Virgin Media* case.

In the meantime, various industry bodies are urging the Department for Work and Pensions to issue regulations so as to validate amendments which would be void on *Virgin Media* principles. Whether the DWP will do so remains to be seen.

Litigation funding

The Civil Justice Council is expected to complete its review of litigation funding by summer 2025, having recently published an interim report. The previous Government had proposed legislation as to litigation funding, following the Supreme Court's *PACCAR* decision. The new Government has said that it does not intend to re-introduce legislation until the Council's review is complete.

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