

July 2009

# Law at work



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# Features

## **Pensions and retirement – Key issues explored in our recent Taylor Wessing European HR conference**

The "Pensions and Retirement" workshop at our recent European HR Conference looked at some of the pensions issues that are high on the agenda for those employers who sponsor defined benefit occupational pension schemes and for scheme trustees.

### **Cost containment and the power to amend**

One of the main focus areas for employers is cost containment. In the UK, many defined benefit schemes are already closed to new members and others are also closed to future accruals. For those that still permit defined benefit accrual there are a number of steps that can be taken to reshape future service benefits. These range from reducing the rate of accrual through to changing the accrual basis – maybe to a career average or to a defined contribution basis – and/or to requiring members to increase their contributions. In the majority of cases, it will be necessary to formally amend the rules of the scheme in question in order to introduce these changes and this will usually require the sponsoring employer and the scheme's trustees to agree on the changes to be made. However, it is not part of the trustees' role to frustrate and/or interfere with an employer's legitimate remuneration policies and, therefore, the trustees would usually be expected to agree to any such changes – although maybe not without, at least, attempting to negotiate some other benefit for scheme members as the "price" of their agreement.

### **Changing benefits**

However, amending the scheme may not always be that straightforward. The specific terms of the power of amendment are critical. In particular, the employer and trustees will need to make sure that any restrictions on the power of amendment are complied with. For example, it is fairly common for a power of amendment to be drafted in a way which requires that, when benefits are changed, the past service benefits must be protected on the basis that they are to be calculated by reference to a member's salary at retirement rather than on the basis of the member's salary at the time of the amendment. In addition, employment contracts and, where appropriate, collective agreements, should be reviewed to ensure that there are no contractual issues with changing future service benefits. Finally, certain changes will require the employer to go through a statutory consultation process (under section 259 of the Pensions Act 2004) with the scheme's active members. Failure to do this will expose the employer to the risk of a fine, although it will not invalidate the changes made.

Although it is widely thought that past service benefits cannot be changed, there may be some scope for doing this in cases where the terms of a scheme's power of amendment permit. In these cases, past service benefits can be changed if members consent or by introducing substitute benefits that are "actuarially equivalent". The latter may enable certain existing past service benefits that have a volatile cost to be replaced with benefits the costs of which are more predictable.

We shall be exploring this theme in our forthcoming seminar "All change! - A seminar on amending past and future service benefits" to be held at Taylor Wessing LLP's London offices on 8 September 2009.

### **Impact of current economic climate**

An area of concern for schemes having more than one participating employer is the prospect that the current economic climate will lead to a participating employer ceasing to have any active members in the scheme – for example as a result of redundancies. The issue here is that, unless the employer takes on other active members in the following twelve month period, the law will require that employer to pay the amount of what is known as the employer debt to the scheme's trustees. In essence, the employer debt is the difference between the value of the assets attributable to that employer's members and the cost of buying out the benefits of those members with an insurance company.

If the participating employer is unable to pay the debt then, depending on the circumstances, there are a number of ways of deferring the debt and/or passing it on to other employers. These require the co-operation of the trustees and, in some cases, the consent of the Pensions Regulator.

### The employer covenant

Another issue for both employers and scheme trustees is the vexed topic of the employer covenant. As trading conditions for many employers deteriorate and the funding position of most defined benefit schemes weakens, it follows that an employer's ability to support its defined benefit scheme will also decline. In this situation, the dilemma for a scheme's trustees is whether to press an employer for additional funding before the employer's ability to fund the scheme declines even where the trustees know that this is likely to risk damaging the long term health of the employer's business.

Often the solution for both parties may be the provision, by the employer, of some form of contingent asset which will give the trustees a degree of comfort about the future funding of the scheme. The contingent asset could be something like a parent company or bank guarantee or a charge over property. The trustees will be concerned to ensure that there is real value in the contingent asset and/or that the asset is capable of being realised as required. In appropriate cases it may be worth considering the possibility of using the contingent asset as a means of reducing the risk-based levy that the scheme is required to pay to the Pension Protection Fund. However, this can only be done if the contingent asset and the terms on which it is granted comply with certain stringent conditions, and this may not always be desirable.

### Errors in scheme documentation

The final topic to mention is that of errors in scheme documentation. This is a crucial issue for employers and trustees, since errors that remain undiscovered can lead to substantial liabilities. So far as the law is concerned, a scheme's formal documents are the correct record of the scheme's benefits and, therefore, a scheme's trustees are required to provide benefits in accordance with the terms set out in those documents. Often, however, a scheme can discover that the benefits being provided in practice are subtly different from those written into its formal documents. For example, particular difficulties can arise where benefit changes have been notified to members by written announcement and the scheme's formal documents have either not been amended to reflect this or have only been amended some time afterwards. Unfortunately, some employers are now discovering to their cost that they are responsible for providing unintended benefits retrospectively that have not been funded for.

*Carolyn Saunders*

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# Case law update

## Male colleagues can "piggyback" on the success of women's equal pay claims

### *McAvoy and ors v South Tyneside Borough Council and ors UKEAT/0276/08*

#### Why care?

The appeals raise the issue of whether male colleagues of women, who have brought successful equal pay claims, can "piggyback" on their success. Can men, who have worked alongside female claimants, claim on the basis that if and to the extent that the women's claims succeeded, they would be entitled to equivalent payments using the successful women as comparators?

#### The case

Three hundred male council workers who worked as care assistants, caretakers, drivers and leisure attendants lodged discrimination claims about discriminatory bonuses paid to male workers in better paid jobs such as gardeners and refuse collectors. They were lodged at the same time as those by women in low paid jobs also claiming that the "productivity" bonuses paid to the higher paid male workers were discriminatory.

The scenario was illustrated succinctly by the EAT as a "case where the woman (F1) and the man (M1) are working alongside one another on the same work, but the man is being paid £9 per hour whereas the woman – by virtue of a previous successful claim by reference to the pay of a man doing a different job (M2) – is receiving £10".

The EAT held that:

- the male claimants were permitted to bring contingent claims using the female workers as comparators;
- their claim depended on the payment or award of arrears to the female workers, not on the accrual to the woman of the underlying right; and
- if their claims were successful they would be entitled to an amount equivalent to the females were awarded (including interest), or the period over which they were a comparator.

The EAT also had to decide on a further, discrete issue. In South Tyneside, a compromise was reached in March 2006 under which male and female claimants would be paid a single lump sum representing a discounted proportion of both past and future claims. At the last minute the Council, on legal advice, withdrew it as regards the male claimants who then contended that the difference in treatment was discriminatory as it subjected them to a detriment under the Sex Discrimination Act 1975. On this point the EAT concluded "that in circumstances where ...the Councils would have been obliged, had the claims proceeded to a decision, to pay the same sums (both by way of arrears and for the future) to male and female claimants, it would be remarkable if they were entitled to discriminate between them in any offer to compromise the selfsame claims".

#### What to take away

The fact that male colleagues of female equal pay claimants may bring "piggyback" contingent equal pay claims using the female claimants as comparators could now have implications for about 12,000 council staff across the country, with potential knock on implications for tax payers.

As regards negotiating settlement agreements, this case appears to seek to fetter an employer's right to settle on terms of its choosing. In this case, the employer's decision to treat male and female claimants differently resulted in litigation on the grounds of sex discrimination. This could herald a new threat to employers – that any such employment settlement negotiations are susceptible to future litigation.

## Constructive dismissal claim – Employer's breach of contract can be remedied

### ***Bournemouth University Higher Education Corporation v. Professor P Buckland*** **UKEAT/0492/08**

#### Why care?

The case provides guidance on the correct test by which to judge constructive dismissal claims and the way in which such claims can be avoided by an employer.

#### The case

The Claimant was a professor employed by the Respondent University. He did not take kindly to the chair of the board of examiners authorising the re-marking of one of his exams he had marked and then releasing the new results to the students without consulting with him (the person in question had concerns that so many of the students had failed and then subsequently failed the re-sit exam). Mr Buckland raised a grievance.

An internal enquiry – the "Vinney" report – was conducted by the university as a result and this, essentially, upheld Mr Buckland's complaints. However, Mr Buckland was not appeased and he resigned and claimed constructive dismissal.

At first instance, the ET held that he had been unfairly constructively dismissed. The EAT held:

- that the "range of reasonable responses" test used in unfair dismissal cases to deal with the question of whether an employer had acted reasonably in treating a potentially fair reason as sufficient to dismiss had no application to constructive dismissals. For these to succeed an employee may only resign in response to an employer's fundamental breach of contract.
- In accordance with normal contractual principles, the wronged party (Mr Buckland) may give the other party (the University) an opportunity to remedy the breach. In this case, the University's report had vindicated Mr Buckland and agreed with his complaints. The EAT asked "what more could be objectively expected of the Respondent?" It had remedied the breach by the time the employee resigned so there was no breach of contract. It didn't matter that Mr Buckland didn't feel that they had remedied the breach. Mr Buckland's unfair dismissal claim was therefore unsuccessful.

#### What to take away

This case makes clear that an employer's breach of contract can be "cured" and that this will be assessed on an objective basis. If the issue between the parties is remedied, such as after satisfactory investigation of an employee's grievance then the grounds for a constructive dismissal claim fall away. However, it is arguable that a serious breakdown of trust and confidence between the parties cannot be remedied, even if as in this case, it appears that the employer has taken all reasonable steps to do so.

## Hot topics

### Revised EU agreement on length of parental leave

The Maternity and Parental Leave etc Regulations 1999 which implement the Parental Leave Directive currently allow employers give a minimum of three months unpaid leave to both mothers and fathers after the birth of a child, and before they reach the age of 5 (or 18 if the child is disabled).

A revised framework agreement on parental leave concluded by the EU social partners increases the duration of parental leave from three to four months. The European Commission will now move ahead with a proposal to incorporate these changes into EU law through an amendment to the Parental Leave Directive.

### New TUPE guidance from BIS

The Department for Business Innovation & Skills (BIS) (previously BERR) has published a new guide, called "Employment rights on the transfer of an undertaking (June 2009)" available [here](#). This revised guide on the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) replaces the previous March 2007 version. It reflects the changes to the employee liability information on disciplinary and grievance procedures required to be provided under regulation 11 of TUPE.

### Consultation on keeping regulatory bodies informed about "whistleblowing" claims

BIS has also released a consultation, available [here](#), seeking views on the problems of Public Interest Disclosure Claims (PIDA) in Tribunals. Currently, Employment Tribunals determine whistleblowing claims by Claimants but do not make any assessment of, or take any action on, the underlying issues of the claim. The purpose of the consultation would be to develop a practical method of passing employment tribunal papers to the relevant regulator for claims under PIDA. The regulator could then take any appropriate action in accordance with their own practices and procedures. Any responses to the consultation must be received by Friday 2 October 2009.

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# Contacts

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