Pensions Case Law Update

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Welcome

This is the third edition of the Linklaters Dispute Resolution Group's Pensions Case Law Update.

The aim of this publication is to provide a look back and commentary on recent cases that have come before the courts and to look ahead to some of the key decisions on the horizon.

Please do not hesitate to get in touch if you would like to discuss any of the issues mentioned below or indeed any contentious issues on which the Linklaters Pension Dispute Resolution Group may be able to assist.

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Is there a quick and easy way to resolve drafting errors?

Key points:

> s.48 of the Administration of Justice Act 1985 may give trustees some comfort that they can administer their scheme in a certain way.

> However s.48 does not prevent members from bringing their own claims and may not be appropriate in cases where there was any dispute as to the interpretation of a provision.

Re BCA Pension Plan involved a drafting error whereby a provision in a previous set of rules was mistakenly deleted in the new draft. The parties applied to the court under s.48 of the Administration of Justice Act for an order that the scheme could be administered on the basis that the missing words were read into the updated rules.

S.48 requires that where there is a question as to how scheme rules should be interpreted and a counsel of good standing of at least 10 years' call to the bar provides a written opinion on this issue, then the court may order that the trustees can administer the scheme in reliance on that opinion.

However, this does not mean that there is now an easy route to remedying drafting errors. S.48 has been around for a long time and is seldom used. The reasons for this are that (i) it is not binding on the members because their interests have not been represented before the Court; and (ii) it does not give a decision on the question of construction itself but merely permits trustees to administer the scheme in accordance with counsel's opinion.

This is not to say that s.48 does not have its attractions in specific cases. It would protect trustees from challenges from members who contend that the scheme has been administered incorrectly. In such cases, the members are free to argue a different interpretation whilst the trustees remain protected. The order may also be persuasive should the issue ever come before the High Court.

In theory, s.48 is also potentially cost efficient as it is intended to be a quick route for dealing with issues on paper. However, judges may decide that the issue in question is sufficiently complex that a substantive hearing with member representation is required to resolve the issue. For this reason, only very clear cut mistakes are generally associated with s.48.

Indeed, in most cases, schemes will simply rely on their own legal advisors to advise on how a scheme should be administered, without incurring the expense of going to court.

"Members are free to argue a different interpretation whilst the trustees remain protected."

When can terms be implied into a contract?

Key points:

> the *Belize* case had suggested that implying a term into a contract was part of the process of construing the meaning of the contract as a whole, thereby expanding the discretion of the court in inferring terms into them.

> However the *Marks & Spencer v BNP Paribas* case has tempered some of the impact of the *Belize* decision and restored the traditional restrictive approach to implying terms into contracts.

Marks & Spencer v BNP Paribas was a Supreme Court decision concerned with the interpretation of a commercial lease and whether a term ought to be implied into the lease.

Lord Neuberger considered the state of the law on implied terms and concluded that the case law required a series of strict tests to be applied. It must be reasonable and equitable to imply the relevant term; it must be necessary to give business efficacy to the contract; it must be so obvious that "it goes without saying"; it must be capable of clear expression; and it must not contradict any express terms of the contract.

> "Belize had suggested a loosening of this strict approach."

Belize had suggested a loosening of this strict approach and implied that the Court would have greater discretion to find implied terms in a contract. However, Lord Neuberger explained that Lord Hoffman's judgment in Belize was "typically inspired discussion rather than authoritative guidance" and so should not be seen as having changed the established strict approach. In particular, Lord Hoffman's approach in *Belize* was taken to conflate the process of contractual interpretation with the process of implying a term into a contract.

To the existing strict approach, Lord Neuberger also added some further observations. First, the court adopts the position of a notional reasonable person at the time of the contract. Construing the meaning of a lease does not depend on evidence of actual intention of the parties. Secondly, business necessity and obviousness can be alternatives. Finally business necessity did not mean absolute necessity.

What this all means is that the Court should only imply a term into a contract where it is so obvious that it goes without saying or it is necessary for business efficacy, and even then the court should proceed with appropriate restraint.

Although two of the other supporting judgments were less dismissive of the judgement in *Belize*, neither was prepared to accept it as involving any relaxation of the traditional and highly restrictive approach to implying terms into contracts.

When is someone "ordinarily working in Great Britain"?

Key points:

> The judgment is limited to the auto-enrolment legislation and the seafaring industry.

> However, it will be of significance to employers in other industries with mobile workers.

In *Fleet Maritime Services*, the High Court considered what it means to be ordinarily working in Great Britain under the auto-enrolment legislation (Pensions Act 2008). The auto-enrolment employer duties only apply in respect of jobholders who ordinarily work in Great Britain. In this case, the Pensions Regulator had viewed certain seafaring workers as ordinarily working in Great Britain including those who were resident in the UK and who began and ended their periods of work either inside or outside of the UK.

The High Court held as follows:

- a seafarer living in Great Britain who spends most of their time in foreign waters will not ordinarily be working in Great Britain if the ports at which they join and leave are outside of Great Britain.
- conversely, and contrary to the Pensions Regulator's view, seafarers living in Great Britain who spend most of their time in foreign waters do not ordinarily work in Great Britain if their ports of embarkation and debarkation are outside of Great Britain. These workers' contracts stated that their tours of duty commenced and ended with boarding and disembarking.

> "The High Court considered what it means to be ordinarily working in Great Britain under the auto-enrolment legislation."

Does an employer have a duty to make reasonable adjustments when taking disciplinary action against an employee for sickness absence?

Key points:

> The duty to make reasonable adjustments is more than ensuring equal treatment – it requires positive steps.

> Employers are only required to make reasonable adjustments taking into account the cost and practicalities of doing so.

If a person meets the definition of disabled in the Equality Act 2010, employers are required to make reasonable adjustments to avoid putting a disabled person at a substantial disadvantage when comparted to a non-disabled person. This includes making reasonable adjustments to policies or practices applied by or on behalf of the employer.

In the case of *Griffiths v The Secretary of State for Work and Pensions 2015*, Ms Griffiths was working for the DWP when she was diagnosed with an illness called fibromyalgia. It was agreed this meant Ms Griffiths was disabled for the purposes of the legislation. Due to her illness, Ms Griffiths was absent from work for 62 days and as a result, her employer issued her a formal warning in accordance with its attendance management policy ("**AMP**").

Ms Griffiths complained that the DWP failed to make reasonable adjustments to its AMP to remove the disadvantage to her as a disabled person. Ms Griffiths claimed that it was reasonable for the DWP to make two adjustments to its AMP as follows:

1. It should not count the absence due to her disability as absence under the AMP; and
2. It should extend the point at which disciplinary action could be taken for disabled people, so that they are permitted longer periods of absence.

The Employment Tribunal ("**ET**") and Employment Appeals Tribunal ("**EAT**") had concluded that, as the AMP applied equally to disabled and non-disabled employees, no employees were disadvantaged and the duty to make reasonable adjustments was not engaged. The Court of Appeal, overturning this, confirmed that a policy such as the AMP was capable of putting a disabled employee at a substantial disadvantage and the duty to make reasonable adjustments to the policy did apply."

The Court of Appeal said that the duty to make reasonable adjustments is more than ensuring equal treatment – it requires an employer to take positive steps.

However, the decision of the ET and the EAT that it was not reasonable to expect the employer to make these adjustments was upheld by the Court of Appeal. It was noted that increasing the period during which a disabled employee could claim full pay (which would be a consequence of amending the AMP in this way) was not reasonable.

Employers are only required to make adjustments that are reasonable. The cost and practicality of making an adjustment and the resources available to the employer may be relevant in determining what is reasonable.

This is a disability discrimination case but it interesting in the pensions context as an example of the limitations on what employers can be expected to do to accommodate an employee's disability.

> "That the duty to make reasonable adjustments is more than ensuring equal treatment – it requires an employer to take positive steps."

What does it mean to leave service for reasons of business efficiency?

Key points:

> If the removal from employment was due to concerns about performance, it was not for reasons of business efficiency.

Regulations that govern the Local Government Pension Scheme permit members to take an unreduced early retirement pension from age 50, if the member's dismissal from employment was on "grounds of business efficiency".

The meaning of business efficiency was considered in the case of *Ascham Homes Limited v Hassett Auguste 2015*. Ascham Homes Ltd ("**Ascham**") a housing services provider received all its income from a local authority. The local authority had lost confidence in the ability of Ascham's Chief Executive, Mr Auguste and threatened to remove funding provided to Ascham unless it dismissed him, which Ascham did.

Following the termination of his employment Mr Auguste (who was age 52) requested to take an unreduced early pension from the Local Government Pension Scheme. Ascham refused his application on the basis he was not dismissed for reasons of business efficiency. It argued that Mr Auguste was compensated for loss of office in accordance with a Compromise Agreement and was immediately replaced, so there was no cost saving for the company in dismissing him.

Mr Auguste complained to the Pensions Ombudsman who upheld his complaint on the basis that he was dismissed for reasons of business efficiency because:

> Ascham removed Mr Auguste in order to continue receiving council funding; and

> there was "*no doubt that Ascham's business operated more efficiently as a result*"

The Pensions Ombudsman held that Ascham's decision not to pay Mr Auguste an unreduced early retirement pension was "*so wholly against the weight of the evidence that it was perverse*".

However, the High Court restored Ascham's decision. It held that Mr Auguste's employment ceased because there were serious concerns about his performance. Therefore, the reason for his removal was personal performance and not any systemic or structural change in the business. Mr Justice Hildyard said "Ascham achieved no cash or other saving, actual or prospective: indeed it had to pay Mr Auguste substantial compensation for loss of office…it would be surprising to my mind, if the Regulations provided for him to be specially favoured in such circumstances".

This case clarifies the scope of the wording "business efficiency". It is interesting to see that it is not as wide as might first appear.

> "The reason for his removal was personal performance and not any systemic or structural change in the business."

Can the presumption of regularity apply when considering the validity of amendments to Scheme Rules?

Key points:

> The maxim "all things are presumed to have been done duly and in the usual manner" can be applied to the formalities for amending Rules.

> Just because supporting documentation could no longer be found did not mean correct procedures were not followed.

The case of *Alexander and other as Trustees of the Scottish Solicitors Staff Pension Fund v Pattison & Sim and others 2015* considered whether arrears of pension contributions were due from a firm of solicitors to the Scottish Solicitors Staff Pension Fund.

The Fund was established by a Declaration of Trust in 1947 which was amended from time to time. The claim for payment of contributions was based on provisions in the 1990 version of the Rules, as amended.

"The partners of the firm of solicitors argued that the meetings to approve the amendments did not happen."

The partners of the firm of solicitors denied that they had liability to pay arrears of on the basis that amendments made to the Fund's governing documentation from 1990 were invalid because it had not been established that the formal amendment procedure set out in the original trust documentation was followed when the amendments were made. The partners appealed the decision of the lower Commercial Court ordering them to pay the contributions plus interest.

The procedure for making a rule amendment was described as a "triple lock" mechanism, whereby any amendment must be approved by a two-thirds majority of three meetings. The partners of the firm of solicitors argued that the meetings to approve the amendments did not happen. The evidence did not confirm that the three meetings required by the triple lock procedure were held.

The Scottish Court of Session applied the maxim *omnia praesumuntur rite esse acta* (all things are presumed to have been done duly and in the usual manner) and ruled that the amendments were valid. The Court held that the onus was on the firm of solicitors to establish that proper procedures were not followed and they had failed to do so.

The Court stated that the general approach to the interpretation of pension scheme documents should reflect the fact that pension scheme are designed to exist for long periods and invariably include powers of amendment which enable the scheme to adapt. If a power of amendment imposes conditions, these "*must obviously be satisfied*". However the primary aim is that the exercise of the power should be clear and certain and put in a permanent form. The amendments were put into a formal deed and the Court held that "to permit such a document to be challenged merely because supporting documentation can no longer be found would subvert the very purpose of executing a formal deed".

Looking ahead

Date to be TBC but before 31 March 2016
IBM United Kingdom Holdings Ltd and another v Dalgleish and others

Leave to appeal the "breach" and "remedies" High Court judgments.

April 2016
Appeal in Horton v Henry to be heard in the Court of Appeal

What sort of pension benefits can be called upon in bankruptcy proceedings

17 or 18 May 2016
Appeal in Heis and others v MF Global UK Services Ltd

See first edition of our Case Alert

11 or 12 July 2016
Appeal in Gleeds

The consequences of not following execution formalities; breaking the final salary link

October 2016
BA Case

Trustee duties in relation to awarding discretionary pensions increases

Permission to appeal to Court of Appeal. October 2016
Buckinghamshire v Barnados

Ability of Trustees to replace RPI

December 2016
Appeal to Court of Appeal

Granada case

Permission to appeal granted. Date TBC
Brewster

Rights of a cohabitee to spouse's death benefits

Trial date TBC
Upper Tribunal hearing on Box Clever

The Upper Tribunal will take its decision again in light of the Court of Appeal decision

Permission to appeal granted. Date TBC
Dutton v FDR Ltd

Concerns a change to the pension increase Rule.

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