

ALLEN & OVERY

Pensions in Dispute

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Welcome to our quarterly pensions litigation briefing, designed to help pensions managers identify key risks in scheme administration, and trustees update their knowledge and understanding. This briefing highlights recent cases and Pensions Ombudsman determinations that have practical implications for schemes generally. For more information, please contact pensions.team@allenovery.com.

The Court of Appeal has ruled on two long-running disputes about the ability of an employer to change pension benefits for future service (for example by closing a scheme to future accrual and/or capping pensionable pay). The decisions provide greater clarity for employers and trustees considering similar proposals.

IBM: primacy of ‘reasonable expectations’ overturned

The Court of Appeal’s decision in *IBM v Dalgliesh* overturns a significant previous High Court ruling that IBM had breached its *Imperial* duty (that is, the employer’s implied duty of good faith in exercising its powers under a pension scheme) and its contractual duty of trust and confidence towards its employees.

The key factor in the High Court’s decision was the finding that IBM had, by its communications with members in the context of earlier benefit redesign exercises, created ‘reasonable expectations’ about the future of its DB plans, and that its actions were inconsistent with these reasonable expectations. The Court of Appeal has now ruled that any such expectations were just one of many relevant factors to be taken into account in the decision-making process. Other factors, including changes in financial and economic circumstances, were also relevant.

The Court of Appeal also ruled that ‘non-pensionability agreements’ – changes to the employment contract under which members agreed that future pay rises would not be pensionable – would only breach the contractual duty of trust and confidence in extreme circumstances (for example, where a pay rise was being given to other comparable employees).

For more details of the IBM decision, click [here](#).

BBC: capping pay via ‘basic salary’, and the importance of context

In the case of *Bradbury v BBC*, the Court of Appeal ruled that the scheme’s definition of basic salary (‘the amount determined by the BBC as being an Employee’s basic salary or wages’) was wide enough to allow the BBC to decide whether (or how much of) an increase in pay counted as basic salary. The BBC’s determination would have a ‘ratchet’ effect – that is, the power would not allow it to determine that some part of existing basic salary was non-pensionable for the future.

The Court of Appeal also dismissed Mr Bradbury’s argument that the BBC had breached its implied duty of trust and confidence through the process by which it had decided to propose the cap, or that the cap singled out a class of employees for less favourable treatment (those who did not agree to the cap received no pay rise).

What do these rulings mean for trustees?

The Court of Appeal’s detailed consideration of the precise test to be applied in assessing whether the *Imperial* duty has been breached will help both trustees and employers. Trustees considering scheme change proposals will wish to satisfy themselves that proper consideration has been given to all relevant factors and to test the employer’s case, but it is clear that members’ expectations based on historic communications do not present as great a hurdle as had been suggested by the previous IBM High Court decision. Taken together, the two decisions clarify that those expectations remain a relevant factor for consideration, but that the employer’s financial circumstances are equally relevant.

Death benefits for same-sex partners

Same-sex spouses and civil partners should be given the same pension rights as opposite-sex spouses, following the Supreme Court's ruling in *Walker v Innospec*.

The Court held that exception in the Equality Act 2010 that permits same-sex spouses' pensions to be calculated only by reference to the member's service from 5 December 2005 is contrary to EU law and therefore invalid.

What does this ruling mean for trustees?

Some schemes already provide survivors' pensions for same-sex spouses and civil partners based on the member's full service, rather than only service from 5 December 2005, and will be unaffected by this ruling. However, schemes that have written the 5 December 2005 restriction into their rules will now need to amend their rules.

Trustees of affected schemes should ask their administrators to review whether any pensions are already in payment on the restricted basis, and if so, take corrective action to increase the pension going forward and make good any previous underpayments.

Ombudsman ruling on review of ill-health pensions

Under Finance Act rules, specific criteria must be met before an incapacity pension is put into payment. There is no statutory requirement for trustees to monitor whether a member continues to meet the criteria once the pension is in payment, but the Finance Act provides an exception, in ill-health cases, to the general rule that a pension in payment should be payable for life.

In a [recent determination](#), the scheme rules included discretionary power for the trustee to vary, suspend or reinstate an incapacity pension 'as it considers appropriate', at any time before the member reaches normal pension age. The rule did not specify a test to be applied on that review.

The Pensions Ombudsman held that members are entitled to a degree of certainty:

'Once the decision has been made that the member meets the eligibility criteria for an incapacity pension, that decision should stand unless and until there is a change in the member's circumstances. Any such change needs to be explained to the member.'

As there was no evidence of a change in the member's circumstances in this case (only a change of view about whether the member met the criteria), the Ombudsman ordered the trustee to reconsider its decision and, if necessary, reinstate the pension. The member was also awarded GBP500 compensation.

What does this ruling mean for trustees?

It appears that the trustee in this case had approached the situation as a fresh application rather than a decision to remove an existing entitlement. Trustees undertaking review processes of this type should ensure that the need to identify a change in the member's circumstances (which might potentially include the availability of new treatments) is factored into their decision-making process and that the outcome is communicated appropriately where relevant.



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Jason is a Senior Associate in the Litigation group. He specialises in all aspects of pensions disputes, including advising clients in relation to internal disputes and disputes before the Pensions Ombudsman, the Financial Ombudsman Service, the Pensions Regulator, the PPF Ombudsman and the Courts. Jason is ranked in Chambers & Partners Directory in the field of Pensions Litigation.

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