



Protecting pensions on employer's insolvency: the ASW case

The European Court of Justice has ruled* that the UK Government has failed to adequately implement the Council Directive on Employer Insolvency. The ECJ said that the system of protection did not need to offer full protection but that the protection the system afforded was inadequate. The ECJ referred the case back to the High Court for a final decision on whether the Government was liable for damages.

Background

The claimants, former employees of ASW Limited, brought a claim against the Government on the basis that the Government failed to implement Article 8 of the Insolvency Directive. The claimants sought payment of the difference between the pension contractually promised and the actual level of pension they can expect (between 20-50% of their contractual entitlement).

Article 8 of the Directive required Member States to protect the pensions of employees on their employer's insolvency. The Directive does not specify the type or level of protection to be offered. It requires that:

"Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business...in respect of...entitlement to old-age benefits under supplementary company or inter-company pension schemes outside the national statutory social security schemes."

The ECJ, in ruling on the questions referred to it by the High Court, concluded that:

- Accrued pension rights need not be funded in full nor must accrued pension rights be funded by the Member States themselves. The ECJ did not go as far as the Advocate General who concluded that benefits should be funded in full.
- The UK system of protection was inadequate. The ECJ's conclusion was based on the comparatively low level of pension that the claimants would receive: 20 to 50% of their expected benefits. The ECJ said that its decision was "not shaken" by the introduction of the Financial Assistance Scheme (FAS) – it did not comment on the Pension Protection Fund (PPF).
- For the United Kingdom Government to be able to pay damages to the claimants, the High Court will have to find that there has been "manifest and grave disregard" by the Government of its obligations under the Directive.

Conclusion

The ECJ has ruled that the system of protection that was in place when ASW became insolvent was inadequate. It remains to be seen what impact that has on the current system of protection. The Government has already indicated that the FAS will be expanded. The question remains whether the Government will take any other action, including altering the maximum benefits payable from the PPF, resulting in increased levies for all pension schemes. A further update will be issued after the High Court has reached a decision.

**Robins v Secretary of State for Work and Pensions*

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