Safeway pensions equalisation: the saga continues

The latest instalment of a long-running pension equalisation case has reached the European Court of Justice (ECJ) (*Safeway Ltd v Newton and Safeway Pension Trustees Ltd C-171/18*). The ECJ has confirmed that one possible approach to equalisation, through an announcement and a subsequent retrospective amendment to scheme rules, is blocked.

Retrospective equalisation

In 1990, the ECJ famously held that an occupational pension scheme must have the same retirement age for men and women for pensionable service on and after 17 May 1990 (*Barber Guardian Royal Exchange Assurance Group [1991] 1 QB 344*) (*see feature article "An end to sex discrimination in pensions schemes?", www.practicallaw.com/8-100-6506*). At that time, in common with virtually all defined benefit schemes, the Safeway pension scheme (the scheme) had a retirement age of 65 for men and 60 for women.

On 1 September 1991, the scheme's trustees and Safeway's management issued a joint announcement stating that the scheme was going to equalise benefits at 65 for pensionable service on and after 1 December 1991. On 1 December 1991, Safeway confirmed the announcement in a follow-up letter to active and potential members of the scheme. The scheme's rules were formally amended with retrospective effect by a deed of amendment on 2 May 1996.

The dispute

The question that the courts have been grappling with is whether the normal retirement date in the scheme was equalised on 1 December 1991, which was the effective date of the announcement and the date of Safeway's letter, or 2 May 1996, which was the date of the deed of amendment.

Amending the scheme

Both the High Court and the Court of Appeal held that it was not possible to interpret the scheme's rules as allowing an amendment to be made by announcement (*[2016] EWHC 377; [2017] EWCA Civ 1482, www.practicallaw.com/w-011-7238*). Introducing a new amendment in such a non-legally binding way was not sufficiently certain. However, on 2 May 1996, when the scheme's rules were amended by deed, there was nothing in English law which stopped a deed of amendment from having retrospective effect. Section 67 of the Pensions Act 1995, which broadly prevents amendments that take away existing rights unless the affected members have given consent, did not become law until 6 April 1997.

EU law

The argument that, subject to any restriction in the trust deed, English law allows retrospective amendments taking away benefits, was also raised in *Harland & Wolff Pension Trustees Ltd v Aon Consulting Financial Services Ltd* (*[2006] EWHC 1778 (Ch); www.practicallaw.com/5-204-0997*). In *Harland*, the High Court held that it was contrary to EU law retrospectively to take away accrued benefits by raising the female retirement age. Similarly, in *Smith v Avdel Systems Ltd*, the ECJ had made it clear that if benefits are granted by EU law, that is, the benefit of an unreduced pension at 60 to both men and women, that benefit could not retrospectively be taken away (*C-408/92*).

The Court of Appeal in *Safeway* took a slightly different approach to the High Court in *Harland*, holding that it was not clear from *Smith* that EU law prevents benefits conferred by the ECJ's decision in *Barber* from being removed retrospectively. It therefore referred this question to the ECJ.

ECJ decision

In *Safeway*, the Advocate General (AG) opined that EU law does prevent benefits conferred by the *Barber* decision from being removed retrospectively. The ECJ reached the same conclusion. In making this decision, the ECJ was conscious of the preamble to the Treaty establishing the European Community, which was in force at the relevant time, which makes it clear that working conditions should be harmonised while maintaining improvements.

Unfortunately, the reasoning in both the AG's opinion and the ECJ's judgment is a little opaque. The ECJ noted that while the referring court generally has sole jurisdiction to interpret domestic law, its interpretation must comply with EU law and neither the national law nor the trust deed in *Safeway* could circumvent the requirements of EU law. The thrust of the ECJ's decision seems to be that to allow retrospective levelling-down of benefits would remove the benefit given by *Barber* and so negate its effect.

Limited implications

The decision in *Safeway* is unlikely to have any wide-ranging implications, except for Safeway, as it makes it much more difficult for Safeway to continue to argue that the scheme was equalised in 1991. For the most part, the decision simply confirms that the High Court's view of EU law in *Harland* is the correct approach, unless there is a public interest reason to take a different approach.

Under the European Union (Withdrawal) Act 2018, which takes effect on the day the UK leaves the EU, EU law will be incorporated into UK law. Therefore, the law in this area will not change after Brexit, although Parliament would be able, if it wished, to change the law to allow equalisation by levelling-down benefits retrospectively. However, considering that Parliament passed specific legislation in 1997 to stop pension schemes from removing existing accrued benefits without member consent, except in very limited circumstances, it seems unlikely that Parliament would do this.

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