

Section 37 Ruling

Appeal dismissed

July 2024

Introduction

A High Court judgment on 16 June 2023 in the Virgin Media v NTL Pension Trustees case had left many involved in administering previously contracted-out defined benefit schemes concerned that historic deeds (between 1997 and 2016) might now be considered void.

An appeal was heard at the end of last month and the judgment has now been handed down, dismissing the appeal and upholding the original ruling. Whilst there is still hope that the DWP might be able to offer some assistance, all affected schemes should now be actively considering their position.

Background

From 6 April 1997, schemes contracted-out on a defined benefit basis had to provide a minimum standard of benefits in return for paying reduced National Insurance contributions. In particular, they had to satisfy the 'Reference Scheme Test' (RST).

Section 37 of the Pension Scheme Act 1993 then required that the rules of such schemes relating to contracted out benefits could not be altered unless the Trustees had informed the Scheme Actuary in writing of the proposed alteration and the actuary had confirmed in writing that the scheme would continue to satisfy the RST.

The original case revolved around a deed executed in 1999 reducing the rate of revaluation. Confirmation from the Scheme Actuary could not be located and if the deed were deemed invalid, then this would increase the liabilities of the Plan by £10m.

The Judge ruled on three questions, as follows:

1. Amendments made between 1997 and 2013* would be invalid if they did not have written actuarial confirmation. (** Despite a slight change in regulations, we expect this continues to 2016.*)
2. Past and future service rights would be affected.
3. All alterations, whether adverse or positive, would be void.

As a result of these conclusions, the Plan would need to meet the additional £10m of liabilities.

The appeal challenged the second of these points but was ultimately unsuccessful with the resounding summary verdict quoted below.

“I think Bacon J [*the original judge*] came to the right conclusion in her impressive judgment and would dismiss the appeal.”

Lord Justice Nugee

What next?

Time to start reviewing deeds – Many have been awaiting the results of the appeal before taking any action, in the hope that the issue might resolve itself through successful legal appeal or DWP intervention. The appeal has however resoundingly endorsed the initial ruling and there seems little alternative than for affected schemes to at least now take the first step and start reviewing their historic deeds. This will look for evidence of the trustees and their legal advisers having obtained the necessary written actuarial confirmation where relevant.

Some deeds will have actuarial confirmation attached and some (such as those simply changing trustees) will not be in scope. However, a number are likely to fall into grey areas where there is some evidence the position was thought about but written actuarial confirmation cannot be located. New legal advice is likely to be needed to determine a way forward if there is any doubt whether a deed was legally enacted.

Will the DWP help? – As noted above, one option that has been mooted is that the DWP could provide some sort of solution e.g. by providing retrospective legislation that allows the current Scheme Actuary to certify an otherwise potentially invalid deed. We expect further lobbying on this point now the appeal has been unsuccessful, not least because the PPF will need to understand what benefits should be paid to members. However, the likelihood, exact scope or timing of any such a solution is unclear.

Broadstone view

The upholding of the original ruling is likely to cause headaches for sponsors and trustees of large numbers of schemes. Many amendments will not have evidence of the actuarial confirmation attached, even if all the correct steps were taken at the time. Reviewing archive materials from up to 27 years ago will not be appealing.

It is frustrating that time and money that could be spent more productively will now need to be diverted to evidencing or justifying historic decisions that all of the parties involved (sponsors, trustees and members alike) were entirely comfortable with and have been happily operating for decades.

Whilst we hope that the DWP might provide a solution, there are no guarantees on how long it might take or whether it will fully address the problem. It seems unlikely this would be a blanket instruction that this issue can be ignored so schemes will at least need to determine which deeds need additional consideration. Although some amendments would be very clear to retrospectively sign off, others may have relied on the specific membership of the scheme at the time or nature of individual member earnings.

In the large majority of cases, we expect trustees will have taken legal advice in implementing the original documents and followed the recommended process in doing so to ensure the amendments were valid. However, the residual audit trail may be patchy. Pragmatic legal advice based on the available evidence may provide reassurance in some cases and avoid the need for unexpected and unwelcome rectification exercises, but even the process of getting to that point will take time and incur cost.

For schemes trying to buy out, this adds another critical step in the path and may delay some transactions. For others, still wrestling with trying to address GMP equalisation, it appears this will unfortunately be a further project to work through looking back at historic contracted-out benefits.

Find out more

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