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Court of Appeal rules in Virgin Media v NTL: What next?

The Court of Appeal has dismissed the appeal made by the employer in the case of Virgin Media v NTL.

In this briefing we look at the background to the case and consider the implications of the Court of Appeal ruling. We also discuss the possibility of new DWP regulations and of a further High Court case.

Background

Prior to 6 April 1997, contracted-out Defined Benefit (DB) schemes had to provide each member with a guaranteed minimum pension (GMP), which was an individually calculated minimum amount.

From 6 April 1997, the requirements for contracted-out DB schemes changed significantly. Instead of providing a GMP, post 6 April 1997 contracted-out rights provided by a scheme – known as *section 9(2B) rights* – had to satisfy an overall quality requirement. The Scheme Actuary had to certify (and periodically recertify) that the scheme satisfied this requirement, which was known as the *reference scheme test*.

At the time of the events considered by the case, legislation governing contracted-out DB schemes included requirements covering the alteration of their rules. Section 37 of the Pension Schemes Act 1993 provided that the rules of a contracted-out DB scheme *cannot be altered* unless the alteration is *of a prescribed description*, except in *prescribed circumstances*.

The contracting-out regulations further provided that the rules of a contracted-out DB scheme relating to section 9(2B) rights *cannot be altered* unless:

- The trustees *informed* the Scheme Actuary *in writing of the proposed alteration*, and
- The Scheme Actuary *considered the proposed alteration* and *confirmed to the trustees in writing* that they *are satisfied* that the scheme *would continue* to pass the reference scheme test *if the alteration were made*.

The relevant legislation was amended several times during the period running from 6 April 1997 (when the reference scheme test was introduced) to 6 April 2016 (when DB contracting-out ended).

It's also worth noting that section 37 allows government to make regulations to validate retrospectively any amendments that would otherwise be voided by it.

The Virgin Media v NTL Pension Trustees II case

The case concerned amendments made to the rules of the National Transcommunications Ltd Pension Plan in 1999, which aimed to reduce the level of revaluation given to deferred pensioners. This reduction only affected future benefit accrual. The Plan was a contracted-out DB scheme.

The judgment assumed that the Scheme Actuary did not provide the required section 37 written confirmation. It appears that no such confirmation had been found. The judge emphasised that the court had not made a ruling on whether this confirmation was made.

The key finding of the judge was that in the absence of the Scheme Actuary's confirmation, the 1999 amendments are void.

The judge also found that the requirement for confirmation from the Scheme Actuary applied to changes affecting both past and future service rights. Whereas the employer had tried to argue that the legislation at the time only applied to changes to past service rights.

Finally, the judge also found that all amendments (including benefit improvements) – and not just adverse amendments – could potentially be voided as a result of an absence of actuarial confirmation.

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The potential impact on benefit improvements may possibly be less material, as scheme rules may give trustees the power to improve benefits retrospectively. Typically, such powers can only be used with the employer's consent, although this would depend on the scheme rules in question.

According to the judgment, the cost to the Plan of the amendments being voided has been estimated at around £10 million.

Appeal

The employer appealed on one point only, namely whether the High Court was correct in ruling that the requirement for confirmation from the Scheme Actuary applied to changes affecting both past and future service rights.

In brief, the Court of Appeal dismissed the employer's appeal and upheld the High Court's ruling.

What does this mean for schemes?

The unsuccessful appeal means that trustees have one less reason for not taking any action. One possible next step might be to review all past in-scope scheme amendments to identify areas where there might be issues.

It's our understanding that Virgin Media does not intend to make a further appeal to the Supreme Court. However, we also understand that they might bring a further High Court case next year to clarify some points around what counts as evidence of actuarial confirmation.

Three industry bodies have formed a working group and have proposed to the Department of Work and Pensions (DWP) the creation of regulations to retrospectively validate any amendments that are voided just because written actuarial confirmation was either not obtained or cannot now be found. According to the working group:

This group has shared its thinking with the [DWP]. The DWP is considering any wider effects for both schemes and scheme members as it explores the implications of the judgment. At this stage the DWP has not indicated what, if any, resolution to the issue it may take.

It remains to be seen whether the DWP will make any such regulations.

Before taking any steps, trustees must speak to their legal advisers when considering what to do next in light of:

- The Court of Appeal ruling
- The possibility of fresh legislation from the DWP
- A further High Court case next year.

Sponsors with schemes that could be affected by the ruling should discuss the issue with their auditors ahead of their financial year-end. Ultimately, the ruling may result in additional liabilities (though there is still significant uncertainty). This possibility may need to be reflected in some way in company accounts.

Further information

For further information, please contact your usual First Actuarial consultant.