

**How open to attack are trustees when
making decisions that reduce
benefits?**

**Should the sponsoring employer's
interest be considered?**

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What a difference a year can make

- *Thales UK Ltd v Thales Pension Trustees Ltd* [2017] EWHC 666 (Ch); [2017] Pens LR 15, Warren J.
- *British Telecommunications Plc v BT Pension Scheme Trustees Ltd* [2018] EWHC 69 (Ch), Zacaroli J.

Employer's duty of good faith:

- *IBM UK Holdings Ltd. v Dalgleish* [2017] EWCA Civ 212, [2018] Pens LR 1

Trustee duties:

- *Edge v Pensions Ombudsman* [1998] Ch. 512, [2000] Ch 602
- *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108

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Goode (September 1993) at §4.6.16:

We believe that it would be unreasonable not to allow the employer to procure changes to the pension scheme for future service . To insist that the terms on which pension rights accrued did not change (and that in consequence the scheme could not be wound up) for any employee who was a member of the scheme at the point of change would make pension provision extremely inflexible. Pension schemes are established by the voluntary act of the employer, who should equally be free to stop providing pensions, or to change the way in which they are provided. Locking employers in to a single pattern of provision would be a major disincentive to their making any provision at all. The employer's ability to procure such changes would, of course, be subject to the scheme rules, employment law and the contract of employment.

Lloyds Bank Pension Trust Corp. Ltd. v. Lloyds Bank Plc [1996] P.L.R. 263

PoA which prohibited the making of amendments

“*decreasing the pecuniary benefits secured to or in respect of ... Members under the Scheme...”*

I regard it as a fair and natural use of language to describe the scheme under which the promised pension benefits are to be provided as 'securing' the benefits, including both those benefits which at any particular moment can be regarded as earned by past service and also those benefits which at the same moment are in the nature of promised future benefits. Moreover, I not only regard such word as a natural one to use in that context, I regard it as probably the most appropriate one.

“Daughters’ futures to be secured by £1.4m trust fund”. Had The Times thought the establishment of the Scheme to be sufficiently newsworthy to merit an article, it might quite naturally have headed it “Bank workers’ pensions secured by trust scheme”.

Wedgwood Pension Plan Trustee Ltd v Salt
[2018] EWHC 79 (Ch), Miss Penelope Reed
QC sitting as a deputy judge

Proviso to PoA

*... provided always that no alteration
modification or addition shall be made
which (i) shall prejudice or adversely
affect any pension or annuity then
payable or (ii) the rights of any Member*

The Judge said (§44):

The word "rights" does not, in my view, naturally cover benefits which might in the future be obtained as a result of future service with the employer. It seems to me that this conclusion is consistent with the proper approach to construction of a pension scheme and in particular that the rules should be construed so as to give a reasonable and practical effect to the scheme bearing in mind that the scheme has to be operated against a constantly changing commercial background.

Ex-public sector schemes:

- *The Electricity (Protected Persons) (England and Wales) Pension Regulations 1990, S.I. No. 346*
- Water industry schemes and the “Belstead protections”
- *Urenco UK Ltd v Urenco UK Pension Trustee Co Ltd [2012] EWHC 1495 (Ch), [2012] Pens LR 307*

Approaches commonly adopted

- accrual rate change, including moving to CARE
- member contributions – increasing (or even introducing)
- raising NRD
- limiting definition of pensionable pay
- closure to accrual and moving members to DC

See:

- Mark Smith: *Looking after members' best interests: does anyone have to?*
- David Pollard: *The short form “Best Interests Duty”: Mad, Bad and Dangerous to Know*

The key case:

- *Merchant Navy Ratings Pension Fund Trustees Ltd v Stena Line Ltd.* [2015] EWHC 448 (Ch), [2015] Pens LR 239
- No *paramount stand-alone best interests duty*, and that the trustees' duty is correctly described as being *to promote the purpose for which the trust was created*
 - It follows that it is not the duty of trustees of an occupational pension scheme to seek to maximise members' benefits
- As part of their process decision-making when exercising their discretionary powers trustees should take into account the interests of employers

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- CPI is going to produce lower increases for our members than RPI so why should we switch?
- Particular perspective of MNT/Ds

It is important to recognise that trustees are not representatives; they are individuals who are appointed under trust law to act independently and collectively, putting aside their own personal preferences in the best interests of all the beneficiaries. It is with that in mind ... that we have opted for the one-third minimum. Our objective is not to give scheme members a representative as such on the trustee board, but to ensure that the board as a whole has a sufficiently broad perspective on the issues for which it is responsible.

(Hansard 13 February 1995 at column 448)

Closure to accrual

- *Merchant Navy Ratings Pension Fund Trustees Ltd v Chambers* [2002] I.C.R. 359
 - Part 8 blessing application
- Included closure of scheme to further accrual, but part of larger restructuring
- Generally, closure proposal alone unlikely to justify an application

- Appeal in *British Airways Plc v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch), [2017] Pens LR 16
- Professional Pensions website last week under catchy heading:
 - “*What is the purpose of a pension scheme?*”
- Pensions are deferred pay
- So, purpose of a pension scheme is to provide pensions and related benefits at a cost which is acceptable to the employer (Pollard’s The Law of Pension Trusts at § 9.40; judgment §§373-375)

What happens in practice?

- Employer presents its business case for closure
 - Future funding costs
 - Security of benefits
 - Inequality between DB and DC provision
- Trustees seek concessions
 - Deferred closure for agreed period to give active members additional benefit accrual
 - Enhanced employer contributions into replacement DC scheme
 - Improved funding

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Arcadia Group Ltd v Arcadia Group Pension Trust Ltd [2014] EWHC 2683 (Ch), [2014] 067 P.B.L.R. (018) at §§36 -38:

While, however, an employer may be principally responsible for the initial design of a pension scheme, it does not follow that he is entitled to exercise whatever powers he chooses to provide for ... The documentation for each scheme confers powers that are not exercisable by Arcadia alone.

...

It might also be said that the trustees of [the schemes] can be seen as natural spokesmen for the schemes.

Protecting Defined Benefit Pension Schemes (Cm 9591) at §218:

... the Government is not prepared to countenance a reduction in employer liabilities which might simply facilitate a transfer to shareholders of cash members are relying on to support them in retirement

- The Occupational Pension Schemes (Consultation by Employers and Miscellaneous Amendments) Regulations 2006
- *IBM -type facts?*
- *Danks v QinetiQ Holdings Ltd* [2012] EWHC 570 (Ch), [2012] P.L.R. 131, at §§66-71

Where does all this leave us?

No tPR Guidance or Code of Practice

BA

Leading Counsel opined that the only core legal principle was that the Trustees must take into account relevant factors and ignore irrelevant factors. The Court would only interfere if the Trustees had failed to take account of a relevant factor or taken into account an irrelevant factor or if the decision were perverse or irrational. A successful challenge on this basis would be very unlikely.

(Mr Christopher Nugee QC as he then was, quoted at §213)

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Scott v. National Trust [1998] 2 All E.R. 705 at 717 g-h per Robert Walker J:

“Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever. It is however for advisers to advise and for trustees to decide ...”.

PLSA response to last year's Green Paper

Trustee should be supported with clear guidance in relation to:

- *when an amendment might be in the best interests of their members;*
- *how to manage pressure from their sponsoring employers to make changes, even where the current pension commitments are affordable; and*
- *what consultation and communication requirements with scheme members would be required.*

The employer and its interests

Edge v Pensions Ombudsman [2000] Ch 602 at 626G-627A:

[Trustees] must, for example, always have in mind the main purpose of the scheme—to provide retirement and other benefits for employees of the participating employers. They must consider the effect that any course which they are minded to take will have on the financial ability of the employers to make the contributions which that course will H entail. They must be careful not to impose burdens which imperil the continuity and proper development of the employers' business or the employment of the members who work in that business. The main purpose of the scheme is not served by putting an employer out of business.

Subsequently (*e.g.*,):

- *Law Debenture Trust Corp plc v Lonrho Africa Trade & Finance Ltd* [2003] PLR 13
- *Alexander Forbes Trustee Services Ltd v Halliwell* [2003] EWCH 1685 (Ch), [2003] PLR 269
- *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453
- *Urenco UK Ltd v Urenco UK Pension Trustee Co Ltd* [2012] EWHC 1495 (Ch)
- *Foster Wheeler Ltd. v. Hanley* [2009] EWCA Civ 651, [2010] ICR 374

MNRPF at §233

“... As long as the primary purpose of securing the benefits due under the Rules is furthered and the employer covenant is sufficiently strong to fulfil that purpose, it is reasonable and proper should the Trustee consider it appropriate to do so, to take into account the Employers' interests both when determining whether to widen the pool of those liable to contribute and when considering whether to seek to reduce the element of cross-subsidy.”

What weight is to be attached to the employer's interests?

- *Edge:*

If the trustees were entitled to take those matters into account, then it was for the trustees—and not for the ombudsman—to decide what weight those matters should be given.

- Nor is it a matter for the advisers (*Scott v National Trust*)

How open to attack are trustees?

- Ombudsman's costs-free jurisdiction
- Clear guidance on legal principles required
- Blessing application unlikely to be an option
- Evaluation of relevant factors, and decision itself, is a matter for trustees, not advisers

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