Re Merchant Navy Ratings Pension Fund--some things to think about

13/03/2015

Pensions analysis: Edward Sawyer, barrister at Wilberforce Chambers, examines the decision in Re Merchant Navy Ratings Pension Fund and says the decision will be of particular interest to trustees and employers as well as lawyers advising on schemes which have closed to accrual but where final salary linkage has been preserved.

Original news

Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd and others [2015] EWHC 448 (Ch), [2015] All ER (D) 298 (Feb)

In Merchant Navy Ratings Pension Fund Trustees Ltd v Stena Line Ltd and others, the High Court approved a new deficit contribution regime for a large pension scheme, and determined a number of technical points on the employer debt legislation of the Pensions Act 1995, s 75 (PA 1995).

What were the issues before the High Court in relation to the Merchant Navy Ratings Pension Fund (MNRPF)?

This case was principally concerned with:

- an application for the 'blessing' of a trustee's exercise of powers to impose new contribution liabilities on employers of an occupational pension scheme
- the interpretation of regulations made under PA 1995, s 75 (ie the legislation which imposes a statutory debt on pension scheme employers in respect of a scheme funding deficit), in particular whether a multi-employer scheme is a 'frozen scheme' and whether 'employment-cessation events' have occurred

Issues in the blessing application

The court (Asplin J) was asked by the trustee of the MNRPF to approve a proposed amendment to the rules governing the fund. The power to amend the rules was vested solely in the trustee. The amendment would introduce a new contribution regime under which all employers which had adhered to the fund since its inception in 1978 could be made liable to repair its current funding deficit estimated at £333m. Under the MNRPF's current contribution regime, only 40 'current' employers are liable to repair the deficit. Under the new regime, an additional 200 or so 'historic' employers would also be made liable and the deficit would be divided proportionately among all the employers.

The application gave rise to various issues, such as the test to apply in a 'blessing' application, the duties of a pension trustee when dealing with deficit repair and amending the rules, the role of employers' interests in a pension trustee's decision-making, retrospective amendments and the relevance of employer covenant strength.

The historic employers who opposed the amendment argued that the trustee's decision to introduce the new regime was improper/irrational and failed to take account of relevant information, and/or was outside the trustee's powers because of its allegedly retrospective effect.

The trustee's decision was also opposed by a representative beneficiary of the MNRPF. He argued, among other things, that the trustee had misdirected itself in law by failing to recognise 'a fiduciary duty to act in the best interests of members', and that the trustee had acted for an improper purpose for the benefit of current employers (said to be the alleged purpose of eradicating cross-subsidy among employers). He complained that the trustee had not sought to act in the best interests of members by strengthening the fund's employer covenant.

Issues in respect of PA 1995, s 75

The MNRPF is a 'CARE' scheme (ie benefits are based on career average revalued earnings). It was closed to new members and the accrual of additional years of pensionable service in 2001. However, members who were active members prior to closure and who continued to satisfy specified criteria (which included being in seagoing employment) post-2001, were entitled under the rules to an enhanced rate of revaluation of their earnings when calculating their CARE benefits. The entitlement to enhanced revaluation was an entrenched part of the benefits they had earned prior to closure (which had to be preserved following closure because of a fetter on the amendment power which protected accrued rights).

The court was asked to consider whether the members' entitlement to enhanced revaluation while they remained in seagoing employment made them 'active members' of the fund or 'persons in the description of employment to which the scheme relates', for the purposes of the s 75 statutory debt regime. If the fund had no active members, then it would be a 'frozen scheme' for the purposes of the regulations made under PA 1995, s 75. If there were no persons in the description of employment to which the scheme relates, there would be no employment-cessation events (ie trigger events for PA 1975, s 75 debts) under the regulations in force at the relevant time. (The court also considered a number of MNRPF-specific consequential issues that would arise under the rules if employment-cessation events had occurred.)

What conclusions were reached by the court following the arguments made by the parties on the issues?

As regards the blessing application, Asplin J approved the proposed amendments to introduce the new contribution regime, concluding that the trustee had applied the correct legal test as to its duties, that it had acted within the scope of its powers, and that it had made its decision properly and in a 'meticulous manner'.

As regards the PA 1995, s 75 issues, she concluded that the entitlement to enhanced revaluation did not make members in seagoing employment 'active members' or 'persons in the description of employment to which the scheme relates'. Accordingly, the MNRPF was frozen and no employment-cessation events had occurred during the relevant period.

What was the court's reasoning for reaching such conclusions?

The blessing application

Asplin J applied the well-known test for blessing applications, ie that a trustee must take into account all relevant and no irrelevant, improper or irrational factors and reach a conclusion that a reasonable body of trustees properly directing themselves could have reached. She also applied the guidance in the recent Court of Appeal decision, *Cotton v Earl of Cardigan and others* [2014] EWCA 1312, [2014] All ER (D) 232 (Oct) noting that there is a distinction between allegations that a trustee has not fulfilled its duty (which would prevent blessing being given) and allegations that professional advice acted on by the trustee is in some way defective.

The judge concluded that the trustee had correctly directed itself as to how it should make its decision on the new regime. The trustee had made the decision relying on advice from Christopher Nugee QC (now Nugee J) that the trustee should exercise its power for the purposes of the scheme, which were to deliver the benefits specified in the rules, rather than to maximise the benefits for the beneficiaries, and that the legitimate interests of employers were relevant matters for the trustee to take into account. Asplin J considered that Mr Nugee's advice was correct. She concluded that the 'best interests of beneficiaries' should not be regarded as a paramount stand-alone duty but was simply an expression of a trustee's duty to promote the purposes for which the trust was created.

It was legitimate to take employers' interests into account whether a scheme was in deficit or surplus. Asplin J stated that as long as the primary purpose of securing the benefits under the rules is furthered and the employer covenant was sufficiently strong to fulfil that purpose, it was reasonable for the trustee to take into account employers' interests when deciding who should contribute and whether to seek to reduce cross-subsidy among employers. The fact that some employers might pay less was an effect of the new regime and not an improper purpose.

On the facts, Asplin J rejected the criticisms that had been made of the trustee's professional advice and its decision-making process. She also considered the case-law on the permissibility or otherwise of retrospective amendments and concluded that the trustee's proposed amendments were not retrospective.

The PA 1995, s 75 issues

The issues turned on whether the employees who were entitled to enhanced rates of revaluation were in service in a description of employment to which the scheme 'relates' (present tense) in the statutory sense. The judge concluded that the scheme in fact 'related' (past tense) to the service which had taken place prior to the closure of the fund in 2001. The right to enhanced revaluation was inherent in the accrued benefits earned up to 2001, ie by reference to service up to that date. Continued entitlement to that enhanced revaluation after 2001 was not conditional on employment to which the scheme 'relates'. It followed that there were no active members of the fund post-2001 and no employment-cessation events had occurred in the relevant period.

What are the practical implications of this judgment for pension lawyers advising employers and trustees of pension schemes?

The judge's conclusions on the blessing application provide important guidance about pension trustees' duties to members and their relationship with employers. The legitimacy of taking employers' interests into account could be particularly relevant to trustees' decisions about scheme funding and setting schedules of contributions, as well as a wide range of other decisions which might affect scheme employers (eg benefit augmentation, disposition of surplus etc). There may be room for debate about whether there is a duty in all cases to consider employers' interests or whether they are simply a permissible consideration.

The judge's ruling on the PA 1995, s 75 issues will be of particular interest to lawyers advising on schemes which have closed to accrual but where (as is not uncommon) final salary linkage has been preserved. It might be said that the judge's analysis leads to the conclusion that, for statutory purposes, such schemes have no 'active members' (ie they are 'frozen' and no-one is in 'pensionable service') and no persons in the description of employment to which the scheme relates. This affects the identity of the statutory employers of the scheme for PA 1995, s 75 purposes (and potentially scheme funding purposes) and, in a multi-employer scheme, whether PA 1975, s 75 trigger events have occurred. The judge appears to have accepted that 'pensionable service' means accruing years of pensionable service. 'Pensionable service' is a key concept in the revaluation, preservation and cash equivalent legislation, so the judge's analysis could affect these areas too. On the other hand, it might be argued that the judge's conclusions should be seen as specific to the particular facts before her.

Are there any further points of interest?

The blessing application arguably demonstrates some of the shortcomings of the Civil Procedure Rules 1998, SI 1998/3132, Pt 8 (CPR) procedure, under which it is difficult to control the ambit of the issues or summarily dispose of unsustainable points. This is a disadvantage of the blessing procedure, particularly in a complex area such as pensions. The judge noted that it was unfortunate that the trustee's meticulous decision-making had been subjected to such wide-ranging criticism.

The case is also of interest on the subject of employer covenant strength, which is an important feature of the pensions regulatory regime under the Pensions Act 2004. As recorded in the judgment, there was detailed expert evidence about covenant assessment, which revealed that there are divergent views about how to assess employer covenant strength and indeed what the concept of covenant strength entails (eg is it 'last man standing' support or ability to support the scheme on an ongoing basis?). Ultimately, the judge did

not have to resolve this difference of opinion. This topic could be a fruitful source of disagreement in future pensions cases.

Edward Sawyer has a commercial and chancery practice, with particular experience in the fields of pensions, trusts, commercial disputes, professional negligence, international work, financial services and civil fraud. His practice encompasses litigation and advisory work across the broad range of commercial chancery cases. Edward is regularly involved in large-scale litigation involving pension schemes, regulatory work, trust disputes, business disputes and professional liability--often with an international or offshore element. In Merchant Navy Ratings Pension Fund Trustees Edward Sawyer and James Walmsley were junior counsel for the claimant, led by Michael Tennet QC of Wilberforce Chambers.

Interviewed by Kate Beaumont.