ANOTHER TICKING TIME BOMB?

FAILING TO COMPLY WITH SECTION 37 OF THE PENSION SCHEMES ACT 1993

COMMENTARY BY PAUL NEWMAN QC, 3 SEPTEMBER 2019

A strong candidate for the most important pensions case of this century is *Bestrustees v Stuart* [2001] EWHC 549 (Ch), as it confirmed the invalidity of attempts to equalise retirement ages of male and female members by means which did not comply with the formal requirements of schemes' amendment powers. This has led to a large number of negligence claims against lawyers and other pensions professionals who advised on the introduction of equalisation measures which did not comply with those formal requirements.

A further, perhaps greater, threat to the validity of pension scheme amendments lurks in the form of s.37 of the Pension Schemes Act 1993, together with reg.42 of the Occupational Pension Schemes (Contracting-out) Regulations 1996, as they applied for the majority of the period before the abolition of contracting-out in April 2016. Those provisions prohibited amendments to the rules of salary-related contracted-out pension schemes in relation to "section 9(2B) rights", unless the scheme actuary had provided written confirmation that the scheme would continue to comply with the reference scheme test if the amendment was made. "Section 9(2B) rights" were defined for that purpose as including rights to payments of pensions and accrued rights to pensions (other than AVCs).

In my experience, many pension scheme amendments which purported to affect benefits referable to both past and future service did not comply with that requirement.

Whilst amendments adversely affecting past service benefits would most probably be invalid anyway, because of either the restrictions contained in amendment powers or the operation of s.67 of the Pensions Act 1995, a failure also to comply with s.37 may have far wider-ranging consequences for the amendment. This is because an amendment which affected both past and future service would normally be treated as invalid only insofar as it affected past service benefits, but would be treated as valid insofar as it affected future service benefits. However, amendments which fall foul of s.37 may be invalid both retrospectively and prospectively, which would in turn have a significantly greater effect on the liabilities of the scheme.

The reason for this is an argument that the definition of "s.9(2B) rights" extends beyond past service rights and includes future service rights, so that an amendment which affected future service rights would still contravene s.37 if the requirement of actuarial confirmation was not satisfied. Whilst, at first blush, the reference to "accrued rights" in the definition would appear to preclude its application to future service rights, there is a powerful argument that that would be contrary to the purpose of s.37, as being part of the machinery for the ongoing supervision of contracted-out scheme benefits to ensure that those benefits met, and continued to meet, the relevant statutory standard. To construe s.37 so as only to apply to past service benefits would be to remove the statutory control of alterations in relation to future service benefits in a manner which was inconsistent with the rest of the contracting-out regime.

This issue remains unresolved by caselaw, although there are several cases currently in progress in which the issue has been raised, and indeed the issue was fully argued in the High Court a couple of years ago, in a case which settled before judgment was delivered. While the scope of the effect of non-compliance with s.37 remains undecided, the many amendments to pension schemes which did not comply with s.37 are vulnerable to being invalidated in ways far more radical than the type of amendment in issue in the *Bestrustees* case, and this issue has the potential to send a similar shock wave through the pensions industry.

For more information on our Pensions practice, please click here.

To read Paul Newman QC's previous Pensions Commentary, please click here.