

CASE LAW UPDATE

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Recent decisions

- *BBC v Bradbury (CA)* [2017] EWCA Civ 1144
- *IBM United Kingdom Holdings Ltd v Dalglish* [2017] EWCA Civ 1212
- *British Airways plc v Airways Pension Scheme Trustees* [2017] EWHC 1191 (Ch)
- *Walker v Innospec* [2017] UKSC 47

Recent decisions

BBC v Bradbury

BBC v Bradbury

- Section 91(1) of the Pensions Act 1995:

*“(1) Subject to subsection (5), where a person is entitled to a pension under an occupational pension scheme or **has a right to a future pension** under such a scheme –*

*(a) the entitlement or **right cannot be** assigned, commuted or **surrendered***

(b) the entitlement or right cannot be charged or a lien exercised in respect of it, and

(c) no set-off can be exercised in respect of it

and an agreement to effect any of those things is unenforceable.”

BBC v Bradbury

- The two main arguments:
 - (1) “*right to a future pension*” means accrued rights + pension credits.
 - (2) Section 91(1) is not concerned with extrinsic employment contracts (the *South West Trains v Wightman* argument).

BBC v Bradbury

- Per Gloster LJ at [48]:

“It follows that I accept Mr Furness’s argument that section 91 had no application to the appellant’s agreement to the Cap, since the section only prevented the surrender of rights under the pension agreement, not a change to the content of the appellant’s employment contract. The appellant’s right under the Scheme rules was to a pension calculated by reference to the level of pay stipulated in the appellant’s employment contract. A change to the employment contract, such as the Cap, did not involve any surrender of pension rights because those pension rights merely reflected the terms of the employment contract.”

BBC v Bradbury

- Per Gloster LJ at [49]:

“Issue (iii): Was the Cap binding and effective by reason of the application of the principle set out in SWT?”

49. In my judgment, this issue does not arise for consideration, since there was no breach of section 91 and the Cap was not contrary to the Scheme rules. I do not consider that there would be any utility in expressing what would be obiter views on the hypothetical application or otherwise of the principle articulated in SWT, which was not concerned with section 91 in any event.”

BBC v Bradbury

- Per Gloster LJ at [45]:

“...Section 91 protects the actual, accrued rights of employees. It applies where a person “has a right to a future pension”...”

Recent decisions

IBM United Kingdom Holdings Ltd v Dalglish

IBM v Dalglish – the implied duty

- Implied duty – an obligation on the employer not, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
- *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589 at 597:

“...that obligation of an employer applies as much to the exercise of his rights and powers under a pension scheme as they do to other rights and powers of an employer.”

IBM v Dalglish

- (1) What is the correct test for breach of the the implied duty of trust and confidence and / or the *Imperial* duty of good faith?
- (2) What is the correct approach to the reasonable expectations of the membership?
- (3) What if a non-pensionability agreement is offered in conjunction with a threat to withhold pay increases?

IBM v Dalgleish – the implied duty

- A test of rationality (per Lloyd LJ at [45]):
 - (1) Have the relevant matters, and no irrelevant matters, been taken into account?
 - (2) Is the result such that no reasonable decision-maker could have reached it?
- The rationality test applies to the contractual duty and the *Imperial* duty (per Lloyd LJ at [46]).

IBM v Dalglish – reasonable expectations

- “Mere expectation” – an expectation that an employee may have in fact as to the future, in the sense that they anticipate, assume or expect that something will happen in the ordinary course of events if things “carry on as they are”. The expectation may exist independently of any encouragement by the employer.
- “Reasonable expectation” – an expectation as to what will happen in the future engendered by the employer’s own actions, and in relation to matters over which the employer has some control, which gives employees a positive reason to believe that things will take a certain course.

IBM v Dalglish – reasonable expectations

- Per Lloyd LJ at 229:

“The existence of the Reasonable Expectations, or at any rate the history of the communications to employees in the course of Project Ocean and Project Soto from which the Reasonable Expectations were said to arise, were relevant factors to be taken into account by the decision-maker. But to elevate them to a status in which they had overriding significance over and above other relevant factors was erroneous in law...”

IBM v Dalglish – NPAs backed by threats

- Per Lloyd LJ at [414]:

“Failure or refusal to offer a pay rise to which the employee is not contractually entitled may in some circumstances be a breach of the implied duty of trust and confidence...but the circumstances have to be extreme. The test to be applied is the rationality test...”

Recent decisions

***British Airways plc v
Airways Pension Scheme Trustee
Ltd***

British Airways plc

- (1) Was the introduction of the power to award discretionary increases within the purpose of the power of amendment?
- (2) Did the trustees genuinely consider the exercise of the power to increase benefits?

Recent decisions

Walker v Innospec Ltd

Walker v Innospec Ltd

- Council Directive 2000/78/EC of 27 December 2000:

Article 1:

“The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the member states, the principle of equal treatment.”

Article 2:

“For the purposes of this Directive, the ‘principle of equal treatment’ shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in article 1.”

Walker v Innospec Ltd

- Equality Act 2010, schedule 9, paragraph 18:

“(1) A person does not contravene this part of this Act, so far as relating to sexual orientation, by doing anything which prevents or restricts a person who is not within subparagraph (1A) from having access to a benefit, facility or service –

(a) the right to which accrued before 5 December 2005 (the day on which section 1 of the Civil Partnership Act 2004 came into force), or

(b) which is payable in respect of periods of service before that date.”

Walker v Innospec Ltd

- Per Lord Kerr at [56]:

“The point of unequal treatment occurs at the time that the pension falls to be paid...Mr Walker was entitled to have for his married partner a spouse’s pension at the time he contracted a legal marriage. The period during which he acquired that entitlement had nothing whatever to do with its fulfilment.”

Cases to watch out for

- Anticipated but not expected:
Steria and section 37 certificates
- December 2017:
British Telecommunications plc – indexation
- January 2018:
ITV plc & ors (Box Clever) v tPR (UT) - FSDs
- Further afield:
Buckinghamshire v Barnardo's (SC) - indexation
British Airways plc (CA) – trustee decision-making

Thank you