



Institute
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THE IBM Case – impact for trustees and employers

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IBM UK Holdings Limited v Dalglish [2014] EWHC 980 (Ch)

- Introduction
- Background to the case
- The “Imperial” duty of good faith and contractual duty of trust and confidence – the relevance of Reasonable Expectation
- Use of powers of exclusion to close to accrual



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Background to the Case

Series of changes proposed by IBM in 2009

- closure to accrual
- new early retirement rules
- withholding pay rises unless members agreed to break link to final salary



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Background to the Case (2)

- Previous benefit change exercises in 2004/5 and 2006
- IBM's investment strategy – equities and more equities to improve the bottom line
- The business case – local and global – good enough reasons? [Proper justification in the words of Mr Justice Warren]



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The Case itself

- Brought by IBM following trustees' refusal to implement proposed changes
- Key issue tried – were the proposals a reasonable response to IBM's challenges in light of members reasonable expectations?
- Breach of the consultation regulations



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Imperial duty and contractual duty – what is the difference?

- Implied term of trust and confidence in an employment contract
- Employer shall not *“without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”*
- Extended such that there is an implied term in a pension scheme that operates to constrain the exercise by the employer of any power vested in it under the deed and rules – *the Imperial Duty*



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How awful does the employer's action have to be to breach the test?

- Test is severe – needs to destroy or seriously damage the relationship
- Test is objective
- But does the action have to be irrational or perverse?
- Or merely on which a reasonable employer in good faith would not do?
- Can be breached even if employer otherwise has an unfettered power to do what it wants



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Members' reasonable expectations

In IBM these were

- Benefit accrual would continue into the future unless significant change in financial and economic circumstances
- Member would be able to take advantage of early retirement policy until 2014 unless justification to change it
- IBM had stated that previous changes would put scheme on a footing for the future which was "secure" and "long term" and that it had a "commitment to underpin sustainability."



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Exclusion powers – any use to employers?

- IBM rules included power to allow IBM to exclude “specified person or class of persons”
- Introduced in contravention of Re Courage fetter in power of amendment?



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What does all this mean to employers and trustees?

- Does not put an end to DB closure or benefit change
- Does not mean all employers will be in breach of duty of trust and confidence or their Imperial duty
- Position will very much turn on the facts
- Need to revisit past communication – even if not made to employees
- Review whether employer has right to close accrual unilaterally



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What does all this mean to employers and trustees? (2)

- Ensure robust business case for change
- Communicate carefully
- Carefully consider agreements to sever link to final salary – binding?
- Do not make decisions before consultation ends
- Remember, remember the Imperial duty and the duty of trust and confidence



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Questions

Comments

Expressions of individual views by members of the Institute and Faculty of Actuaries and its staff are encouraged.

The views expressed in this presentation are those of the presenter.



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