

Changing course - do employers need trustee consent for future service changes?

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In the news...

“Aviva to close final-salary pension scheme”

bbc.co.uk/news – 20 April 2010

“Fuijitsu strike threat amid pension cuts”

Timesonline – 31 August 2009

“Barclays scraps final-salary pension”

guardian.co.uk – 3 June 2009

“Pace of closure to exiting members is accelerating, with number of “frozen places” expected to double in next 12 months”

Professional Pensions – 28 April 2010



16



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Overview

- Approaches to scheme change
- Trustees' role in scheme change
- Other matters



Approaches to scheme change

- Scheme change route
- Contractual change note



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Scheme change route 1

- Employer must consider:
 - Scheme amendment power
 - Need for trustee consent
 - Employees' contracts of employment
 - Requirement to consult "affected members"



Scheme change route 2

- Scheme amendment power
 - Beware restrictions
 - **Re Courage** (1986): no amendments which *"vary or affect any benefits already secured by past contributions"*
 - **Lloyds Banks** (1996): no amendments which *"decrease the primary benefits secured"*



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Scheme change route 3

- Consider if employees' contracts of employment need modifying:
 - Depends on contractual terms
 - Contract may permit variations **BUT** remember employers' duty of trust and confidence
 - If not, employment contract can be amended by:
 - Express agreement
 - Unilaterally imposed change
 - Termination and re-engagement



Contractual change route 1

- Change to employees' contracts overrides scheme rules
- Key cases:
 - **South West Trains v Wightman** (1999)
 - **NUS Superannuation Fund v Pensions Ombudsman** (2001)
- Latest case: **HR Trustees v German** (2009)



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Contractual change route 2

- **South West Trains v Wightman**

"it was implicit in the contract between South West Trains and the drivers that the drivers would not seek from the Trustee the payment of a pension on a more generous basis than that agreed with South West Trains."

- Trustees required to execute deed of amendment to reflect contractual changes



Contractual change route 3

- **NUS Superannuation Fund v Pensions Ombudsman**

- Member's conduct meant that employer offer accepted
- Member not entitled to pension based on higher salary dispute rules



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Contractual change route 4

- **HR Trustees v German**

- Consent from employees must be express and fully informed
- Employees should be given real choice over whether to consent
- Burden of proof on creation of binding legal relations is firmly on employer



Contractual change route 5

- **HR Trustees v German (cont)**

- Prudent to ensure members receive comprehensive information and advice
- Proceed with great care and beware restrictions in amendment power
- Compromise agreements may not be effective to surrender pension rights
- Appeal lodged so watch this space ...



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Role of trustees 1

- Employer may need trustees' consent
- Differing views on trustees' role



Role of trustees 2

- Trustees' primary duty to protect accrued benefits
- Trustees may try to negotiate additional contributions/security



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Role of trustees 3

- Scheme change route: consent to amendment (if needed) purely administrative
- Contractual change route: purely administrative to ensure rules reflect reality



Other matters 1

- Consultation
 - Employers with 50 or more employees
 - Need to consult “affected members” before making “listed change”
 - Listed changes include:
 - ceasing accrual
 - charging rate for future accrual
 - from April 2010, changing pensionable earnings (inc via contractual route)

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Other matters 2

- Consultation (cont)
 - 60 day consultation period
 - Trustees' role
 - Other consultation requirements may apply (e.g. under collective bargaining arrangements)



Other matters 3

- Past service changes:
 - Care required: section 67 issues
 - But liability reduction may be possible, eg pensions increase exchanges, enhanced transfer value exercises



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