

7th August 2017

All Members Newsletter

Bum Note For Clarinettist

In the long-running case of Bradbury v BBC, the Court of Appeal unanimously found that the BBC Pension Scheme's definition of "Basic Salary" permitted the BBC to determine whether (or how much of) a pay rise counted as "Basic Salary". As such, the BBC was entitled to impose a cap on any increase in Basic Salary as part of the process of determining its amount. The Court of Appeal also dismissed claims that the BBC's conduct amounted to a breach of the implied duty of trust and confidence, which arises from an employee's employment contract.

Background

The BBC introduced the cap, stating that only 1% of any future pay increases would be pensionable, for active members of its three DB schemes in December 2010. At that time, Mr. Bradbury, a clarinettist with the BBC Orchestra, was a member of the scheme.

Bradbury brought a claim to the Pensions Ombudsman on the grounds that he had contributed to the scheme in good faith that his pensionable salary amounted to his basic salary. The Pensions Ombudsman dismissed the case on the grounds that it was open to the BBC to determine that only part of the Bradbury's salary was pensionable.

Bradbury appealed this decision to the High Court in 2012, and as a result the case was referred back to the Pensions Ombudsman. The Ombudsman reached its second determination in 2013, again finding that there had been no breach of the BBC's terms or the duty of trust and confidence. Bradbury appealed this decision to the High Court again in

2015 where it was dismissed, before subsequently appealing to the Court of Appeal.

The Court of Appeal

This latest appeal considered whether the definition of basic salary enabled the BBC to determine whether a pay rise could be included as basic salary when calculating pensionable salary. It also discussed whether the 1% cap was a breach of the pension scheme rules, whether the cap also breached the Pensions Act 1995 by breaking the link between pay and pensions, and whether the BBC breached its implied duty of trust and confidence by trying to agree the cap with employees individually.

The Court of Appeal dismissed the appeal. It found that the BBC could decide whether an increase in pay counted as basic salary and was thus entitled to limit any increase in basic salary in determining pensionable pay. Lady Justice Gloster stated that, based on this, there was no link between pay and pensions, and that Bradbury had no right to any pay rise.

The judge also confirmed that the cap was not a breach of the 1995 act, because it was in the employees' best interests. If the cap had not been implemented, more drastic action may have been required to cope with the pension scheme's deficit. The judge also clarified that the act is applicable where a person has a right to a future pension, not where an individual may acquire a right to a pension, for example, in relation to a future pay increase.

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In the court documents, Lady Justice Gloster stated: "In my judgment, the [previous] judge's analysis of the relevant facts, and his conclusion that there was no breach of the respondent's duty of trust and confidence, cannot be faulted. The respondent's conduct had to be assessed against the reality of the background that the respondent was faced with a multi-billion pound deficit in the scheme and where the trustees, the unions and the respondent all agreed that something had to be done.

"All employees were given the same choice, either to accept the cap or not, so there was no question of differential treatment."

IBM v Dalglish

On 3rd August 2017, the Court of Appeal published its long-awaited judgment in the IBM case. The key issue to be decided by the Court was whether, in implementing its pension proposals which closure of the pension scheme to future accrual and a pension cap, IBM was in breach of the implied duty of good faith.

Overturning the decision of the High Court, the Court of Appeal found that implementing its pension proposals, IBM had not breached the duty of

good faith. In respect of the pension cap, the Court said: "...failure or refusal to offer a pay rise to which the employee is not contractually entitled to may in some circumstances be a breach of the implied duty of trust and confidence.....but the circumstances have to be extreme".

Despite the failure of certain IBM companies to consult with staff on the pension scheme changes, which it didn't dispute, the Court of Appeal decided it would be wrong to require those companies to undertake a new consultation process before implementing the pension proposals. However, the pension scheme members are entitled to claim damages against IBM for breach of the contractual duty in the conduct of its consultation exercise.

LTU's Pension Ombudsman Cases

LTU has two cases with the Pensions Ombudsman dealing with the imposition of the pension cap in Lloyds Banking Group. LTU will be reviewing those cases given that many of the issues raised are similar to those in the Bradbury and IBM cases. We will keep members informed of developments.

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