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European Court – actuarial and statistical factors based on sex may be discriminatory?

An Advocate General's Opinion recently published by the European Court of Justice has argued that the use of actuarial and statistical factors based on sex infringes the prohibition of discrimination on grounds of sex.

EU Directive 2004/113 prohibits sex from being taken into account as a factor in calculating insurance premiums and benefits in respect of insurance contracts which are concluded after 21 December 2007 (see Pensions Bulletin 2007/51). However, the directive does make provision, in Article 5(2), for Member States to permit sex-specific differences in insurance premiums and benefits in so far as sex is a determining risk factor that can be substantiated by relevant and accurate actuarial and statistical data.

In delivering her Opinion in the case of Association Belge des Consommateurs Test-Achats, the Advocate General Juliane Kokott argued that Article 5(2) was counter to higher-ranking EU law (specifically the Charter of fundamental rights of the European Union). A proper reading of the Charter, in her view, leads to the conclusion that it is legally inappropriate to permit discrimination in cases in which different insurance risks can at most be associated statistically with gender when in fact many other factors play an important role in the evaluation of such risks.

The Advocate General therefore proposed that the European Court should declare Article 5(2) to be invalid. However, she also took the view that that declaration of invalidity should only have effect for the future and that there should be a transitional period of three years from the Court judgment in this matter.

Comment

Potentially, this is paradigm shifting for the insurance industry – and not just in connection with pension business. However, the Court, which has not yet considered this matter, may not agree with the Advocate General's opinion.

Pensions Regulator overturns accrued benefit cut

The Pensions Regulator's Determinations Panel has overturned changes made to a pension scheme's rules which enabled its sponsoring employer to reduce its liability for pension scheme benefits payments by retrospectively reducing the rate of benefit accrual.

The pension scheme in question, the ELCB Staff Pension Scheme, has been in a Pension Protection Fund (PPF) assessment period since August 2007. The sponsoring employer itself is now in liquidation. Before the scheme entered its PPF assessment period, the sponsoring employer passed a deed of amendment which retrospectively reduced the ongoing rate of accrual of scheme benefits. During a PPF assessment period, a scheme must pay the lower of the benefits payable under the scheme rules and the PPF compensation level.

The Panel found that the deed of amendment had an adverse effect on the accrued rights of active scheme members and that consequently, the member consent and actuarial equivalence requirements of Section 67 of the Pensions Act 1995 should have been carried out beforehand. As they had not, the Panel exercised powers granted under Section 67 and declared the deed of amendment, and the consequential reduction in benefit accrual, void.

Comment

This seems a fairly clear-cut case where the law governing modifications to scheme rules was not followed and consequently the rule change has been nullified by the Regulator. But it may have come to light only because the scheme was being assessed for PPF entry. It is not clear from the Determination why the matter took three years to resolve.

Trustees found personally liable for missing pension contributions

The Deputy Pensions Ombudsman has recently ruled that two trustees of a pension scheme are personally liable to make good missing pension scheme contributions.

In the case of McCann v the Trustees of the SureStock Pension Scheme, the Ombudsman found that two trustees of the scheme were in breach of trust as they had failed to ensure that pension scheme contributions deducted from salary were paid into the pension scheme. The particular events of the case led the Ombudsman to find that the trustees had failed to act reasonably and therefore could not rely on the provisions of

Section 61 of the Trustee Act 1925 which ordinarily protect trustees from personal liability (the ruling can be found by searching for “McCann” on the Pensions Ombudsman’s Decisions website page).

Comment

One of the trustees was a director of the sponsoring employer, which went into administration, and the other trustee appears not to have acted on warnings received about the first trustee. It is not surprising that the member's complaint was upheld.

HMRC publishes updates to its Registered Pension Schemes Manual

HM Revenue & Customs (HMRC) has published updates to the Registered Pension Schemes Manual (RPSM) – its on-line guide to pension scheme taxation.

Of the many changes made to the RPSM, the most important are:

- guidance on the change to the “relevant income” threshold from £150,000 to £130,000 for anti-forestalling in the 2009/10 and 2010/11 tax year (see Pensions Bulletin 2009/50);
- a new chapter on the transitional treatment of persons reaching age 75 with undrawn money purchase pension savings (see Pensions Bulletin 2010/29) – this simply incorporates into the RPSM a copy (bar some noted corrections) of previously issued standalone technical guidance; and
- a new chapter on the interaction of the Financial Assistance Scheme (FAS) and the pensions tax regime (this follows the regulations that came into force on 1 May 2010 which ensure that all FAS payments receive broadly the same tax treatment as payments from a registered pension scheme – see Pensions Bulletin 2010/15).

Among the smaller points is welcome confirmation of HMRC’s view that small compensation payments made without ombudsman involvement can in many circumstances be treated as authorised payments with the label “Scheme Administration Member Payment” (RPSM09106050); and that the 1% triviality facility for commuting dependants’ pensions can (subject to the usual other conditions) apply after the pension has started (RPSM10105260), a matter of some debate within the industry until now!

Comment

Formal guidance about the “relevant income” changes is welcome as it is long overdue and the RPSM was dangerously misleading in this area.

Workplace pension reforms – update

The Department for Work and Pensions has announced that the independent review of how best to support the implementation of automatic enrolment into workplace pension arrangements (see Pensions Bulletin 2010/27), has submitted its recommendations. The Government has indicated that once it has had time to study these it will announce its intentions later in the autumn.

Finance (No.2) Bill

With the wheels of Parliament beginning to turn again as the party conference season draws to a close, the Treasury has now published the Finance (No.2) Bill.

The Bill, which is intended to implement various minor technical measures inherited from the previous Government (see Pensions Bulletin 2010/30), was introduced in the House of Commons on 15 September 2010 and is scheduled to receive its 2nd Reading in the House of Commons on 11 October 2010. For pensions, the main point of interest is a measure that ensures the National Employment Savings Trust (NEST) is regarded as an occupational pension scheme within the context of the existing tax regime for registered pension schemes.

Once enacted, the Bill should become known as the Finance (No.3) Act 2010 later this autumn (despite being the No.2 Bill).

Government announces plans to widen flexible working and confirms paternity leave regulations

The Department for Business Innovation & Skills (DBIS) has announced its intention to bring forward proposals to create more flexible, family-friendly workplaces. Edward Davey, Employment Relations Minister, has announced that:

- the right to request flexible working will be extended to the parents of children under age 18 from April 2011; and
- a consultation will be launched later this year looking at how to extend the right to request flexible working to all employees, and at the design of a new system of flexible parental leave.

The DBIS announcement also confirmed that additional paternity leave regulations (implemented in April 2010 and to have effect for parents of children due on or after 3 April 2011) will remain in force as an interim measure for encouraging shared parenting from the earliest stages of pregnancy. There had been some concern that these paternity leave improvements were to be shelved (see Pensions Bulletin 2010/33).

Additional paternity leave will give employed fathers a right to up to six months extra leave which can be taken once the mother has returned to work. Some of the leave may be paid if taken during the mother's maternity pay period. The new provision will be available during the second six months of the child's life.

Lehman Brothers – Pensions Regulator publishes reasoning behind its Financial Support Direction

The Pensions Regulator's Determinations Panel has published the full reasons why it would be appropriate to issue a Financial Support Direction (FSD) against Lehman Brothers Holdings Inc - and the three main operating companies within the UK together with two intermediate UK holding companies - to provide financial support for the Lehman Brothers Pension Scheme (see Pensions Bulletin 2010/40).

The scheme was left without a means of ongoing support when the US parent company, Lehman Brothers Holdings Inc, filed for bankruptcy in the US on 15 September 2008. This triggered the insolvency of a number of UK subsidiaries, including Lehman Brothers Limited, a service company which was the sponsoring employer of the pension scheme. At the time of the group's collapse, it is estimated that the deficit in the scheme calculated on a buy-out basis was £148m.

The Panel has concluded that the companies listed above had strong associations with Lehman Brothers Limited and that they also benefited from this relationship.

The Panel also concluded that it would not be reasonable to seek financial support from 38 smaller UK group subsidiaries because it was not possible to conclude how close their relationships were with Lehman Brothers Limited or whether they derived any benefit.

Comment

Press reports indicate that two of the remnants of Lehman Brothers and Nortel (another recipient of a Financial Support Direction – see Pensions Bulletin 2010/30) are joining forces to challenge the Regulator's decisions in court so this is far from the end of the saga.

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