

# Snapshot

August 2024

## Overview of *Virgin Media v NTL Trustees II Ltd*

- **Summary of the Virgin Media Court of Appeal case**

The Court of Appeal upheld the High Court judgment that, from April 1997 to April 2013, where a scheme actuary had not provided a written confirmation confirming that amendments to past and future benefits in contracted-out schemes met or exceeded the reference scheme test those amendments were void. From 6 April 2013 to 5 April 2016, this was the case for future benefits only.

If the DWP does not intervene and the case is not appealed further, the Court of Appeal judgment will have confirmed the legal position (though there are still some unanswered questions).

- **Impact of the Virgin Media case on pension schemes**

In certain circumstances, trustees may wish to consider reviewing past amendments that affect accrued benefits for whether actuarial confirmations were required but not obtained.

It may be the case that no such confirmation is accessible, but that other documentation may indicate that the necessary written confirmations were likely to have been obtained. It may also be the case that the other documentation itself could be enough to be regarded as the actuarial confirmation itself.

## The Virgin Media case in detail

### What schemes are affected?

The impact of the Virgin Media case concerns schemes:

- which were contracted-out in relation to the additional earnings-related state pension at any point on and from 6 April 1997 to and including 5 April 2016; and
- where amendments were made to members' rights to the payment of pensions and accrued rights to pensions in the same timeframe.

### What were the facts of the case?

Virgin Media is the principal employer of the National Transcommunications Ltd Pension Plan, a formerly contracted-out defined benefit pension scheme.

From 6 April 1997 to 5 April 2016, pension schemes had to ensure that the benefits provided to contracted-out members were at least as generous as those provided under the reference

scheme test (thereby ensuring that members would not be disadvantaged by being opted out from the additional earnings-related state pension).

National Transcommunications Ltd Pension Plan members' benefits were amended in a deed of amendment in 1999, but no written actuarial confirmation that the amended benefits would meet the reference scheme test was found.

### **What issues did the case raise?**

Virgin Media appealed the decision of the High Court that the absence of the written actuarial confirmation rendered the amendment void. The Court of Appeal were asked to consider whether the High Court was correct in ruling that an actuary's confirmation, as stipulated by the Pension Schemes Act 1993 and the Occupational Pension Schemes (Contracting-out) Regulations 1996, was necessary - for amendments affecting future pension benefits, and not just those attributable to past service. The primary issue in the Court of Appeal case was one of legislative interpretation and whether the High Court was right to come to the view that it did - whether the definition of "accrued rights" in section 37 of the Pensions Act 1993 meant rights to benefits that accrued before the effective date of the amendment only, or whether the definition meant rights to benefits that accrued on or after the effective date of the amendment as well.

The Court of Appeal rejected the argument that "accrued rights to pensions" referred only to rights earned by past service, interpreting the term to include rights that members would earn in the future while the scheme remained contracted-out. Accordingly, the Court of Appeal found that, for amendments to be valid:

- from 6 April 1997 to 5 April 2013, a scheme actuary needed to provide written confirmation that amendments to past and future benefits in contracted-out schemes met or exceeded the reference scheme test; and
- from 6 April 2013 to 5 April 2016, a scheme actuary needed to provide written confirmation that amendments to future benefits in contracted-out schemes met or exceeded the reference scheme test.

The reason as to why there is a change on 6 April 2013 is that the Occupational Pension Schemes (Contracting-out) Regulations 1996 were amended by the Occupational and Stakeholder Pension Schemes (Miscellaneous Amendments) Regulation 2013 to explicitly refer to future benefits only.

Therefore, despite the fact that the 1999 deed only amended future benefit accrual, evidence of written actuarial confirmation was necessary for the amendment to be valid. Written actuarial confirmation needs to be given regardless of whether amendments improve or reduce benefits.

### **What's next?**

Virgin Media has until 6 September to seek permission to appeal the case to the Supreme Court.

If the case is not appealed further, there is a possibility that the Department for Work and Pensions (the "**DWP**") will legislate on this matter. The DWP (i.e. the Minister) has the power to do so by way of enacting secondary legislation, so the DWP is not burdened by the Parliamentary process to pass primary legislation. Whilst the Association of Pension Lawyers has made contact with the DWP on this matter, the DWP has made no public announcement that it will act to resolve uncertainty or allow schemes to retrospectively confirm that amendments were compliant with section 37 of the Pensions Act 1993.

If the DWP does not intervene and the case is not appealed further, in certain circumstances trustees may wish to consider reviewing past amendments that affect accrued benefits for such actuarial confirmations.

It may be the case that no such confirmation is accessible, but other documentation, such as trustee meeting minutes, may contain references to written actuarial confirmation being issued by the scheme actuary. Correspondence between the scheme actuary and the trustees may make reference to written confirmation – or even be sufficient to be regarded as the written confirmation itself, depending upon the wording and the circumstances.

There are still numerous points which have not been clarified. Several of these points, including whether a written confirmation is required for closure of scheme, may be dealt with in The Pensions Trust trial to be heard in February 2025.

If your scheme was contracted-out, and you have concerns about the impact this case may have on your scheme, please do not hesitate to contact a member of the Stephenson Harwood pensions team.

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