STEPHENSON HARWOOD

Pensions law team – July 2020

Court of Appeal judgment closes the door on retrospective closure of the Barber window (except in very limited circumstances)

The Court of Appeal (**CoA**) has handed down its judgment in the case of *Safeway v Newton* which confirms that the introduction of section 62 of the Pensions Act 1995 (**Section 62**) was sufficient to close the *Barber window* of the Safeway Pension Scheme (the **Scheme**) retrospectively with effect from 1 January 1996. However, the judgment is of limited application and so appears to have closed the door on retrospective closure of the Barber window to all but a small number of pension schemes.

Background

You may recall from our previous briefing that the Scheme purported to equalise male and female Normal Retirement Dates (**NRDs**) with effect from 1 December 1991 by issuing member announcements in September and December 1991 (the **1991 Announcements**). The intention was to "*level down*" the female members' NRDs to 65 from 1 December 1991 and, in doing so, close the *Barber window* (the period during which the male members' NRDs are required by EU law to be "*levelled up*" to 60) However, the Scheme rules were not amended to reflect this until 2 May 1996 when a deed was executed which purported to have retrospective effect from 1 December 1991 (the **1996 Deed**).

In October 2017 the CoA held that, under the Scheme's power of amendment, an amendment to the Scheme's governing documentation could only be made by deed. The 1991 Announcements could not, therefore, have amended NRDs under the Scheme with effect from 1 December 1991. The amendment power did, however, allow for amendments to be made with retrospective effect. The question was, therefore, whether the 1996 Deed was valid retrospectively so as to change NRDs to 65 with effect from 1 December 1991 or whether the amendment could only have prospective effect from 2 May 1996.

The CoA determined that there was an open question of EU law as to whether such a retrospective amendment was prohibited by what was at the time Article 119 of the Treaty of Rome (**Article 119**). It therefore referred the question to the Court of Justice of the European Union (**CJEU**). The Grand Chamber of the CJEU handed down its judgment on 7 October 2019 and held that, once discrimination has been found to exist (for example through unequal NRDs for male and female members):

- the application of the equal treatment principle must be immediate and full and cannot be made subject to conditions which maintain discrimination, even on a transitional basis; and
- the principle of legal certainty must be observed (in particular, in cases which entail financial consequences) such that the individuals concerned know precisely their rights and obligations.

The steps taken to equalise NRDs before the 1996 Deed did not satisfy these conditions as the rules of the Scheme could not be validly amended without a deed. As such, the 1996 Deed did not, of itself, have retrospective effect to 1 December 1991.

However, the CJEU did not go so far as to hold that retrospective equalisation could never be possible, noting that: "*…it is possible measures seeking to end discrimination contrary to EU law may, exceptionally, be adopted with retrospective effect provided that, in addition to respecting the legitimate expectations of the persons concerned, those measures are in fact warranted by an overriding reason in the public interest…*". See our previous briefing for more on this "*exception*".

The latest CoA judgment

The one remaining question to be considered by the CoA following the CJEU judgment was whether the introduction of Section 62 with effect from 1 January 1996 meant that the Scheme's *Barber window* was closed with effect from that date. Section 62 (now superseded by section 67 of the Equality Act 2010) was intended to provide a domestic law framework for Article 119 in relation to pension rights by introducing an "*equal treatment rule*" for all UK occupational pension schemes.

In considering this question, it is worth noting that the CJEU's view was that the *Barber window* does not close until Article 119 has been implemented into domestic law. Once that has been achieved, Article 119 simply requires equal treatment in relation to pension rights and it becomes a matter of domestic law as to what the level of those pension rights should be.

The argument put forward by Safeway was that, even though it was concluded that the 1996 Deed could not, of itself, retrospectively close the *Barber window*, the introduction of Section 62 into domestic law meant that the *Barber window* was closed with effect from 1 January 1996. As such, Article 119 only prohibited the 1996 Deed from retrospectively "*levelling down*" the female members' NRDs to 65 for the period between 1 December 1991 and 31 December 1995, and not for the period between 1 January 1996 and 2 May 1996 which was governed exclusively by domestic law.

The CoA unanimously agreed that the Scheme's *Barber window* had been closed on 1 January 1996 due to a combination of the introduction of Section 62 and the retrospective nature of the 1996 Deed. The effect of Section 62 was to implement Article 119 into domestic law and, thus, introduce legally enforceable rights and remedies under domestic law that complied with Article 119. The CoA remarked:

"*…section 62 cannot be allowed to circumvent the principles of EU law which are designed to protect the rights of members during the Barber window. In my judgment, however, it does not do so. The effect of section 62 was to level up the rights of men to those of women in accordance with Article 119. That does not involve any undermining of Article 119 rights. Once that has happened, one moves into Period 3, when it is permitted to reduce the level of benefits by levelling down. That does not undermine Article 119 either, because the level of benefits is not controlled by Article 119 in Period 3, as the Court has made clear…*"

Comment

This is a significant decision in relation to the equalisation of NRDs under UK occupational pension schemes as it confirms for the first time that the introduction of Section 62 made it potentially possible for any such schemes which had not closed their *Barber window* on 1 January 1996 to retrospectively close that *window* from 1 January 1996.

However, the number of pension schemes which will benefit from a reduction in liabilities as a result of this judgment is likely to be limited. This is because the judgment only applies to those schemes which:

- were permitted to make retrospective changes under the terms of the scheme amendment power; and
- in compliance with that amendment power, made retrospective changes to close the *Barber window* in the period after 1 January 1996 and before 6 April 1997 (when statutory restrictions in relation to retrospective scheme alterations were introduced by section 67 of the Pensions Act 1995).

For the majority of schemes, which do not meet the above criteria, the CoA judgment appears to close the door on the possibility of successfully arguing that the *Barber window* was closed retrospectively (except, perhaps, where the exception mentioned above applies).

Please feel free to get in touch with your usual contact in the Stephenson Harwood pensions team if you think that your scheme may be affected by this judgment.

Contacts

Stephen Richards
Partner
T: +44 20 7809 2350
E: stephen.richards@shlegal.com

Dan Bowman
Consultant
T: +44 20 7809 2556
E: daniel.bowman@shlegal.com