

Further news on IBM

A further judgement has recently been published in the case of **IBM v Dalglish**. By way of reminder, the original judgement (published early in 2014) found that IBM had breached its implied duty of trust and confidence (or "**good faith**") towards employees and pension scheme members in several respects, notably by:

- Creating "reasonable expectations", as part of projects to change pension benefits, that further changes would not follow within the near future, and then proposing further changes shortly afterwards.
- Asking employees to sign "non-pensionability agreements" (**NPAs**), under which future salary increases would not be pensionable.

The case is fairly fact-specific. There is nothing inherently objectionable in proposing benefit changes or NPAs, and the breach of duty appears to have been due to IBM's particular conduct – it is difficult to draw specific lessons from the case as to exactly what other employers should avoid in order to comply with their duties to employees.

This latest judgement arose due to a lack of clarity as to exactly what remedies applied due to IBM's breach of duty, and, while it is similarly obscure in areas (it adds a further 187 pages to the original judgement's 450), it does contain some points of wider interest. In particular:

- The judgement confirms that, although IBM had created reasonable expectations that its final salary pension scheme would not change for a period of time, employees did not have reasonable expectations that

their salary would actually rise. Rather, they had a reasonable expectation that a salary increase, if granted, would be pensionable. This meant that:

- Employees who signed an NPA were entitled to the salary they were given as a result, and (where the employer had breached its duty) to the inclusion of that salary increase in their pension accrual.
- For employees who refused to sign NPAs, and hence were not given a pay increase, the Court did not feel it had jurisdiction to award the pay increase they would have received if they had signed. However, it could award damages to the employees for breach of the implied duty, and such damages would be largely based around the pay increases they would have

received if the proposals had not been formulated.

In some ways, this sounds rather like a distinction without a difference, but it does have some significance. Firstly, the trustees of the scheme were not under a duty to administer the scheme having regard to the damages that might be due to the 2nd group (but did have to take account of salary granted to the first group). Secondly, some employers may be in a stronger position if they withhold salary increases (with a view to containing pension costs) than if they pay them, but subject to NPAs.

- There are some further comments in the judgement about why IBM's non pensionability agreements breached the contractual duty of trust and confidence – in particular there is a fairly clear statement that the NPAs were objectionable in isolation (not just because they went against employees' reasonable

expectations). There is also a broad statement that no reasonable employer can threaten never to award a pay increase again unless an employee signs an NPA (although this comment probably needs to be seen in the context of IBM's particular behaviour as regards the employees, which was perceived to be aggressive).

- Members who were excluded from the scheme in breach of the implied duty were entitled at their own option to be reinstated – the notices were voidable, not void, and the trustees should act accordingly. In other words, if members want reinstatement, the notices will be treated as being invalid and accrual will be ongoing until IBM takes steps to close off accrual.
- Where IBM had refused consent to early retirement in breach of its duty, the trustees should treat that consent as having been given.
- There is also some discussion on the long-debated question of what constitutes "retirement" (many scheme rules only promise benefits to members who "retire"). In very broad summary, the conclusion was that a dismissal for misconduct is not retirement, but a voluntary or compulsory redundancy can be. Moreover, voluntary redundancy can be construed as retirement "with the consent of the employer", and compulsory redundancy might also be so construed depending on the circumstances.

appeal proceedings are resolved. As a result, the Trustee will not be making any changes to the way the IBM schemes are currently administered at this stage.

Pending an appeal, the parties have agreed in principle to extend the stay in respect of the judgments, until any

Contacts

[Hywel Robinson](#)

Partner

[Imogen Clark](#)

Partner

[Clare Hoxey](#)

Partner

To email one of the above please use:

firstname.lastname@cliffordchance.com

T: +44 20 7006 1000

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