Case law - changing from RPI to CPI

Matthew Swynnerton looks at a recent High Court judgment about whether a set of scheme rules permit a change from RPI to CPI

In recent years there have been a number of judgments from the courts considering whether particular scheme rules permit revaluation of deferred benefits or increases to pensions in payment to move from being calculated by reference to the Retail Prices Index (RPI) to the Consumer Prices Index (CPI). Whilst the position for each scheme depends on the drafting of the particular rules, trustees and employers may nevertheless find it useful to see how this issue is approached by the courts and in this article we report on the most recent judgment from the High Court on this issue.

The court's recent judgment

This judgment concerned the rule on increases to pensions in payment in a particular section of the BT Pension Scheme. The rule provides for pensions to be increased by the increase in the cost of living and states that the cost of living "will be measured by the Government's published General (All Items) Index of Retail Prices or if this ceases to be published or becomes inappropriate, such other measure as the Principal Company, in consultation with the Trustees, decides". The question for the court was therefore whether RPI has "become inappropriate".

Issues of construction of the scheme rules arose, with the court concluding that whether RPI has become inappropriate is a question of objective fact and rejecting submissions that the rule should be construed as conferring

a power on the principal employer to determine whether RPI has become inappropriate. In relation to the meaning of the words "becomes inappropriate" the court's conclusions included that, for RPI to have become inappropriate, it must now be inappropriate (not merely less appropriate than any alternative index) for the purposes of calculating increases in pensions payable to members of the scheme to reflect the inflation experienced by those members.

In terms of whether RPI has in fact become inappropriate, the principal employer relied on a number of matters including the impact of a change in the collection and use of clothing prices in 2010, the decision by the UK Statistics Authority to 'freeze' RPI in January 2013 and the de-designation of RPI as a National Statistic in March 2013. The court concluded that these matters and events, whether by themselves or in combination, have not caused RPI to become inappropriate for the purposes of uprating pensions in the scheme. For example, looking in isolation at the decision to 'freeze' RPI, the court's reasoning included that this did not prevent RPI from remaining fit for purpose as it was maintained for legacy purposes. In relation to its decision about the cumulative effect of the matters relied on, the court considered that the following two factors were particularly important: the flaws which underlie the matters relied on by the principal employer were present in RPI in 2002 when this wording was first included in the rules; and the purpose of the rule is to provide protection for pensioners against increases in the real cost of living to which they are likely to be subjected.

Looking ahead

We expect trustees and employers to continue to watch developments on the issue of changing from RPI to CPI with interest. In terms of future case law developments, the employer in this case has stated that it intends to appeal this judgment, and a November 2016 Court of Appeal judgment (relating to a different scheme) which concerns the construction of the words "or any replacement adopted by the Trustees without prejudicing Approval" is expected to be considered by the Supreme Court this year.

It is also worth noting that the DWP's February 2017 Green Paper on defined benefit schemes noted that "the current arrangement where some schemes are prevented from moving to CPI by scheme rules is something of a lottery" and, in the context of a general question on whether there is a case for special arrangements for schemes and sponsors in certain circumstances, asked whether the government should consider a statutory override to allow schemes to move to a different index. It will therefore also be interesting to see whether the White Paper on defined benefit schemes, which is expected to be published this Spring, contains any proposals on this issue.

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