An assessment of historic pension scheme amendments: Newell Trustees v Newell Rubbermaid

Matthew Swynnerton and Megan Sumpster explore the recent Newell ruling regarding pension scheme amendments

The recent Newell ruling primarily concerns the validity of the conversion of member benefits from defined benefit (DB) to defined contribution (DC); it also involves a claim of age discrimination. The decision is highly relevant for both trustees and employers considering amending benefits and covers the construction of interim deeds, the operation of *Re-Courage* type amendment power restrictions, and age discrimination.

Background

In 1992, the members of the Newell Rubbermaid UK Pension Scheme (plan), which only provided DB benefits at the time, were divided into three groups by reference to their age:

(1) those aged under 40 (**under 40s**);
(2) those aged between 40 and 44 (**40-44s**); and
(3) those aged 45 and over (**over 45s**).

The under 40s were automatically transferred to a new DC section of the plan with their accrued DB benefits converted into a cash amount credited to their DC accounts. The 40-44s had the option of staying in the DB section or transferring over to the DC section. The over 45s remained in the DB section. The amendments were made by the combination of a 1992 Deed and booklets, pending a definitive amending deed in 1993.

The court considered two key questions:

(1) whether the transfer and conversion of the under 40s' and 40-44s' benefits to a DC section was valid in terms of the (i) proper execution of the necessary documents and (ii) as a matter of law (**transfer and conversion issues**); and

(2) whether the under 40s suffered and are suffering unlawful age discrimination as a result of their automatic transfer out of the DB section into the DC section (**age discrimination issues**).

Transfer and conversion issues

The court ruled that the 1992 Deed was effective to set up the new DC section, despite an argument from the representative beneficiary that there was insufficient proof that it was properly executed. The judge noted the age of the evidence in question and stressed that it did not need to be perfect for the amendment to be deemed valid.

In deciding whether the 1992 Deed was valid as a matter of law, the court first considered the plan's amendment power, which provided that no alteration could be made *"such as would prejudice or impair the benefits accrued in respect of membership up to that time"* (the **proviso**). The Court drew upon the well-established principle in *Re Courage* and stated, *"it is now well established at first instance that provisos that protect accrued benefits prevent the breaking of the final pensionable salary link"*. Therefore, it was held that the proviso did not permit the final pensionable salary link to be broken for members transferring to the DC section.

The court further decided that a DB underpin should be imposed and that affected members should be entitled to have their DB accrued benefits properly valued at the time of the conversion to account for the final pensionable salary link. It was also held that the underpin should be calculated retrospectively to ensure any shortfall is included in the transfer sum and accumulated with the investment returns it would have earned had it been invested in the DC section's default strategy, along with interest.

Age discrimination issues

Age discrimination only became unlawful in 2006 under the *Employment Equality (Age) Regulations* and, as such, there was no relevant age discrimination legislation in force at the time of the 1992 transfer. The Court therefore ruled that there could not have been any age discrimination, noting that the claim was *"fatally flawed at the first stage"*. There was also said to be nothing in the current plan rules that contravened the non-discrimination rule and, therefore, the trustee would not be in breach of the non-discrimination rule by administering the plan in accordance with its existing rules.

Conclusions

This case represents a clear victory for the employer. Interestingly, the court observed that the employer's motivation when making the transfer, which was in part to improve the plan's balance sheet, was irrelevant when deciding whether the amendments were carried out *"lawfully, fairly and properly"*.

Written by DLA Piper partner, Matthew Swynnerton and knowledge lawyer, Megan Sumpster