

# British Broadcasting Corporation v (1) BBC Pension Trust Limited (2) Christina Burns

## ➤ Matthew Swynnerton and Megan Sumpster discuss the court ruling on the BBC scheme's amendment power

In this recent High Court case, the judge ruled that the amendment power in the BBC Scheme rules is drafted in such a way as to prevent any reduction to future accrual of benefits.

### Background

This Part 8 Claim, brought by the BBC, raises questions about the treatment of future service benefits under the BBC Pension Scheme. The BBC had hoped to limit the ongoing costs of funding the scheme. As at May 2022, the BBC was paying a contribution rate of 42.3 per cent of the pensionable salaries of active members to fund their ongoing pension accrual in the scheme, a defined benefit (DB) scheme, compared to an average 7-8 per cent rate for members of BBC DC schemes. Rule 19 of the scheme rules gives the trustee power to “alter or modify any of the trusts, powers or provisions of the Trust Deed or the Rules”. However, it is subject to a fetter, which provides that no alteration shall take effect as regards active members “whose interests are certified by the Actuary to be affected thereby”, unless certain criteria are fulfilled, which are designed to ensure that the relevant “interests” are not substantially prejudiced.

The BBC sought the court’s findings on the scope of the term “interests” and whether they include future service benefits. The BBC contended that the correct construction of “interests” refers to the rights earned up to the date of any amendment i.e. not any future service benefits. The Representative Beneficiary, however, argued that the concept of “interests” includes future service benefits.

### The Judgment

The judge, Johnson J, concluded that the concept of “interests” was sufficiently broad as to include a future salary linkage and future accrual of benefits.

In reaching his decision, Johnson J noted several significant pension cases. In *Barnardo’s v Buckinghamshire* [2018], the judge considered that emphasis should be given to textual analysis, noting pension schemes are usually the product of specialist drafting, designed to operate in the long term. Part of the BBC’s case was that this approach to construction would lead to serious problems with the scheme’s ongoing management, given the increasing costs, and the BBC argued that pension scheme terms should be construed to give reasonable and practical effect to the scheme. However, Johnson J disagreed and viewed giving practical effect to a scheme as meaning simply ensuring that the scheme works as intended under the rules.

Johnson J also cited the ruling in *Re Courage* [1987], which also concerned a fetter on an amendment power and in which the judge stated, “In the absence of express definition, I see no reason to exclude any benefit to which a member is prospectively entitled ... [from the definition of Accrued pensions]”. Finally, Johnson J considered the case of *Bradbury v BBC* [2012], [2017] but concluded that *Bradbury* was concerned with whether “interests” would be substantially prejudiced by a 2000 amendment to cap pensionable pay and not with the scope of the “interests” themselves.

In his analysis of the natural reading of the amendment power and fetter, Johnson J noted that, “as a matter of

ordinary language, the concept of interests does not seem to ... suggest that the intended division between matters which are protected and matters which are not is marked by the fault line between benefits already earned by past service and those which are yet to be earned in the future.” Instead, the focus should be on the position that active members have under the Rules before, and after, an amendment. If their positions are different, Johnson J posited that it seems “inescapable that their interests are affected”.

### Comment

This is a significant ruling. It is only the second time that the courts have ruled that a fetter on an amendment power protects future service benefits, and it means that the BBC cannot modify its DB scheme rules to reduce future benefit accrual or close the scheme to future accrual altogether.

Scheme rules differ, and the amendment powers of more recent schemes tend to avoid terms like “interests”, in favour of “rights”, which, as Johnson J argued, are potentially narrower in scope. That said, the decision highlights the continued willingness of the Courts to focus on textual analysis, rather than considerations of practicality or fairness.

The BBC will now have to decide whether to appeal.



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