



# Pensions

## *Safeway Limited v Newton*

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### **Briefing**

March 2016

### **Summary**

### **Introduction**

In its recent decision, the High Court has once again highlighted the need for pension schemes to check whether benefits have been correctly equalised in accordance with EU law, to ensure male and female members accrue the same benefits. Although much of this decision relates to the specific steps that had been taken under the Safeway Pension Scheme's power of amendment, Warren J's judgment emphasises the need to comply with overriding EU legal requirements.

### **Background**

The European Court of Justice (ECJ) decided in the case of *Barber v Guardian Royal Exchange* that the Treaty of Rome's requirement that male and female employees must receive equal pay for equal work should apply to pension provision. It is, therefore, not permitted for pension schemes to discriminate between male and female members on the grounds of sex, which prevents different normal retirement ages for men and women.

A number of subsequent ECJ decisions (including in the cases of *Coloroll Pension Trustees Limited v Russell* and *Smith v Avdel Systems Limited*) clarified several points arising from the Barber decision. In particular, the requirement to provide the same benefits for male and female members applies only to pensionable service after 17 May 1990 (the date of the Barber decision).

Benefits accrued during the period between this date and the date of any amendment to a pension scheme's rules to equalise benefits (often referred to as the 'Barber window') must be levelled up. This means that the benefits accrued by the disadvantaged sex during this period must be increased to the same level as the benefits accrued by the advantaged sex. For example, a common consequence of this has been that male members of pension schemes have accrued benefits during the Barber window on the basis of a normal retirement age of 60 instead of age 65, to reflect the normal retirement age of female members.

In addition, trustees of pension schemes are required to take ‘measures’ to comply with the equalisation requirements. This includes taking steps to amend a pension scheme’s rules to make the basis of benefit accrual the same for male and female members. Benefits accrued after such an amendment (i.e. after the Barber window) may be decreased to the level of the previously disadvantaged sex or increased to the level of the previously advantaged sex, provided that both male and female members accrue benefits at the same level.

### **Facts of *Safeway Limited v Newton***

Safeway issued a written announcement to members of the Safeway Pension Scheme in September 1991. As a part of a member consultation, this announcement stated that normal retirement age would be equalised at 65 for male and female members with effect from December 1, 1991 (having previously been 60 for female members and 65 for male members). This was followed by a letter to members dated December 1, 1991, which confirmed that this change was taking effect from the date of the letter. The Safeway Pension Scheme’s rules were not amended to reflect this change until a deed was executed on May 2, 1996, although the amended rules stated that the common normal retirement age of 65 applied from December 1, 1991.

### **Effectiveness of the 1991 notice and letter**

Safeway argued that the 1991 notice and letter were sufficient in themselves to equalise benefits with effect from December 1, 1991. This was on the basis of the Safeway Pension Scheme’s power of amendment, which permitted the trustees to amend the rules ‘so as to take effect from a date specified in the Supplemental Deed which may be the date of such Deed or the date of any prior written announcement to Members of the alteration or addition’. Safeway considered that this allowed the trustees to act as if the rules had been amended pending the update to the drafting of the rules.

The High Court agreed with Newton that the amendment was not made until the deed of amendment had been executed on May 2, 1996. The requirements of the power of amendment were considered to be clear. Otherwise, there would be uncertainty whether the amendment would be perfected until the deed had been executed. However, it was possible under the power of amendment and domestic law to amend retrospectively the retirement ages in this way (section 67 of the Pensions Act 1995, which restricts detrimental modifications to accrued benefits, was not in force at the time of this change).

### ***Harland & Wolff***

Warren J had previously decided the High Court case of *Harland & Wolff Pension Trustees Limited v Aon* in 2006. In *Harland & Wolff*, the pension scheme’s rules permitted retrospective amendments. A deed of amendment executed in 1993 purported to equalise benefits with effect from 17 May 1990. However, the amendment was a levelling down of benefits during this period (i.e. the benefits of the advantaged sex were reduced to the level of the disadvantaged sex during the Barber window). This was contrary to the ECJ’s decisions, in particular, that benefits should be levelled up during the Barber window. Despite this retrospective amendment being permitted under the power of amendment and domestic law, Warren J held that the amendment did not satisfy EU law requirements in respect of equalisation.

Safeway sought to distinguish the facts of *Safeway Limited v Newton* from *Harland & Wolff*. This was on the basis that the change to the Safeway Pension Scheme's rules involved no element of retrospectivity, as the change was made prospectively from December 1, 1991 in accordance with the power of amendment. Safeway argued that the change was announced in advance and it was open to Safeway and the trustees to execute a deed of amendment at any time after the announcement had been made. In the event that *Harland & Wolff* could not be distinguished, Safeway also argued that it had been decided incorrectly, as a number of issues had not been fully considered by the court.

The High Court again agreed with Newton that *Harland & Wolff* was a decision precisely in point that could not be distinguished and that all relevant issues had been considered. The wording of the Safeway Pension Scheme's power of amendment effectively permitted retrospective amendments and was being relied on to increase female members' normal retirement age to 65 during the period from December 1, 1991 to May 2, 1996. The Barber window did not end until the Safeway Pension Scheme's trustees had taken the necessary measures (i.e. by executing the deed on May 2, 1996). The purported effective date of equalisation of December 1, 1991 was, therefore, contrary to the EU law requirement that benefits during the Barber window must be levelled up.

## Section 62 of the Pensions Act 1995

Section 62(1) of the Pensions Act 1995 states that 'An occupational pension scheme which does not contain an equal treatment rule shall be treated as including one'. Although section 62 did not come into force until January 1, 1996, the legislation goes on to state that it shall be treated as having had effect in relation to any pensionable service on or after May 17, 1990 and that alterations may have effect in relation to a period before the alterations are made.

Safeway argued that, notwithstanding its other arguments in respect of the effectiveness of the 1991 notice and letter and the application of *Harland & Wolff*, section 62 permitted the May 2, 1996 deed to implement equalisation with effect from December 1, 1991. Safeway also submitted that, in any event, equalisation took place on January 1, 1996 at the latest (when the legislation came into force).

However, the High Court decided that section 62 had not fully implemented the EU law requirements in respect of equalisation. Consequently, members may continue to rely on their rights under EU law. The existence of section 62, therefore, did not alter the position that had been decided in relation to the purported equalisation with effect from December 1, 1991 nor the levelling down of benefits during the Barber window.

## Comment

Warren J has perhaps unsurprisingly followed his previous decision and reasoning in *Harland & Wolff*. However, despite this case focusing on events that took place around 20 years ago, it demonstrates the need to ensure that equalisation has been carried out correctly. This is not least due to the large amounts of additional liability that may arise if it materialises that normal retirement ages have not been equalised (this case reportedly involved an additional £100 million of liability). Given the significant amounts involved, this is highly unlikely to be the last case regarding equalisation that comes to court. Indeed, the issues considered by the High Court in this case be examined further by the Court of Appeal, as permission to appeal has been granted.

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