Equalisation: the saga continues

It is almost twenty years since the Barber case first made equalisation a thorny issue for UK pension schemes. It continues to cause problems for many pension schemes, but the recent case of Foster Wheeler v Hanley may point to a way forward, as Peter White explains.

Equalisation – the problem in a nutshell

For many years now, European law has required the equal treatment of men and women as regards their pay. It became clear in 1990, in the famous Barber case, that this meant women and men had the right to equal pension benefits from 17 May 1990 (the date of the Barber judgment) onwards. However, it was several years later before it was established that, until pension benefits were equalised, disadvantaged employees should be given the same benefits as advantaged employees. In other words, pension schemes with different normal retirement dates for men and women must apply the lower normal retirement date to both sexes in respect of service between 17 May 1990 and the date when the scheme was amended to equalise normal retirement ages.

Let us look at the position of the Foster Wheeler Pension Plan members by way of example. This pension scheme equalised the normal retirement date (NRD) at 65 on 1 June 1992. Before this, the scheme’s NRD is 60 for women and 65 for men. The members’ NRDs for the various periods of pensionable service are set out below:
Women | Men
---|---
Pre–17 May 1990 | 60 | 65
17 May 1990 to 31 May 1992 | 60 | 60
1 June 1992 onwards | 65 | 65

For pensionable service between 17 May 1990 and 31 May 1992 (known as the “Barber window”) all members are entitled to receive a pension at 60 which is not reduced for early payment, regardless of what the rules of the scheme say.

However, members with service before and after 1 June 1992 will have some benefits with a NRD of 60 and some benefits with a NRD of 65. How should the benefits with a NRD of 65 be treated when the other benefits are due to come into payment at age 60? Could those benefits be reduced to take account of early payment? Or should the pension be split so that some comes into payment at age 60 and some at age 65? This is the problem that the Court considered in the Foster Wheeler case.

**What is Foster Wheeler about?**

The Foster Wheeler Pension Plan had an early retirement rule allowing early retirement with the consent of the employer from age 60. If consent was granted, no reduction for early payment was to be applied to the pension. It was therefore unclear whether benefits earned after 1 June 1992 could be reduced for early payment if the employer did not consent to them coming into payment at age 60.

The High Court initially decided that benefits with a NRD of 65 could be taken at 60, and the scheme’s early retirement rule would mean no early payment reduction would be applied. This effectively took away the employer’s power to refuse pre-1992 members an unreduced early retirement pension. It could have been very expensive for the scheme.

The Court of Appeal rejected the High Court’s decision. The Court of Appeal described it as conferring a “windfall”, as members gained the right to retire at 60 in respect of all benefits. The High Court had given members far more than they were entitled to under European law.
The Court of Appeal decided that members’ benefits calculated by reference to a NRD of 65 could be reduced for early payment if they were drawn at age 60. This involved applying the rule governing deferred pensions, which provided for a reduction in benefits with employer consent on early retirement. The Court emphasised that the principle laid out in the case of \textit{BESTrustees v Stewart} (ie that the Court should take the path which interferes least with members’ rights under the scheme) meant that the deferred rule was the most appropriate rule to apply (although it was not immediately obvious why that rule should apply to these circumstances).

In this case a member retiring at age 60 will take all his pension at the same time, but some of those benefits could be reduced for early payment under the deferred pension rule. The court decided that although the deferred pension rule provided for the consent of the employer, there would be no reason to withhold that consent if the pension was reduced.

\textbf{What does this mean for other schemes?}

It will be very interesting to see how \textit{Foster Wheeler} is applied in future cases. Courts in future may decide that the case only applies narrowly to the specific circumstances of the \textit{Foster Wheeler} case and if the early retirement rule does not provide for an unreduced pension with employer consent at age 60 then \textit{Foster Wheeler} has no application. However, the Court of Appeal has tried to give a firm steer that equalisation problems should be dealt with by trustees without recourse to the Courts, except in rare circumstances. Trustees should pursue “the most sensible and practical way of achieving the necessary equalisation”. Moreover, “the parties must exercise their judgment in choosing between different options in terms of how to equalise and what incidental provisions to adopt”.

“It will be very interesting to see how Foster Wheeler is applied in future cases.”
In practice, a judgment which follows the wording of a particular scheme’s rules may not be easy for trustees of other schemes to follow. If trustees decide that the line of “least interference” means that a rule can be invoked that would not otherwise apply, then this could lead to some peculiar resolutions to the equalisation problem. We will have to wait to see how this plays out in future.

Whether this means that the Courts would support the alternative approach of splitting pensions so that some benefits are paid from age 60 and some from age 65 (or whatever normal retirement ages are applicable) is not clear. This was rejected in the Foster Wheeler case, but presumably much would depend on the wording of the individual scheme rules.

In the meantime, trustees and employees should consider seeking advice as to the specific application of Foster Wheeler to their pension scheme.