Member Consent and Pension Trust Benefit Change

*David Pollard and Alison Chung**

Introduction

Many defined benefit pension schemes are looking to change the future level of benefits provided in the schemes as a way of limiting the rate at which the liabilities of the scheme grow.

There are different ways of implementing scheme benefit changes, and in deciding on the most appropriate implementation method, the following legal issues will be among those that are key:

(a) the scope of the scheme amendment power (ie the balance of power and any relevant restrictions on the power);
(b) whether or not the employment contracts give rise to any contractual rights to future levels of pension benefit; and
(c) any reasonable expectations as to the future level of benefits which may have been engendered in active members in previous employee/member communications.

In many cases, it will be possible to implement the changes to scheme benefit structures by way of a deed of amendment to the scheme alone, without needing express consent from the affected members. In some cases, however, employers look to seek express consent to the changes from affected members. This might be for a number of reasons, including the following:

(a) the scheme amendment power is limited and does not permit the change to be made to future benefits without member consent;
(b) the company may feel that it accords with prior company practice to make benefit structure changes in this way;
(c) employees may have contractual rights to their current level of pension benefit and therefore need to consent to the rights being amended;
(d) there may be a concern that previous communications have given rise to a reasonable expectation of the current level of pension benefits continuing beyond the proposed date of the change, such that to make the amendment would be to breach the implied employer duty of trust and confidence; or
(e) to take the pressure off the pension scheme trustee compared with implementing the changes by deed of amendment alone.

* Solicitors, Freshfields Bruckhaus Deringer LLP, London. This article is based on a talk given to the Association of Pension Lawyers (APL) in March 2016.

This article looks at some of the legal issues that arise where the individual employee consent route is followed. We consider the following points:

(a) Validity of external contracts

  (i) To what extent are extrinsic contracts effective to vary a member's benefits under a trust?
  (ii) Are the trustees bound by the consents?
  (iii) Can a member bind their dependants or spouses by their consent?

(b) Procuring employee consents

  (i) What are the employer's options if an employee does not consent?
  (ii) What are the legal issues associated with dismissing non-consenting employees?
  (iii) Can the employer force the change by creating a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006[1] (TUPE 2006) of the relevant employees?

Validity of external contracts

Contract is effective

This section[2] looks in depth at the legal issues in relation to any contract between the employer and the employee concerning the reduction of future service pension benefits.[3] The case law is relatively clear in this area. If there is a valid contract between the employer and the employee providing for a reduction in future service benefits, then this will (in effect) be binding on the pension trust and the pension scheme trustee: *South West Trains Ltd v Wightman*.[4] This means that:

(a) it is binding on the trustee in the sense that the trustee should not pay out the higher level of benefits, but should instead pay out the lower level of benefits; and
(b) the case law on this confirms that such a binding contract will be enforced by the courts, if necessary by means of an injunction against the member restraining him or her from claiming the higher benefits, contrary to the express (or implied) terms of the contract between the employer and the employee. Such a contract can be enforced by the employer.

The leading modern case[5] is the decision of Neuberger J (as he then was) in *South West Trains Ltd v Wightman*.[6] In that case, the members had agreed (as part of a collective

1 SI 2006/246.
2 This section is largely based on Chapter 29 in Pollard, *Employment Law and Pensions* (Bloomsbury Professional, 2016).
3 See Chapter 15 ('Contract overriding Trust') in David Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013); Sandeep Maudgil 'Benefit changes and the employment contract' (APL Conference, 2009); Nigel Burroughs, 'Pensions and extrinsic contracts' (PLC, 1 August 2012) at 'Key points for practitioners' and Robert Ham and Jonathan Hilliard, 'A runaway train or stuck in the sidings? *South West Trains v Wightman* after *Bradbury* and *IBM*' (4 December 2012, APL seminar).
4 [1997] EWHC 1160 (Ch), [1997] OPLR 249, [1998] PLR 113 (Neuberger J).
5 There is a House of Lords decision from the 1930s to the same effect: *Tibbals v Port of London Authority* [1937] 2 All ER 413, HL. This case was first pointed out to modern audiences by Michael Tennet.
6 [1997] EWHC 1160 (Ch), [1997] OPLR 249, [1998] PLR 113 (Neuberger J).

agreement) that part of their future pay would not be pensionable for past service (various non-pensionable allowances were being consolidated into basic pay).

Neuberger J held that it was implicit in the binding pensions agreement that the relevant employees would not claim a pension at a higher rate than agreed. Indeed, it was arguable that the employer owed a duty to the other employees to enforce the binding pensions agreement against such an employee.[7]

Neuberger J held:

> 'On behalf of SWT, Mr Warren contends that it is implicit in the binding pensions agreement between SWT and each of the [train] drivers that the drivers will not claim pensions at a higher level than that agreed, and that, were the drivers to seek to claim a higher pension, SWT could obtain an injunction restraining them from doing so ... In my judgment, that contention is well founded.'[8]

In *South West Trains* the trustee was seeking to amend the trust deed to reflect the binding pensions agreement, but Neuberger J commented that the trustee could in any event refuse to pay the members at a higher rate, giving three reasons for this (potential abuse of the process of the court; no basis on which the member could make a demand and that the level of pay must follow the employment contract).[9]

Neuberger J held that:

> 'Whether any or all of these three arguments are correct need not be decided, because it seems clear to me that, for the reasons I have given above, SWT can, would and probably should enforce the binding pensions agreement made with the drivers by restraining any driver claiming a pension on a more generous basis than that agreed under that binding pensions agreement.'

Later cases have followed the *South West Trains* approach:

(a) *NUS*[10] – Lightman J held that an employee was bound by the terms of a pay rise offer made on the express basis that it would be non-pensionable, even though the employee expressly rejected the non-pensionability term (but accepted the pay rise and new job).
(b) *Bradbury v BBC*[11] – In 2012, Warren J held that the relevant non-pensionable pay agreements were binding, despite the claim that they contravened the express terms of the pension trust.[12]
(c) *IBM UK Pensions Trust Ltd v IBM UK Holdings Ltd*[13] – Later in 2012 Warren J found, on the facts, that there was no separate contract with new joiners (providing for

7 At pp 269B and 269G.
8 *South West Trains Ltd v Wightman* [1997] EWHC 1160 (Ch), [1997] OPLR 249, at paras [95]–[96].
9 See p 270G and David Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013) at 15.81.
10 *Trustees of the NUS Officials and Employees Superannuation Fund v Pensions Ombudsman* [2002] OPLR 17, [2002] PLR 93 (Lightman J). See also *Machin v A F Blakemore & Son Ltd* [2007] EWHC 963 (Ch), [2007] PLR 189 (Lightman J) holding that oral agreements between the member and employer would (if found on the facts to exist) be effective.
11 *Bradbury v British Broadcasting Corporation* [2012] EWHC 1369, [2012] PLR 283 (Warren J).
12 The issue of whether there was a breach of the implied duty of trust and confidence was referred back to the Pensions Ombudsman, who subsequently held that there was not. This was later upheld by Warren J in 2015 in a second judgment: *Bradbury v British Broadcasting Corporation* [2015] EWHC 1368 (Ch), [2015] PLR 457 (Warren J). See Ch 35 in Pollard *Employment Law and Pensions* (Bloomsbury Professional, 2016).
13 [2012] EWHC 2766 (Ch), [2012] PLR 469 (Warren J), at [465].

employer consent to be required before an early retirement pension could be paid). But for this it seems he would have allowed a contract to apply despite the rules:

> 'it is possible for a contract of employment to restrict in some circumstances the benefits which a member of a pension scheme would otherwise be entitled to receive under the rules of the scheme'.

(d) *IBM UK Holdings Ltd v Dalgleish*[14] – In 2014 Warren J dealt with various non-pensioable pay agreements between IBM and its employees. He held that these were inoperative because of a breach of the implied duty of trust and confidence, but would have held them to be valid but for that.[15]

(e) *Re Gleeds*[16] – In 2014 Newey J held that application forms signed by members did not amount to external contracts with the employer, as they were consistent with merely exercising rights under the scheme.[17] However, in 2006, where the employer had sent letters to the members outlining the change in benefits (termination of deferred benefit (DB) accrual and a move to deferred contribution (DC) for future service) and making a pay rise conditional on the member signing and returning the letter, the agreement was held to be binding on the employees.[18] This applied even though the relevant amending document had not been executed properly and so was not a valid amendment to the scheme.

Various other cases have held that the purported agreement with the individual member was not clear enough to override the rules of the scheme (*Capita v Gellately*,[19] *IMG*,[20] *Gleeds*[21]).

Various Pensions Ombudsman decisions[22] have also upheld external contracts in relation to non-pensionable pay.

Does an external contract only work if it relates to future pensionable pay?

Most of the cases where external contracts have been upheld have involved an agreement between the employer and member about the level of future pay that is pensionable, eg *Tibbals*,[23] *South West Trains* and *Bradbury*.[24]

It was sometimes argued[25] that a narrow approach to the external contracts principle means that it could be limited to matters where the trust deed itself envisages that the trustee has to look to the external position to determine the benefits, eg where the trust deed refers to the relevant salary received by the member. But this commentary usually pre-dates the 2014

14 [2014] EWHC 980 (Ch), [2014] PLR 335 (Warren J).
15 [2014] EWHC 980 (Ch), at [15]–[19].
16 *Re Gleeds Retirement Benefits Scheme* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J).
17 *Gleeds* at [150] and [159].
18 *Gleeds* at [16] and [177].
19 *Capita ATL Pension Trustees Ltd v Gellately* [2011] EWHC 485 (Ch), [2011] PLR 153 (Henderson J).
20 *Re IMG Pension Plan; HR Trustees Ltd v German* [2009] EWHC 2785 (Ch), [2010] 23 PLR (Arnold J).
21 *Re Gleeds Retirement Benefits Scheme* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J).
22 *Ahmed v National Bank of Pakistan* (G00648) (1999) 2 July; *Miller v Commission for the New Towns* (J00141) (2000) 8 February; *Martin v IBM UK Pensions Trust* (75663/1) (2010) 6 August; and *Stodart v Railways Pension Trustee* (78763/3) (2013) 12 February.
23 *Tibbals v Port of London Authority* [1937] 2 All ER 413, HL.
24 *Bradbury v British Broadcasting Corporation* [2012] EWHC 1369, [2012] PLR 283 (Warren J).
25 Eg Nigel Burroughs, '*Pensions and extrinsic contracts*' (PLC, 1 August 2012) at 'Key points for practitioners' and Robert Ham and Jonathan Hilliard, 'A runaway train or stuck in the sidings? *South West Trains v Wightman* after *Bradbury* and *IBM*' (December 2012, APL seminar).

decision by Newey J in *Gleeds*[26] (where a binding contract to switch to DC for future accrual was held to be binding on the members).[27]

Given that the members will often have an express right to opt-out of future service under a scheme, it seems appropriate to allow that to be binding on the trustee. It would perhaps remain open for the trustee not to accept an obligation to provide other benefits that relate to future service (eg DC for the future or salary linkage for the past DB benefits), but the termination (or reduction) obligation should be enforceable.

Once the trustee has notice of the contract there is good reason for it to follow what has been agreed. Potentially it could be liable for inducing breach of contract[28] if it acted in a way that would breach the terms of the contract (ie paid more than was agreed).

Requirements of extrinsic contract

In order for such a result to apply, various conditions need to be satisfied:

(a) there needs to be a valid contract between the employer and the employee. A simple statement or agreement (which is not a contract) is probably not enough. It is not enough that a statement has an intention to create legal relations, there must instead be a contract: *IMG*[29] and *IBM*[30];
(b) the contract must be clear that it overrides the terms of the trust deed, ie as a matter of construction the contract must have that effect: see, eg *Gleeds*[31] and *IMG*[32];
(c) there must be no material breach of contract or factor that would invalidate the contract (eg fraud, economic duress, breach of trust of confidence);
(d) the benefit change must be a reduction[33] in benefits, not an increase (as the rationale for the principle is that the member can be restrained from claiming the higher benefit). This also makes practical sense, as an increase will affect funding and so potentially the other members under the trust;
(e) there is no requirement for the consent of the member's spouse or dependants;
(f) there must be a binding contract – there is no extra requirement for informed consent by the employee/member;
(g) the contract must be supported by valuable (not nominal) consideration. A deed entered into by the employee would not be enough in the absence of consideration. The grant of future benefits (or commitment to provide further benefits) would be enough here;
(h) damages must not be an adequate remedy;
(i) if the employer needs to be able to show that it could (in theory) get an injunction against the employee, it would need to be approaching the court with 'clean hands'; and

26 *Re Gleeds Retirement Benefits Scheme* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J).
27 The current note on extrinsic contracts by Nigel Burroughs on PLC has been updated to include reference to *Gleeds*, but still takes the same cautious approach as the 2010 version of his note.
28 On this tort, see *OBG Ltd v Allen* [2007] UKHL 21, [2008] 1 AC 1, HL and Paul S Davis, *Accessory Liability* (Oxford University Press, 2015).
29 *Re IMG Pension Plan; HR Trustees Ltd v German* [2009] EWHC 2785 (Ch), [2010] PLR 23 (Arnold J).
30 *IBM Holdings Ltd v Dalgleish* [2014] EWHC 980 (Ch), [2014] PLR 335 (Warren J).
31 *Re Gleeds Retirement Benefits Scheme, Briggs v Gleeds* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J).
32 *Re IMG Pension Plan; HR Trustees Ltd v German* [2009] EWHC 2785 (Ch), [2010] PLR 23 (Arnold J).
33 This section looks at external contracts dealing with benefit changes not envisaged under the trust deed and rules of a scheme. There may be cases where an agreement by the employer is binding on the pension scheme in any event under its rules – for example, an agreement to reduce pay or an agreement for an unreduced pension on redundancy or early retirement (if the deed and rules provide that this happens if the employer consents).

(j) the change in benefits (or injunction) must not be contrary to the restrictions in the Pensions Act 1995, s 91.

These different factors and conditions are analysed below. This section goes on to look at the questions of enforceability on the trustee of the scheme of such an external contract.

There must be a valid binding contract

It is not enough that there may be a statement or agreement from the employee that does not amount to a binding contract. The usual requirements for a valid and binding contract must apply – including consideration (or obligation in a deed), intention to create legal relations.

There should preferably (but not necessarily) be express written consent, eg a signature or written confirmation from the member. Silence and continuing to work may not be enough if the change has no immediate practical effect: *Jones v Associated Tunnelling*[34] and *Khatri*.[35] But it is likely to be enough if the member accepts benefits which can only be attributable to the new contract, for example, the relevant new benefit is attributable to the new contract and is accepted by the member, eg a non-pensionable pay rise (*NUS*[36]) or other benefit (*FW Farnsworth v Lacy*[37]).

It is not enough that a statement has an intent to create legal relations, there must instead be a contract: see *IMG*[38] and *Gleeds*.[39] The contract must be one which overrides the terms of the pension scheme trust deed, ie as a matter of construction the contract must have that effect. This is easiest to show if the document relied upon clearly intends to modify the terms of the pension scheme, eg is not just (say) an application form to join the scheme: *IMG*,[40] *Gellately*[41] and *Gleeds*.

If the parties' behaviour can be explained by reference to pre-existing rights, then there may be no new separate contract: *Gleeds*.[42]

There must be no material breach of contract or factor that would invalidate the contract (eg fraud, economic duress, breach of the implied duty of trust of confidence).

Generally, the courts will not enforce a contract (eg by granting an injunction) if the party seeking to enforce the contract is themselves in material breach of contract or the contract is not binding.[43] Partly this reflects that there must be a valid and binding contract (see above), but also the fact that an injunction is an equitable remedy and so a discretionary

34 [1981] IRLR 477, EAT.
35 *Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2010] EWCA Civ 397, [2010] IRLR 715.
36 *Trustees of the NUS Officials and Employees Superannuation Fund v Pensions Ombudsman* [2002] OPLR 17, [2002] PLR 93 (Lightman J).
37 [2012] EWHC 2830 (Ch), [2013] IRLR 198 (Hildyard J).
38 *Re IMG Pension Plan; HR Trustees Ltd v German* [2009] EWHC 2785 (Ch), [2010] PLR 23 (Arnold J), at [163].
39 *Re Gleeds Retirement Benefits Scheme* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J), at [147] and [148].
40 *Re IMG Pension Plan; HR Trustees Ltd v German* [2009] EWHC 2785 (Ch) (Arnold J).
41 *Capita ATL Pension Trustees Ltd v Gellately* [2011] EWHC 485 (Ch), [2011] PLR 153 (Henderson J). See also *Hodgson v Toray Textiles Europe Ltd* [2006] EWHC 2612 (Ch) (Lewison J).
42 *Gleeds* at [148] and [149], citing the landlord and tenant case, *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, at 323G (Buckley J) holding that arrangements have no contractual effect if they are entered into in the belief that they merely give effect to pre-existing rights. Newey J in *Gleeds* also followed *The Aramis* [1989] 1 Lloyd's Rep 213, CA and *Glencore Grain Ltd v Flacker Shipping Ltd, The Happy Day* [2002] EWCA Civ 1068. *Beesly* was approved on this point by the House of Lords in *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207, [1985] 2 All ER 966, at 977 (per Lord Templeman).
43 Eg J Heydon, M Leeming & P Turner, *Meagher Gummow & Lehane's Equity Doctrines and Remedies*, 5th Ed, (LexisNexis, 2015) at 20-025.

remedy. In practice, it would be unlikely to be issued if the employer was in a material breach of contract.[44]

For example, in the remedies judgment in *IBM* (2015),[45] Warren J held that the non-pensionable pay agreements between IBM (as employer) and the members were in breach of the employer's implied mutual duty of trust and confidence (MDTC) and so were unenforceable by IBM and were voidable at the option of the member. If so avoided, the member could keep the benefit of the pay rise and it would be pensionable (even though it had been offered on the terms that it was non-pensionable): *IBM* (2015) at [121].

This paper does not discuss further in relation to an external contract the issues that arise in relation to the implied mutual duty of trust and confidence or the 'Imperial' duty.[46]

Economic duress

A contract will generally only be valid if it has been entered into freely and voluntarily. Where the agreement of a party to a contract is induced by duress, it is voidable by the injured party.[47] Duress can include economic duress (a threat to damage someone's financial interests), which can include a threat to terminate a contract.[48]

The issue would be whether the new contract between the employer and employee (eg accepting the new pension terms) could be invalidating under economic duress principles – on the basis that the employee's agreement was forced by the alternative – in effect having employment terminated.

The two factors needed to show economic duress are:

(a) illegitimate pressure; and
(b) causation (this is not considered further, because causation would likely be able to be shown by an employee in the circumstances envisaged).

Illegitimate pressure may be unlawful conduct such as a crime, a tort, or a breach of contract, including past and threatened breaches. In practice, the mere offer of new pension terms, coupled with a termination alternative is not likely to be found unlawful.

In *Hepworth Heating Ltd v Akers*,[49] the EAT decided that a group of employees, who had been asked to move to cashless pay or have their current contract terminated, had not signed their contracts under duress, despite one group of employees indicating on their acceptance forms that they were signing 'under duress'. Part of the reasoning in this case was that since full notice had been given to employees, there was no unlawful act.

Illegitimate pressure may sometimes also take the form of lawful conduct. However, it is

44 *General Billposting Co Ltd v Atkinson* [1909] AC 118, HL and *Measures Bros Ltd v Measures* [1910] 2 Ch 248, CA. But this may now be more a question of interpretation of the contract: see *Rock Refrigeration v Jones* [1997] 1 All ER 1, CA, at [15].

45 *IBM United Kingdom Holdings Ltd v Dalgleish* [2015] EWHC 389 (Ch), [2015] PLR 99 (Warren J).

46 For more on MDTC and the Imperial duty, see Chapters 33 to 35 in Pollard *Employment Law and Pensions* (Bloomsbury Professional, 2016); Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013); David Pollard, 'Employers' powers in pension schemes: the implied duty of trust and confidence' (1997) 11 TLI 93; Philip Stear, 'Pensions, the Employment contract and the duty of good faith: where are we now?' (APL seminar, Nov 2004) and from Australia, Anthea Nolan and Steve Godding, 'Employers' rights and duties in respect of the funds they sponsor' (Superannuation conference 2010).

47 *Capital Structures plc v Time & Tide Construction Ltd* [2006] EWHC 591 (Judge David Wilcox), cited in *Chitty on Contracts*, 31st Ed, (Sweet & Maxwell, 2012), at 7-054.

48 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 (Mocatta J).

49 EAT/13/02; (2003) 21 January, [2003] All ER (D) 33, EAT.

very difficult to prove that such lawful pressure constitutes economic duress, particularly in a commercial context[50] – even in situations where the claimant might be in a difficult and vulnerable position. For example, in *Wright v HSBC Bank plc*[51] the claimant owed the bank money but the bank was found not to have put undue pressure on the claimant to come to an agreement to repay her debt.

There is no absolute test to distinguish illegitimate pressure from normal commercial bargaining. The courts will consider all the circumstances, including the following factors, set out in *DSND Subsea Ltd v PGS Offshore Technology AS*.[52]

No realistic alternative

Whether the employee has a real choice or a realistic alternative, including an adequate legal remedy and access to any independent advice,[53] an unattractive alternative may still be a reasonable alternative.

In *Hennessy v Craigmyle & Co Ltd*,[54] the Court of Appeal upheld a settlement agreement signed by an employee who was told that his employment would end in 8 days and that the settlement was only on offer for that period. The employee consulted ACAS and signed the agreement.

Sir John Donaldson MR (with whom Parker and Woolf LJJ agreed) gave the only judgment and held:

> 'This leaves the issue of economic duress. It appears from the opinion of the Judicial Committee of the Privy Council delivered by Lord Scarman in *Pao On v Lau Yiu Long* [1980] AC 614, that in the last century there was doubt whether the common law recognised economic or commercial duress, as contrasted with duress to the person, as a ground for avoiding a contract. However, the common law is a living thing. Its principles may not change, but its application conforms to changing circumstances. Economic duress has been recognised as a potential ground for avoidance by Kerr J in *Occidental Worldwide Investment Corporation v Skibs AS Avanti* (1976) 1 LL L Rep 293 and by Mocatta J in *North Ocean Shipping Company Ltd v Hyundai Construction Co Ltd* [1979] QB 705. That this recognition is not contrary to principle was accepted in *Pao On* at p 636. However, like the well-established duress to the person, it is a ground of avoidance only if the duress is such that the will of the contractor is overborne. His consent must be vitiated.
>
> In *Pao On's* case Lord Scarman added: ''It must be shown that the payment made or the contract entered into was not a voluntary act''. This led Mr Tyrrell to argue that Mr Hennessy was forced to agree to the settlement. To use a phrase beloved of politicians and trade union officials, ''There was no alternative''. As is the norm when that phrase is used, in fact there was a very clear alternative, namely, to complain to an Industrial Tribunal and to draw social security meanwhile. It may have been a highly

50 *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm), [2012] 2 All ER (Comm) 855 (Cooke J), at [30].
51 [2006] EWHC 930 (QB), [2006] All ER (D) 64 (May) (Jack J).
52 [2000] EWHC 185 (TCC), [2000] All ER (D) 1101, [2000] BLR 530 (Dyson J), at [131], citing *Universal Tankships of Monrovia v ITWF* [1983] AC 336, 400B–E, and *Dimskal Shipping Co SA v International Transport Workers Federation (The 'Evia Luck')* [1992] 2 AC 152, 165G.
53 *Pao On v Lau Yiu Long* [1980] AC 614, PC.
54 *Hennessy v Craigmyle & Co Ltd* [1986] ICR 461, [1986] IRLR 300, CA, per Donaldson MR at [17]–[19].

> unattractive alternative, but nevertheless it was a real alternative. Economic duress can only provide a basis for avoiding a contract if there was no real alternative. With the benefit of hindsight, Lord Scarman's meaning might have been better expressed if he had said: ''It must be shown that the payment made, or the contract entered into, was an involuntary act''.
>
> Whether economic duress of this order did or did not exist is entirely a question of fact for the tribunal of fact, in this case the industrial tribunal.'

Bradbury v BBC[55] gave rise to two decisions by Warren J, one in 2012 and one in 2015. The employee, Mr Bradbury, was faced with a choice in relation to pension arrangements, including whether to move to a new DC scheme or to remain in the DB scheme but accept that future pay rises would be subject to a cap on pensionable pay increases. Mr Bradbury complained that the options were contrary to the trust deed and rules and PA 1995, s 91 – this was rejected by the Pensions Ombudsman (PO) and again by Warren J in 2012.[56] A further claim, that the changes were contrary to the implied duties owed by the employer, was also rejected by the PO and, on appeal, by Warren J in 2015.[57]

In the second case, Mr Bradbury had argued that he had been subjected to improper coercion. This was rejected by the PO and again by Warren J, holding[58] that:

> '[4] As part of his submissions, Mr Stafford relies on the following statement in the Determination (which took the form of a letter to Mr Bradbury) ''I do not know whether you are bound by a collective bargaining agreement – I see you are a member of the Musicians' Union, so it seems probable – or whether you could attempt to individually negotiate some other salary increase. Either way, I accept that in effect you do not have a real alternative to accepting the salary increase on the terms offered.''
>
> [5] I do not attach any weight to the last sentence. It is, I consider, a misreading to interpret it as a finding of fact that there was some sort of coercion on the part of the BBC. Rather, it is no more than a reflection of the obvious truth that sometimes difficult choices have to be made.'

And later that the PO:

> 'noted that Mr Bradbury had options, albeit limited. He appreciated Mr Bradbury's unhappiness at having in practical terms no alternative but to leave the New Section and join CAB 2011 (although I repeat that he did not do so immediately but waited a year) and that he felt pressurised to make the decision. However ''... that does not mean that in requiring him to make choices, the BBC was applying 'improper coercion' and that it was acting improperly''. Mr Stafford submits that the PO was wrong to reach that conclusion. However, absent any Reasonable Expectation regarding salary increases, I agree with the PO's conclusion, that presenting Mr Bradbury with hard choices did not of itself amount to improper coercion.'

55 *Bradbury v BBC* [2012] EWHC 1369 (Ch), [2012] PLR 283 (Warren J) and *Bradbury v BBC* [2015] EWHC 1368 (Ch), [2015] PLR 457 (Warren J).
56 *Bradbury v BBC* [2012] EWHC 1369 (Ch), [2012] PLR 283 (Warren J).
57 *Bradbury v BBC* [2015] EWHC 1368 (Ch), [2015] PLR 457 (Warren J).
58 *Bradbury v BBC* [2015] EWHC 1368 (Ch), [2015] PLR 457 (Warren J) at [4], [5], [43] and [44].

In *Hepworth Heating Ltd v Akers*[59] (see above) the key factor in the EAT's decision (in favour of the employer) was that there were clear alternatives for the employees; for example, they could have regarded themselves as dismissed and claimed unfair dismissal. It will often be the case that the employer would have a good argument that employees will have an alternative to agreeing to the changes.

Protesting

Case law also suggests that illegitimate pressure is more likely to be found to have occurred where the alleged victim has protested.[60] However, the failure to protest is not determinative.

Whether the person exerting the pressure has acted in good or bad faith

If a full business case were prepared, and discussed with the consultation bodies during the consultation process, it will usually be likely that an employer will be able to successfully argue that it bona fide believed that the action being taken was legitimate.[61]

The severity of the threat

In practice, an employer would usually be able to show that any threat should not be considered sufficiently severe such as to amount to economic duress in the context of an offer of continued employment on amended terms.

The agreement needs to be one to reduce benefits

Sometimes the express provisions of the trust deed may provide for a decision of the employer or member to have effect to modify benefits. There may be cases where an agreement by the employer is binding on the pension scheme in any event under its rules – for example, an agreement to reduce actual pay or an agreement for an unreduced pension on redundancy or early retirement (if the deed and rules provide that this happens if the employer consents).

In other cases, in order to be binding on the trustee and the existing pension trust, the benefit change in the contract between the member and the employer must be either:

(a) a reduction in benefits, not an increase (as the rationale for the principle is that the member can be restrained from claiming the higher benefit); or
(b) the member agreeing to opt out of the pension scheme for future accrual (if the member is to have future benefits under a different scheme).

This also makes practical sense, as an increase in benefits could affect other members under the trust.

There is no requirement for the consent of the member's spouse or dependants

The member's spouse and dependants are commonly contingent future beneficiaries under the pension scheme (eg with an entitlement to benefits under the scheme on the member's death).

59 EAT/13/02; (2003) 21 January, [2003] All ER (D) 33, EAT.
60 *Pao On v Lau Yiu Long* [1980] AC 614, PC.
61 *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm), [2012] 2 All ER (Comm) 855 (Cooke J), at [30].

The level of such secondary benefits may be affected by the choices made by the member, eg to agree a pay cut, to move employment, to opt-out of the scheme; to take a transfer value out of the scheme. All of these decisions are clearly ones for the member alone. If made by the member, they bind the spouse and dependants. Neither the employer nor the trustee are obliged to consider the impact on the member's spouse or dependants.

Given these member powers and the secondary or dependent nature of the spouse/dependant benefits, it is clear that the agreement of the member will, in effect, bind the spouse and dependants, so that their contingent future benefits are also bound.[62]

This structure is reflected in various statutory provisions, including the statutory limits on an amendment envisaged to benefits under a scheme. Section 67 of the Pensions Act 1995 prohibits amendments which adversely affect subsisting rights, unless various conditions are met, including that the member (if alive) consents to the change.[63] There is no requirement for secondary beneficiaries to consent as well.

In *South West Trains*,[64] a spouse took part in the proceedings as a representative beneficiary, but ultimately agreed that if the relevant contract was binding on the member, it was binding on her too (she used the same legal team as the representative beneficiary member).

There is no extra requirement for informed consent by the employee/member

It could be argued that in order for a contract to alter an employee's rights in respect of benefits under the scheme (even benefits to be accrued in respect of future service only), it would be necessary to show 'informed consent' on the part of the employee, ie a form of consent that meets a high standard of disclosure and which, under orthodox trust law, is necessary in order for beneficiaries under a trust to waive any action against the trustee for breach of trust.

In the *IMG* case[65] Arnold J held (obiter) that informed consent was required in order for a contract with the employee to alter the employee's rights under a pension scheme trust; a similar argument can be made by reference to the implied duty of trust and confidence.

However, in practice, where there has been full consultation, this is unlikely to be an issue. It will (usually) be very clear to the employees what they are agreeing to. (By contrast, in the *IMG* case the relevant communications and documentation were insufficiently clear as to the effect of the agreement).

In *IMG*, Arnold J commented that there was a need for *informed* consent by the employee, basing this point on *Re Pauling's Settlement Trust*,[66] a case involving a waiver by a beneficiary of a potential breach of trust.

This is confusing the legal position. In an external contract case there will be a valid contract between the member and the employer. Unlike in a waiver case (where there is no contract), there is no place for any further requirement as to the employee giving informed consent.

62 See David Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013) at Ch 8 ('Pension Trusts: the position of spouses and dependants') and Dominic Harris 'The risks of de-risking: what can possibly go wrong?' (APL conference, November 2015) at 5.28.

63 See *Freshfields on Corporate Pensions Law 2015* (Bloomsbury Professional, 2015), at Chapter 14.7 ('Section 67: modification of subsisting rights').

64 *South West Trains v Wightman* [1997] OPLR 249 at 274E.

65 *Re IMG Pension Plan; HR Trustees Ltd v German* [2009] EWHC 2785 (Ch), [2010] PLR 23 (Arnold J), at [172]–[174].

66 *Re Pauling's Settlement Trusts*, *Younghusband v Coutts & Co* [1961] 3 All ER 713, [1962] 1 WLR 86 (Wilberforce J).

In *Gleeds*,[67] Newey J agreed with this approach and took a different view to that of Arnold J in *IMG*. Newey J doubted that the ruling in *IMG* was correct on a requirement for informed consent, commenting that the authority cited in *IMG* in relation to informed consent was:

> 'concerned with the circumstances in which a beneficiary's concurrence will prevent him from complaining of a trustee's conduct. I do not myself see why the same criteria should govern whether a beneficiary can contract with a third party not to enforce rights he has under a trust. Contracts can, of course, sometimes be unenforceable for reasons of illegality or public policy, but, the IMG case apart, I was not referred to any authority for the proposition that a contract not to enforce rights under a trust can be impugned on such a basis.'

In any event, any external contract is likely to have been put in place only after the usual consultation required under the Pensions Act 2004.[68] It is unlikely that the employee would be able to show that he or she has not given informed consent.

It may be that to have a very aggressive approach to obtaining agreement to the contract (eg swearing and obscenities) and giving little explanation of the new terms could be a breach of the implied duty of trust and confidence: see, eg the extreme facts in *Cantor Fitzgerald International v Bird*.[69] It is noticeable that even in that case (where two employees were held not to be bound by restrictive covenants in the new contracts) the covenants for a third employee were held to be binding (where there had been a proper information process).

The contract must be supported by valuable consideration

At common law, a contract is enforceable if there is a formal deed or if there is consideration. However, in the context of external employee agreements, it may be that consideration[70] is needed and an agreement in a deed is not enough. This is because the grant of an injunction is an equitable remedy and the general rule is that 'equity will not aid a volunteer'. This is an odd result (and goes against the rule that 'equity follows the law'). It may be that in future a simple deed would be enforced in equity as well.

In practice, in the context of current employees, consideration is likely to be easily found. The grant of future benefits (or commitment to provide further benefits) seems to be enough to provide good consideration: see, eg *Lee v GEC Plessey Telecommunications*.[71] A similar analysis was accepted by Arnold J in the *IMG* case.[72]

67 *Re Gleeds Retirement Benefits Scheme* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J) at [170]. See also Warren J at [59] in *Bradbury v BBC* [2012] EWHC 1369 (Ch), [2012] PLR 283.

68 See Ch 37 ('Consultation about pension benefit changes') in Pollard *Employment Law and Pensions* (Bloomsbury Professional, 2016,).

69 [2002] IRLR 867 (McCombe J) at [112].

70 Eg *Re Cook's Settlement Trusts* [1965] Ch 902 (Buckley J), at 916 and *Jefferys v Jefferys* (1841) 41 ER 443, (1841) Cr & Ph 138 (Lord Cottenham LC), cited in J Heydon, M Leeming & P Turner, *Meagher Gummow & Lehane's Equity Doctrines and Remedies* 5th Ed, (LexisNexis Australia, 2015), at 20-025. See also *Laing v Lanron Shelf Co No 56 Ltd* [1994] 1 NZLR 562 (Gallen J), at 568 and Spry, *Equitable Remedies* 9th Ed, (Sweet & Maxwell, 2014), at p 59.

71 [1993] IRLR 583 (Connell J) and see Ch 26 (Contractual promises – consideration and enforceability) in Pollard *Employment Law and Pensions* (Bloomsbury Professional, 2016).

72 *Re IMG Pension Plan; HR Trustees Ltd v German* [2009] EWHC 2785 (Ch), [2010] PLR 23 (Arnold J), at [171].

Nominal consideration is also enough – equity will not investigate the adequacy of consideration, eg in *Mountford v Scott*,[73] a nominal £1 paid for the grant of an option was enough for specific performance to be granted.[74]

Damages must not be an adequate remedy

Injunctions will generally only be granted if the claimant can show that damages are not an adequate remedy.[75] This is potentially relevant if the external contract analysis depends on the ability of the employer to restrain the employee (by an injunction) from claiming higher benefits from the pension scheme than agreed in the external contract. This seems likely to be easy to show in an external contract case involving a pension scheme.

This issue has not caused the courts any concern in the existing cases in which contracts with the employees that affected pension scheme rights were considered.[76]

Clean hands

If the employer needs to be able to show that it could (in theory) get an injunction against the employee, it would need to be approaching the court with 'clean hands'.

An injunction is an equitable remedy and the court retains a discretion as to whether or not it will be granted in any particular case (contrast an action for damages for breach of contract at common law). One aspect of this is that the court may refuse an injunction if the claimant does not come with 'clean hands'.[77] This seems to be an additional test over and above the claimant not being in breach of contract (see above).

The party seeking an injunction or (perhaps) declaration must come with 'clean hands' – in other words, that party must not have engaged in conduct (or some other factor in relation to that party must not apply) that would cause the court to not exercise its discretion to grant an injunction or declaration. For this to apply there must be 'some immediate and necessary relation to the equity sued for'.[78]

Examples of such conduct are a claimant's 'sharp practice' in bringing a claim or in concealing evidence from the court. The concept of 'clean hands' does not just relate to the conduct of the claim, but must be related to the claim itself in some way.[79]

---

73 [1975] Ch 258, CA.

74 See, also Nicholas Seddon, *Seddon on Deeds* (Federation Press, 2015) at [6.21] to [6.25] and Spry, *Equitable Remedies* 9th Ed, (Sweet & Maxwell, 2014), at p 61, citing *Axelsen v O'Brien* [1949] HCA 18, (1949) 80 CLR 219 (Aus High Ct), at 226. In *Reuse Collections Ltd v Sendall* [2014] EWHC 3852 (QB), [2015] IRLR 226, Judge Stephen Davies at [70]–[83] took a very restrictive interpretation, holding that restrictive covenants in a new written contract (with benefits for the employee) were unsupported by adequate consideration, nor did later pay rises provide consideration (nor did continuing to work). This seems much too restrictive as a general rule of equity, but may be justified if linked to the requirement for restrictive covenants only to be enforceable if reasonable: *A Schroeder Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, HL.

75 John McGhee (ed), *Snell's Equity* 33rd Ed, (Sweet & Maxwell, 2015) at 18-034, citing *Garden Food Cottages v Milk Marketing Board* [1984] AC 130, HL.

76 For example, *South West Trains*; *NUS Superannuation Fund v Pensions Ombudsman* [2002] PLR 93 (Lightman J); *Bradbury v BBC* [2012] EWHC 1369 (Ch), [2012] PLR 283, [2012] 064 PBLR (026) (Warren J); and *Re Gleeds Retirement Benefits Scheme* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J).

77 See *Snell's Equity* at 5-010 and Spry, *Equitable Remedies* at p 175. M W Bryan and V J Vann have commented that this raises images of Lady MacBeth, but that the doctrine is 'far less colourful and much more restricted than the image suggests' in *Equity and Trusts in Australia* (Cambridge University Press, 2012) at 6.13, citing Basten AJ in *Kaitom Pty Ltd v Lamru Pty Ltd* (2009) 257 ALR 336.

78 *Grobbelaar v News Group Newspapers* [2002] UKHL 40, [2002] 1 WLR 3024. Sarah Worthington *Equity* 2nd Ed, (2006, Oxford University Press) at p 40.

79 See *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328, at [158], approving Burton J at first instance at [175]–[180].

An employee or trustee may perhaps raise the argument that the choice given by the employer to the employees (ie to agree to the new scheme benefits or face potential dismissal) amounts to a form of 'economic duress' which, while not enough to vitiate the contract as a matter of contract law, is a course of conduct that would attract criticism such that the clean hands requirement would not be met. The clean hands doctrine is relatively vague and very fact specific, but in practice such an argument is unlikely to succeed.

Change in benefits (or injunction) must not be contrary to the restrictions in PA 1995, s 91

Section 91 of the Pensions Act 1995 generally prohibits members surrendering or assigning their pension rights.[80]

It seems logical that this only extends to rights accrued up to the relevant date of surrender, but in *Bradbury v BBC*,[81] Warren J considered that the prohibition also extends to future service rights, although not to rights based on potential future pay increase.

There are a number of exceptions to the prohibitions in s 91. These include an agreement by a member to surrender benefits in exchange for benefits for the spouse or dependants or different benefits for the member in the same scheme (s 91(5)(b)), so an exchange of benefits (future DB accrual) for different benefits (eg future DC accrual) is allowed. In *Re LPA Umbrella Trust*,[82] Rose J held (obiter) that the exception in s 91(5) requires that even for the spouse or dependants, the future benefits granted in exchange must be benefits in the same scheme as the existing benefits – if this is right (and seems a strange gloss on the statute) it is not enough to be granted new benefits in a new scheme.

The Court of Appeal held in *IMG*[83] (on appeal) that s 91 did not operate to prohibit agreements that operated to settle disputes between the member and the employer. The Court of Appeal held that this was not a 'surrender' of rights but the compromise of a doubtful legal claim in respect of the pension scheme. The Court of Appeal explained that an 'established or accepted entitlement or right is clearly within the general language' of s 91(1)(a), but that PA 1995 does not preclude 'the settlement of claims to a putative entitlement or right'.

Section 91 was raised as an issue in various contract cases:

(a) In *Bradbury*,[84] Warren J held that the section did not cover benefits based on potential pay increases.
(b) In *Gleeds*,[85] Newey J relied on *IMG* and held that the section did not apply where the member's rights are not clear cut (because the employer would have an argument to the contrary). Newey J therefore held that the reasoning in *Bradbury*, itself relying on the Court of Appeal in *IMG*,[86] applied.
(c) In the 2015 *IBM*[87] remedies judgment, Warren J upheld compromise agreements entered into by members (but did not refer to s 91 issues).

80 See Jonathan Moody 'Inalienability of pension: section 91 Pensions Act 1995' (APL conference talk, June 2013).
81 *Bradbury v BBC* [2012] EWHC 1369 (Ch), [2012] 064 PBLR (026) (Warren J).
82 [2014] EWHC 1378 (Ch) (Rose J), at [54].
83 *HR Trustees v German* [2010] EWCA Civ 1349, [2011] ICR 329, per Mummery LJ at [28] and [30].
84 *Bradbury v BBC* [2012] EWHC 1369 (Ch), [2012] PLR 283, [2012] 064 PBLR (026) (Warren J).
85 *Re Gleeds Retirement Benefits Scheme* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J), at [176].
86 *HR Trustees v German* [2010] EWCA Civ 1349, [2011] ICR 329.
87 *IBM UK Holdings Ltd v Dalgleish* [2015] EWHC 389 (Ch), [2015] PLR 99 (Warren J), at [642].

(d) In *White v Thames Water*,[88] the Deputy Pension Ombudsman relied on *IMG* and held that s 91 did not apply to invalidate a settlement agreement. A member took voluntary redundancy under an agreement with the employer and agreed that he did not qualify for an unreduced pension (available under the scheme rules if the employer certified that 'he had ceased to be an employee by reason of redundancy or in the efficient exercise of the employer's functions'). The DPO held that the member was bound by that waiver in the agreement.
(e) Similarly, in *Pusinelli*,[89] the DPO held that an accrued right or entitlement could not be waived in an agreement with the employer, but that this limit did not apply to disputed claims, nor to a claim relating to revaluation of accrued pensions (as this 'is not an entitlement or an accrued right until the calculation has been done'). Section 91 was not specifically mentioned.

Section 91 is therefore very unlikely to apply to a contract between a member and the employer. This is because either:

(a) a court would find that s 91 does not apply in respect of future service;[90] or
(b) there is sufficient doubt as to the legal position, such that the employee's agreement can be said to be not a 'surrender' of rights but the compromise of a doubtful legal claim in respect of the pension scheme, which has been found to not infringe s 91: *IMG*[91] and *Gleeds*.[92]

Procuring employee consents

Strategies for procuring employee consents

Where an employer has decided either that it needs or wants to procure employee consents to pension benefit changes, it then has to undergo the administratively burdensome process of procuring those changes.

A difficult issue that will arise is how to ensure that employees will agree to the change. There are two main approaches:

(a) Fire and re-hire, ie dismissing non-consenting employees. There are a couple of variations of this:
    (i) requiring employee acceptance of the new benefit terms as a condition of continued employment. Where the employees do not consent, they are given notice to terminate their employment contract (with an offer of re-engagement on the revised terms);
    (ii) giving all employees notice of termination, following by an immediate offer of re-engagement on the revised terms.

88 *White v Thames Water Utilities Ltd* (2015) 20 May PO-5304 (Irvine DPO).
89 *Pusinelli* (PO-2591) (2014) 28 November (Irvine DPO), at [66].
90 A proposition that is arguably supported by the judgment of Warren J in 2012 in *Bradbury v BBC* [2012] EWHC 1369 (Ch), [2012] PLR 283, at [68]–[88], which dealt with an agreement to restrict the extent to which future pay increases would be pensionable.
91 *HR Trustees v German* [2010] EWCA Civ 1349; [2011] ICR 329.
92 *Re Gleeds Retirement Benefits Scheme* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J).

(b) TUPE transfer the employees, and providing them with the amended benefit terms in the new employer. This could be used as a fall-back plan if it is not possible to get all of the employee consents required.

Does the employer need express consent?

If the employee continues to work after having been informed of changes, this can in some cases be considered to be implied consent to the change in contract terms. However, the courts and tribunals have generally considered this is only the case where both:

(a) the employee does not expressly object to the changes;[93] and
(b) the change in terms has immediate practical effect[94] and the employee stays working for more than a short period.

This is generally more difficult to show in relation to pension benefit changes (as the changes may not have immediate practical effect until the employee retires).

A change to salary/contributions could be seen to have such an immediate practical effect. This may be less of an issue where the change does not vary take-home pay (eg a salary sacrifice with net take home pay being the same before the change as after[95]).

There may be more of an argument here if, for example, any employee was to move between pension schemes as part of any proposals.

It is also, in theory, possible for an employee to continue to work and accept changes, but claim that the effect of the acceptance/agreement was to put in place a new employment contract, replacing his existing employment contract. Technically, this could in some cases amount to a 'dismissal' for the purposes of the unfair dismissal legislation as the existing employment contract has ended: see *Hogg v Dover College*.[96] However, again this is a factual test. The variation needs to be 'substantial' and fundamental.

Any unfair dismissal claim would need to be made within the usual time period for bringing unfair dismissal claims (ie three months of the date of the 'dismissal').

It is also clear that not all contractual variations amount to a termination of the existing contract – again this is a question of fact and degree and one where the views of the tribunal tends to be determinative: see, for example, *BBC v Kelly-Phillips*[97] and *Potter v North Cumbria*.[98]

On appeal in *Potter*,[99] the CA noted the argument:

> 'Accordingly, the issue before the tribunals was whether the previous ''employment'' came to an end on the day on which the new terms came into effect in each case, with

93 *Rigby v Ferodo Ltd* [1987] IRLR 516, HL. Working under protest for a long period may throw the onus on to the employees to show that they have not accepted: *Henry v London General Transport Services Ltd* [2002] IRLR 472 (two years).
94 *Jones v Associated Tunnelling Co Ltd* [1981] IRLR 477, EAT and *Khatri v Co-operative Centrale Raiffeisen-Boerenleenbank BA* [2010] EWCA Civ 397, [2010] IRLR 715.
95 See eg *Reed Employment plc v HMRC* [2015] EWCA Civ 805, [2015] STC 2516.
96 [1990] ICR 39, EAT. Applied more recently in *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), [2013] IRLR 86 (Briggs J).
97 [1998] 2 All ER 845, CA.
98 [2009] IRLR 900, EAT.
99 *North Cumbria University Hospitals NHS Trust v Fox (sub nom Potter v North Cumbria Acute Hospitals NHS Trust (No.2))* [2010] EWCA Civ 729, [2010] IRLR 804, Carnwath LJ at [9].

the result that the six-month period ran that from that time. This was treated as turning on whether the changes were sufficiently 'fundamental' to result in the substitution of a new contract, or whether they constituted a mere variation of a continuing contract. A number of authorities were discussed by both tribunals. Recent guidance was found in the summary of principles by Elias P in *Cumbria County Council v Dow (No 2)* [2008] IRLR 109 paragraph 12, encapsulated in the following self-direction (paragraph 36):

> "If the change is not of a fundamental nature, the only proper inference is that there was a variation unless we are satisfied that there was, objectively viewed, an express agreement that the mechanism to be adopted was the termination and new contract route."'

But in the CA, the case was decided on other grounds.

The implied consent analysis may be more difficult to sustain where there has been an approach to employees for their express consent to the changes (as by definition the remaining employees have not given their express consent and the communications will not envisage that continuing to work after failing to give express consent can be treated as acceptance).

Method 1: Fire and re-hire

Forcing change by terminating contracts and re-hiring

One option is to consider the route of dismissing employees who do not expressly agree to the changes, but offering to re-hire them on new terms, including an express agreement to the pension changes.[100]

The issues include:

(a) Carrying out collective consultation.
(b) The employer may be exposed to:
    (i) statutory claims based on unfair dismissal under the Employment Rights Act 1996; and
    (ii) contractual claims based on wrongful dismissal (if the full contractual notice period is not given);

    from employees who refuse to consent to the changes in pension benefits and who the employer then dismisses (with an offer to re-hire on the new terms).
(c) A dismissal could (depending on the relevant benefits and scheme rules) trigger other potential contractual liabilities (eg enhanced pension benefits). For example:
    (i) a benefit that depends on a dismissal by the employer; and
    (ii) giving less than full notice will be a breach of contract and so probably mean that any post-termination restrictive covenants (eg non-compete) are unenforceable; and

100 See Ch 24 in Pollard *Employment Law and Pensions* (2016, Bloomsbury Professional) and Sandeep Maudgil '*Benefit changes and the employment contract*' (APL Conference, 2009).

(iii) the position under any bonus or share plans should be considered.

(d) Changing pension benefits may also potentially give rise to claims for unlawful discrimination. The consent of the employee to the change will not necessarily be a defence against such a claim (it is not possible to contract out of the discrimination laws). The main potential issues are likely to be claims based on indirect unlawful discrimination, potential on the grounds of age or, perhaps less likely, sex.

Consultation

Consultation in relation to such a proposal is usually (depending on the number of employees) required:

(a) under the collective dismissal provisions in s 188 of Trade Unions Labour Relations (Consolidation) Act 1992 (TULRCA 1992);
(b) under the consultation provisions under the Pensions Act 2004;
(c) under any consultation arrangements of the employer (eg a national works council); and
(d) if employees in more than one EU Member State are involved, potentially with any European Works Council (EWC) of the employer (depending on the terms of such EWC).

In addition if the TULRCA 1992 consultation obligation applied (which again can depend on the numbers involved), the Secretary of State would need to be notified of the proposal on Form HR1 (TULRCA 1992, s 193). Failure to comply with this obligation can be a criminal offence.

Wrongful dismissal

Contractual wrongful dismissal claims should not apply if the employer gives full contractual notice. Any claim for damages based on a failure to give full notice of dismissal would be based on the loss of pay and benefits over the notice period, but subject to a duty to take reasonable steps to mitigate any loss.[101]

The potential for continuing employment on the new terms would probably be considered as a factor in mitigation, depending on the circumstances (see 'Mitigation' below).

The usual contractual damages rules would apply. Where an employer dismisses an employee in breach of contract (eg without full notice), it will be exposed to claims for damages for wrongful dismissal. The damages will be the loss suffered by the employee, usually the value of his or her wages or other benefits over the notice period, less any reasonable mitigation (see below).

A breach of contract will arise (assuming there is no other reason entitling the employer to dismiss the employee) where the employer does not either (a) give full contractual notice

101 For contracts which contain a clause providing for payment in lieu of notice (PILON), it may not be possible for the employer to argue that relevant employees should mitigate their loss, since an employee suing under such a clause would be suing for a contractual sum due rather than for damages for breach of contract: *Abrahams v Performing Rights Society* [1995] IRLR 486, CA. The wording of the PILON provision is critical here. If the PILON only applies at the employer's option then it should be possible to give notice without triggering the PILON obligation: *Cerberus Software Ltd v Rowley* [2001] ICR 376, CA.

to the employee or (b) if the individual contract allows this, exercise a pay in lieu of notice (PILON) provision and pay the specified amount.

Unfair dismissal – was the dismissal unfair?

In order to be able to bring a successful unfair dismissal claim, the employee must establish both that they were dismissed, and that the dismissal was unfair under the terms of the Employment Rights Act 1996. The element of 'fairness' has been interpreted to require both a fair reason for dismissal (in the context of a fire and re-hire, the most likely 'fair reason' will be the 'some other substantial reason' defence), and that a fair procedure was followed.

In a fire and re-hire scenario, an employee will be able to establish a dismissal. It would then be for the employer to defend the claim by showing that *both*:

(a) the reason for the dismissal was 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held'[102] (an *SOSR*); and
(b) it acted fairly and reasonably in treating that as a reason for dismissal.

SOSR

Business reorganisations can, in some circumstances, constitute an SOSR. Broadly, there is no requirement that the business might fail (absent the dismissal),[103] but the employer does need to establish a 'sound good business reason' for the dismissal.[104]

The tribunal will take account of the circumstances (including the size and administrative resources of the employer) in deciding whether or not the employer acted reasonably in treating the reason as a sufficient reason for a dismissal.[105]

In order to show this potential fair reason for dismissal, the employer would need to demonstrate that it has a sound business reason for the dismissal.[106] In its assessment of this, an employment tribunal would look at:

(a) whether the employer has shown advantages to its business of the changes. A mere statement of these is likely not to be enough;[107]
(b) whether the advantages to the employer of making the changes outweigh the disadvantages to the employee of the dismissal;[108] and
(c) in a case (presumably as here) involving a cut in pay or benefits, whether the change is 'in accordance with equity', looking at the level of the cut, the numbers who accepted

102 ERA 1996, s 98(1)(b). See the discussion in Kate Brearley and Selwyn Bloch, *Employment Covenants and Confidential Information* 3rd Ed, (Tottel Publishing, 2009), at 13.17.
103 *Catamaran Cruisers Ltd v Williams* [1994] IRLR 386, EAT and *Garside & Laycock Ltd v Booth* UKEAT/0003/11/CEA, [2011] IRLR 735, EAT.
104 *Hollister v National Farmers Union* [1979] ICR 542, CA. For examples, see *Bowater Containers Ltd v McCormack* [1980] IRLR 50, EAT (reorganisation with agreement of union) and *Genower v Ealing, Hammersmith and Hounslow Area Health Authority* [1980] IRLR 297, EAT.
105 ERA 1996, s 98(4).
106 *Hollister v National Farmers Union* [1979] ICR 542, CA.
107 *Kerry Foods v Lynch* [2005] IRLR 680, EAT and *Banerjee v City and East London Area Health Authority* [1979] IRLR 147, EAT.
108 Eg *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932, [2005] IRLR 811 (reasonable to dismiss employee who refused to change hours of work, having fully consulted).

it, the level of consultation and on whom in the workforce cuts would fall (eg not just non-management).[109]

In effect, the court or tribunal will balance the business reasons of the employer against the need to protect the employee(s).

It is clear that a refusal to accept new terms and conditions can be an SOSR[110] and so can a change in pension terms, depending on the facts: see for example, the decision of the employment tribunal in *Dumbreck v Ofcom*[111] dismissing an unfair dismissal claim where the employer was moving to a DC scheme for future service benefits.

It is also clear that an overall business reason can be an SOSR even where it impacts on one individual in particular. The reason does not have to relate to the individual specifically. For example, in *Dumbreck*, the employment tribunal decided (unanimously) that the employer had established a good business reason, given that:

(a) its funding had been cut substantially;
(b) all of the other employees had agreed to the change;[112] and
(c) it would be inappropriate and unreasonable to expect the employer to continue the final salary scheme just for one employee.

It is clear that these are factual tests and much would depend on the evidence given to any tribunal and the view it takes.

Need to act overall reasonably

As well as establishing a fair reason for dismissal (eg SOSR), if an unfair dismissal claim were to be defeated the employer would need:

(a) to follow a fair procedure in presenting the change to employees; and
(b) if the employees do not accept the variation of their contract, to follow a fair procedure in moving to termination.

This would mean that the employer would need to show that it had gone through a consultation process under which information is provided to employees and there is consultation, both on a collective level and also with the individuals who are unwilling to accept the change. The employer should probably also follow its usual disciplinary procedure before giving notice to terminate employment.[113] This would mean holding a formal dismissal meeting at which the employee has the right to be accompanied by a fellow employee or a trade union representative.

It may (depending on the circumstances) still be reasonable if an employer dismisses an employee in circumstances where an inducement was previously offered to those accepting

109 *Garside & Laycock Ltd v Booth* [2011] IRLR 735, EAT.
110 Eg *Ellis v Brighton Co-operative Society* [1976] IRLR 419, EAT.
111 [2012] Eq LR 1164, [2012] 124 PBLR (017), ET.
112 The number of employees in favour compared to those rejecting looks to be a relevant factor. For example, in the pay cut case *Garside & Laycock Ltd v Booth* [2011] IRLR 735, EAT, 77 employees had accepted, seven abstained and only four had rejected.
113 The amount of the compensatory award on unfair dismissal can be increased by up to 25 per cent (but still subject to the cap) if this is just and equitable where the employer does not follow the ACAS Code of Practice 1 on grievance procedures – TULRCA 1992, s 207A.

the change, but is not included as part of the new terms offered on dismissal of those rejecting the change: *Slade v TNT (UK) Ltd.*[114]

Unfair dismissal remedies

Were an employment tribunal to find that an employee had been unfairly dismissed in the context of the employer trying to change pension benefits to the employee's disadvantage (ie if the SOSR defence did not succeed), it is likely that an employment tribunal would consider it 'just and equitable' to make a compensatory award. This enables an employee to recover compensation based on the loss that they have suffered.

The employee's remedy for unfair dismissal will usually be made up of a basic award and, potentially, a compensatory award.

(a) The basic award is a set amount calculated by reference to the amount of time that the employee has been in 'continuous employment'.
(b) The compensatory award is 'such amount as the tribunal considers just and equitable in all the circumstances', subject to a cap which is currently set at the lower of (a) £78,962[115] and (b) 52 weeks' gross pay for the individual. This cap does not apply if unlawful discrimination was found. The compensatory award is not a fine or penalty award. It must reflect the loss that the employee has or will suffer as a result of the dismissal. 'It should not over compensate the claimant': *Optimum Group Services plc v Muir*.[116]

In quantifying the amount of the award, a tribunal would consider the loss suffered by the employee, and would factor in such considerations as his or her prospects of re-employment upon substantially similar terms (including pensions), and the timescale that it envisaged might be necessary to obtain such employment.

Notably, the tribunal would consider the value of the loss of accrual of pension benefits for the expected length of the employer service and this might well bring liability towards the higher end of the cap set out above.

An employment tribunal could, in theory, award re-instatement or re-engagement on the same terms as before, ie with the DB pension that they previously enjoyed. However, a re-instatement or re-engagement order will not be made where it is not reasonably practicable for the employer to comply. They are comparatively rarely made. In practice, if there are only a small number of employees bringing claims, a tribunal is likely to be persuaded that it is too difficult to retain a DB scheme just for a small number of employees (eg *Dumbreck v Ofcom*,[117] discussed above), so the risk of a re-instatement or re-engagement order (with the previous DB pension) will usually be low. Where an unfair dismissal is found, this could give rise to a basic award and a compensatory award, including an amount for pension loss.

114 UKEAT/0113/11/DA, (2011) 13 September, EAT.
115 Employment Rights Act 1996 (ERA 1996), s 124(1). The statutory limit from 6 April 2016 was prescribed by the Employment Rights (Increase of Limits) Order 2016 (SI 2016/288). From 6 April 2015 to 5 April 2016 the fixed cap amount was £78,335 (see SI 2015/266).
116 [2013] IRLR 339, EAT. See *Harvey on Industrial Relations and Employment Law* (LexisNexis) at D1.17.D(1) [2525].
117 [2012] Eq LR 1164, [2012] 124 PBLR (017), ET.

Mitigation?

Even if there is no complete defence to an unfair dismissal claim (because the SOSR defence fails) or a claim for damages for wrongful dismissal, the amount awarded should reflect any reasonable mitigation that the employee should have undertaken[118] of his or her loss.

The compensatory award for any unfair dismissal would be reduced if the employee successfully secured alternative employment elsewhere or reasonably should have done so. If the pay level in the new job was the same as the old, then the compensatory award should reflect that no loss in pay should flow after the new job started (or reasonably should have started).

However, a more interesting question is whether or not the failure to accept the offer from the employer to re-hire on new terms may go to a reduction of any compensatory award (or damages) that would otherwise be made. The argument would be that the failure of the employee to continue to work and accept the revised terms offer meant that he or she had not reasonably mitigated his or her loss of salary and benefits[119] (there may still be a damages or compensatory award claim based on the reduction in pension value).

This is a largely untested area in relation to pension changes and there may well be arguments against such an analysis (on the basis that such an acceptance of the new terms was not in fact reasonable or appropriate in the circumstances).

Wrongful dismissal damages will only be reduced if the employee does not 'take all reasonable steps to mitigate the loss'.[120]

It will be for the employer to show that it would be reasonable for the employee to accept re-employment.[121] In *Wilding v British Telecommunications*,[122] Sedley LJ held that:

> 'it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed. He must show that it was unreasonable of the innocent party not to take them. This is an important legal distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is only where the wrongdoer can show affirmatively that the other party acted unreasonably in relation to his duty to mitigate that the defence will succeed'.

Generally the courts will often consider that it would not be reasonable for an employee to accept employment that involved materially inferior terms and conditions.[123] However, there are particular matters which will affect this analysis, which a judge will probably take into account in assessing the employee's reasonableness in refusing alternative employment. It will be reasonable to accept re-employment by the previous employer where the new

118 In an unfair dismissal case, see ERA 1996, s 123(4). See, generally, *McGregor on Damages* (19th edn, 2014, Sweet & Maxwell) at 31-106.

119 Eg *Brace v Calder* [1895] 2 QB 253, CA.

120 *Wilding v British Telecommunications plc* [2002] EWCA Civ 349, [2002] IRLR 524, Potter LJ at [22] citing *Fyfe v Scientific Furnishings* [1989] IRLR 331, EAT; *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, HL; and *Ministry of Defence v Hunt* [1996] IRLR 139, EAT.

121 Apparently *Emblem v Ingram Cactus Ltd* (CA) (unreported) 5 November 1997 is authority for this. Noted in (1998) Journal of Personal Injury Litigation 144. Cited in *Wilding v British Telecommunications plc* [2002] EWCA Civ 349, [2002] IRLR 524, at [23] (Potter LJ) and [55] (Sedley LJ) and in Kramer, *The Law of Contract Damages* (Hart Publishing, 2014).

122 [2002] EWCA Civ 349, [2002] IRLR 524.

123 *Jackson v Hayes* [1938] 4 All ER 587 (Du Parcq LJ), at 588G (an unreserved judgment); *Fyfe v Scientific Furnishings* [1989] IRLR 331, EAT; and *Wilding v British Telecommunications plc* [2002] EWCA Civ 349, [2002] IRLR 524.

employment 'in a pecuniary sense' was not 'of a less value to him' than the previous employment.[124]

Other relevant factors will include:

(a) the manner in which the employee had been treated;[125]
(b) the state of the relationship between the relevant employee and the employer;[126] and,
(c) most importantly, whether or not the new employment is of a lower status.[127]

Wilding v British Telecommunications plc[128] is the leading case. It involved a disability discrimination claim by Mr Wilding against his employer, BT, following his dismissal by BT. Following the first employment tribunal hearing, in which BT was held to have acted in an unlawfully discriminatory manner, BT made an offer to Mr Wheeler for him to return to work on a part-time basis. On the liability hearing, the ET held that Mr Wilding had acted unreasonably in refusing the offer of re-employment and that he had therefore not mitigated his loss. On appeal to the EAT and then to the Court of Appeal, this decision was upheld.

Potter LJ (with whom Brooke LJ agreed) set out a summary of the relevant principles (paragraph split up for ease of reading):

> 'As was made clear in the judgment of the EAT, (at paragraph 64) the various authorities referred to by the tribunal (see paragraph 22 and 23 above) and *Payzu v Saunders*[129] are apt to establish the following principles which (in a form which I have somewhat recast) were accepted as common ground between the parties.
>
> (i) It was the duty of Mr Wilding to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer.
> (ii) The onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment.
> (iii) The test of unreasonableness is an objective one based on the totality of the evidence.
> (iv) In applying that test, the circumstances in which the offer was made and refused, the attitude of BT, the way in which Mr Wilding had been treated and all the surrounding circumstances should be taken into account.
> (v) The court or tribunal deciding the issue must not be too stringent in its expectations of the injured party.
>
> I would add under (iv) that the circumstances to be taken into account included the state of mind of Mr Wilding.'

124 *Brace v Calder* [1895] 2 QB 253, CA.
125 *Yetton v Eastwoods Froy Ltd* [1966] 3 All ER 353 (Blain J) and *Payzu Ltd v Saunders* [1919] 2 KB 581, CA. See also *Gibbs v Leeds United Football Club* [2016] EWHC 960 (QB) (Langstaff J) at [44]: 'The way Leeds had acted towards him made it untenable for the Claimant to return, unless he wished to take the chance it would change its behaviour toward him. In my judgment he was not obliged to do so.'
126 *Shindler v Northern Raincoat Co Ltd* [1960] 2 All ER 239 (Diplock J).
127 *Yetton v Eastwoods Froy Ltd* [1966] 3 All ER 353 (Blain J).
128 *Wilding v British Telecommunications plc* [2002] EWCA Civ 349, [2002] IRLR 524 at [37].
129 *Payzu Ltd v Saunders* [1919] 2 KB 581, CA.

These principles have been followed in subsequent re-hire offer cases, for example:

(a) *Debique v Ministry of Defence*:[130] re-hire offer should still apply as mitigation even where employer and employee have been in dispute.
(b) *Saddington v F & G Cleaners Ltd*:[131] re-hire offer on self-employed terms (following a TUPE transfer) could be mitigation, but the ET upheld in its decision that it was not in this case.

It will depend on the individual circumstances how these factors will apply in the case of changing pension benefits. It may be significant that in most cases there is (presumably) no change in status for the employee. However, the level of overall remuneration may be an issue if pension benefits are reduced or changed from DB to DC (if the DC can be shown to be of a lower overall value that the DB).

(a) It may be that it is shown that it would be difficult for the employee to gain a post with comparable DB benefits, so potentially meaning that the compensatory award loss calculation could include an amount for the loss of the value of ongoing DB pension accrual (less the value of any DC or other benefits actually provided in the new employment), perhaps up to the anticipated retirement date for the employee.
(b) However, it may be possible to argue that any part of the compensatory award based on the loss of DB pension should be reduced to reflect the fact that the original employer had made arrangements for the cessation of future accrual of DB pension (and switched to the DC pension), so that element of change would have applied in any event.

Other factors such as employee/employer relationship and treatment by the employer of the employee will vary on a case-by-case basis.

However, it seems strongly arguable that these factors should not weigh unduly against the employer, if it can show that there is no question of the changes being brought in as a means of penalising an employee or as a demonstration or reflection of bad faith.

The question of the treatment of the employee by the employer might need some further consideration. The conduct of the relevant consultation process would be relevant here.

It is likely to depend greatly on the particular facts whether or not a court or tribunal would find that an employee had been unreasonable in refusing to accept the re-hire offer from the employer (incorporating the proposed changes to pension benefits). Factors could include the value of the changes in the pension benefits being either:

(a) quite hard to quantify (and therefore it might be more unreasonable to expect an employee to accept the changes); or
(b) quite high (in which case the mitigation achieved by acceptance of the new terms would be less).

If a court did consider that the employee had failed to take reasonable steps to mitigate his or her loss by refusing the re-hire offer, the mitigation deduction would:

130 UKEAT/0075/11, 15 September 2001, EAT.
131 [2012] IRLR 892, EAT.

(a) cancel the element of compensation arising from the loss of salary (as the employee would have earned the salary under the re-hire route); and
(b) may reduce (but perhaps not entirely extinguish) any claim for compensation for the loss of pension benefits which the employee would have suffered even if he or she had accepted the new terms. On this it could be argued that the employee has no loss of pension benefits as the test is what level of benefits would have been earned had he or she remained in employment – here the pension benefits under the employment have changed to the new arrangement.

It seems that no duty to mitigate arises before the employee is actually dismissed: *Saviola v Chiltern Herb Farms*.[132] Accordingly the employer would need to keep the re-hire offer open (and repeat it) even after any dismissal has taken effect.

Method 2: TUPE transfer

Forcing change by TUPE transfer

Given the exclusion of (most of the) rights and liabilities associated with occupational pension schemes from the automatic transfer principle set out in TUPE,[133] it is theoretically possible to use a TUPE transfer to implement benefit changes. We will look at the following key challenges if seeking to use a TUPE transfer to implement the benefit changes:

(a) structuring the TUPE transfer;
(b) consultation requirements;
(c) the impact of the TUPE transfer on the member's rights under the scheme; and
(d) the implied duty of trust and confidence.

The method of using a TUPE transfer to bring about the benefit changes could either be used in isolation (ie member consent would not be sought at all, rather the changes are implemented by way of a TUPE transfer alone), or the TUPE transfer could be used as a 'backup plan' where an insufficient number of employees consent to the changes.

In the context of this paper we have assumed that the TUPE transfer will be used in the latter scenario, as a backup option, and in the circumstances of a scheme closure to future accrual. We can envisage the following logic flow of the communications strategy to be along the lines of the following:

(a) there is a business case for making certain benefit changes to the scheme (eg arguments related to equality of treatment between the employees, profit/cost-related arguments, business results, pension provision in the sector/amongst competitors);
(b) the employer/company has explored the way in which the changes can be achieved as a legal matter;
(c) there is an option that works as a legal matter in relation to which member consent would not be required, and there are certainly more aggressive methods of seeking employee consent (eg a fire and re-hire approach);

132 [1981] IRLR 65, EAT at [16]. See also *McAndrew v Prestwick Circuits Ltd* [1988] IRLR 514, EAT, at [21] and *Saddington v F & G Cleaners Ltd* [2012] IRLR 892, EAT, at [27].
133 The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246, as amended).

(d) however, the company did not feel that those would be appropriate, and so asks the employees to understand the company's business case in agreeing to reform of the benefits;
(e) the company estimates that £X of cost would be saved if the changes can be effected with employee consent rather than any of the other routes, which it proposes to use in the mitigation package (for example); and
(f) the company wishes therefore to avoid using the TUPE transfer method of achieving the changes, but if required, is aware of it as a possible implementation method.

Structuring the TUPE transfer

TUPE applies in two scenarios, both of which are described as 'relevant transfers':[134]

(a) a business transfer (ie a transfer of an economic entity that retains its identity following the transfer); and
(b) a service provision change (ie outsourcing, change of contractor, insourcing).

Whether or not TUPE is engaged in any set of circumstances is highly factual, and an understanding of the following points would be required before any analysis of a particular set of circumstances can be carried out:

(a) which group company/companies currently employ the affected employee population;
(b) what proportion of the total UK employee population is made up by the affected employee population;
(c) how many non-impacted employees are also employed by that company/those companies; and
(d) how the employees are organised, ie whether there is a clear business unit that the affected employees are assigned to.

Depending on how the relevant employer is organised, it may be that any TUPE transfer would not be one single transfer, but would more likely need to be effected by means of a series of transfers (assuming that the population that would be within the scope of any proposed transfer are likely to be disparate, rather than one 'neat' grouping of resources).

Asset transfer

Employers will likely want to know the extent to which they will need to move assets and employees around the group in order to achieve the desired result.

(a) Whether or not an 'economic entity' has been transferred is a matter of fact.
(b) It will be clear that there has been a TUPE transfer where the whole of a business or a business division/unit is transferred.
(c) In cases where not all of the assets of a business unit are transferred, a factual analysis will need to be conducted in order to conclude whether or not the assets being transferred amount to an 'economic entity'.
(d) Once the transferring assets are identified, the transferring population of employees are those who are 'assigned' to that business. This again is a matter of fact, and assignment criteria is often the subject of discussion with employee representatives.

134 TUPE 2006, reg 3(1).

If, therefore, a (smaller) business unit can be identified in which the affected employees work, only those employees working in that business unit would be transferred by operation of TUPE. However, if as a matter of fact there is no logical (smaller) grouping of assets within the business on which the affected employee work that could be transferred and which would amount to an 'economic entity', it would be more likely that a greater number of employees would need to transfer.

Service transfer provision

If (as we would expect is usually the case) the business is not organised such that it is easy to identify a business unit for transfer in which the affected employees work, it may be easier to consider the service transfer provision of TUPE. This would operate by transferring the employment of employees to a new intra-group service company, and the service company would then contract the employees to carry out services for the old employer. Under this approach, it would be likely to be difficult to not transfer all of the employees. Where the employees who would be within the scope of any proposed transfer are disparate, it would be necessary to transfer all of the employees into the service company via multiple service provision changes.

Consultation requirements

Taking the TUPE transfer approach to achieving benefit change will likely trigger two consultation requirements:

(a) assuming the benefit changes are 'listed changes', the pensions consultation requirement would apply (the Pension Consultation Regulations);[135] and
(b) the TUPE information and consultation requirements would apply as there will be changes to the future pension entitlements of the transferring employees, ie there will be 'measures' taken in respect of the employees.[136]

To the extent that the employer is willing to implement the TUPE transfer where an insufficient number of employee consents are obtained, this will need to be clearly identified as part of the consultation processes.

Statutory pensions consultation requirements

The Pension Consultation Regulations require a minimum 60-day pension consultation, and the following (among other things):

(a) 'relevant background information' to be provided to the affected members or their representatives prior to the start of the consultation: reg 11(2)(d);
(b) the information should be provided in such a way and with such content such as to enable any representatives to give their view to the employer of, the impact of the listed change on the represented members: reg 11(2)(f); and
(c) consultation should be conducted in a 'spirit of co-operation': reg 15.

135 The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (2006/349). See Ch 37 in Pollard, *Employment Law and Pensions* (Bloomsbury Professional, 2016).
136 TUPE 2006, reg 13(6).

Where the TUPE transfer method of implementing the benefit changes is thought to be both legally and practically feasible and the company is ready and willing to deploy it as a backup option, both the possibility of the transfer and the reason for undertaking it would form part of the 'relevant background information' that the company is required to provide to members.

At the same time, it should not be used in the manner of a 'threat', as consultation should still be conducted in a spirit of co-operation.[137] Furthermore, it would be important to communicate the possibility of the transfer as a proposal only, rather than a settled intention, as the latter would indicate that the consultation process is not genuine.

Any communications issued to employees should be accurate, as it has been held[138] in the context of a consultation process that was conducted for a proposed TUPE transfer that employers have a duty to take reasonable care in making statements, where:

(a) the employer is proposing that employees transfer their employment;
(b) the transfer would impact on the future economic interests of the employees;
(c) the transfer would be unlikely to take place if a significant body of the employees objected;
(d) the employer had access to certain information unavailable to the employees; and
(e) the employer knew that its information or advice would carry significant weight with the employees.

Hagen v ICI concerned a transferring employer who gave misleading information about employees' pension benefits post-transfer.[139] Clearly the role and importance of the TUPE transfer would need to be presented appropriately in the consultation.

Although this is considering the requirements relating to disclosure in the context of the pension consultation under the Pension Consultation Regulations (and not under the TUPE consultation that could follow), there is a strong analogy with the *Hagen v ICI* case despite that case concerning a TUPE process. This is because in that case real consequences would have flowed for the proposed TUPE transfer had a large number of the employees objected to the transfer (ie the transfer would not in all likelihood have gone ahead). Where member consent is being sought as 'Plan A', the same point can be made in relation to the initial pensions consultation because whether or not the consent route can succeed, and whether or not any TUPE fallback would need to be implemented, will depend on member consent (which in turn will be influenced by the information that the members receive in consultation).

TUPE consultation requirements

TUPE 2006 requires that the employee representatives of the 'affected employees' be informed, long enough before the TUPE transfer to allow genuine consultation, of certain

137 In *IBM UK Holdings v Dalgleish* [2014] EWHC 980 (Ch), [2014] PLR 335 part of the members' complaint on consultation was that IBM had attempted to 'scare' them into accepting the changes by withholding information as to its realistic proposed implementation date. Warren J did not decide the point, relying rather on the fact that IBM had given misleading information as part of its consultation.

138 *Hagen v ICI Chemicals* [2001] EWHC 548, [2002] IRLR 31, [2002] OPLR 45 (Elias J).

139 The liability that arose from the misleading statements made during the consultation remained with the transferor, as the statements related to pension benefits, which are generally excluded from the scope of the automatic transfer principle under TUPE. This point is of less significance here, as the proposed transfers would be intra-group.

information in relation to the transfer. The information that needs to be provided includes the reasons for the transfer and the economic implications of the transfer for the affected employees. While the TUPE consultation process would be separate to the process that would have been followed in accordance with the Pension Consultation Regulations, the employee communications could build on (and would clearly 'follow on' from) what would have been issued under the earlier process.

In addition, consultation is required under TUPE 2006 in respect of any 'measures', ie changes to terms of conditions. The fact that a defined benefit pension would not be offered for transferring employees post-transfer would therefore fall under the consultation requirements of TUPE (although in practice this would also build on what would have been communicated under the initial pensions consultation exercise).

Under TUPE, the 'affected employee' definition covers employees affected by the transfer, whether or not they are themselves in scope to transfer (whereas the 'affected members' who need to be consulted for Consultation Regulation purposes are those active or prospective members to whom the listed change relates[140]). Depending on the scope of the TUPE transfer, there may therefore be a greater number of employees who need (as a technical matter) to be consulted under TUPE, than under the Pension Consultation Regulations. Whether or not the employer chooses to distinguish between the two processes and create a distinction between the employee population in this way would be a strategic matter to be considered in the relevant circumstances.

Unlike a pensions consultation, there is no minimum length of time required for a TUPE consultation, although a reasonable time should be allowed, bearing in mind that the consultation should be 'with a view to seeking ... agreement' with the employee representatives on the relevant measures.

Benefit issues

Cessation of active membership under the Scheme rules

The default effect of the TUPE transfer to a company that does not participate in the relevant pension scheme should be to end the active membership of the scheme for the transferring employees under the scheme rules (ie the employees would become deferred members of the scheme).

If this is correct, the employees' pensionable service under the scheme would cease at the point of transfer, and their final pensionable salary calculation would (for the purposes of the Scheme) take the point of transfer as the last date of pensionable service (ie the salary link would be broken when determining Scheme benefits).

We have seen it argued (at a preliminary stage) that a pension scheme trustee can refuse to recognise the effect of the TUPE transfer under the scheme rules on the basis that an employee can claim constructive dismissal in the circumstances of a TUPE transfer and one of the remedies available to employees would be reinstatement, following which the employee would return to the scheme with unbroken pensionable service. We are doubtful that this legal analysis has merit in this context (and, in that matter, even those who advanced the argument conceded that after the three-month limitation period for bringing dismissal claims it was likely that the pension scheme trustee would have to accept the effect of the TUPE

140 Pension Consultation Regulations, reg 7(4).

transfer for scheme members) and it was ultimately not pursued in the circumstances in which we saw it argued. If relations with the trustee were to be strained, however, it might be one further argument that the trustee could seek to raise by way of objection.

Trigger of early retirement benefit under the Scheme?

Scheme rules should be reviewed carefully to see if they provide for an enhanced benefit in some circumstances that could be triggered by a TUPE transfer. For example a provision triggering an enhanced benefit where the employee retires 'at the request of the employer' should be reviewed carefully. The better view[141] is likely to be that a TUPE transfer would not trigger this benefit, as the TUPE transfer itself aims to preserve an employee's employment, as opposed to requiring them to leave service, or 'retire'.

Transfer of liability to provide past service benefits under TUPE – the general rule

There is also a separate matter of whether or not the liability to provide the benefits under the scheme rules transfers to the new employer by operation of TUPE. TUPE provides that, as a general matter, rights under or in connection with an 'occupational pension scheme' are generally excluded from transferring under TUPE, if the rights relate to benefits for '*old age, invalidity or survivors*' within occupational pension schemes.[142] So no liability relating to benefits that come within this description should transfer.

Transfer of liability to provide past service benefits under TUPE – the exception

However, a significant complication with a TUPE transfer: is that rights under occupational pension schemes which are other than those related to '*old age, invalidity or survivors*' do transfer to the transferee.

This exception to the general TUPE principle that occupational pension scheme rights and liabilities do not transfer to the transferee has been the subject of some case law (in particular the European Court of Justice decision *Beckmann v Dynamco*[143]), although the principles arising out of the case law precedents are in many respects not clear.

While we do not propose in this paper to cover the technical detail relating to the benefits that do transfer under TUPE (so-called 'Beckmann Rights'), at a high level[144] the current case law supports the following views in this area:

(a) An obligation under the Scheme to provide enhanced early retirement benefits (including on redundancy) – and possibly to provide non-enhanced early retirement benefits – could transfer to the new employer under TUPE as an unfunded obligation, as these may not be 'old age' benefits.
(b) This can apply even where the benefit is not a right, but requires the employer's consent. In this case, what is transferred is the obligation to consider in good faith any application by a member for consent to early retirement.[145]

141 See Ch 52 ('TUPE transfer: potential trigger of enhanced benefit') in Pollard, *Employment Law and Pensions* (Bloomsbury Professional, 2016).
142 TUPE 2006 , reg 10(2).
143 *Beckmann v Dynamco Whicheloe Macfarlane Ltd* [2002] IRLR 578.
144 For more detail see Part 6 ('TUPE and pensions') in Pollard, *Employment Law and Pensions* (Bloomsbury Professional, 2016).
145 *Procter & Gamble v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 1257 (Ch), [2012] IRLR 733, [2012] PLR 257 (Hildyard J).

(c) Other benefits payable before NRD may transfer as well – although in practice the major concern is likely to be with any enhanced early retirement benefits (eg where the normal actuarial reduction for early payment is waived or generous to the member, or where prospective pensionable service is added).
(d) However, illness and death benefits (eg a spouse pension) probably do not transfer, even if those rights are attached to an early retirement/redundancy pension that might transfer.

A limitation that is likely to apply is that any non-old age pension, ie a pension that becomes payable before NRD, will lose this status at NRD, so in most cases only the pension that is payable up to NRD could transfer.

Where there are any Beckmann rights in the scheme, the obligation that would transfer under TUPE is in principle limited to one to provide a top-up pension over the period *from leaving service to NRD*. This is the pension that the member would have received had he or she stayed in the scheme as an active member during the period between the date of the TUPE transfer and the time of leaving service with the transferee employer. Note that this will usually be greater than the preserved pension in scheme, because:

(a) it will include pension based on service accrued after the TUPE transfer;
(b) it will include the effect of pay rises after the TUPE transfer; and
(c) it will include any 'enhancements' (eg no or fixed actuarial reductions).

To this extent, therefore, pensionable service and a final salary link will continue to accrue as a liability of the transferee employer (although there would be no further accrual under the scheme for the relevant members). Note, however, that the risk related to any enhanced early retirement benefits may be within the company's control to a large extent:

(a) the triggers for the application of the enhanced early retirement benefit will usually be in the employer's control:
    (i) it may be that the benefit is triggered where the employee leaves service at the employer's request (eg redundancy); or
    (ii) the employer may need to consent to a request is made by the employee (ie the employee does not have an absolute right to take enhanced early retirement). Where an employee requests early retirement under this type of rule he must still obtain employer consent to the retirement. Under TUPE, it is likely that what is transferred is the obligation to consider in good faith any application by a member for consent to early retirement (rather than necessarily to grant early retirement in all cases). The caveat to this is that if there has been a consistent practice of giving consent to early retirement under the Scheme, this could give rise to an enforceable right to early retirement on the basis of custom and practice (whether this is the case will depend on the factual analysis in relation to any past practice). Even if no claim can be made on those grounds, there could also be a risk that discontinuing any past practice could breach the employer's duty of trust and confidence; and
(b) in relation to salary linkage, it is possible for the company to stipulate that a condition of accepting any pay increases following the transfer is that they will not be pensionable so far as the scheme and *Beckmann* rights are concerned.

In addition, where *Beckmann* Rights are triggered, an offset should apply in respect of the transferring liabilities, as part of the obligation to provide the combined early retirement pension would be met by:

(a) the pension that the member would get from the original transferor scheme (ie the preserved pension) – note that this would be based on pensionable service up to the TUPE transfer and salary at that date, but it would also be increased with revaluation in deferment; and
(b) (probably[146]) the value of the defined contribution pension provided by the plan/arrangements set up by the transferee company in respect of the employees after the TUPE transfer.

With regard to 'normal' early retirement rights, a more pragmatic approach might be to treat these benefits as if they do not transfer and take the (low) risk that subsequent case law decides that such benefits do transfer by operation of TUPE.

While the TUPE transfer would therefore be sufficient to bring the affected members out of the scheme and prevent further accrual under the scheme in respect of those members, there are circumstances which would mean that it is not strictly accurate to say that no salary linkage and no further pensionable service liability could remain for the company in respect of these employees. However, the analysis above supports the view that the risk applies in limited circumstances, and they may be circumstances over which the company is able to exercise a large degree of control.

Future service – minimum requirements

For completeness, the Pensions Act 2004 ('the Act') requires a minimum level of future pension provision to be provided to transferring employees following a TUPE transfer, where the transfer includes employees who were previously members of an occupational pension scheme.

In addition, the company would be subject to auto-enrolment obligations in respect of the employees. Following the end of the transitional periods in respect of the auto-enrolment legislation (6 April 2019), the minimum overall contribution obligations for employees will be 8 per cent of 'qualifying earnings' (made up of a minimum 3 per cent employer contributions, 4 per cent employee contributions and 1 per cent tax relief).

The implied mutual duty of trust and confidence (MDTC)

The implied term of mutual trust and confidence requires the employer not to 'without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee'.[147]

Undertaking scheme changes via the TUPE transfer route does give rise to a risk that an employee would bring a claim that the implied duty of trust and confidence had been breached. This is particularly the case where the option of getting member consent to the changes has failed for lack of employee support.

146 There is no reported case law on this.
147 *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, HL. See further Chs 33 to 35 in Pollard, *Employment Law and Pensions* (Bloomsbury Professional, 2016).

Separately, depending on the extent to which the Trustee is required to participate in the proposals (for example if the Trustee needs to consider whether or not to exercise its power to amend the scheme rules to facilitate the TUPE transfer), the Trustee may also seek to bring a claim to the Court to seek a direction on whether any particular exercise of its power under the Scheme rules would be proper.[148] The Trustee might take this route if it also had concerns about whether the employer was breaching its duty of trust and confidence in proposing to make changes in this manner (as this would be a relevant consideration for the Trustee in deciding whether or not to agree to make any required amendment to the scheme rules, or administer the scheme on the basis that there are no longer any active members).

An employee claiming a breach of trust and confidence would have to show that the employer had behaved 'without reasonable and proper cause'. Some of the relevant factors in showing this would be as follows:

(a) Has the employer engaged in a full and open consultation with members? Did it give proper consideration to the feedback from affected employees?
(b) Does the employer have a strong business case for reform?
(c) What are the company's reasons for changing the benefit provision? Is it hoping to move to a less discriminatory method of providing pension benefits for future service?
(d) What is the company's proposed mitigation package and does it take into account the relative impact of the changes on different groups of employees?

There may be a risk that members could claim that the employer had breached the implied term of trust and confidence if it pursued a TUPE implementation route. The risk that members would make such a claim would be particularly acute if very few members are willing to consent to the benefit changes.

However, the likelihood of success of any such legal challenge would be dependent upon the strength of the company's business case for amending the benefit structure and whether or not a proper process had been followed.

If the TUPE transfer proceeded, and the trustee/employees later wanted to argue that the transfer was a breach of the implied duty of trust and confidence, it is not clear whether there would be an ability on the part of the trustee/employees to claim that the appropriate remedy would be for the TUPE transfer to be declared void or voidable. There is no case law precedent on this. While in *IBM (2014)* it was held that the agreements between the company and the employees that pay increases would be non-pensionable were voidable as they were procured pursuant to a breach of the implied duty of trust and confidence, it is doubtful that such a remedy can be used in the context of TUPE (as it is an automatic transfer principle under law, and not a contract extrinsic to the trust).

In addition, there are likely to be arguments available by analogy with *Johnson v Unisys Ltd*[149] that where statute provides a remedy for the behaviour complained of (in that case, unfair dismissal), the court will not also grant an overlapping contractual remedy.

Where there are unions involved in the relevant discussions, one further issue that should be considered is the possibility of the unions seeking to take collective industrial action in response to a TUPE implementation route. There have been a number of recent high profile disputes relating to the proposed closure of defined benefit pension arrangements. The TUPE implementation route in particular may be regarded by the unions as a disingenuous

148 The *IBM* litigation was a case of this nature brought by the trustee of the IBM pension schemes.
149 [2001] UKHL 13, [2003] 1 AC 518.

way of achieving the closure of the scheme and therefore something that also undermines the collective relationship between the company and the employees. That may make them more inclined to seek to take collective action in respect of any proposed TUPE transfer implementation method.