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Foster Wheeler - a victory for common sense in the provision of equal benefits

The Court of Appeal judgment in the case of *Foster Wheeler Limited v Hanley and Others*, issued yesterday, should be welcomed by employers. It overturns the High Court decision that male members of the Foster Wheeler Pension Scheme ("**Scheme**") could retire after age 60 but before age 65 without any reduction in their pension earned by reference to the age 65 retirement date.

The decision is a victory for common sense and encourages employers and trustees alike to work towards a sensible, workable solution to provide equal benefits without conferring unexpected windfalls on a lucky proportion of the members.

The Court of Appeal reversed the High Court decision on the grounds that service accrued by male members of the Scheme prior to 17 May 1990 and the decision in the European Court of Justice judgment of *Barber v Guardian Royal Exchange Assurance Group* in 1990 (which established that retirement ages for men and women should be equalised as required by Article 141 of the EC Treaty) was subject to a normal retirement age of 65, as was service accrued after the Scheme was amended in 1993 to equalise the normal retirement age of male and female members at age 65. In other words, only the service accrued by male members during the "Barber window" of 1990 to 1993 was subject to a retirement age of 60.

The Court was asked to determine how the trustees should amend the Scheme rules in order to reflect the entitlements of male members. The Court was presented with 3 options. These were:

1. a single pension calculated on the basis that all the benefits had fallen due for payment on the date of retirement (favoured by the High Court); or
2. a single pension payable in full, save that the pension payable by reference to benefits accrued with a normal retirement date of 65 must be discounted for early retirement (ultimately favoured by the Court of Appeal); or
3. split pensions, meaning that separate pensions are payable from each normal retirement date respectively (rejected as too complex to administer).

The governing principle was that the solution which achieved the required outcome and involved the minimum interference by the courts with the rules of the Scheme should be preferred. Minimum interference in this case should take into account the substance and not simply the form of any notional amendment to the scheme rules and whether a particular solution is appropriate in any given case will depend on the circumstances of the pension scheme in question.

The Court determined that the correct rule to apply on the facts of this case was the rule providing for an immediate payment of a deferred pension ("**Deferred Pension Rule**") prior to normal retirement date, as opposed to the rule applicable for early retirement. Due to the drafting of the early retirement rule, were that rule to be applied, there would be no actuarial reduction if the pension were taken after age 60. By contrast, the Deferred Pension Rule

provided for an actuarial reduction where the pension was paid out before normal retirement age. Application of the Deferred Pension Rule therefore allowed benefits to be paid in accordance with requirements of *Barber* but no more favourable than those requirements and with the least interference by the court in the rules of the scheme.

Implications for Trustees and Companies

The decision of *Foster Wheeler* highlights the need to ensure that scheme rules do provide for benefits for men and women which comply with the requirements of the *Barber* decision as interpreted in this Court of Appeal judgment. Equally, now that the Court of Appeal has rejected the generous approach taken by the High Court judge, care should be taken to ensure that any benefits provided are no more favourable than they need to be, as only the benefits accrued during the *Barber* window need to be subject to a retirement age of 60 (or whichever age was applicable to women prior to any deed of amendment). We would encourage companies to review any amendments that have been made to the scheme rules in light of the *Barber* decision with this in mind.

The amendments necessary to scheme rules in any particular case will depend very much on the individual circumstances of the scheme, in particular the drafting of the early retirement and deferred pension provisions, as well as the date of any modification/equalisation of normal retirement ages in light of the *Barber* decision.

Trustees and the Company should seek specialist legal advice and in some cases an application for directions may be required to put the matter beyond doubt and to avoid the risk of future complaints by members who accrued service during the "Barber window".

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