

## Court of Appeal upholds Virgin Media decision

*The Court of Appeal has upheld the original decision in the June 2023 High Court case of Virgin Media v NTL Pension Trustees. This related to historic amendments made to benefits accrued after 6 April 1997 in a contracted-out salary-related pension scheme. These are now confirmed as being invalid if a "Section 37 Certificate" was not obtained at the time from the Scheme Actuary. We recommend that those Trustees who have not yet investigated whether this could be relevant for their scheme should now start this process.*

### Background

In the period between 6 April 1997 and 5 April 2016, pension schemes could contract-out of the State Second Pension (previously the State Earnings-Related Pension Scheme, or SERPS) on a salary-related basis if they passed a "Reference Scheme Test", meaning that they provided a level of benefits above a prescribed minimum. Benefits accrued under such schemes during this period are usually described as "Section 9(2B) Rights" in reference to the relevant section of the Pension Schemes Act 1993. Section 37 of the Pension Schemes Act 1993 provided that, if the rules of such a scheme were to be amended in a way that affected members' Section 9(2B) Rights, then the Scheme Actuary had to confirm that the scheme would continue to meet the Reference Scheme Test after the amendment had been made. This is commonly referred to as a "Section 37 Certificate", although the legislation itself is unspecific about what form this should take, other than it should be in writing.

### The Original Judgment

The High Court decided that, if a Section 37 Certificate was not obtained, then past amendments making changes to members' Section 9(2B) Rights are void. In addition, the judgment confirmed that:

- This affects all changes, i.e. improvements as well as benefit reductions; and
- In respect of changes made prior to April 2013, it affects all rights, both past and future service. (From April 2013, changes in legislation meant that it then explicitly only applied to future service changes).

### The Appeal

On 25 July 2024, the Court of Appeal upheld the original judgment, which they deemed to be "impressive", and dismissed the Appeal. This was unanimously agreed by all three judges.

The Court of Appeal did confirm that *"if Section 37 did apply, it was not necessary for there to be a formal certificate appended to the Deed – all that was required was written confirmation"* from the Actuary that the changes did not affect the scheme's ability to pass the Reference Scheme Test.

### Further Developments

Because the legislation is unspecific about the form of the confirmation required from the Scheme Actuary, there could be a further hearing to ascertain whether, in the absence of an explicit Section 37 Certificate, other actuarial advice could suffice to validate any amendments made, e.g. confirmation at a later actuarial valuation that the Scheme continued to meet the Reference Scheme Test. There could also be an appeal to the Supreme Court.

This judgment potentially affects many pension schemes, since it casts doubt over the validity of past amendments made to the rules of contracted-out schemes. Various pension industry representative bodies have therefore appealed to the Government for help to resolve the uncertainty this has created. They have proposed that the DWP should make regulations that would remove this uncertainty, by validating retrospectively any amendment that is now held to be void solely because a written actuarial confirmation was not received before the amendment was made (or where such confirmation cannot now be located). There are existing powers in the Pension Schemes Act 1993 which could be used for this purpose; it would not need new primary legislation.

It is understood that the DWP is considering this, but as yet there is no indication of whether they are prepared to act as requested. There are several difficult issues which would need to be addressed. For example, if an amendment which reduced members' benefits is now deemed to be void, could passing regulations which retrospectively reinstate these reductions be seen as reducing members' accrued rights, something which could be seen as unpopular, or against members' interests.

## Impact on Employers

Employers should now consider the implications for their accounting disclosures. Our experience to date is that generally, company auditors have been content for employers to make only general reference to the possible implications of the case in the notes to their accounts. But now that the original judgment has been upheld, and no resolution (in the form of further Court cases or possible Government intervention) is in immediate sight, we can expect auditors to request further details of the implications for the employer, possibly even including approximate quantification of any potential additional liability, if past amendments reducing members' benefits are now deemed to be void.

## Action Required

Although the consequences of this Appeal are still being considered, it may no longer be tenable to simply wait to see if there will be further hearings, court cases, or Government intervention. We recommend that trustees start the process of reviewing past rule amendments to see whether a Section 37 Certificate (or other confirmation from the then Scheme Actuary) was required, and if so whether it was obtained at the time, so that they are aware of whether this could be an issue, and if so what benefits might be affected. As part of the next actuarial valuation, the Scheme Actuary can then seek to quantify the impact if any past Rule changes are considered now to be invalid, or this could be considered as part of the work on the employer's annual accounting disclosures.

More immediate action may be required if a scheme is about to enter into a buy-in or buy-out. These are usually permanent arrangements, so the absence of a Section 37 Certificate could mean locking into an incorrect level of benefits.

If you would like to discuss any of these matters further, please get in touch with your usual contact at Cartwright.

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