



Pensions and sex equality Cheaper at the Barber

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The Court of Appeal has removed the threat of a significant increase in the cost of “Barber window” pension in defined benefit pension schemes that provide unreduced early retirement pensions. The decision is widely seen as a good news for employers, trustees and most scheme members.

A member who retires at age 60 having accrued pension with separate normal retirement dates of 60 and 65 as a result of sex equalisation can receive a single pension. Pension with an NRD of 60 is paid in full; pension with an NRD of 65 can be reduced for early payment even where the rules say that early retirement pensions are unreduced.

The original decision in the High Court was that such a scheme had to pay the whole of a member's pension unreduced at age 60, regardless of when it accrued. If that decision had not been overturned, many schemes could have faced significant cost increases.

The case is *Foster Wheeler v Hanley*.

As well as dealing with the particular issue of unreduced early pensions, the decision is important because:

- a common approach to Barber window benefits has received approval i.e. paying a single pension made up of an NRD 60 element and an NRD 65 element each of which is reduced, paid in full or increased according to whether it is paid early, on time or late;
- it confirms that schemes have the freedom to pick their own approach to the detail of equalising benefits but that they should not interfere more than necessary with the original distribution of rights and responsibilities in their rules; and
- it leaves schemes the option of providing two pensions (or a “split pension”) with NRD 60 pension coming into payment at age 60 and NRD 65 pension at age 65. But this would normally require substantial rule amendments.

Ends and means

Schemes must not discriminate on grounds of sex: EU and UK legislation are clear on that objective. But both codes are deliberately “hands off” over the means to that end.

The Court of Appeal decision in *Foster Wheeler* is the most substantial legal guidance so far about how a scheme with a Barber window should go about equalising benefits. (The “Barber window” is the period after the *Barber* decision in 1990 when men and women's NRDs remained unequal.)

The Court of Appeal said that schemes should work within their rules as far as possible and any amendments that are needed should interfere with the existing balance of rights and obligations to a minimum.

The Court acknowledged that where a number of different approaches would satisfy this principle, the choice of which one is appropriate is for the scheme and depends on its particular circumstances.

Foster Wheeler

The Foster Wheeler scheme equalised NRD at age 65 in 1993, closing its Barber window after three years. It also chose to provide that pension taken early with consent would be unreduced. The High Court said that because the company had chosen to use the early retirement rule to deliver equality, its consent for women (and so for men) with Barber window service to retire early had to be implied. That gave members with Barber window service a right to take all their pension unreduced at 60. The result was a significant windfall that the company and/or other members would have to pay for.

Overtaking the High Court, the Court of Appeal held that creating a windfall was not “minimum interference”. Given the particular scheme rules, the correct approach was to see NRD 65 pension drawn at 60 as a deferred

pension taken early. The rule about deferred pensions allowed the trustees to apply a reduction. The result would be a single pension payable at age 60, with NRD 60 pension paid in full and NRD 65 pension reduced for early payment.

The Court said the Foster Wheeler scheme should consider what, if any, rule amendments it would need to make to deliver equal Barber window benefits using its deferred benefits rule as a model.

The Court's innovative use of the deferred pension rule (for a member drawing pension immediately on leaving) shows that schemes have considerable freedom as they look to achieve equality within the broad framework of their rules.

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