

MACFARLANES

IBM V DALGLEISH – THE END OF “REASONABLE EXPECTATIONS”

The Court of Appeal has overturned the decision in [IBM v Dalglish](#). It was held in the High Court that IBM UK Limited had breached its contractual duty of trust and confidence to its employees in carrying out a number of changes to its pension scheme and requiring employees to sign “non-pensionability agreements” as a condition of receiving pay rises. It was also held that IBM UK Holdings, as principal employer, had breached its duty of good faith (known as the Imperial duty of good faith) in making the changes to the pension scheme.

The decision in the High Court turned on a finding that “reasonable expectations” had been engendered by the previous actions and communications of IBM UK and IBM UK Holdings. It found that any decision that frustrated those “reasonable expectations” would be voidable as a breach of the duty of trust and confidence or the Imperial duty of good faith (as applicable) unless there was no other possible course available.

The appeal was determined on the issue of breach of these duties. The Court of Appeal held that the test for a breach of both the Imperial duty of good faith applicable to those exercising non-fiduciary powers under pension schemes and the employer’s duty of trust and confidence is a rationality test equivalent to that of the public law test in *Wednesbury*: the employer or the person exercising the power must take account of relevant matters (and no irrelevant matters) and the decision must not be arbitrary, perverse or capricious. The test however is one of commercial rationality and logic and not of reasonableness. The Court of Appeal noted that a test of reasonableness could result in the court substituting its own decision which is not its role.

No higher duty arises from “reasonable expectations” engendered by previous actions and communications. Those previous actions and communications, and any expectations that employees or members may have as a result, are relevant considerations but have no special status.

COMMENT

The High Court decision was controversial in finding a remedy based on “reasonable expectations” where the communications and conduct fell short of the requirements for a contractual obligation or an estoppel. While enforceable rights do arise from conduct and communications under the doctrines of estoppel, “custom and practice” and negligent misrepresentation, the conditions for such rights must be met. Employers should still consider their communications and dealings with care to ensure no unintended liabilities arise.

The Court of Appeal also noted the need to allow discretions to be exercised repeatedly and consistently without resulting in the relevant discretion being lost. This is consistent with the decision in *Prudential Staff Pensions v Prudential Assurance*.

The validity of “non-pensionability agreements” is confirmed: an employer can require employees to agree that a pay rise will be disregarded for pension purposes as a condition of granting the pay rise.

This has also been confirmed in the separate decision of the Court of Appeal in *Bradbury v BBC* which also considered other potential challenges based on the restriction on the right to surrender a pension under section 91 of the Pensions Act 1995 and allegations of discrimination and improper motive.

CONTACT DETAILS

If you would like further information or specific advice please contact:

CAMILLA BARRY

PARTNER
PENSIONS
DD +44 (0)20 7849 2238
camilla.barry@macfarlanes.com

SHEAMAL SAMARASEKERA

SENIOR SOLICITOR
PENSIONS
DD +44 (0)20 7849 2577
sheamal.samarasekera@macfarlanes.com

AUGUST 2017

MACFARLANES LLP

20 CURSITOR STREET LONDON EC4A 1LT

T +44 (0)20 7831 9222 F +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com

This note is intended to provide general information about some recent and anticipated developments which may be of interest.

It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

Macfarlanes LLP is a limited liability partnership registered in England with number OC334406. Its registered office and principal place of business are at 20 Cursitor Street, London EC4A 1LT. The firm is not authorised under the Financial Services and Markets Act 2000, but is able in certain circumstances to offer a limited range of investment services to clients because it is authorised and regulated by the Solicitors Regulation Authority. It can provide these investment services if they are an incidental part of the professional services it has been engaged to provide. © Macfarlanes August 2017

