Joint ACA/APL meeting

29 November 2012

Test-Achats – *update on legal status and potential implications for occupational pensions*

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Overview

1. What is the *Test-Achats* case about?
2. Implications of *Test-Achats* on exceptions for pension schemes in Equal Treatment Directive

Part 1
What is the *Test-Achats* case about?

1. What is the ***<u>Test-Achats</u>***[1] case about?

- Is the exception (the "**Actuarial Pricing Exception**"), in Article 5(2) of the Goods and Services Directive[2], which allows sex actuarial factors to be used for pricing insurance policies, valid?
- This exception has been transposed into domestic law in a number of Member States, including the United Kingdom
- The ECJ decided on 1st March, 2011 that the Actuarial Factors Exception was to be struck out of the Goods and Services Directive
- But the judgment contains a temporal limitation allowing the exception to continue to apply until **20th December, 2012**

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[1] Association Belge des Consommateurs Test-Achats v Conseil des Ministres du Royaume de Belgique (C-236/09).

[2] Directive 2004/113/EEC (Equal treatment between men and women in the access for supply of goods and services)

1. Actuarial Factors Exception in Goods and Services Directive

- Actuarial Pricing Exception in Goods and Services Directive:
  - Article 5 states that use of sex as a factor in calculating premiums and benefits for the purposes of insurance and related financial services must not result in differences in individuals' premiums and benefits
  - Exception in Article 5(2) currently allows member states to legislate to allow "proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data"

1. Differences in approach to temporal limitations between insurance contracts and employment contracts

- Judgment of ECJ on temporal limitation:
  - "In the light of the above, the answer to the first question is that Article 5(2) of Directive 2004/113 is invalid with effect from 21 December 2012"
  - EU Commission guidance[1] that this applies "new contracts"
- Approach for employment contracts:
  - _Barber_[1]:
    - *"It must therefore be held that the direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment"*
  - _Coloroll_[2] cases
    - *"by virtue of the Barber judgment the direct effect of Article 119 of the Treaty may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, in relation to periods of service subsequent to 17 May 1990 [the date of the judgment]"*

1 C(2001) 9497
2 C-262/88: Judgment given on 17th May, 1990
3 C-200/91: Judgment given on 28th September, 1994. See also C-109/91 (Ten Oever), C-110/91 (Moroni) and C-15291 (_Neath_) where the ECJ Judgment was also given on 28th September, 1994 and which were joined with Coloroll

1. Differences in approach to temporal limitations between insurance contracts and employment contracts

	Key dates of insurance contract	Need to equalise price/benefits	Result expected by analogy with *Barber* and *Coloroll*
1.	Premiums paid and benefits provided in full before 21st December, 2012	NO	YES
2.	Premiums paid in full before 21st December, 2012 to purchase benefits to be paid after 21st December, 2012	NO	YES
3.	Contracts entered into between 21st December, 2007 and before 21st December, 2012, where premiums fall to be paid after 20th December, 2012		
4.	Contracts entered into after 20th December 2012	YES	YES

1. Transposition of Actuarial Pricing Exception into UK law

- The Actuarial Pricing Exception was transposed into UK law by Paragraph 22 of Schedule 3 of Equality Act 2010
  - to be removed by Equality Act 2010 (Amendment) Regulations 2012 with effect from 21st December, 2012

Part 2

Implications of ***Test-Achats*** on exceptions for pension schemes in Equal Treatment Directive

2. Exceptions in Equal Treatment Directive for pension schemes

- Article 9 of Equal Treatment Directive[1]:

1. "Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for:

…

(h) setting different levels of benefit, ***except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined contribution schemes****; in the case of funded defined-benefit schemes,* ***certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented****;*

…

(j) setting different levels for employers' contributions, ***except:***

(i) in the case of defined-contribution schemes if the aim is to equalise the amount of the final benefits or to make them more nearly equal for both sexes,

(ii) in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined;"

(emphasis added)

- Does the strike out of the Actuarial Factors Exception have any implications for these exceptions?

[1] Directive 2006/54/EEC

2. General principles in EU Treaties relevant to exceptions

- Article 6 of the Treaty on European Union (introduced by Treaty Lisbon with effect from 1st December, 2009)
  - The rights in the Charter[1] have the same legal value as Treaties
- Article 21 and 23 of the Charter
  - Principle of non-discrimination
  - Equality between women and men
  - Note UK opt-out[2]:
    - "*The Charter does not extend the ability of the Court of Justice of the European Union, or any tribunal…of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of…the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms*"
- Article 19 Treaty on the Functioning of the European Union (2009)
  - Power to legislate to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

[1] The Charter of Fundamental Rights of the European Union.

[2] Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom C306/156

2. Case law relevant to exceptions

- *Barber and Coloroll* (above)
- *Neath v Hugh Steeper Limited*[1] and the *Coloroll* cases appeared to permit sex differentiated actuarially justified factors in certain circumstances:
  - Neath: "*the use of actuarial factors differing according to sex in funded defined-benefit occupation pension schemes does not fall within the scope of Article 119 of the EEC Treaty*"
  - *Coloroll: "The answer to the fourth question must therefore be that the use of actuarial factors varying according to sex in funded defined-benefit occupational pension schemes does not fall within the scope of Article 119 of the Treaty."*

1 C-152/91: Judgment given on 22nd September, 1993

2. Case law relevant to exceptions (ctd)

— *Lindorfer v EU Council*[1]

"56 Secondly, as regards the justification of that difference in treatment between men and women by the need for sound financial management of the pension scheme, such an argument cannot be invoked to support the need for higher actuarial values for women.

57 It is sufficient to observe, in that regard, that the identical level of contributions from the remuneration of male and female officials does not adversely affect such management.

58 In addition, the fact that the same equilibrium can be attained with "unisex" actuarial values is also shown by the fact that, subsequently to the facts of this case, as is clear from the replies of the Council and of the Commission to the Court's questions, the institutions decided to use such values.

*59 Consequently, the Court of First Instance was wrong in holding that Ms Lindorfer had **not** suffered discrimination on account of her sex."*

(emphasis added)

- Note that the Staff Regulations of officials of the European Communities provided that:

"*Officials shall be entitled to equal treatment under these Staff Regulations without reference, direct or indirect, to race, political, philosophical or religious beliefs, sex or sexual orientation"*

1 C-152/91: Judgment given on 22nd September, 1993

2. Do the general principles of the EU Treaties override the provisions of the Directive?

– Case law suggests that "general principles" of EU law override contradictory provisions in the directives and national law:

- *Mangold v Helm*[1]
  - *"it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law"*
- *Kucukdeveci v Swedex*[2]
  - *"European Union law, more particularly the principle of non-discrimination on grounds of age…must be interpreted as precluding national legislation"*

1 C-144/04: Judgement given on 22nd Decemebr, 2005
2 C-555: Judgement given on 19th January, 2010

2. Do the general principles of the EU Treaties override the provisions of the Directive?

- "General principles" are part of Community law but are not codified:
  - Mangold:

    45 "the source of the actual principle underlying these forms of discrimination [on the grounds of religion or belief, disability, age or sexual orientation] being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional tradition common to the Member States.

    46 The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law."

2. Do the general principles of the EU Treaties override the provisions of the Directive? (ctd)

- Opinion of Advocate General in *Test-Achats*:
  - Noted that the Court in *Neath* and *Coloroll* held that the general principle of equal pay was not applicable to sex differentiated factors as employer contributions were not within the meaning of "pay" in the view of the Court at that time, but that the Treaties would apply to any element of "pay".
  - " *57.* ***If anything, the case-law in Neath and Coloroll Pension Trustees suggests the conclusion that the prohibition of discrimination on grounds of sex under European Union law precludes differences between men and women which are purely statistical from being taken into consideration with regard to insurance risks.***"

  (emphasis added)
- Note that the ECJ on 1st March, 2011 adopted a narrower approach to strike out Article 5(2)

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