Neutral Citation Number: [2019] EWHC 3027 (Ch)

Case No: PE-2018-000015

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

HEARING IN IN PRIVATE
JUDGMENT IN PUBLIC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2019

Before :

THE HONOURABLE MR JUSTICE ZACAROLI

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Between :

AIRWAYS PENSION SCHEME TRUSTEE LIMITED	**Claimant**
- and -	
(1) MARK OWEN FIELDER	**Defendants**
(2) BRITISH AIRWAYS PLC	

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Jonathan Hilliard QC, David Southern QC, Stephen Arthur and Henry Day (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
Michael Furness QC (instructed by **Hogan Lovells International LLP**) for the **First Defendant**

Hearing dates: 31 October 2019 and 1 November 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

1. This is an application by the corporate trustee (the "Trustee") of the Airways Pension Scheme (the "Scheme") for approval of its decision to enter into a settlement agreement with the second defendant, British Airways plc ("BA"). The settlement will compromise, among other things, existing proceedings between the parties in respect of which an appeal is pending to the Supreme Court against a decision of the Court of Appeal dated 5 July 2018 (*British Airways plc v Airways Pension Scheme Trustee Ltd* [2018] EWCA Civ 1533) (the "main proceedings").

2. This is a public judgment setting out my conclusions and an outline of my reasoning. My detailed reasons were given in a private hearing – at which only the Trustee and the representative beneficiary, and their advisors, were present – and remain private.

3. The members of the Scheme have been represented by the first defendant, Mr Mark Fielder. Mr Fielder and his legal team have undertaken the task of scrutinising the Trustee's decision-making process and evaluating the overall merits of the settlement agreement. He has then drawn to the attention of the court any issues which he thinks the court should take into account when deciding whether or not to approve the agreement. It has not been Mr Fielder's role to approve or disapprove the settlement agreement. Rather, he has offered a critical assessment of the agreement with a view to assisting the court to take that decision.

4. The relevant question for me is whether the Trustee's decision to enter into the settlement agreement, and to continue with it in light of changed circumstances since it was entered into, are decisions which a reasonable body of trustees could have arrived at. As David Richards J said, in *MF Global UK Ltd* [2014] EWHC 2222 (Ch), at [32], citing Lewin on Trusts (18th ed) at 29-299 (now Lewin on Trusts (19th ed) at 27-079):

> "once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed."

5. It is common ground that the test has two aspects. First, process: has the Trustee properly taken into account relevant matters, and not taken into account irrelevant matters? Second, outcome: is the decision one which a rational trustee could have come to?

6. I have been greatly assisted by the comprehensive review of the Trustee's decision-making process undertaken on behalf of the representative beneficiary.

7. While I accept that it is necessary to review the Trustee's decision in light of factors which exist at the time it is made, it is nevertheless helpful to have regard to the matters which gave rise to the settlement. The starting point is the Government's decision in 2010 to increase public sector pensions and certain other state benefits annually by reference to CPI rather than RPI. This had the practical consequence of reducing the year-on-year increase to the benefits of Scheme members whose pensions increases are linked to Pension Increase (Review) Orders by about 1%.

8. The Trustee, in response, amended Rule 15 of Part VI of the Scheme's rules dated 1 April 2008 ("Rule 15"), to enable them to implement (by a super-majority of two-thirds) discretionary increases. In 2013 the Trustee resolved to grant an increase of 0.2%. The amendment, and the exercise of the discretionary increase power, were challenged in the main proceedings. As things stand following the decision of the Court of Appeal, the introduction of the power was for an improper purpose and thus invalid. It is common ground that there are reasonable prospects of success for either side in the pending appeal to the Supreme Court.

9. Another important piece of the background is that in 2012 the Scheme was in deficit, leading to a deficit payment plan requiring BA to pay several hundreds of millions of pounds into the Scheme. The position has, however, changed and the Scheme now has a substantial surplus. In the normal course, there would have been two further valuations since 2012, which would very likely have resulted in the reversal of BA's contribution payments. But these have been held up by the main proceedings.

10. The core elements of the deal reached by the Trustee and BA in April 2019 are:

    i) The Trustee will have largely unfettered access to the surplus now sitting in the Scheme, in order to provide increases in pensions – including catch up payments since 2013 – leading to full RPI increases from 2021.

    ii) In return, BA is to be excused from making the accrued, and any further, contributions under the deficit plan put in place in 2012 (save that it will assume a contingent liability to pay up to £40m in certain circumstances).

11. I am satisfied that the decision to enter into the settlement agreement was one which a reasonable trustee could rationally take. I note that – while there exists a current deficit on the assumption that payments would be increased in line with the settlement – it is anticipated that savings can be made which will ensure that there will be enough in the Scheme to pay all pensions on an RPI basis going forward. In those circumstances, I consider that it is rational for the Trustee to opt for the certainty of being able to use the surplus that does exist in order to enhance benefits, rather than maximising further contributions from BA. That is particularly so where those continuing contributions are a collateral advantage of the failure to carry out the last two triennial valuations.

12. Mr Furness did not take issue with that conclusion.

13. He pointed to three things that have changed since March: (1) the size of the deficit; (2) further contributions have (and will) become due from BA under the deficit plan put in place after the 2012 valuation, simply because more time will pass until resolution of the Supreme Court appeal; and (3) in a recently published exchange of correspondence between the Government and the UK Statistics Authority, it has been suggested that RPI is likely to become aligned with CPIH – not before 2025, possibly thereafter, but most likely from 2030.

14. Mr Furness does not place any great reliance on the first of these.

15. The second is a relevant factor, but not a critical one. The essence of the settlement was always going to be giving up contributions under the deficit payment plan agreed

in 2012 in return for the certainty of increased benefits – up to RPI - under the Scheme. It is not suggested that agreeing to such a deal is irrational, and I do not think that the mere fact that because more time has passed a greater sum of contributions is now being given up is a critical difference.

16. It is the third point which is said to be critical. Mr Furness submits that once it was announced that there is a real likelihood of RPI being aligned with CPIH, most likely from 2030, there was a risk that the long-term benefits of the settlement would become illusory. Although this would make it much easier for the Scheme to pay increases based on RPI, there was a risk that this would be a false promise, because that is only possible as a result of the calculation of RPI being changed so that it is in practice reduced to parity with CPIH.

17. Mr Furness submits that this creates a conflict between older and newer members. The settlement remains a good deal for older members because they will have both certainty and speed of distribution. That is, there will be immediate payment of back-dated enhanced benefits (by the payment of a lump sum of 4.6% of pensions, and further sums) and they will see immediate year-on-year increases, growing to full RPI from 2021. But – says Mr Furness – younger members will not see that benefit, because they would expect to receive the bulk of their pension in the years after 2030, when there would be no benefit of increases to RPI, because RPI would be the same as CPIH.

18. I will first address the outcome question. The question is therefore, given the changed circumstances, could a trustee rationally agree to the settlement?

19. In considering this question, it is important to understand the practical consequences of the likely convergence of RPI and CPIH, first noting that there is no certainty that RPI will converge with CPIH: the issue is contentious and politically sensitive and a lot could happen in the next eleven years. If it does happen in 2030, that leaves eleven years of relative certainty as regards use of the surplus. This is particularly relevant in light of the maturity of the Scheme and age profile of members.

20. There are approximately 23,000 members eligible for discretionary increases. Approximately 1000 members currently pass away each year. That means that by 2030 it is likely that only half the current members will remain. The convergence of RPI and CPIH will have no effect on the benefits that that half of the current membership will enjoy from the settlement. Mr Furness himself pointed out that for older members, the settlement remains a good one.

21. As to the remainder: 70% of the members are currently over 70. That means that by 2030, 70% of current members will either be over 80 or will have passed away. For those that survive, even assuming the worst (namely that RPI is thereafter reduced to CPIH), they will have obtained a substantial benefit from the settlement, in three ways: (1) they will have received the back-dated and catch-up payments to compensate them for the freeze since 2013; (2) they will have the year-on-year increases for the next 11 years, including full RPI increases from 2021; and (3) since increases are compounded, the base amount of their pensions, on which increases at CPIH after 2030 will be based, will be some 14% higher as a result of the settlement.

22. It is common ground that in deciding whether to exercise dispositive powers, occupational pension scheme trustees do not owe a duty to act impartially between members, as the essence of dispositive powers is that they can be used to favour some over others: see *Edge v The Pensions Ombudsman* [2000] Ch 602 at p.627.

23. In my judgment, it is clearly within the bounds of rationality for the Trustee to take the view that even in the changed circumstances of a likely convergence of RPI and CPIH in the future, it remains in the interests of the Scheme as a whole to enter into the settlement. On the basis of the figures I have just mentioned, the changes make no practical difference to approximately half of the current Scheme members. And for the other half, the Scheme continues to provide immediate and certain benefits which have substantial value even if the differential between RPI and CPIH closes completely in 2030.

24. I have also considered the process followed by the Trustee and I consider that the Trustee gave proper consideration to all the issues and took appropriate professional advice.

25. Accordingly, I am satisfied both that the processes followed by the Trustee were consistent with those of a rational trustee and that the settlement is one which a reasonable trustee could enter into. I will therefore make the order requested, approving the settlement.