

FAO: Sean Redgate
Community Administration Centre
The Grange
108 Northampton Road
Earls Barton
Northampton
NN6 0JH

50-52 Chancery Lane London WC2A 1HL
Manchester M1 4DZ

Tel 020 7657 1555 Fax 020 7657 1557 DX 202 Lon/Ch'ry Ln
Direct Tel 0207 657 1516 Direct Fax 020 7657 1546
Email: m.a.fletcher@rjw.co.uk

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By Email only: sredgate@community-tu.org

Dear Sean

Re: NSPCC Final Salary Pension Scheme

I have now had an opportunity to review all of the documentation that you have provided to me in relation to the NSPCC Final Salary Pension Scheme ("the Scheme") and the relevant authorities relating to amendment of the terms of such schemes by the employer and/or Trustees, and potential restrictions on any relevant power to amend.

I set out below our advice with regards to the employment rights of the individuals affected by the removal of the final salary pension scheme.

Contractual right to benefits conferred under Pension Scheme

In many cases, as is the case here, the employment contract contains very little detail about pensions, but simply refers to separate scheme documentation. Therefore, it is debatable whether employees have any contractual right to accrue specific pension benefits, as opposed to simply a right to join a scheme operated by the employer.

Employer's Right to vary Contractual Terms

If a particular employee was to have a contractual right to join a particular pension scheme, it will primarily be a question of contract whether the employer is entitled to change or withdraw that benefit.

If an employer has reserved to itself, within the provisions of the employee's contract or the pension scheme itself, the right to vary the terms of this, or any, specific benefit it will be difficult for the employee to argue that a variation, if the subject of appropriate consultation, amounts to a breach of contract.

Even if employees do not have a contractual right, either express or implied, to continuation of specific pension benefits, it is sometimes possible to argue that the discontinuance or amending of the terms of a pension scheme by an employer could be in breach of the implied duty of

mutual trust and confidence. We would need more facts to assess this properly but consider that any such claim is likely to be very difficult.

The situation can become complicated further by potential trust law issues as pension schemes are set up trusts and by terms of deed and supporting rules.

Right to benefits under NSPCC Final Salary Scheme

In the sample contract that has been provided to me the right to join the NSPCC Pension Scheme is contained at clause 12. This clause states that membership of the pension scheme is open to the employee, if under 65, "*subject to the rules of the Scheme from time to time in force.*"

Therefore, the operation of the Scheme, and any rights of either the employee or employer (including any right for the employer to vary the terms of, or withdraw, the benefit), is governed by the trust deed and rules relating to the Scheme – the Definitive Trust Deed and Rules.

Variation of terms of NSPCC Final Salary Scheme

The Definitive Trust Deed and Rules document in force at the time that the relevant changes were made is that which came into effect on 26 November 2004.

Clause 15 of the Deed sets out a power for the Society to amend the Trust Deed and Rules, **without the requirement of consent** from the affected employees.

In some cases such a power to amend is restricted, by wording within the relevant clause, so as to prevent amendment to the rules of a scheme that would affect the benefits secured by past, or in some cases (depending on the wording) past or future, contributions. The authorities in such cases, suggest that amendments to schemes containing such restrictions must preserve the link to final salary (either in relation to benefits secured to the time of the amendment or entirely, depending on the extent of the restriction).

However, the power of amendment at clause 15 of the Deed in force as at the time of the changes concerned here does **not, unfortunately, contain any such restriction**. The restrictions that are included only stipulate that the main purpose of the Scheme must not be altered from being the provision of pensions (it does not stipulate what type) for Members, and that the changes must not result in payment to the Society of any assets of the Scheme.

There will be, from the effective from dates of the documents I have seen, earlier versions of the Trust Deed and Rules. If the amendment powers within those documents differed, that might affect the situation.

Conclusion

On the basis of the documentation I have seen, we would advise that employees with contractual terms equivalent to those of the sample contract have, at best, a contractual right to join and participate in a pension scheme operated by the NSPCC, and not to participate in a non-contributory, final salary pension scheme.

The employer has, under clause 15 of the Deed, the power to alter or withdraw the Scheme. I would advise that this power is not fettered by any restriction that, it could be argued, prevents the employer from altering the terms of the Scheme to remove the link to final salary. Relying on an alleged breach of implied terms is likely to be difficult.

Therefore, it does not appear from the documents I have seen that the company has acted in breach of contract in altering the Scheme from a final salary to defined contributions pension scheme.

This is a general view, based on the Trust Deed and Rules and the sample contract that I have seen. If certain affected individuals have different contractual terms, which it is considered might give rise to a more specific contractual right to participate in a defined benefits scheme, I am, of course, happy to look over and assess a particular employee's situation if so instructed.

If you have any further queries, please do not hesitate to contact me.

Yours sincerely



Matthew Fletcher

