IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2020] EWHC 3132 (Admin)

No. CO/2220/2020

Royal Courts of Justice

Thursday, 12 November 2020

Before:

THE HONOURABLE MRS JUSTICE LANG DBE

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
(1) AMEY PLC ("AMEY")
(2) ENTERPRISE MANAGED SERVICE LIMITED ("EMS Ltd.")

Claimants

- and -

SECRETARY OF STATE FOR HOUSING
COMMUNITIES AND LOCAL GOVERNMENT

Defendant

- and -

(1) NORTHAMPTONSHIRE COUNTY COUNCIL
(2) NORTHAMPTON BOROUGH COUNCIL
(3) DAVENTRY DISTRICT COUNCIL

Interested Parties

MR P. BOWEN QC and MR T. JOHNSTON (instructed by Blake Morgan LLP) appeared on behalf of the Claimants.

MS J. CLEMENT (instructed by Government Legal Department) appeared on behalf of the Defendant.

MR N. GIFFIN QC and MR P. HALLIDAY (instructed by Burges Salmon LLP) appeared on behalf of the Second and Third Interested Parties.

THE FIRST INTERESTED PARTY was not present and was not represented.

J U D G M E N T

(Transcript prepared from remote Microsoft Teams recording)

MRS JUSTICE LANG:

1 The claimants seek permission to apply for judicial review to challenge the making of the Local Government Pension Scheme (Amendment) Regulations 2020, No. 179 ("the 2020 Regulations"), which were made by the defendant on 20 March 2020 pursuant to powers conferred by the Public Service Pensions Act 2013.

2 The challenge is directed at regulations 1, 3 and 4, which purport to give retrospective effect from 14 May 2018 to the amendments to Regulation 64 of the Local Government Pension Scheme Regulations 2013, as amended by the Local Government Pension Scheme (Amendment) Regulations 2018 ("the 2018 Regulations").

3 In summary, the claimants claim that the 2020 Regulations breach the claimants' fair trial and property rights, insofar as they extinguish an absolute right to an exit credit and replace it with a discretionary entitlement. The claimants fear that the discretionary amount awarded is likely to be nil.

Factual background

4 The first claimant is Enterprise Managed Service Limited ("EMS Ltd") and the second claimant is AMEY PLC ("Amey"). EMS is a company within the Amey Group of Companies.

5 EMS Ltd entered into a contract ("the contract") with the interested parties ("the Councils") to provide environmental services on 3 May 2011 for a term of seven years. EMS Ltd became the employer of a number of employees by virtue of the Transfer of Undertaking Regulations 2006 and the EU Acquired Rights Directive 2001/23/EC.Upon transfer, the Councils' employees were entitled to a, broadly, comparable level of pension protection to that which they had enjoyed prior to the transfer. This was effected by requiring EMS Ltd to be admitted to the Local Government Pension Scheme ("LGPS").

6 LGPS is a defined benefit public sector pension scheme for employees of local government and participating employers - usually charities and independent companies providing contracted-out local authority services - known as "admission bodies". The LGPS is made up of 89 separate funds in England and Wales, administered and managed at local level by an "administering authority", although the rules are set nationally by the Secretary of State by the 2013 Regulations.

7 Accordingly, in addition to the contract, on 3 June 2011, EMS Ltd entered into an admission agreement with the first interested party, Northamptonshire County Council ("NCC"), as "administering authority", and the Councils, as the "admission bodies", pursuant to which the transferring employees became members of and were able to participate in the local LGPS fund, the Northamptonshire Local Government fund ("the fund").

8 The LGPS is funded through the contributions of all employers and employees participating in the scheme. Contributions are estimated on the basis of actuarial predictions of what pension benefits are likely to cost and when they are to be paid. These contributions are then invested to seek a return that can meet the liabilities to the LGPS fund members. If the value of the pension scheme assets is not sufficient to meet those liabilities, then the scheme is in deficit. This may require an increase in contributions from an employer and, when an employer leaves the scheme, any deficit attributed to that employer is calculated at the end

of the contract and levied as an "exit payment", as provided for by the relevant LGPS Regulations. If, however, the actuarial valuation found that there was any surplus in the fund at that time, there was no provision by which an admission body was entitled to recover that surplus from the fund. It was not until 13 May 2018 that provision was made to allow for exit credits to exiting employers where the LGPS fund is in credit. Accordingly, upon becoming an admission body, EMS Ltd became liable to make pension contributions and other payments, including an exit payment, under the terms of the relevant Regulations, which it had agreed to pay to NCC under the terms of the admission agreement.

9 To mitigate the risks of increased contributions and of any exit payment at the end of the contract, EMS Limited agreed with the Councils to share those potential liabilities through what is known as a "pass-through" arrangement, which was written into the terms of the contract. Neither the admission agreement nor the contract made any provision for what would happen at the end of the contract term if the actuarial valuation assessed the fund to be in surplus, in relation to the liabilities of the fund for pension benefits owed to EMS Ltd's current and former employees. That is because the relevant Regulations made no provision for the payment of any such surplus to an admission body upon leaving an LGPS fund.

10 In 2016 a valuation of the fund was conducted, which calculated that there would be a significant surplus at the expiry of the contract and, as a consequence, the employer contribution rate payable by EMS Ltd to NCC was reduced to zero. That reduction was passed on to the Councils, but, as it transpired, there still remained a significant surplus when the contract expired.

11 As the law stood in 2016, EMS Ltd would not have been entitled to an exit credit in respect of that surplus, at the expiry of the contract in 2018. This was an anomaly that led to calls for a change in the law.

12 The defendant first consulted on the idea of introducing exit credits and a consultation paper in May 2016. In April 2018, the defendant published its response to the consultation and announced that exit credits would be introduced by an amendment to the 2013 Regulations.

13 On 14 May 2018, the 2018 Regulations came into force, amending regulation 64 of the 2013 Regulations, so that an admission body leaving an LGPS on or after that date was entitled to be paid an exit credit in the event of any surplus in the fund. By regulation 64 (2ZA), the administering authority was obliged to pay the exit credit within three months of the date on which the admission body left the LGPS.

14 The contract ended on 3 June 2018. As a result, EMI Ltd's participation in the fund ceased and the admission agreement automatically terminated. EMS Ltd became an exiting employer for the purposes of regulation 64 of the 2013 Regulations.

15 NCC obtained an actuarial valuation of the fund in October 2018, as required by regulation 64(2A) of the 2013 Regulations. The valuation showed a surplus of £6,518,000 in the fund in respect of the claimants' current and former employees.

16 According to the terms of regulation 64 (2ZA), NCC became obliged to pay the surplus to EMS Ltd within three months. By 3 September 2018, the councils objected to such a payment being made, because of the impact on the value of the assets in the fund. NCC then refused to pay the exit credit to EMS Ltd.

17 On 25 March 2019, EMS Ltd issued proceedings against NCC in the Chancery Division of the High Court seeking recovery of that sum. This claim will be referred to as "the Exit Credit Claim".

18 On 8 May 2019, the defendant published a further consultation document in which it proposed a further amendment to regulation 64 of the 2013 Regulations. The consultation paper explained that the amendment that was made by the 2018 Regulations had led to concerns, which the Government now proposed to address by further amendments to regulation 64, so that exit credits would not be payable in circumstances where the exiting employer had mitigated its risks by a pass-through arrangement. This amendment would apply retrospectively.

19 The Exit Credit Claim was stayed because of the Government's proposed amendments, and it has been further stayed because of this judicial review claim.

20 The 2020 Regulations were laid before Parliament, under the negative resolution procedure, on 27 February 2020. These gave effect to the amendments to fegulation 64, foreshadowed by the consultation response paper. By regulation 1, the amendments were to come into force on 20 March 2020, but "to have effect from 14 May 2018", thus, giving them retrospective effect.

21 The Explanatory Memorandum to the Regulations stated at paras.7.2 and 7.3,

> "7.2 It has become apparent that the payment of exit credits in all circumstances may not be appropriate … It is not uncommon for a local authority to enter into a side agreement with the service provider whereby the local authority assumes the pensions' risk in exchange for a lower contract price from the service provider. Some such contracts were entered into before exit credits were available under the Regulations. In such cases a local authority may have explicitly assumed the responsibility for any deficit and the resulting exit payment resulting at the end of the contract, while the responsibility for any surplus and resulting exit credit is not similarly explicitly assigned and, by default, will be paid to the service provider.
>
> 7.3 Between 8 May and 31 July 2019, the Government consulted on changes to the 2013 Regulations to provide that an LGPS administering authority must take into account a scheme employer's exposure to risk in calculating the value of an exit credit."

22 The second and third interested parties ("IP2" and "IP3") contend that this case is an example of the situation described in the consultation document and the Explanatory Memorandum, since it would not be appropriate to pay an exit credit to the claimants, as it would represent an unmerited windfall for them and would place an unfair burden on them, as they will have to pay higher contributions to the fund if the payment out is made.

Grounds of challenge

23 The claimants' challenge relates to three categories of exit credit. Category 1: exit credits that had been vested, valued and in respect of which a legal claim had already been issued when the 2020 Regulations came into force. Category2: exit credits that had vested, but not been valued before the 2020 Regulations came into force. Category 3: exit credits that will not vest until after 20 March 2020.

24 The claimants rely on four grounds of challenge:

Ground 1: fair trial rights, both at common law and under Article 6 ECHR.
Ground 2: property rights, both at common law and under Article 1 of Protocol I to the ECHR ("A1P1").
Ground 3: interpretation of regulation 3.
Ground 4: non-discrimination.

Grounds 1 and 2

25 It is convenient to consider Grounds 1 and2 together. Under Ground1, the claimants submit that, although s.3(3)(b) of the Public Service Pensions Act 2013 permits retrospective changes to scheme rules, it does not confer a power to introduce legislation, which has the effect of extinguishing existing valid legal claims that have already been made, as this would be contrary to the principle of legality. Furthermore, EMS Ltd's exit credit is a civil right for the purposes of Article 6 ECHR and the Human Rights Act 1998. The extinction by retrospective legislation of a legal claim that will determine that right may constitute a violation of the right to a fair trial.

26 Under Ground 2, the claimants submit that regulations 1 and 3 of the 2020 Regulations have, retrospectively, removed vested rights to exit credits in a disproportionate manner, which is unlawful at common law and amounts to an unjustified interference with the peaceful enjoyment of their possessions under AIP1.

27 Although the defendant contests Grounds 1 and 2, he concedes that it passes the low threshold which applies at permission stage.

28 IP2 and IP3 submit that Grounds 1 and 2 are unarguable because the claimants never acquired any right to an exit credit payment. Alternatively, even if such a right had accrued, its removal was justified - on compelling grounds in the public interest - to address the anomalies that resulted from the 2018 Regulations. Furthermore, the payments for which the claimants contend would constitute unlawful state aid under Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU"), as they are selective advantages conferred upon an economic undertaking which might distort competition and have an effect on interstate trade.

29 The claimants object to the interested parties' reliance on the state aid submission and they have applied to strike out the reference to it in the Summary Grounds of Resistance, on the basis that it should have been raised at a much earlier stage, in a challenge to the making of the 2108 and 2020 Regulations, not in these proceedings.

30 The defendant denies that the 2018 Regulations conferred unlawful state aid. While they may have inadvertently conferred an unwarranted windfall on certain economic operators, an exit credit did not constitute state aid as any payments were not selective; all undertakings in a similar position were treated in the same way; and the payments were not liable to distort competition, or to affect trade between member states.

31 In my judgment, the claimants' grounds are certainly arguable. I consider that the state aid argument is unlikely to succeed for the reasons given by the defendant, which are supported by the claimants. So it does not amount to a knock-out blow which would justify the refusal of permission. However, the claimants' application to strike out the state aid argument from the pleadings is misconceived. The interested parties are entitled to raise the point in response to the claimants' challenge.

Grounds 3 and 4

32 Under Ground 3, the claimants submit that regulation 3 of the 2020 Regulations, as it amends regulation 64 of the 2013 Regulations, should be accorded its plain and unambiguous meaning, namely, that all relevant factors should be taken into account in the exercise of the discretion to determine the amount of any exit credit. This is broad enough to include the fact that a contractor gave a discount reflecting the assessed risk of making an exit payment in return for passing through the pensions' risk to the local authority. The suggestion in the defendant's consultation paper, and in the Explanatory Memorandum that exit payments are not appropriate where a pass-through arrangement is in effect, does not represent the law.

33 In the alternative, under Ground 4, the claimants submit that, if regulation 64 is interpreted in accordance with the Explanatory Memorandum, it is unlawful, insofar as the claimants are treated differently and, without objective justification, in the enjoyment of their A1P1 rights compared with other contractors. The difference in treatment is irrational and also contrary to Article 14 of the ECHR.

34 The claimants, therefore, seek a declaration by consent, at permission stage, on the interpretation of regulation 64 in the terms set out in para.105(b) of the claimants' Grounds:

> "A declaration that in exercising their discretion under Reg. 64(2AZB) an administering authority may take into account the relative share of risk, including the amount of any discount given to a local authority by a contractor in return for passing-through their liability to pay any increase in employer contributions and an exit payment."

35 The defendant, IP2 and IP3 submit that permission should be refused on Grounds 3 and 4 because all parties are agreed that, under regulation 64 of the 2013 Regulations, all relevant factors should be taken into account in the exercise of the discretion to determine the amount of any exit credit. The point is, therefore, academic and there is no need for a declaration to be made.

36 In my judgment, this issue is not academic and the claimants' concern is justified. The adjudicators, who will have to determine these disputes, are likely to be assisted by the court clarifying the scope of their discretion, when considering contracts with pass-through clauses, in the light of the steer given by the Government's consultation paper and then the Explanatory Memorandum as to the rationale behind the 2020 amendment. I note with concern Mr Currid's evidence about the differences in the interpretation of regulation 64 by the administering authorities in their "funding strategy statements". However, in my view, it is not appropriate to make a declaration at permission stage and, in any event, I consider that the claimants' proposed declaration may be too narrowly drafted.

Delay

37 The defendant submits that permission should be refused on the grounds of delay. He submits that the claim was not made in accordance with CPR 54.5(1) which provides that the claim form must be filed promptly, and in any event, not later than three months after the grounds to make the claim first arose. It was not made promptly and it was made more than three months after the 2020 Regulations were made by the defendant. IP2 and IP3 support this submission.

38 The defendant made the 2020 Regulations on 25 February 2020. On 27 February 2020, the defendant laid them before Parliament under the negative resolution procedure, which provides for either House of Parliament to seek to annul the instrument if it is opposed. The 2020 Regulations were not opposed. They came into force on 20 March 2020.

39 Mr Rupert Graham-Evans, a partner at the claimants' solicitors, Blake Morgan, has provided a chronology in his second witness statement made on 29 October 2020. Blake Morgan were acting for the claimants in the Exit Credit Claim in the Chancery Division and so were aware of the defendant's consultation and the proposed further Regulations. They raised the possibility of a public law challenge with the claimants and arranged a meeting with them on 10 March 2020. At that meeting, the claimants authorised Blake Morgan to obtain advice on a potential judicial review claim, as the solicitors acting in the Exit Credit Claim were not specialists in judicial review.

40 When the COVID-19 lockdown commenced on 23 March 2020, there was a major disruption to work at Blake Morgan. Solicitors at the firm switched to remote working from home, but they did not have access to their physical case files. The solicitors concerned were also dealing with the unexpected additional caring responsibilities for children and elderly relatives as a result of the pandemic. Staff of the claimants were similarly affected by the pandemic and were heavily engaged in managing the furlough scheme. These factors affected their ability to give timely instructions to Blake Morgan.

41 By 29 April 2020, the claimants had approved the choice of counsel and the instructions to counsel. On 11 May 2020, they had the first of three consultations with leading counsel, Mr Bowen QC, who then gave written advice. Mr Bowen QC advised that the three-month period for filing a judicial review claim ran from 20 March 2020, the date when the 2020 Regulations came into force. The claimants sent a pre-action protocol letter on 3 June 2020 and received a response on 18 June 2020. The claim was filed on the following day, 19 June 2020 This was just within the three-month period, if time ran from 20 March 2020, when the 2020 Regulations came into force, but approximately, three to four weeks outside the three-month period if time ran from 25 February 2020, when the defendant made the 2020 Regulations.

42 The defendant, IP2 and IP3 submit that the three-month period for filing a judicial review claim ran from 25 February 2020, the date when the defendant made the 2020 Regulations. The claimants submitted that it ran from 20 March 2020, the date when the 2020 Regulations came into force.

43 Counsel referred me to a number of authorities, including, but not limited to, *R. v HM Treasury ex p. Smedley* [1985] QB 657*; R v Customs and Excise Commissioners Ex p Eurotunnel Plc* [1995] CLR. 392; *R (Cukurova Finance International Ltd) v HM Treasury* [2008] EWHC 2567 (Admin); *R (Association of Independent Meat Suppliers) v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 1961 (Admin); *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWHC 1786 (Admin); *R (Christchurch BC) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 598; *R v Hammersmith and Fulham LBC, ex parte Burkett* [2002] UKHL 23; *R (Badmus) v Secretary of State for the Home Department* [2020] EWCA Civ 657; *R (Delve) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199; and *AXA General Insurance v. The Lord Advocate* [2012] 1AC 868.

44 In my view, there is no binding authority directly on the point that I have to decide. The authorities point in different directions. Also, some are distinguishable because they were

not concerned with the negative resolution procedure, and some are decisions of the High Court which are not binding upon me.

45 Having considered the authorities and the submissions with care, in my judgment, the better view is that time ran from the date on which the 2020 Regulations came into force, namely, 20 March 2020, which is when the claimants became directly affected in law by its provisions. By this date, the 2020 Regulations had been published, so they were readily available to the public and they had been laid before Parliament, so it was known that there was not going to be any Parliamentary challenge. The date of coming into force is set out in the Regulations, thus providing clarity and certainty to all.

46 Therefore, I conclude that the claim was made in time, but, in case I am wrong about that, I now go on to consider the claimants' application for an extension of time. I consider that the claimants have shown good reason why time for filing the claim should be extended to 19 June 2020. The duration of the delay was more than minor, but not long enough to be categorised as serious.

47 A major reason for the delay in preparing this claim was the unforeseen and unavoidable disruption caused to the claimants and their solicitors by the COVID-19 pandemic and lockdown. Practice Direction 51(ZA) para.4 advises that the impact of the pandemic will be taken into account by the court, when considering applications for an extension of time for compliance with directions and applications for relief from sanctions. In my view, the court should adopt a similar approach in considering whether to grant an extension for an out-of-time claim for judicial review.

48 The failure to file in time was also a result of the advice from counsel that the three-month period ran from 20 March 2020, which, in the light of the authorities, was, perhaps, understandable. (For the purposes of this part of my judgment only, I am assuming that counsel's advice was incorrect).

49 I appreciate the difficulties which the Councils are facing, as set out in the witness statement of Mr Burnette made on 15 October 2020. However, I consider that the effect of the delay of three to four weeks on the defendant and the Councils is negligible, and would not justify a refusal of permission under s.31(6) of the Senior Courts Act 1981.

50 Finally, I take into account the fact that I have found the claim to be arguable and it has significant financial implications for many local authorities and contractors. In my view, there is a public interest in the Court ruling on the law as soon as possible, in advance of individual adjudicator decisions.

51 The defendant, IP2 and IP3 also submit that, even if the claim was filed in time, it was not filed promptly, as is required. I accept that the promptness requirement applies to non-EU law claims. In my view, the reason why it was not filed sooner was the unforeseen and unavoidable disruption caused to the claimants and their solicitors by the COVID-19 pandemic and lockdown, which I have already described. I take into account that the filing on 19 June 2020, as opposed to three to four weeks earlier, has had a negligible effect on the defendant and the councils. The claim is arguable and there is a public interest, particularly for local authorities and contractors, in resolving the legal issues in dispute. Therefore, I do not accede to the application to refuse permission on the ground of lack of promptness.

Alternative remedy and stay

52 In its written submissions prior to the hearing, the defendant submitted that permission should be refused, on the basis that there is an alternative remedy which should be pursued by the claimants under the 2013 Regulations, which provide for a determination of any exit credit by the administering authority and a dispute resolution procedure to be determined by an adjudicator to be selected by the administering authority. If the claimants were not satisfied by the outcome, they could then complain to the Pensions Ombudsman.

53 The claimants, IP2 and IP3 filed submissions in opposition to the defendant's submissions on alternative remedy. I agree with their submissions that the lawfulness of the disputed provisions in the 2020 Regulations ought to be established by the Court prior to their application by the administering authority and the adjudicator in this case and others, otherwise it is probable that there will be another legal challenge at a later date to an adverse decision by the administering authority and the adjudicator. This will duplicate the work already done in this claim. It will prolong the period of uncertainty for all those concerned, and delay the payment of any sums due.

54 It is also probable that, by that stage, the Court will have received other legal challenges by other disappointed contractors, in respect of differing decisions by other administering authorities and adjudicators. These claims will be progressing through the Administrative Court, and litigants are likely to request that they are linked to the claimants' claim for hearing. An increase in the volume of litigation on the 2020 Regulations would be undesirable.

55 For the same reasons, I do not favour the defendant's proposal that this claim should be stayed until the claimants have obtained a determination from the administering authority and adjudicator. I have had regard to the letter from NCC's solicitors, dated 11 November 2020, in which they express their client's concerns about having to make a decision on the payment of exit credits, whilst the judicial review claim is ongoing, and their wish for certainty about their legal duties before they make a decision, and in any event as soon as possible. IP2 and IP3 share these concerns. In my view, there is the added difficulty that there would have to be a second judicial review challenge to the lawfulness of the decision of the administering authority and the adjudicator in the claimants' case, as it would stand unless quashed. I fear that, ultimately, the proposed stay may lead to delay, duplication and further expense.

56 However, it was indicated to me during the course of the hearing that the claimants are now, apparently, willing to defer the judicial review until after the regulation 64 decision has been finally made. The defendant very much advocates that approach, correctly arguing that the court will then have the benefit of a substantive decision on the claimants' claim when considering the legal arguments.

57 Despite my own reservations about the defendant's proposal of a stay, I am concerned about the Court refusing a stay if the main parties are both persuaded that a stay is the proper course, or the more desirable course. It is not clear to me whether this remains the claimants' preferred route or whether, now that they have permission to apply for judicial review, they would prefer to pursue the judicial review claim first. Therefore, I suggest - and I will hear the views of counsel in a moment - that I give the parties a period of time, say, seven days, to lodge written submissions on their position, in the light of my judgment, and to propose case management directions, either to take effect immediately or to take effect after the conclusion of the regulation 64 application.

58 I conclude that the order will be that permission is granted on all grounds and there will be an extension of time for filing the claim to 19 June, if required.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.