



Neutral Citation Number: [2013] EWCA Civ 901

Case No: C1/2012/2976

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION,
ADMINISTRATIVE COURT
MR JUSTICE OUSELEY
CO103082011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2013

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE JACKSON

Between:

THE QUEEN ON THE APPLICATION OF THE
GOVERNMENT ACTUARY'S DEPARTMENT
- and -
THE PENSIONS OMBUDSMAN

Appellant

Respondent

Mr Jonathan Swift QC and Mr Martin Chamberlain QC (instructed by Treasury
Solicitors) for the Appellant

Mr Jonathan Evans (instructed by Pensions Ombudsman) for the Respondent

Hearing date: 10 July 2013

Judgment Approved by the court
for handing down
(subject to editorial corrections)

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Master of the Rolls:

1. This appeal concerns a judicial review challenge brought by the Government Actuary's Department ("GAD") to a decision by the Pensions Ombudsman ("the Ombudsman") that GAD came within its jurisdiction in respect of acts or omissions relating to the Firemen's Pension Scheme (the "FPS") occurring in the period prior to 6 April 2005. Ouseley J dismissed the challenge. GAD appeals with the permission of Tomlinson LJ.
2. The Ombudsman has jurisdiction to investigate and determine complaints of maladministration under section 146(4) of the Pension Schemes Act 1993 ("the 1993 Act") and the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 ("the Regulations"). This jurisdiction applies in respect of the acts or omissions of a person "responsible for the management of the scheme", who by subsection (3) is defined as "the trustees or managers and the employer". The Regulations enable a complaint to be made against a person "concerned with the....administration of the scheme". It is the meaning of these words that lies at the heart of the present appeal.
3. GAD is responsible for performing the duties of the Government Actuary. One of these duties is to produce and from time to time revise the actuarial tables used in certain public-sector pension schemes. These tables are not used by GAD, but they are used by those responsible for managing the schemes to perform certain calculations, including the calculation of the lump sums due on retirement to those scheme members who choose to commute part of their pension entitlement. One of the public-sector pension schemes in respect of which GAD prepares actuarial tables is the Firefighters' Pension Scheme ("FPS"), the provisions of which are contained in the Firemen's Pension Scheme Order 1992 ("the 1992 Order").
4. The 1992 Order was made under the Fire Services Act 1947. It contains a detailed set of rules regarding the operation of the FPS. Responsibility for running a pension fund rests with each fire and rescue authority. Among other things, they are required to receive pension contributions, determine the amounts of awards, and pay the sums awarded. GAD does not perform the calculation of lump sum awards or periodical payments. The fire and rescue authorities are responsible for making these calculations using the actuarial tables produced by GAD.
5. Prior to the judgment of Cox J in *R (Police Federation of England and Wales) v Secretary of State for the Home Department* [2009] EWHC 488 (Admin), GAD and the Department for Communities and Local Government ("the Department") operated on the shared assumption that the responsibility to commission a review of the actuarial tables referred to in rule B7(3) in schedule 2 of the 1992 Order and to publish revised tables lay with the Department. At para 105 of her judgment, Cox J held that GAD was subject to an implied statutory obligation to "prepare tables and, if necessary, to review and revise them, because they are needed to enable the police authorities to comply with their express obligation to use them". It is common ground that what she said in relation to police authorities applies with equal force to other public sector authorities such as the fire and rescue authorities. There has been no challenge to Cox J's judgment.

6. In September 2008, Mr William Milne and other firefighters who had retired prior to August 2006 made a complaint to the Ombudsman against GAD, alleging that it had been guilty of maladministration by not updating the actuarial tables for the FPS between June 1998 and August 2006. Their case was that the failure by GAD to update the tables had resulted in the lump sums that they received at retirement being lower than they would have been if GAD had complied with its duty to review and update the tables. Mr Milne's complaint was selected as one of a number of lead cases.
7. The Ombudsman has not yet considered the substance of the complaints, but he rejected a preliminary point raised by GAD that he has no jurisdiction to consider the complaints in relation to the period up to 6 April 2005 on the grounds that GAD was not an "administrator" within the meaning of the Regulations. The Ombudsman concluded that GAD was an administrator during that period. It is common ground that, as a result of an amendment to the 1993 Act, GAD has been an administrator since 6 April 2005.

The statutory framework governing the jurisdiction of the Ombudsman

8. The Ombudsman's jurisdiction to investigate and determine complaints is set out in section 146 of the 1993 Act. Section 146 (1)(a) gives him jurisdiction to investigate and determine "a complaint made to him by or on behalf of an actual or potential beneficiary of an occupational pension scheme who alleges that he has sustained injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of the scheme".
9. Section 146 (3) provides:

"For the purposes of this Part, the following persons (subject to subsection (4)) are responsible for the management of an occupational scheme ... -

 - (a) the trustees or managers, and
 - (b) the employer;

but in relation to a person falling within one of those paragraphs, references in this Part to another person responsible for the management of the same scheme are to a person falling within the other paragraph."
10. Section 146 (4) provides:

"Regulations may provide that, subject to any prescribed modifications or exceptions, this Part shall apply in the case of an occupational or personal pension scheme in relation to any prescribed person or body of persons where the person or body

 - (a) is not a trustee or manager or employer, but

- (b) is concerned with the financing or administration of, or the provision of benefits under, the scheme,
 - (c) as if for the purposes of this Part he were a person responsible for the management of the scheme.”
11. The Regulations were made under section 146 (4) of the 1993 Act. They extend the Ombudsman’s jurisdiction to complaints of maladministration by an “administrator” of a pension scheme, “administrator” being defined in regulation 1(2)(a) as:
- “any person concerned with the administration of the scheme, other than the person responsible for the management of the scheme (as defined in section 146 (3) of the 1993 Act for the purposes of Part X of that Act).”

Case law on the meaning of “concerned with the administration of the scheme”

12. In *Ewing v The Trustees of the Stockham Valve Limited Staff Retirement Benefit Scheme* [2000] OPLR 257, the Northern Ireland Court of Appeal considered the position of solicitors engaged by the trustees of a scheme equivalent to the FPS to recover money owed to the pension fund by a third party. Sir Robert Carswell LCJ said:
- “The work done by a solicitor may vary considerably from case to case. He may be engaged to perform tasks which are connected with the running of the affairs of his principal. It is, as counsel rightly submitted, a matter of fact and degree, depending on the terms of the solicitor’s retainer. Where he’s simply instructed to write a letter of claim to a debtor he is acting as the agent of the principal in carrying out his instructions. We do not consider that it can be said that in these circumstances he is concerned with the administration of the affairs of the principal. Arthur Cox were in that position. They were merely instructed to seek recovery of certain sums of money from the respondent, and wrote a letter of claim accordingly. In our view this cannot be said to have been “concerned with the administration of the scheme”, and the Ombudsman was in error in so holding”.
13. This judgment is of limited value to the present appeal because it contains no discussion of the meaning of the phrase “concerned with the administration of the scheme”. But it does state that the question is one of fact and degree and provides an example of a person who clearly was not performing a role that was concerned with the administration of the scheme.
14. In *R (Britannic Asset Management Limited) v Pensions Ombudsman*, Lightman J ([2002] EWHC 441 (Admin)) and the Court of Appeal ([2002] EWCA Civ 1405) gave further consideration to the meaning of “concerned with the administration of the scheme”. The facts in the *Britannic* case were as follows. The claimants were an

asset manager, an insurance company and an investment management company, all within the same corporate group. They managed the underlying financial assets to which the value of the pensions scheme in question (a unit-linked long-term insurance policy) was linked. They also provided customer services to the trustees, who were the policy-holders. This involved producing monthly statements, processing investment and divestment instructions and dealing with customer queries. The trustees of the scheme had practised a substantial fraud on the beneficiaries, by requesting divestments of substantial sums of money. A complaint was made to the Ombudsman that the claimants' acts of complying with the trustees' requests and paying the divestments made them accessories to the trustees' breach of trust and, hence, constituted maladministration. The claimants submitted to the Ombudsman that he had no jurisdiction to entertain the complaint, as they had not acted as "administrators" within the meaning of regulation 1(2)(a) of the Regulations. The Ombudsman expressed the view that the claimants' implementation of the trustees' instruction to disinvest assets was "an act of administration concerned with the Scheme". The claimants challenged this decision by way of judicial review.

15. Both Lightman J and the Court of Appeal (Lord Phillips MR, Chadwick and Keene LJ) disagreed with the Ombudsman.

16. Lightman J said:

"In my view the claimants are correct when they say that "administering the Scheme" means (in whole or in part) running the Scheme, e.g. inviting employees to join, keeping records of members, communicating with members, calculating benefits, providing benefit statements, paying benefits when due, keeping documentation up to date, dealing with governmental or regulatory agencies (Inland Revenue, DWP, OPRA) etc. In the case of a funded scheme, it will also no doubt involve running the fund and investing in managing the Scheme's assets."

17. The Court of Appeal emphasised "the important distinction between doing an administrative act in connection with a pension scheme and being concerned with its administration". They said:

"We accept, of course, that those activities, whether carried out by BULA or by BIM, are administrative in nature; and that they are administrative activities which may be described as being carried out in connection with this Scheme. But the relevant question is not whether a person carries out administrative activities in connection with a Scheme; the relevant question is whether the person is "concerned with the administration of the Scheme". An insurance company which does no more than administer its own assets and calculate, from time to time, the amount which it is liable to pay under a unit linked policy which it has issued is in much the same position as the trustees' bankers or any other depository. It is no more concerned with the administration of the Scheme than others who have contracted to make payments to the trustees or the Scheme

beneficiaries on request or demand. As we have said, it is significant that the Ombudsman's powers to investigate and determine under Part X of the 1993 Act have not been extended to those concerned only with the financing of, or the provision of benefits under, a Scheme."

18. As a result of *Britannic*, section 275 (1) of the Pensions Act 2004 ("the 2004 Act") was enacted. It inserted into the 1993 Act a new section 146 (4A) which reads as follows:

"For the purposes of subsection (4) a person or body of persons is concerned with the administration of an occupational or personal pension scheme where the person or body is responsible for carrying out an act of administration concerned with the scheme."

19. Section 146 (4A) came into force on 6 April 2005. Section 275 (2) of the 2004 Act confirms that it does not apply with retrospective effect.
20. As I have said, GAD accepts that its role involves carrying out "acts of administration concerned with the scheme" so as to bring it within section 146 (4A). But, as the Court of Appeal made clear in *Britannic*, it is a separate question whether GAD is "concerned with the administration of the scheme" so as to come within the scope of the Regulations.

The judgment

21. The judge said (para 30) that the words "concerned with" in the phrase "concerned with the administration of the scheme" cover "those who, while having a lesser role than trustees, managers or the employer, have some responsibility for running the whole or part of the scheme or some involvement beyond, here (sic), acts of administration". It was a "broad phrase". He accepted that the GAD did not run the whole of the scheme. But it was "concerned with the scheme" because:

"GAD is under a duty imposed as part of the structure of the scheme and indeed it is a duty necessary for the proper operation of a part of the scheme commonly used. It is only GAD which can perform that duty. [Counsel for the Ombudsman] placed decisive weight on the fact that it had a continuing duty to consider revising the tables and, if necessary, then to revise them. It was GAD which had to exercise that expert judgment as to whether it was necessary to revise the tables at any particular juncture." (para 31)

22. GAD's continuing duty to consider revising the tables and, if necessary, to revise them was "far beyond the mere administrative act described by Lord Carswell in *Ewing*" (para 32). There was a distinction between GAD and somebody in the position of the insurer in *Britannic*. GAD's role was to assist the trustees, managers and employers in the performance of their functions. There was a clear distinction between its role and that performed by *Britannic* (para 33).

23. Finally, at para 37 he said:

“...it also seems to me that the provision of commutation tables is part of the administration of the scheme. The scheme permits commutation, the calculation of which requires these tables. The scheme cannot properly be administered or operated without them. Granted that they are used for the calculation or division of individual benefits between commuted and periodical payments, the duty to consider and provide tables still readily comes under the head of administration even if it is also related to the calculation of benefits.”

GAD's case

24. The following is a summary of the submissions of Mr Swift QC. The fact that GAD had a continuing duty, which it alone could perform, to consider revising the commutation tables and, if necessary, to revise them is not a factor of decisive weight in determining whether it was concerned with the administration of the scheme. There are many individuals and bodies who are plainly not concerned with the administration of a scheme and who nevertheless perform functions that are necessary for its proper operation. For example, medical doctors called upon to make expert judgments under the FPS Rules could be said to be necessary for the proper operation of the ill-health retirement provisions: without expert medical judgment, these provisions could not be operated. Yet in *Suffolk County Council v Wallis* [2004] Pens LR 255, the provision of such an opinion was held not to make the doctor “concerned with the administration of the scheme”. The solicitor in *Ewing* could be said to be performing a function necessary for the proper operation of the scheme, yet the solicitor was held not to be “concerned in the administration of the scheme”. And the insurers and asset managers in *Britannic* could be said to be performing a function that was “necessary” for the proper operation of the scheme: unless the assets were properly managed, the scheme would not be in a position to meet its ongoing liabilities. Yet again, the insurers and asset managers were not “concerned in the administration of the scheme”.
25. It is difficult to see why the fact that the duty is imposed on a particular individual or body, rather than being delegable, should make any difference. By using the words “concerned in the administration of the scheme”, Parliament focused on the role being undertaken, not the separate question of whether that role could have been performed by someone else.
26. Nor is it obvious why it should be relevant that the duty is a continuing one. Why should a body which discharges a continuing statutory duty by updating tables from time to time be regarded as more likely to qualify as an “administrator” than a firm which is engaged by the manager of a scheme on an ad hoc basis (but is in fact engaged, say, once a month) to send out benefit statements?
27. The correct view is that GAD's role is as a provider of independent, expert, actuarial judgment, based on statistical data. This is a role that could have been fulfilled by any actuarial consultancy. GAD is not involved in the “running” or “administering” of the scheme or any part of it. If GAD is concerned with anything at all, it is more

appropriately to be regarded as “concerned with the provision of benefits” under the scheme. But the Regulations define “administrator” as a person concerned with the “administration” of the scheme, and not a person concerned with “the financing” or the “provision of benefits under” the scheme.

Discussion

28. I would dismiss this appeal largely for the reasons given by the judge and Mr Evans. It is common ground that (i) whether a person is or is not an “administrator” is a question of fact and degree; (ii) the focus is on the substance of what the person does, rather than the source of his obligations; and (iii) it is not necessary to be solely responsible for running a scheme (or part of a scheme) to be an “administrator”, but it is necessary to participate in the scheme (or part of it).
29. I should explain what I understand by the statement that the question is one of fact and degree. As this court said in *Britannic*, there is a difference between (i) doing an administrative act in connection with a pension scheme and (ii) being concerned with the administration of the scheme. That is why section 146(4A) was introduced. But it may not always be easy to determine whether a person is responsible for carrying out an act of administration concerned with the scheme (to use the language of section 146(4A)) or is concerned with the administration of the scheme. In some cases, the correct classification is clear. Thus it is plain that the acts of the solicitor in *Ewing* and of the companies in *Britannic* were those of a person responsible for carrying out an act of administration concerned or in connection with the scheme, and not of a person concerned with the administration or running of the scheme. At most, they were individual acts which were incidental to the running of the scheme. They were not central or integral to its operation as a pension scheme. It is unnecessary to decide whether an agglomeration of acts which, individually, are no more than acts of administration concerned with the scheme, when considered cumulatively, amount to acts concerned with the administration of the scheme. The effect of section 146(4A) is that, in respect of the period since 6 April 2006, classificatory problems of this kind no longer arise.
30. A person responsible for carrying out a single act of administration in connection with a scheme is unlikely to be “concerned with the administration of the scheme” within the meaning of section 146(4), at any rate if the act is not central to the administration of the scheme. As Jackson LJ suggested in argument, administering a pension scheme involves carrying out a bundle of administrative activities. Some of these were identified by Lightman J in *Britannic* (see para 16 above). A person is concerned with the administration of the scheme (as opposed to carrying out administrative acts concerned or in connection with the scheme) if he is responsible for this bundle of activities to a material extent.
31. The role of GAD in relation to the FPS cannot be described as incidental to the running of the scheme. It is central to its proper operation. As Mr Evans says, GAD’s function is essentially interventionist and is integral to the structure of the scheme. Its role is not reactive. It cannot wait to be asked to advise about updating actuarial tables. It is obliged to decide whether the tables need updating and to update them as necessary. The structure of the FPS is such that it can only function properly (in the sense of the fire and rescue authorities paying the correct lump sum benefits at retirement) if GAD reviews and updates the commutation tables as necessary. The

authorities cannot change the tables themselves, nor can they apply different commutation rates (supplied by other actuaries) to calculate the lump sum payments: they are obliged to use the tables provided by GAD. That is why the position of GAD is fundamentally different from that of actuaries who are retained by the managers of pension schemes to advise and update commutation tables. Mr Swift correctly asserts that such actuaries are not concerned with the administration of a scheme, although they perform functions that are necessary for the proper operation of the scheme. The fundamental difference is that a professional adviser employed to provide services at the request of the manager can choose whether or not to provide the services.

32. I accept the submission of Mr Swift that the fact that the duty imposed on GAD is a continuing duty does not of itself shed light on whether it is concerned with the administration of the FPS. The fact that an actuary is retained for a period of time to review and update commutation tables (and is therefore under a continuing contractual duty to do so) does not mean that he is concerned with the administration of the scheme.
33. In short, GAD performs an important proactive role which is central to the administration of the scheme. For the reasons that I have given thus far, I am satisfied that GAD was concerned with the administration of the FPS within the meaning of section 146(4)(b). But I need to deal with Mr Swift's submission that GAD is more appropriately to be regarded as "concerned with the provision of benefits" and, on that account, not to be regarded as being "concerned with the administration of the scheme".
34. I accept that, if a person is concerned with the provision of benefits within the meaning of section 146(4)(b), he is not concerned with the administration of the scheme. Section 146(4)(b) refers to three distinct categories of person. Regulations have been made to extend the jurisdiction of the Ombudsman to complaints of maladministration by those concerned with the administration of a scheme, but not maladministration by those concerned with the financing or the provision of benefits under a scheme.
35. What light does the existence of the category of persons concerned with the provision of benefits shed on the meaning of "persons concerned with the administration of a scheme"? The meaning of the phrase "concerned with the provision of benefits under the scheme" is far from clear. In a sense, it could be said that the administration or running of any pension scheme is concerned with the provision of benefits. The provision of benefits for the beneficiaries of the scheme is the central aim and object of the scheme. But it is clear that the provision of benefits under a scheme is not intended to be coterminous with the administration of the scheme itself. It seems to me that it must relate to the payment out to the beneficiaries of the benefits to which they are entitled under the scheme.
36. Whatever the precise meaning of a person "concerned with the provision of benefits" may be, the existence of this category does not cause me to doubt the correctness of the conclusion that I have reached as to the meaning of a person who is "concerned with the administration of the scheme". I see no reason to give an expansive meaning to "concerned with the provision of benefits" and a correspondingly narrow meaning to "concerned with the administration of the scheme". Mr Swift has been

unable to suggest any policy reason why Parliament would have intended to exclude victims of maladministration by GAD from the Ombudsman's jurisdiction. In view of the central role played by GAD in the scheme and the fact that it alone is responsible for the discharge of functions which are critical for its proper and effective operation, it would be surprising (to say the least) if Parliament had intended to limit the jurisdiction of the Ombudsman in this way. The fact that the gap in protection which was exposed by the *Britannic* case was made good by the introduction of section 146(4A) strongly suggests that Parliament did not consider that there was any policy justification for restricting the Ombudsman's jurisdiction.

Conclusion

37. For all these reasons, I would dismiss this appeal.

Lord Justice Moore-Bick:

38. I agree.

Lord Justice Jackson:

39. I also agree.