



# Cemex decision on section 75 of the Pensions Act 1995

HIGH COURT DECISION ON PRE-APRIL 2008 'EMPLOYMENT-CESSATION EVENTS'

EMPLOYMENT, PENSIONS AND BENEFITS BRIEFING 191

In the *Cemex* case, the High Court interpreted the meaning of 'employment-cessation event' in the Employer Debt Regulations 2005. The impact of this case is that an employer may still be liable to pay a debt under section 75 of the Pensions Act 1995 in the future even if they (purportedly) triggered the debt before 6 April 2008 and discharged it. This briefing explains.

## High Court interprets pre-April 2008 'employment-cessation events'

In *Cemex UK Marine v MNOFP Trustees* [2009], Peter Smith J, sitting in the High Court, held that under the Employer Debt Regulations 2005 (before their amendment in April 2008) a section 75 debt would not necessarily be triggered in a multi-employer defined-benefit (DB) scheme if an employer ceased to employ active members in the scheme at a time when another employer continued to do so.

Before the Employer Debt Regulations 2005 were amended in April 2008 (see our briefing 167: [The employer debt amendment regulations](#)), the regulations provided that a debt payable under section 75 of the Pensions Act 1995 (a section 75 debt) would be triggered if an employer 'ceases to be an employer employing persons in the description of employment to which the scheme relates' – this is called 'an employment-cessation event'.

In this case, the last active member in the scheme employed by Cemex had become a deferred pensioner (on reaching normal retirement date) and then retired and left the company. But, as the judge stated, Cemex retained employees, remained a 'participating employer' (presumably under the scheme rules) and so potentially could have an employee become an active member in the future.

Peter Smith J held that an employment-cessation event had not occurred even though the employer stopped employing any active members at a time when another

employer did so. He said that there would be no employment-cessation event if the 'employer has anyone who is an employee in the description of... employment'. In this case the employer was held to employ persons in the 'description of... employment' because it continued to employ:

- persons who could prospectively join the scheme (even if, as here, this would need trustee consent and they had not actually applied to join the scheme);
- a deferred member (ie a member who was entitled to a preserved pension benefit because they were no longer accruing benefits but were not yet entitled to receive their benefits);
- a pensioner member (ie a member entitled to receive their pension or other benefits).

However, Peter Smith J said that an employer would trigger a section 75 debt if it no longer employed 'persons in the description of employment' even if it intended to employ one in the near future – ie the 2005 regulations did not envisage a 'period of grace' (until a provision for this was included by the 2008 amendments).

## General comment

This judgment is difficult to follow for a variety of reasons.

First, Peter Smith J repeatedly stated, without discussion, that the company in this case continued to be a 'participating employer'. Presumably this is a reference to the provisions under the scheme's trust deed and rules (but this is not made clear). This is an important point because it is not clear from the judgment whether

a company that does not employ active members would still be capable of being an employer (for section 75 purposes) by reason of employing a person ‘in the description of... employment’ if the company’s participation had terminated under the scheme rules (eg if the rules envisaged cessation if a relevant notice has been given or if the company stops being associated with the principal employer).

Second, this judgment does not analyse in any depth when a company’s employee is or is not ‘in the description of employment’. It could, for example, be argued that an employee who is a deferred or pensioner member does not ‘relate’ to the scheme because their benefits no longer depend on their continued employment. This is not discussed in the judgment.

Third, the limits on when an employee could qualify for future membership are unclear. The judgment accepts that this could apply to an employee even though entry could require trustee agreement. But not (perhaps) if the employee does not otherwise qualify (eg because too old or because not meeting an entry requirement?). But often schemes give trustees and/or employers discretion to waive entry conditions. So would this power mean that all employees could potentially qualify? What about discretion to amend the scheme to remove restrictions? This seems to be going too far, but is not an issue addressed in the judgment.

This judgment may also be a surprise to employers and trustees who relied on the Pensions Regulator’s interpretation of ‘employment-cessation event’. In its November 2005 guidance on multi-employer withdrawal arrangements, the Regulator expressly states that ‘the main question... is whether you have ceased to employ, or intend to cease to employ, all your active members of the scheme. If this happens and there is at least one other employer remaining in the scheme that employs active members this will be a cessation event’.

## Effects on pre-April 2008 employment-cessation events

These difficulties with the judgment may cast doubt on whether it will be followed in the future. Some of the issues raised in the case are expected to be revisited in the *Pilots’ National Pension Fund* (PNPF) case that has recently been heard in the High Court (judgment

is awaited). But if the decision in *Cemex* is followed, it could be important in determining whether a section 75 debt was triggered due to an ‘employment-cessation event’ before 6 April 2008 (when the Employer Debt Regulations 2005 were changed). Employers and trustees may therefore want to review employment-cessation events that purportedly occurred before 6 April 2008 and consider this case’s implications.

This judgment may encourage employers to seek to recover payments that they made in the mistaken belief that a section 75 debt had been triggered when they ceased to employ any active members (at a time when other employers did so) sometime before 6 April 2008.

On the other hand, former employers that participated in a DB scheme and mistakenly thought they had triggered a section 75 debt before 6 April 2008 (and discharged it) may be more concerned to find that they may still be considered to be an ‘employer’ under section 75, even though they no longer employ active members. This could mean that they are still liable to pay a section 75 debt at a future date (eg on the scheme winding up) and this may now be larger than before.

## Position following sales?

It may be difficult to determine whether an employment-cessation event was triggered before 6 April 2008 if a company was sold out of the group or there was a transfer on a business sale under the Transfer of Undertakings (Protection of Employment) Regulations 2006. In these circumstances, it is common for the employees of the company or business being sold to stop being active members and for the company (in effect) to cease to participate in the scheme. On one hand, the judgment in this case suggests that ceasing to employ active members (while another employer continues to do so) will not necessarily trigger a section 75 debt. But on the other hand, it is not clear if this case applies where the employer ceases to participate in the scheme – see discussion above.

## Ongoing impact

In relation to current legislation, the judgment in this case does not provide guidance for post-6 April 2008 employment-cessation events. This is because the

Employer Debt Amendment Regulations 2008 amended the definition of 'employment-cessation event'. They now expressly refer to ceasing to employ active members.

However, the decision in *Cemex* could affect who is an 'employer' for other pensions legislation purposes. For example, the provisions setting out the Pensions Regulator's moral hazard powers and on whether a DB scheme can enter the Pension Protection Fund. Here, legislation continues to refer to 'employers in the description of employment' to which the scheme or section relates for multi-employer schemes or sections.

It is also worth noting that regulations 2(3) and 2(4) of the Employer Debt Amendment Regulations 2008 set out transitional provisions. These apply if an employer ceased to employ active members before 6 April 2008, at a time when other employers continued to do so but this was not an employment-cessation event (eg because the employer continued to employ a deferred member – see above discussion). In such cases, the pre-April 2008 definition of 'employment-cessation event' will continue to apply until immediately before the employer ceases to employ persons in 'the description of employment to which the scheme relates at a time when at least one other person continues to employ such persons' or 'such time as that person employs an active member'.

## Key action points

In light of this decision, and depending on the outcome of the PNPf case, employers and trustees should consider reviewing past employment-cessation events, which were believed to occur sometime before 6 April 2008, and check:

- whether the employer has paid a sum to the pension scheme trustees in the mistaken belief that an employment-cessation event had occurred; and
- whether the employer, despite believing it has already triggered and discharged its section 75 debt, is still liable at a future date (eg on the scheme winding up) under section 75 of the Pensions Act 1995.

*Cemex UK Marine Ltd v MNOFF Trustees Ltd* [2009] EWHC 3258 (Ch)

For further information please contact

David Pollard  
T +44 20 7832 7060  
E david.pollard@freshfields.com

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