

**Welcome to Landmark Chambers’
‘An Update on Public Sector Pensions, Age
Discrimination and the Fallout from McCloud v
Lord Chancellor’ webinar**

The recording may be accessed [here](#).

Your speakers today are...



Paul Brown QC (Chair)



David Lock QC

Topic:
Public Sector
Pensions – managing
the interregnum



Samantha Broadfoot QC

Topic:
Public Sector
Pensions - age
discrimination

Public Sector Pensions - age discrimination



Samantha Broadfoot QC

Introduction – legislative framework

- Police Pensions Act 1976:
 - Police Pensions Regulations 1987
 - Police Pensions Regulations 2006
 - Police Pensions Regulations 2015

'Value' of different rights

- HC briefing paper 2020:
 - 1987 – 33%
 - 2006 – 29%
 - 2015 – 24%

Creation of a new scheme

- Doesn't automatically mean that the old one is redundant
- Acquired rights remain
- Complex transitional provisions
- Not required to move from 1987 Scheme to 2006 Scheme.

All Change – 2015 pension changes

- Context – Hutton Report 2011
- New regulations across the public sector: police, firefighters, judges, NHS...
- Policy decision not to permit acquisition of further rights under old schemes
 - As Hutton recommended
 - BUT
 - An exception would be made for certain groups of individuals – in effect those closest to retirement.

The litigation

- *Lord Chancellor & SS for Justice & another v McCloud & others* (judicial pensions)
- *Sargeant & Others v London Fire and Emergency Planning Authority & others* (firefighters' pensions)
 - ET – 2016
 - EAT – 2017
 - CA – 2018

[2018] EWCA Civ 2844

Core claim

- Key transitional provisions were that those born before a certain date were fully protected from the changes whilst those born after the specified date were entitled either to tapering or no protection.
- Core claim was that this amounted to direct discrimination on the grounds of age which was not justified.
- There were also equal pay and indirect race discrimination claims.

Govt / authority position

- Accepted that the transitional provisions were discriminatory but
- Asserted that they were a proportionate means of achieving their legitimate aim of protecting those closest to retirement from the financial effects of pension reform.

Court of Appeal

- Agreed with ET judge in *McCloud* that an aim which protected older individuals rather than youngest when those in the older group needed it least was irrational: §92
- Held in *Sargeant* that where the transitional treatment between the 3 groups of members was of a nature that was manifestly discriminatory, govt/authority had to show why it was justifiable. That needed to be substantially evidenced and was not – the desire to protect older firefighters had to be based on something more than “visceral instinct”: §157

Impact

- Other cases stayed
- Govt accepted discrimination had to be addressed
- Across all schemes
- But in the meantime individuals were affected

What happened next

- Consultation in 2020
- 4 Feb 2021 – government published its policy response:

<https://www.gov.uk/government/publications/public-service-pension-schemes-consultation-response-guidance/guidance-on-the-public-service-pension-scheme-consultation-response>

The decision – “deferred choice underpin”

- Eligible members who were moved to one of the new pension schemes in 2015 (or later if tapered protection) *will be moved back into their legacy pension scheme for the period during which the discrimination occurred* – between 1 April 2015 and 31 March 2022.
- When payment of pension benefits commence for those members, or members who were originally protected, they will then receive a choice of which pension scheme benefits they would prefer to take for the period – ‘the deferred choice’

Who does this apply to?

- Individuals who:
 - Were members or eligible to be members, of a public service pension scheme on 31 March 2012
 - Were members of a public service pension scheme between 1 April 2015 and 31 March 2022 and
 - The 2 periods were continuous (or treated as continuous)
- Legacy schemes will be closed to future accrual from April 2022.

In the meantime

- There are as yet no regulations – and devil will be in the detail
- Range of questions re people who have retired in the meantime, opted out etc
- IHR is specifically recognised as needing particular attention
- Contributions – will they need to be backdated? Over what time period?

Public Sector Pensions – managing the interregnum



David Lock QC

The background

- Timeline of a £17Bn problem:
 - 31 March 2012 : Start of protection period
 - April 2015: New Public Sector Pension Schemes
 - Nov 2016: McCloud in Tribunal
 - Jan 2017: McCloud in EAT
 - Dec 2018: McCloud in Court of Appeal
 - Oct 2019: McCloud refused permission to appeal
 - February 2021: Publication of routemap for next steps
 - October 2023: Date by which new Regs are promised for “deferred choice underpin”

Who will be affected prior to April 2022?

- Those who were required to transfer from a legacy scheme and have any form of entitlement to a pension based on a 2015 Regs scheme prior to 2022
 - Ill-health retirees
 - Deceased members and their beneficiaries
 - Those made redundant if that triggers pension entitlement
 - Those who re-join and wish to re-activate membership of an old scheme

Why does the Equality Act 2010 matter?

- Section 61(1) to (3) provides:

“(1) An occupational pension scheme must be taken to include a non-discrimination rule.

(2) A non-discrimination rule is a provision by virtue of which a responsible person (A)—

- (a) must not discriminate against another person (B) in carrying out any of A’s functions in relation to the scheme;
- (b) must not, in relation to the scheme, harass B;
- (c) must not, in relation to the scheme, victimise B.

(3) The provisions of an occupational pension scheme have effect subject to the non-discrimination rule.”

Does this apply to public sector scheme?

- Yes – see *London Fire Commissioner v Sargeant* (EAT – 12 February 2021)
- No defence to say scheme terms are in Regulations
- Local scheme managers are affected
- Confirms the approach in *McCloud* in ET (and no appeal on that point to the EAT)

So what difference does this make

- Terms of pension scheme take effect subject to non-discrimination clause
- Pension scheme managers have a legal duty to re-write the terms of the scheme to remove unlawful discrimination
- No defence in schedule 22 of EA because there is a mechanism to make the changes to the scheme
- Section 62 gives powers to pension scheme managers to change the terms of the terms of the pension scheme to remove discrimination

What did Sargeant decide?

- “[61(3)] says in terms that the non-discrimination rule, which the Scheme must be taken to include by reason of this statutory provision, overrides the provisions of the Scheme”
- “Section 62 gives the trustees or managers of an occupational pension scheme the power to pass a resolution to make non-discrimination alterations to an occupational pension scheme”
- In my judgment the FRAs [*Fire and Rescue Authorities*] have vested in them the power to pass a resolution making non-discrimination alterations to the scheme of which they are managers in respect of those members who were last employed by them. In that respect, also, they were not obliged by a statutory requirement to discriminate against the claimants on the grounds of age and so by that route too are unable to avail themselves of the statutory defence provided by paragraph 1(1) of Schedule 22.

The problem of contributions

- For many public sector schemes, employer and employee contribution rates were higher under legacy schemes
- Pension scheme members unlawfully forced to transfer have to be given the chance to rejoin the old scheme
- But they (and employers) will have to pay higher contributions if they re-join
- Probably have to be given choice to join either prospectively or retrospectively

Pension scheme managers

- Dilemma: Hang on and wait for new Regs or re-draft now?
- No clear better policy choice – but maybe best strategy is to be open and acknowledge problems with employee representatives and negotiate a standstill
- Much more difficult for ill-health retirees

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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