

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

Thank you for listening

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