

Public Sector Pensions - age discrimination



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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?

Thank you for listening

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