

UK Pensions Speedbrief: Public sector age discrimination appeals - latest

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The Employment Appeal Tribunal (**EAT**) has ruled that the transitional arrangements in the New Judges Pension Scheme (**NJPS**) constitute unlawful age discrimination.

In a related case, the EAT has also held that the Employment Tribunal (**ET**) failed to give adequate scrutiny to the Government's arguments that equivalent transitional arrangements in the New Firefighters' Pension Scheme (**NFPS**) were objectively justified, and remitted the case back to the ET for further consideration.

These decisions could have far-reaching consequences across other public service pension schemes where similar transitional provisions were adopted. They may also be of interest to private sector schemes as providing useful insight into when an objective justification defence might succeed or fail.

Background

The cases (***Ministry of Justice v McCloud and Sargeant v London Fire and Emergency Planning Authority***) relate to complaints by numerous members of the judiciary and fire authorities that the transitional provisions in the NJPS and NFPS subjected them to age discrimination.

Before 1 April 2015, the claimants were (respectively) members of the previous final salary Judicial Pension Scheme (**JPS**) and the Firefighters' Pension Scheme (**FPS**). The JPS and FPS were both closed on 31 March 2015, and on 1 April 2015 members were transferred into the replacement NJPS / NFPS, both of which provided benefits on a Career Average Revalued Earnings basis.

However, the Government also put in place transitional protection, which allowed older members either to:

- remain members of their existing scheme until retirement, rather than becoming members of the replacement scheme; or
- remain members of their existing scheme until the end of a period of tapered protection (dependent on their age) and then become members of the replacement scheme

The claimants, who were either subject to the tapered protection or not subject to any protection at all, argued that the transitional arrangements amounted to direct age discrimination and disadvantaged them over older scheme members, solely by virtue of their age. Whilst the claims were primarily concerned with age discrimination, the transitional provisions were also alleged to have a disproportionate impact on female and black/ethnic minority members.

In response, the Government, whilst agreeing that the transitional arrangements were directly age discriminatory, argued that they were not unlawful because they were a proportionate means of achieving a legitimate aim, in particular the social policy objective of protecting those closest to retirement. As such (the Government argued), they were objectively justified.

The Employment Tribunal's (ET) decisions

In the *McCloud* case, the ET decided that the transitional provisions were age discriminatory and could not be objectively justified. In particular, the Government had failed to show either that the Government's purpose (of protecting those closest to retirement) was a legitimate aim, or that the treatment of the claimants under the transitional provisions was a proportionate means of achieving that aim. Further details on the ET's decision for the *McCloud* case can be found [here](#).

Conversely, in the *Sargeant* case, the ET decided that the transitional provisions in the NFPS were a proportionate means of achieving a legitimate aim and therefore could be objectively justified.

The Government appealed against the *McCloud* decision, and the firefighters appealed against the *Sargeant* decision.

The EAT's decisions

In *McCloud*, the EAT found that the ET had taken too stringent an approach in considering the Government's legitimate aims. The judge (Sir Alan Wilkie) held that, when determining social policy aims, case law consistently indicates that the Government must be allowed a margin of discretion, and such case law further accepts that such social policy aims may involve moral / political considerations where it is difficult to produce 'hard' evidence to support such aims. As such, the Government's aim of protecting those closest to retirement on the basis that this was the 'right' thing to do was legitimate, despite the fact that the evidence showed that this age group were in fact least adversely affected by the changes.

However, the EAT agreed with the ET that the Government had failed to justify the discriminatory effect of the transitional arrangements as a proportionate means of achieving its social policy aims, holding that "*the extremely severe impact of the transitional provisions on the Claimants far outweighed the public benefit of applying the policy consistently across the whole public service pension sector.*" Consequently, the Government's appeal was dismissed.

In *Sargeant*, the EAT found that the ET was correct in its conclusion that the Government had a margin of discretion in pursuing and implementing social policy, and that therefore it had sufficiently established that it had a legitimate aim in implementing the transitional arrangements.

However, the ET had erred by taking the wrong approach to the question of proportionality, in light of previous case law. Citing the Supreme Court case of *Seldon v Clarkson Wright & Jakes* (2012), the EAT held that the transitional arrangements must be carefully scrutinised in order to see whether they met the Government's objective and whether there were other, less discriminatory, measures which would also do so. This test must be applied rigorously by the tribunal, without allowing the Government same margin of discretion as applies when considering the question of whether or not the Government had a legitimate aim.

The ET judge also appeared to have misunderstood the arguments raised by the claimants, which were not about the detrimental impact of the new career average benefit structure of the NFPS (as the ET judge appeared to think), but instead related to the failure of the transitional provisions to protect them from that detrimental impact.

Finally, the ET in *Sargeant* had made a separate error of law in respect of the associated arguments of indirect sex / race discrimination by effectively concluding that because the "material factor" resulting in differential treatment of the claimants and their comparators was age (rather than sex / race), there was no need to justify the materially adverse effect on female and black/ethnic minority firefighters.

The EAT therefore remitted the proportionality and sex/race discrimination issues back to the ET for further hearing.

Comment

This is not the end of the story. The Government may still appeal the *McCloud* decision and it is difficult to predict with any certainty what decision will be reached when *Sargeant* is re-heard. It is also not clear what impact the decision will have on similar transitional arrangements in place across the other public service pension schemes. In this regard, it is worth noting the emphasis laid by the EAT on the "unique" position of the judiciary and the "uniquely adverse impact" of the changes on the younger members, which may well be seized upon by the Government in support of an argument that the *McCloud* criticisms cannot just be read across into the context of the other schemes.

Nevertheless, it is helpful that we now have two consistent decisions on this matter (the two ET decisions on the two cases appeared wholly at odds with each other) and therefore more clarity in this area. It would appear that the Government (though not necessarily a private sector employer) will be allowed a reasonably free hand in formulating its legitimate aims, but will be closely scrutinised when designing and implementing the concrete legal and operational structures which are intended to further those aims.

These cases may be of interest to trustees and sponsoring employers of private sector schemes, who should take note of the tribunal's approach to assessing whether discriminatory measures designed to protect certain groups of members against the impact of pension changes have been shown to be satisfactorily justified.

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