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NORTON ROSE FULBRIGHT

Essential pensions news

Updater

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Introduction

Essential Pensions News covers the latest pensions developments each month.

Government consults on major changes to DB benefit provision

Of interest to all schemes providing DB benefits is the long-awaited publication by the Department for Work and Pensions (DWP) of the Green Paper setting out the Government's proposals to make major changes to the way defined benefit (DB) pension schemes are run.

The consultation seeks views on a wide range of issues relating to future DB pension provision and the key themes include

- **An extended role for the Pensions Regulator** (TPR) – the Green Paper sets out proposals involving a more prominent role for TPR in the scheme funding process, and provides some detail on what actions could be taken in respect of schemes where the company is 'struggling' and paying large deficit reduction contributions is not sustainable in the long term.
- **Help for 'stressed schemes'** – proposals include the simplification of the trivial commutation rules and a 'special measures' funding regime involving more support from TPR.
- **Help for 'stressed employers'** – there is a suggestion that this could involve allowing an employer limited powers to reduce members' benefits and to modify the basis of pension increases from RPI to CPI.
- **Renewed focus on the role of trustees** – the role of scheme trustees, and their level of expertise, is a central part of the scheme investment proposals.

However, one change not included is the power for TPR to impose ‘nuclear deterrent’ fines to make scheme sponsors honour their promises, which was included in the earlier House of Commons Work and Pensions Committee report about DB pension schemes. In a separate letter to the MP chairing that committee, the Pensions Minister has stated “ … *we are concerned that such punitive fines … could damage corporate groups with DB pension schemes by stifling finance and investment, particularly because of the increased risk to investors*.”

Our March 2017 client briefing note will examine the proposals in the Green Paper in greater detail.

The consultation is open to responses until *May 14, 2017*.

The Budget 2017 – few surprises for pensions

On *March 8, 2017*, the Chancellor of the Exchequer delivered his Budget speech, in which there were few surprises as the majority of the pensions-related announcements had been made in the 2016 Autumn Statement. The key issues that were confirmed include

- The introduction of a 25 per cent tax charge on transfers requested on or after *March 9, 2017* to a QROPS unless, from the point of transfer, both the individual and the pension savings are in the same country, both are within the European Economic Area or the QROPS is provided by the individual’s employer.

- From *April 6, 2017*, a similar tax charge will apply to payments made from funds transferred from the UK, to a QROPS, in the five years following the transfer. HMRC has confirmed that, following the introduction of this charge, an overseas pension scheme cannot be a QROPS unless the scheme manager has given an undertaking that they will operate the new overseas transfer charge and pay this to HMRC when due. For the purposes of these new undertakings only, HMRC will deem existing QROPS that continue to meet the ‘qualifying’ requirement to be a QROPS until April 13, 2017. If HMRC has not received the new undertaking by that date then the scheme will automatically cease to be a QROPS.

  View the QROPS policy paper.

- Confirmation that the reduction in the money purchase annual allowance (MPAA) from £10,000 to £4,000 will go ahead from *April 6, 2017*. This allowance effectively restricts tax relief available on further contributions to a DC arrangement and is triggered when an individual flexibly accesses a DC pension. There are no changes being made to how the MPAA will operate and, as before, any unused allowance cannot be carried forward

  View the MPAA policy paper.

- Amendments to the tax registration process for master trust pension schemes from October 2018, to better align this system with TPR’s forthcoming new authorisation and supervision regime. This is due to be introduced to apply to DC master trusts by the Pensions Schemes Bill 2016/17.

The Budget documents also note the widespread adoption of the DC pension flexibilities. Government figures confirm that although these flexibilities were initially estimated to raise around £0.3 billion in 2015/16 and £0.6 billion in 2016/17 this facility has actually raised £1.5 billion in 2015/16, while the latest estimate for 2016/17 is £1.1 billion.

View the Budget statement document.

Comment

Although many pensions practitioners will be grateful that the Government chose not to make any substantial changes in this budget, It is disappointing that the change in the MPAA has not been delayed or dropped. As far as the potential recycling of pensions savings is concerned, it seems there is scant evidence to suggest that the MPAA set at the previous rate of £10,000 contributed to this problem.

In addition, the tapering of the annual allowance for pension savings applying to high earners has attracted much criticism and it was hoped that there might be further changes to make this system easier to administer, or for it to be removed altogether.

While this Budget made no changes to pensions tax relief, we understand that this may now be back on the Chancellor’s Autumn agenda, given the gap in Government revenue following the reversal of the increases announced in National Insurance contributions for the self-employed.

PPF opens consultation on levy rule for schemes without a substantive sponsor

Of interest to DB schemes is the developing by the Pensions Protection Fund (PPF) of an approach to how it would charge a risk-based levy for a scheme which ceased to have a substantive sponsor after a restructuring of its pension arrangements. It has now published a consultation document on its proposed levy rule for schemes without a substantive sponsor, for inclusion in the 2017/18 Levy Determination.

The thinking behind the consultation is that one of the PPF’s key principles is for the level of the scheme levy to reflect risk as accurately as possible. Schemes without a substantive sponsor present a different risk to the PPF from that posed by other schemes. Hence the new approach has been developed to attempt to guard against cross-subsidy from existing levy payers.

The consultation period was short and closed on *March 6, 2017* as the PPF intends to implement the new calculation methodology for schemes without a substantive employer for the 2017/18 levy.

Context for the new approach

In September, in its response to the Government's consultation on the future of the British Steel Pension Scheme, the PPF set out its general view about permitting schemes to run on without a substantive employer. In the absence of a genuine sponsor, PPF levy payers would be directly exposed to the risk of failure of a scheme's investment strategy.

It is likely that a proposal for a scheme to continue without a substantive employer could be put forward as part of a regulated apportion arrangement, which would require approval from TPR and a lack of objection from the PPF. In these circumstances, the PPF states that it would (broadly) look to ensure that the scheme

- Is sufficiently well-funded.
- Can afford the levy that would be charged on a market consistent basis (i.e. a basis that implies that the risk has not been undercharged, to the detriment of other levy payers) in line with the proposals set out in the consultation document (this would effectively act as a limit on the level of investment risk that a scheme could take).
- Is sustainable in the long-term – with the expected returns on investments exceeding the required return needed to ensure scheme benefits and the levy can be paid in full.

The PPF would require legally binding arrangements that these criteria are tested on at least an annual basis, so that if they are no longer met then the scheme must be wound up triggering the start of a PPF assessment period.

Proposed new rule

The PPF intends to draft a specific levy rule for the 2017/18 levy applying in relation to new arrangements that are established between *January 1,2017* and *March 31, 2018*.

It is expected that the new levy rule will apply to schemes that run on without a substantive employer under the terms of an ongoing governance arrangement. The PPF expects any such arrangement to include a funding trigger set at the relatively high level of funding considered necessary for the scheme to run on without a funding sponsor. This level, the PPF has concluded, is equivalent to the PPF selling a put option on the scheme.

The PPF will also include a general provision to give it sufficient flexibility to adapt the rule in the light of unanticipated issues.

The PPF proposes that the definition of the schemes whose levies will be calculated under the new rule is written by reference to schemes that have entered into an ongoing governance arrangement (in a similar way to that used for describing ABC arrangements). The changes will apply where a scheme falls within the scope of the definition by *March 31, 2018*. Once a scheme meets the definition, it will be able to exit the special levy treatment by no longer being subject to the arrangement.

A summary of consultation responses and the Board's final Determination and confirmed policy will be published on the PPF website in *March 2017*, prior to the publication of the final 2017/18 levy Determination by *March 31, 2017* at the latest.

View the consultation paper.

Reminder – PPF levy deadlines imminent

DB schemes should note that the first of the deadlines for submitting information that will be used to calculate a scheme's PPF levy is *March 31, 2017* – please see the table below, which was originally published in our January 2017 update.

Monthly Experian scores	Between April 30, 2016 – March 31, 2017
Deadline for submission of data to Experian to impact monthly Experian scores	One calendar month prior to the score measurement date (though accounts for new guarantors can be provided up to midnight on March 31, 2017)
Submit scheme returns on exchange	By midnight, March 31, 2017
Reference period over which funding is smoothed	5-year period to March 31, 2017
Contingent asset certificates to be submitted on exchange and with hard copy documents as necessary to PPF	By midnight, March 31, 2017
ABC certificate to be sent to PPF	By midnight, March 31, 2017
Mortgage exclusion ('officers') certificates and supporting evidence to be sent to Experian	By midnight on March 31, 2017
Accounting change certificates (with supporting evidence)	By midnight on March 31, 2017
Deficit-reduction contributions certificates to be submitted on exchange	By 5pm, April 28, 2017
Certification of full block transfers to be completed on exchange or sent to PPF (in limited circumstances)	By 5pm, June 30, 2017
Invoicing starts	Autumn 2017

Although the PPF is currently consulting on changes to its calculation methodology to address schemes that have no substantive employer (see above), it has previously confirmed that the provisional 2017/18 levy determination, published in December 2016, will be finalised by *March 31, 2017*, but will change only in respect of that one issue.

PPF levy – PPF Ombudsman confirms partial recognition discretion ‘should be exercised in a proper manner’

Of interest to DB schemes is the decision by the PPF Ombudsman that detailed reasons must be provided to a pension scheme’s trustees to explain why partial recognition of a ‘type A’ contingent asset had not been granted.

The PPF had rejected an application for a parent company guarantee to be used as a contingent asset to reduce the Massey Ferguson Works Pension Scheme’s (the Scheme) risk-based levy. Type A guarantees such as this that are not able to meet the full realisable recovery amount will usually be completely rejected. However, the PPF has discretion to allow partial recognition in some circumstances.

Broadly, the guarantee was rejected because the PPF considered that the guarantor’s assets were comprised of investments in its subsidiaries, including the scheme employers, so an insolvency event would reduce the value of the guarantor’s investments and it would not be able to fulfil the guarantee. After exhausting the PPF’s appeal process, the trustees appealed to the PPF Ombudsman.

In response to an enquiry from the Ombudsman’s office, the PPF stated that it did not consider partial recognition of the contingent asset. However, as part of a discussion with the Ombudsman’s adjudicator it was noted that the PPF considers partial recognition as part of its initial financial assessment of type A contingent asset guarantors and, in respect of this scheme, the discretion was drawn to its notice. It stated that the grounds on which it based its decision concerning full recognition applied equally for partial recognition and so the committee did not consider the question of partial recognition further.

The Ombudsman noted that the PPF had a wide discretion to grant partial recognition, not merely where this was raised as a ground for review. He determined that the PPF’s discretion ‘should be exercised in a proper manner’ and that ‘the lack of transparency in its decision did not satisfy that requirement’. By not making its consideration of partial recognition clear to the trustees the PPF had denied them the ability to query its decision.

The Ombudsman confirmed that the decision had not been reached correctly and that the PPF should provide the trustees with its detailed reasons and allow them to request a review and reconsideration as before.

View the PPF Ombudsman’s determination.

DWP publishes response on the evolution of NEST

The DWP has published its response to the July 2016 consultation on possible future changes to the National Employment Savings Trust (NEST). The consultation called for views on a number of proposals, including extending access to NEST and expanding its decumulation options.

The response confirms that the Government will consult later this year on amendments to allow employers to contractually enrol workers into NEST. (Contractual enrolment may be used where an employer decides that, given the scale of the administrative burden required in assessing the individual eligibility of employees in a large workforce, it is preferable simply to enrol all new joiners in a qualifying scheme when they start work under the terms of their contracts of employment, regardless of whether or not they qualify as eligible jobholders).

The proposals in the consultation to ease restrictions on bulk transfers without consent into NEST where an employer is not using the scheme for auto-enrolment purposes will not be pursued. The Government will keep under review proposals to extend access to NEST to individuals without an employer link.

The Government has also decided not to introduce reforms that would have allowed NEST to offer additional decumulation services, although this will be kept under 'active review'. If it becomes clear that the market is not developing, this may be reconsidered in future. The consultation response notes that NEST members will typically have low balances and are therefore likely to choose to access their pots as cash at retirement. However, this will change, particularly as minimum contribution rates increase.

HMRC publishes pension schemes newsletter no. 85

On *March 17, 2017*, HMRC published the latest edition of its pension schemes newsletter. In summary, the contents include

- Details of the spring budget 2017 announcements (see above).
- Reporting of wholly non-taxable death benefits through Real Time Information (RTI).
- Confirmation that the deadline for submission of relief at source returns for 2015/16 has passed and interim repayments will not be made until HMRC receives a successful re-submission.
- An update on HMRC's work to understand the impact of the introduction of the Scottish rate of income tax on both business systems and processes.
- A reminder that the deadline for applying for individual protection 2014 is *April 5, 2017*.

View the newsletter.

Occupational and Personal Pension Schemes (General Levy) (Amendment) Regulations 2017 – DWP confirms reduction in general levy rate for very large schemes

The Occupational and Personal Pension Schemes (General Levy) (Amendment) Regulations 2017 (the Regulations) were published for consultation in November 2016. They introduce new, lower general levy rates for large schemes – those with 500,000 members or more. The new rate is approximately 25 per cent lower than the current lowest rates and will apply from the 2017/18 year onwards. The levy for schemes with fewer than 500,000 members is unchanged.

The DWP has concluded that reducing levy rates for very large schemes only, will correct an imbalance in levy structure without disadvantaging smaller schemes, by better reflecting the changing pensions market, in addition to incentivising scale. It is estimated that the change to the levy rates will eliminate the current levy surplus (approximately £13 million) by 2020.

The general levy recovers the core funding provided by the DWP to pay for TPR, the Pensions Advisory Service and the Pensions Ombudsman. The levy rates used to calculate the amount payable by eligible pension schemes have remained unchanged since 2012/13 when they were reduced by approximately 13 per cent.

The Regulations come into force on *April 1, 2017*.

PPF long-service cap in force on April 6, 2017

Pension Protection Fund (Modification) (Amendment) Regulations 2017

Pensions Act 2014 (Commencement No.10) Order 2017

Pensions Act 2014 (Pension Protection Fund: Increased Compensation Cap for Long Service) (Pension Compensation Sharing on Divorce) (Transitional Provision) Order 2017

The DWP has laid before parliament the secondary legislation necessary to implement the PPF long-service cap on *April 6, 2017*.

Background

The PPF provides compensation at the rate of 90 per cent of an individual's accrued pension if the member is below the scheme's normal pension age when the employer enters insolvency. This compensation is subject to a cap, with the current annual maximum set at £33,678 at age 65.

Under measures enacted in the Pensions Act 2014 (PA 2014), the cap will be supplemented by a new long-service element. Thus employees who have worked for one employer for a long period should receive higher compensation to reflect the fact that the lost scheme pension is likely to represent a larger proportion of their retirement savings. The long service cap will increase the standard compensation cap by 3 per cent for each full year of pensionable service above 20 years, subject to a new maximum of double the standard cap.

Changes

Once the Commencement Order brings into force the relevant sections of the Pensions Act 2014, the new Regulations amend the PPF (Compensation) Regulations 2005 so that they

- Ensure that where a person has two or more entitlements to compensation arising from different sources, these are not added together before the compensation cap is applied.
- Allow for a long-service blended cap where entitlement arising from a single source is payable at different dates.
- Increase the amount of money purchase benefits the PPF may discharge as a lump sum from £2,000 to £10,000.

Individuals already receiving capped PPF compensation on *April 6, 2017* will have their compensation re-determined and the 3 per cent uplift will be applied to the cap. Somewhat unfairly from the members' point of view, schemes currently in an assessment period or winding up outside the PPF will not be required to reflect the long-service cap in their valuations. The DWP's reasoning for excluding such schemes was primarily that requiring additional valuations to be undertaken would have proved complex and costly.

DWP responds to consultation on proposed methodology for GMP equalisation, legislation subject to review and draft amending regulations

In our December 2016 update, we reported on the DWP's consultation paper seeking views on

- A proposal for a new methodology for equalising pensions for the effect of guaranteed minimum pensions (GMPs).
- The draft Occupational Pension Schemes and Social Security (Schemes that were Contracted-out and Graduated Retirement Benefits) (Miscellaneous Amendments) Regulations 2017 (the 2017 Regulations).
- A review of existing areas of contracting-out law.

The DWP's response was been published on March 13, 2017 and the 2017 Regulations will come into force on *April 6, 2017* and include the following changes

- An extension to the period during which formerly contracted-out schemes may pay contributions equivalent premiums where they have used HMRC's scheme reconciliation service to reconcile their GMP data.
- A revision to the rate of fixed-rate GMP revaluation for those leaving pensionable service after April 5, 2017. The new rate will be set at 3.5 per cent a year, a reduction from the current 4.75 per cent rate, and below the 4 per cent rate originally proposed by the DWP. The amending regulations will come into force on April 6, 2017.

Following negative feedback, the DWP is not implementing its proposed changes to the existing protection on alterations to members' section 9(2B) rights, but it says it will reflect further on what, if any, changes are needed.

Respondents broadly welcomed the new method of equalising GMPs, which compares the value of the future expected benefits for the member in the period that needs to be adjusted for GMP inequalities with that for the opposite sex comparator. If the comparator has the greater discounted value of expected cash flow, then that amount is converted into an ordinary scheme benefit. This is a simpler, and more cost-effective, method than previously suggested by the DWP. A number of technical points will now be considered by the DWP with its working industry group. There is currently no timeframe for finalisation of the new method, or its implementation.

The DWP has confirmed that while it is aware of existing practical problems with current contracting-out legislation, including bulk transfers without consent to schemes that have never been contracted out, this is due to be considered 'before Autumn 2017'.

The Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2017 – Auto-enrolment 2017/18 qualifying earnings band finalised

Of relevance to all schemes is the automatic enrolment (earnings trigger and qualifying earnings band) Order 2017, which comes into force on *April 6, 2017*.

For the 2017/18 tax year

- The upper end of the qualifying earnings band will rise from £43,000 to £45,000, in line with the revised upper earnings limit for National Insurance Contribution (NIC) purposes for 2017/18.
- The lower end of the band will rise from £5,824 to £5,876, again in line with the NIC lower earnings limit for 2017/18.

The Order also confirms the correct rounded amounts which employers should use for pay reference periods of lengths ranging from one week to six months. No change is made to the earnings trigger for auto-enrolment, which will remain fixed at £10,000 for 2017/18.

Auto-enrolment: DWP finalises technical changes for post-staging new employers – The Employers' Duties (Implementation) (Amendment) Regulations 2017

Of interest to small and micro-employers due to implement auto-enrolment during 2017 are the DWP's finalised amending regulations that will make two technical changes.

The employers' duties (implementation) (amendment) regulations 2017 will affect post-staging new employers (that is, new employers that do not fall within the existing auto-enrolment staging timetable) provide that

- The trigger date for a post-staging new employer will be the date when the employer's first worker begins to be employed by the employer, where the employer first pays PAYE income in respect of any worker on or after *October 1, 2017* and the employers' duties do not already apply to that employer

- Post-staging new employers may use the three-month postponement option currently available to employers within the staging timetable. For post-staging new employers, postponement will be described as the 'deferral period'. Provision-of-information requirements similar to those that apply in relation to postponement will apply to this deferral period.

The amending regulations will come into force on *April 1, 2017*.

The DWP has also confirmed that additional issues raised by consultation respondents about whether some of the auto-enrolment terminology could be simplified will be considered as part of the DWP's 2017 review.

Age discriminatory transitional provisions in pension schemes – can they be objectively justified?

In two recent cases, an employment tribunal (ET) has considered discriminatory pension scheme provisions.

In *McCloud and Others v Lord Chancellor and Secretary of State and Another* (*McCloud*), the ET held that discriminatory transitional provisions in the Judicial Pensions Regulations 2015 (JPR 2015), which mitigated the effect of compulsory pension reforms for older judges, could not be objectively justified and were therefore unlawful.

In *Sargeant and Others v London Fire and Emergency Planning Authority and Others* (*Sargeant*), the ET held that the transitional provisions for changes to the Firefighters' Pensions Scheme *were* objectively justifiable and therefore were not unlawfully discriminatory on grounds of age, race or sex.

Neither decision is binding on a future tribunal, and we understand that both these decisions are likely to be appealed.

The law

Unlike other forms of direct discrimination, direct age discrimination can be objectively justified. Article 6 of the Equal Treatment Framework Directive (the Directive) states:

"Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives and if the means of achieving that legitimate aim are appropriate and necessary."

In the UK, this has been implemented by section 13 of the Equality Act 2010, which provides that

- Direct age discrimination occurs where, because of age, A treats B less favourably than A treats or would treat others.
- There will be no direct age discrimination where A can show that its treatment of B is a proportionate means of achieving a legitimate aim.

The upper Courts have also considered the issue of age discrimination in several cases and have held that

- To justify direct age discrimination, employers must identify a social policy aim and not only a 'real business need' (Supreme Court, having examined the European Court of Justice (ECJ) case law in *Seldon v Clarkson Wright and Jakes* [2012]).
- 'Mere generalisations' concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the measure amounts to a legitimate aim (ECJ in *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform)*.
- A Hungarian law reducing the compulsory retirement age of judges and prosecutors from 70 to 62 within the space of one year breached the age discrimination provisions of the Directive. Standardising retirement ages across the public sector and seeking a balanced age structure within the relevant professions were both held to be legitimate aims. However, Hungary had failed to establish that less extreme measures (such as staggering the change over a number of years) could not have been used to achieve those aims *(ECJ in Commission v Hungary)*.

Public sector pension reform

In March 2011 the Hutton Report recommended wholesale public sector pension reform. It recommended, among other things, a move from a final salary to a career average basis, with an increase in normal pension age (NPA) in line with State pension age, but that benefits already accrued for past service (on a final salary basis) should be maintained. It concluded that no special protection should be necessary for those already close to retirement, as their pensions would be the least affected by the change.

Despite this, the Government decided to introduce transitional provisions to protect the rights of all those who were within 10 years of their NPA on April 1, 2012, with tapering protection for those with 10–14 years to go until NPA. Negotiations then took place with the relevant public sector unions to implement changes to the pension schemes.

Facts in *McCloud*

In *McCloud*, an ET had to decide at a preliminary hearing whether transitional provisions attached to reforms of the judicial pension scheme (JPS), which were acknowledged to be discriminatory on grounds of age, were objectively justified.

On March 31, 2015, the JPS was closed and replaced by the New Judicial Pension Scheme (NJPS). All serving judges were transferred into the NJPS, which provided generally less valuable retirement benefits.

Under transitional provisions in the NJPS, older judges were permitted to remain members of the JPS either until retirement (full protection members) or until the end of a period of tapered protection (tapered protection members), dependent on their age. Overall, the protected period was set at around ten years from the introduction of the NJPS.

The ten-year protected period was incorporated into the JPR 2015 because similar provisions had been agreed with trade unions for other workforces, and the Government wanted to maintain consistency across the public sector.

In addition, the 2011 consultation on State pension reform had led to the view that a period of ten years' notice was appropriate for any future changes to the State pension age.

A group of 210 judges at various levels, who were either tapered protection members or unprotected members of the JPS, brought discrimination claims based on the effect of the transitional provisions. They claimed that the provisions were directly discriminatory on grounds of age, that they constituted indirect sex and race discrimination, and that they contravened the principle of equal pay.

Could the transitional provisions be objectively justified?

The Government conceded that the transitional provisions involved less favourable treatment of the claimants because of age, and also accepted that the provisions had a disproportionate impact on female and black, Asian and Minority Ethnic judges, and so amounted to indirect sex and race discrimination. The ET therefore had to decide purely whether the transitional provisions were objectively justified, that is, whether they were a proportionate means of achieving a legitimate aim.

The Government argued that

- The legitimate aim was protecting those closest to retirement from the financial effects of pension reform.
- There was a supplemental aim that public sector pensions should be consistent.
- Any differences in treatment were therefore a proportionate means of achieving a legitimate aim.

The ET decision

The ET determined that

- Focusing transitional provisions on members closest to retirement was not a legitimate aim, as those members were the least adversely affected by the move to the less generous NJPS.
- Consistency with other public sector pensions reforms was capable of being a legitimate aim if properly evidenced, but the Government had failed to demonstrate beyond 'mere generalisations' how such consistency was capable of contributing to its social policy objective.
- Even if the ET had accepted the Government's proposed aims as legitimate, it would have found that the transitional provisions were not proportionate. The transitional provisions went beyond what was necessary, whether to achieve consistency or protect those closest to retirement.

The ET's conclusion on objective justification relating to direct age discrimination applied equally to the indirect discrimination and equal pay claims.

Facts in *Sargeant*

The Firefighters' Pension Scheme 1992 was closed to new members on April 1, 2006. Existing members continued to accrue benefits under the 1992 scheme but new members joined the Firefighters Pension Scheme 2006. On April 1, 2015 the Firefighters' Pension Scheme 2015 was introduced. Differences between the 1992 and 2015 schemes included

- NPA of 60 rather than 55
- Lower accrual rates
- Pension based on career average rather than final salary.

The differences between the 2006 scheme and the 2015 scheme were not relevant to this case, as all the claimants and their comparators were members of the 1992 scheme.

It was common ground that the claimants had been treated less favourably on grounds of age. It was therefore accepted that the treatment would amount to unlawful age discrimination unless it could be objectively justified.

Some of the claimants also brought equal pay, sex discrimination and/or race discrimination claims on the basis that there were comparatively fewer women and ethnic minority firefighters in the older cohort.

The ET decision

The ET (employment Judge Lewzey sitting alone) dismissed all the claims and held in particular that the respondents had established that the age-related treatment in the transitional provisions was objectively justified.

The ET concluded that, on the evidence, the reasons for any disparities were wholly unrelated to sex or race and therefore the equal pay and indirect sex and race claims failed. In any case, the decision on objective justification for the age claim would apply equally in relation to sex and race.

Objective justification

The ET considered the *McCloud* determination and noted that it was not bound by this decision. It therefore disregarded *McCloud* and reached its decision solely on the evidence and submissions presented in this case.

The ET noted that the State was being asked to justify its 'social policy choice' of giving protection to those closest to retirement age. It should therefore be distinguished from a case in which an individual employer is seeking to justify an 'operational decision'. In cases where justification is sought of social policy, ECJ and domestic case law confirms that the State has a 'broad discretion' or a 'wide margin of appreciation' as to the choice of aims and the measures it adopts in order to achieve them.

Legitimate aims

The ET found that, taking account of the State's broad discretion in social policy matters, the following were legitimate aims to

- Protect those closest to NPA (who had the least time to rearrange their financial affairs prior to retirement).
- Take account of their greater legitimate expectation that their pension entitlement would not change significantly.
- Prevent a cliff edge between the protected and unprotected groups.
- Ensure consistency across the public sector.

The ET noted that the Hutton Report had considered transitional provisions for older workers to be unnecessary. However, the Government had decided to make more generous provision for those workers. This was a social policy decision and the evidence showed it had been made with great care and after negotiations with the relevant unions.

Proportionality

In performing the balancing exercise required under the proportionality test, the ET considered the claimants' argument that the impact on the younger firefighters (the unprotected group) was catastrophic and unfair. Their NPA is 60 rather than between 50 and 55, they have a lower accrual rate, a less generous lump sum, and a career average rather than final salary scheme. However, the ET noted that this argument went to the pension reforms themselves, which were not in issue. The case solely concerned the transitional arrangements.

Having held that it was legitimate to try and protect those closest to retirement, the ET held that it was reasonably necessary for the Government to draw a line somewhere. That was a social policy decision and inevitably some individuals would be disadvantaged. In the circumstances the decision was proportionate.

Comment

It is difficult to reconcile the *McCloud* and *Sargeant* decisions. The respective ETs reached the opposite conclusion on some of the key questions, including whether protecting those over a certain age was even capable of being a legitimate aim, because it was itself age-based. In addition, the ET in *McCloud* considered there was no rational explanation as to why the judges closest to retirement needed protection, as they were least affected by the changes.

It is understood that the Government has now sought permission to appeal the *McCloud* decision, citing among other things the ET's decision in *Sargeant* in support of the appeal. In addition, the Fire Brigades Union is also understood to be considering an appeal in *Sargeant*.

Neither decision is, of course, binding on a future tribunal, but it is surprising that opposite conclusions could have been reached on facts which are so similar. There are also other cases in the tribunal system, including one brought in relation to the police pension scheme, so this is an area that will require watching in future.

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