

Prospect Pensions Briefing Note 2017/00215

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Employment Tribunals on Age Discrimination – Judicial and Firefighters' Pension Schemes

The first two months of 2017 have seen some contradictory messages emerging from Employment Tribunals as to the nature of age discrimination in providing pension protection for older workers.

In January 2017, the Employment Tribunal ruled that in respect of a group of claimant judges who were put into the New Judicial Pension Scheme in April 2015 the discriminatory act of denying them the protections that were afforded to older colleagues was not a proportionate means of achieving a legitimate aim.

This was followed by a separate Employment Tribunal decision in February 2017, that in respect of younger Firefighters, who were also put into a new pension scheme in 2015, the discriminatory act of not affording protections to them was a proportionate means of achieving a legitimate aim (and therefore allowable).

The Judges decision can be seen at <https://www.judiciary.gov.uk/wp-content/uploads/2017/01/mccloud-v-moj.pdf> (the Firefighters decision is not yet available online.)

Background - General

Following the publication of the [Hutton Report](#) on public sector pensions, and the negotiations held with public sector trade unions, scheme reforms were enshrined in the subsequent [Public Services Pensions Act \(2013\)](#).

In most areas of the public sector, new pension schemes were introduced in April 2015 which had career average structures for calculating pension, and normal pension ages set equal to State Pension age (except for firefighters, police and military who would have a pension age of 60).

A feature adopted across the public sector was that older workers were protected against their pension schemes being changed. Full protection was given to members who were within 10 years of their original normal pension age on 1 April 2012. For most schemes this meant that they would not be moved into the new pension schemes at all. For anyone who was between 10 and 13.5 years of their original normal pension age on 1 April 2012, transitional protection was given meaning that they would move into the schemes at a later date.

Background – Judicial Pension Scheme

The Judicial Pension Scheme was set up in 1993. It provides pensions on a final salary basis, with a pension age of 65. It also provides for a retirement lump sum – this is taxable but the MoJ covers the tax charge with a special payment.

Crucially a major difference between the old (1993) and new (2015) scheme was the tax registration status. The old scheme was not tax registered, meaning that there was no risk of any Annual Allowance or Lifetime Allowance charges accruing. The new scheme has been registered for tax purposes – whilst this means that employee contributions are free of income tax, it does mean that Annual Allowance and Lifetime Allowances can be charged, and in many cases will fall due to highly paid judges accruing pension at a generous rate (1/43rd accrual).

Background – Firefighters’ Pension Schemes

Prior to 2015, there were already two firefighters’ schemes in place:

- The 1992 Firefighters’ Pension Scheme – available to anyone joining the service prior to 6 April 2006. This offers a pension based on final salary payable from 55, or from 50 if you have 25 years of service. Pension builds up at a rate of 1/60th. Members who have more than 20 years of service will see any further years of service count for double (i.e. someone with 22 years’ service would have 24 years counting towards their pension).
- The 2006 Firefighters’ Pension Scheme – available to anyone joining after 5 April 2006. This offers a pension based on final salary payable from 60, or from 55 with management agreement. Pension is built up at a rate of 1/60th.

The 2015 scheme accrues on a career average basis at the rate of 1/59.7 each year. Accrued pension revalues in line changes in national average earnings.

There are no differences in the tax registration between the schemes.

The Claims

Non-protected judges and firefighters who were moved (or are scheduled to move) into the new 2015 schemes claim they have been treated less favourably than older colleagues.

The Judgement

In respect of the judges’ application, the conclusions of Employment Judge Williams were that by excluding younger judges from pension protection the Ministry of Justice had treated (and continue to treat) the younger judges (as claimants) less favourably than comparators because of their age. The judge was not convinced that the Ministry of Justice had demonstrated that this treatment was a proportionate means of achieving a legitimate aim. Employment Judge Williams was convinced that transferring judges suffered an extremely serious adverse impact on the value of their pension which was further exacerbated by the change in tax status.

However, in the Firefighters’ case, Employment Judge Lewzey concluded that decisions on pension protection were a social policy matter for which there was no right or wrong

answer and that the choice is one for Government to make. Lewzey was also convinced that there was discretion for Government to seek to protect older members against pension change and that consideration of the ability of older workers to adapt to the fitness requirements of working to an older age were legitimate.

What Next?

It is understood that both the Fire Brigades Union and the Ministry of Justice (as the respective "losing" parties in each case) are appealing these decisions to the Employment Appeal Tribunal. We will keep abreast of developments in this regard and implications for other pension schemes.

Depending on the ultimate outcome, Government could be required to ensure that judges and firefighters, who have been put into the relevant new schemes are reverted back to existing pension schemes.

So what might be the impact on other pension schemes?

This judgement clearly applies in respect of a practice adopted by two particular schemes, but it is equally clear that the practice of protecting older workers has been used in other pension schemes, most notably across the public sector and civil service.

Whilst it is noted that each case has its own individual merits, it is impossible not to be struck that completely different decisions have been reached in what seem like broadly analogous practises.

There are significant differences in circumstance between the judiciary, firefighters and other public sector schemes, notably the civil service scheme.

Firstly, the difference in tax registration status of the judicial arrangements means that the relative differences between the judicial schemes are likely to be larger.

Secondly, the pension arrangements for civil service, and elsewhere in the public sector, were negotiated with trade unions and, in most instances, agreed by members through a democratic ballot. This does not negate the age discriminatory nature of such protections, but could give much more weight to an argument that the protections were a proportionate means of achieving a legitimate aim.

For now

Prospect is monitoring the position and will be discussing this matter with our legal advisers and other trade unions. Members will be kept updated on developments.