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PENSIONS UPDATE
Court of Appeal Judges & Firefighters Cases

This circular is a precis from our legal advisors on the 5 day hearing heard in the Court of Appeal, 5th to 9th November 2018.

The stages to the argument: discrimination, legitimate aims and proportionate means

To reiterate some previous points:

1. Direct discrimination (discriminating just because someone is female, BME, disabled, older etc) is usually just plain unlawful. It cannot be justified. Age discrimination is different: direct age discrimination can be justified, meaning that it can be lawful even if age is the sole criterion for deciding who wins and who loses.

2. The Government has always accepted that the age criteria built into the transitional protections directly discriminate on the grounds of age. Everything is going to come down to justification. Justification has a technical meaning:

   (a) the discriminator must show that he or she was pursuing a 'legitimate aim'; and, if he or she did, must go on to show that

   (b) the means used were 'proportionate', in the sense that they were an appropriate and reasonably necessary means of achieving the legitimate aim.

3. In the EAT, the judge found that the Government did have a legitimate aim, as discussed below. In the firefighters' case he found the proportionality issue unproven and remitted the case to the Employment Tribunal. In the judges' case he found that there was no reason to overturn

the Employment Tribunal's decision on proportionality, and so the judges won without having to go back to the Employment Tribunal. We therefore had a plethora of appeals: the Government appealed on proportionality, the judges and firefighters appealed or cross-appealed on legitimate aim.

4. The sex and race discrimination claims are a bit of a by-blow. These are *indirect* discrimination claims (younger judges and firefighters are more likely to be female or of BME origin), and indirect discrimination can always be defended on the basis that the consequences of the criterion that segregates winners from losers – age in this case – are justifiable. For all of the fact that there was an interesting debate in court on indirect sex- and race discrimination which will no doubt reach the textbooks, the fact of the matter is that if the judges and firefighters win on age discrimination they should win on sex and race as well, but if they lose on age the court will not single out female and BME judges/firefighters/police officers and say they win but white males do not.

What was the aim, and was it legitimate?

What the Government was trying to achieve (its 'aim') was scarcely articulated in the judges' Employment Tribunal. It tightened up its case when it came to the firefighters' Employment Tribunal a month or two later, and it has continued to shift as the case has progressed through the EAT and Court of Appeal.

It is important to realise, however, that an aim *can* be legitimate even if it was not in the discriminator's mind when the discriminatory measures were taken.

The case law says so. What it does mean, however, is that the court has to examine more carefully whether this was in fact the aim that the discriminator was trying to achieve, and the evidence that it was trying to achieve it must be that bit more compelling. This is a point that the Court of Appeal kept coming back to. The discriminator may not have fully articulated what it was trying to do and might be able to rationalise it in a more coherent way later. That is one thing, but inventing a new reason altogether at a later stage may be something quite different.

1. The evidence clearly shows that the original aim that the Government was trying to achieve was to protect the older cohort from the financial effects of changing the pension schemes. But the thought process behind that is just irrational – older members do not need protection. Take the extreme case to make the point: examine the case of an MDP officer who is one day away from retirement on 1 April 2015. Why does he or she need to be kept in the old scheme? He or she suffers the loss of one day's membership of alpha instead of the PCSPS.

2. That is why the Government's ground shifted. In the firefighters' Employment Tribunal and in the EAT, it said that the aim was to protect

the older cohort from dashing their expectations of being allowed to retire at their expected normal retirement age. They built on this in the Court of Appeal by saying that this felt like '*the right thing to do*', not for any financial reasons but because people should be able to retire when they thought they were going to be able to retire.

The Court of Appeal was sceptical. *Why* does it feel like the 'right thing to do'?

The Government's QC illustrated his point by saying that most people would think it is 'the right thing to do' to give pensioners free bus passes but one of the judges asked "why"? Giving pensioners bus passes fills buses, keeps pensioners mobile, and means that they can keep in touch with friends and family. Where is the parallel?

3. This brought us to the real nub of the case. Why does the court need to ask that question at all? If the Government has a social policy that it wants to achieve, what business of the courts is it to second-guess Government policy?

   Here the Government appears to be shifting its ground again. Its original position was that if it is a social policy or political issue, the court has no basis for interfering unless the link between the Government's (unquestionable) policy and its outcome is incoherent – that is, there is no rational link between the two. The court's examination must be light touch.

   The judges' and firefighters' case was that the Government's actions as an employer are subject to the same scrutiny as any other employer's: the court or tribunal must examine the reasons under a microscope and reach its own view – there is no scope for a 'band of reasonable responses' defence such as there is in an unfair dismissal case (i.e. concluding that "I might not have done it, but what you did is not beyond the pale"). Meeting this argument, the Government said that Government policy, and what it thinks are legitimate social aims, must weigh heavily in the balance.

   This is actually part of the next question: if the Government has an aim in mind, was it 'legitimate'? The Government's argument is that it is not for the court to question. The response is that when the Government is making decisions about its treatment of its own workforce, it is an employer just like any other. The Government, as legislator, can legislate for the *types* of aim that any employer might rely upon (workforce mobility, or dignity in old age for example) but when relying on that type of aim in relation to its own workforce it is subject to the same level of scrutiny as any other employer. Another (admittedly large) employer would not get away with saying "well, it felt like the right thing to do".

Proportionality: an appropriate and reasonably necessary means of achieving the legitimate aim

One of the judges hearing the case (Sir Patrick Elias) made the point in one of the previous leading cases that questions about aims and means often blend into each other, and no-one should "cudgel their brains" into putting questions into one box or the other. But what is clear is that this stage of the argument is a balancing exercise: weigh up the need to achieve the aim against the damage that it does to those who do not pass the test.

This is the stage that the Government lost in both cases in the EAT. Its argument in the Court of Appeal was that this is not an issue that the court is entitled to delve into. The Government is entitled to make its own judgement as to where the balance lies as a matter of policy or morality. As with the previous stage, all that the court can do is see if there is a rational connection between the aim and the means being used to achieve it.

We come back to the point discussed above. When the Government is making decisions about its own workforce, is that a question of politics or morality at all? Or is the Government expected to behave like any other employer and should the court or tribunal scrutinise what is did as it would for any other employer?

The two strands of the Government's case stand or fall together. Either its judgement in enacting the transitional provisions was a broad social or political decision which it was entitled to make subject only to a broad rationality test; or it was dealing with its own employees in the same way as any other employer.

Looked at as a balancing exercise, the court was struck by the fact that there was little or no evidence that the Government did any analysis at all, in 2011 – 2015, as to what the financial consequences of the changes would be for younger judges and firefighters.

The three judges already knew what the consequences for younger judges were, and they are quite dramatic: they lose hundreds of thousands of pounds. They were shocked at the consequences for younger firefighters which they hadn't truly comprehended. A younger firefighter earning a little under £30,000 per annum would have to save £19,000 per annum to replace their missing pension.

The Employment Tribunal conducted this balancing exercise in the judges' case (and found for the judges). It didn't conduct it at all in the firefighters' case, and just said it was up to the Government to decide where the line is to be drawn. The EAT said that was the wrong approach and the Employment Tribunal should look again.

Conclusion for DPF

So far as the DPF are concerned:

(a) If the Court of Appeal decides that there could be no plausible legitimate aim, there is no need to go any further. If the aim was not legitimate for judges and firefighters it cannot be a legitimate aim for anyone else – whatever the aim was, it was the same for everyone. We win.

(b) If the question of legitimate aim is remitted for reconsideration in the Employment Tribunal, we carry on as before. Our claims remain stayed, and we wait to see what comes out of the firefighters' case.

(c) If the Court of Appeal decides against the firefighters on the question of legitimate aim we need to see if the FBU appeals to the Supreme Court. Subject to that, we need to lift the stay on the MDP claims and get into the factual argument about proportionality: just how bad was the change for MDP officers, and how does that weigh in the balance against the Government's need to have some form of transitional protection (noting that the need for transitional protection is a very different thing from the need to change pension arrangements for the future)?

We don't know when the judgment will be handed down, but I would expect it in January or February.

Paul Hunter
Pension Sub-Committee Chair