



DEFENCE POLICE FEDERATION

Established by Act of Parliament

To All Members

Circular 44/18

20th December 2018

Pensions Update – Firefighters and Judges Age Discrimination Cases

Please see below an update on the cases being run on behalf of the Firefighters and the Judges.

Our case, that is currently 'Stayed' in the courts is the same and as such this is a good outcome for our members also.

We will be looking to meet with our legal advisors, some of whom helped win these cases, in the new year to see how we take our members cases forward now. But in essence our case is as strong as the ones that won today, so we should feel extremely confident.

Thank you for your patience on this issue and we will keep you updated as more becomes clear.

The judgment

You will see that the Fire Brigades Union and the Judges have won. More than that, they have won comprehensively.

- The Court has said that there is only one possible answer to the question whether the Government was pursuing a 'legitimate aim' when it introduced the transitional protections: on the evidence produced by the Government, no it wasn't.
- The Court could have said that the case should go back to the Employment Tribunal to consider, as a question of fact, whether the aims the Government said it was trying to achieve were 'legitimate'. It said instead that, on the available evidence there was only one possible answer to that question. The Court has simply substituted its own finding. The Government's aims were not, and could not be legitimate.

Please don't forget to register on our website and receive updates www.dpf.org.uk

- As you know, for the Government to succeed in justifying the transitional protections, it has to show not only that it had a 'legitimate aim' but also that the means it used to achieve it were appropriate and reasonably necessary. Because we won on the first question, the Court said it did not need to go into this.
- For completeness, we also won the subsidiary race discrimination and equal pay claims subject to one point: the proportions of female and BME firefighters have increased over the last few decades but the numbers are still small, and to win the claim we would have to prove as a factual question whether the disproportionate impact on female and BME firefighters was significant. The Court of Appeal has remitted the race discrimination and equal pay cases to the Employment Tribunal to consider that factual issue, but in the expectation that it will never need to be argued because we have won on the principal age discrimination case.

The Government has asked for permission to appeal to the Supreme Court. They need permission either from the Court of Appeal or from the Supreme Court to do so. To get permission they need to show that there is an arguable point of law of general public importance. Since the Court of Appeal's decision essentially turns on the Government's inability to provide evidence that its aims were legitimate, I don't think that permission will be granted.

On the face of it, the cases now return to the Employment Tribunal to consider only the question of remedy. In reality the only plausible remedy is to put all younger members back in the old firefighters' pension scheme, and that will come down to negotiations with the Home Office. But the negotiations will be about *how* not *whether* to put them back. There is no question that they have to be put back.

Having said that, there is no doubt but that the Government could re-revise the pension schemes so that all firefighters go into the 2015 Scheme or something similar to it. The law requires equality, but does not require equality at the level of the favoured (older) firefighters. But until equality is achieved (by making new regulations), it must be achieved, as a matter of law, by improving the position of the younger disadvantaged members so that they are in the same position as their older colleagues. So everyone who was in the fire and rescue service on 31 March 2015 returns to their former scheme. We can therefore expect another round of negotiations about the terms of the Firefighters' Pension Scheme 2019, 2020 or 2021. The longer that takes, the better.

The reasoning in more detail

The precise identity of the aim that the Government was trying to achieve has been a moving target throughout this litigation. It started as:

To protect those closest to pension age from the effects of pension reform, since they would have least time to rearrange their affairs before retirement, by making lifestyle changes or alternative financial provision (or by finding alternative employment).

The Court of Appeal said that this was nonsense: was the Government seriously suggesting that younger firefighters should solve their pension problems by leaving the fire and rescue service and find a better job? The idea that they could solve their problems by making different financial arrangements was unrealistic: the agreed evidence was that a trained firefighter earning just under £30,000 would have to save between £16,000 and £19,000 every year to make up their pension losses; and even if they did that, all it would mean is that they impoverish themselves this year to provide for a comfortable retirement. As the Court said, “*There appears to us to be a real question as to the rationality of this suggestion*”.

That was in fact the aim that the Government relied upon as the changes were being made. As the penny dropped that this is in fact completely irrational, it changed tack: it said that firefighters have a reasonable expectation that their pension arrangements would not be changed, and later, as a gloss to that, that the expectations of older firefighters were greater than the expectations of younger firefighters. The Court of Appeal’s answer to that was essentially “well, prove it”. There is no evidence that younger firefighters do not have plans for their retirement, and no evidence that older firefighters’ arrangements would be put out of joint by having to move to the 2015 Scheme. To the contrary, the impact on older firefighters would be minimal if they had to move: they had already earned most (or virtually all) of their pension. That was preserved, and was still linked to their final pay.

The Government was left arguing that this was a broad social policy for it to decide, and not for the courts to question. It did what it did as a political and moral judgement because it felt like the right thing to do. The Court of Appeal said that the Government does have a margin of discretion in setting its social policy objectives, but it has to go on and show how that policy objective applies in the circumstances of this case:

If their proposal was to be upheld as justifiable, the [English and Welsh] Governments had to show why it was justifiable. Yet they provided no evidence to substantiate the reasons for such discriminatory treatment. Their claimed belief, as [their counsel] put it, that “it felt right” so to protect older firefighters, and that the decision to do so “was a moral decision” and so did not need to be evidentially substantiated, are in our view not good enough. If the Governments’ opinion as to the need to protect the older firefighters was based on something more than visceral instinct, they needed to explain what it was so that the tribunal could assess it when considering the legitimacy of the chosen aims.

It comes down to the question “why did you think you need to do this?”. The Government had no answer beyond “it felt right”.

Next Steps

As I said at the beginning of this circular, we will now sit down with our legal teams and see how we take this forward, to ensure our members are given the same result as the Firefighters and Judges.

Eamon Keating
National Chairman