



## **The legal challenge by judges and the firefighters' union - latest update**

### **From the P.F.E.W.**

Earlier this year, the Employment Appeal Tribunal returned the firefighters' discrimination case to the Employment Tribunal and dismissed the Government's appeal over a similar case relating to a group of judges. The Government took its challenge to the Court of Appeal and the case was heard in November 2018 - a ruling is expected early in 2019.

We monitored progress in the initial Employment Tribunal and continue to follow the appeals for both firefighters and judges. We've summarised the course of events below. Alex Duncan, PFEW National Secretary, said: "There has been nothing in the judgements so far that has changed the Federation's policy position or warrants us taking further legal advice at this point, but we will continue to monitor the situation."

### **Background:**

These cases did not challenge the introduction of the new CARE pension schemes themselves. They instead challenged the introduction and form of the transitional arrangements brought in at the same time. These provided preferential protective treatment to older members of the existing schemes.

Everyone involved in the legal action (government, firefighters and judges) agreed that the introduction of the transitional arrangements were directly discriminatory in terms of age.

So the legal challenges hinged on one aspect alone: in order to justify the age discrimination caused by the transitional arrangements and therefore make them legal, it was necessary for the Government to demonstrate that they were a proportionate means of achieving a legitimate aim.

### **The Employment Tribunals:**

#### **The judges' case**

An Employment Tribunal originally ruled on 16 January 2017 that the Government's transitional pension arrangements for judges amounted to unlawful age discrimination. This had been reported as a victory, but the outcome was far from clear cut.

In response to the ruling, former PFEW National Secretary Andy Fittes said at the time: "The ET ruling was on a narrow part of pension legislation, and ruled against a provision that unions across the public sector had fought for. The PFEW believes that the success of this challenge could have unintended consequences to the detriment of public sector workers."

### **What was the case about?**

The case was solely about transitional protections, and whether these caused direct discrimination by age, and indirect by gender and ethnicity.

- There was no challenge to the legality of the introduction of a new judges' pension scheme itself.
- The judge acknowledged that there is no statutory ban on reducing pensions and pay.
- The judge was very clear that he was not ruling on wider public sector pensions' reform, as this is a matter of public policy.

### **What are transitional protections?**

Transitional protections are a mechanism that was lobbied for by unions – including us – across the public sector to protect members.

The aim is to ensure those members who cannot remain entirely in "old" schemes, but who have fewer years to serve before retirement, are given special arrangements to help them adjust. The rationale was that these members would already have based future plans on an expectation of a certain pension pot.

There are three types of scheme members:

- Those solely in the old scheme.
- Those in the new scheme but with transitional protections.
- Those solely in the new scheme.

### **What did the judgement say?**

The judgement did not state that judges in two of the categories - those only subject to the new scheme (without protection) or those in the old scheme - had been treated illegally.

It only stated that those judges with transitional protection had been treated in a way that caused discrimination. In fact, the judge went further, and stated that those with transitional protection had been treated better than they could have been. When considering whether transitional protections were a proportionate means to achieve a legitimate aim, the judge considered whether they may have been "excessive" and stated that an option might have been to simply follow Hutton's recommendation that accrued rights under the old scheme be protected. The judges' schemes both protected old rights and offered transitional protection. (As do the police schemes).

The judge stated that in conceding to unions that transitional protections were needed, the employer (the Ministry of Justice) failed to seek or provide sufficient evidence of need.

### **What happened next?**

The Ministry of Justice (MoJ) announced in February 2017 their intention to appeal the ruling. This meant in effect they had adopted the position the unions initially argued for – i.e. that transitional protections were a good thing.

Should the MoJ ultimately lose the case, then there are probably two options:

1. The Ministry could offer all judges the same protection that members with transitional protection get – but that would cost more money from the public purse – possibly an additional £80 million for judges alone. (The same across the public sector would cost billions of pounds).
2. Bearing in mind that the unfairness had been deemed to be insofar as those with transitional protections had been treated better (in the judge's view) than they might have been, one option may have been to remove transitional protections completely.

This would reduce the cost to the public – possibly by £28 million.

Unfortunately, if this latter course is taken, some members of the pension scheme lose out. Ultimately it would mean no member of the pensions' scheme will gain from the claimants' win, in this ET.

### **The Fire Brigades' Union (FBU) case**

The FBU also had an Employment Tribunal heard in early 2017. In this case, it was ruled that while the transitional arrangements under the 2015 CARE Scheme do discriminate against some of their members, it was justifiable as it was a proportionate means of achieving a legitimate aim. They later announced their intention to appeal the ruling.

The Employment Appeals Tribunals:

The Employment Appeal Tribunal (EAT) rulings regarding judges' pensions and firefighters' pensions were published on 29 January 2018. Full EAT report.

### **The judges' case**

In summary, the EAT found that there may be a legitimate aim, and that in this case the correct test of proportionality was applied, and the unique circumstances of the judges meant that the measures taken were not proportionate.

- The appeal judge found that the ET judge had been mistaken in concluding that the social policy of protecting older members of the judges' scheme was not capable of being a legitimate aim.

But he ruled this was not significant because the conclusion that the ET judge had reached on the question of proportionality was correct.

- The appeal judges also found that the ET judge had used the correct more rigorous test based on UK law in concluding that the means of achieving the change (i.e. the transitional arrangements) were not proportionate.
- The EAT judge also agreed that the difference in treatment between the older judges and the younger judges was so great that it was not capable of being viewed as reasonable and necessary and therefore failed the proportionality test. Consequently, the appeal by the Ministry of Justice failed.
- The EAT judge went to great lengths to point out the unique nature of the judges' situation. Much of this revolved around the additional adverse tax consequences which arose from the movement of the younger judges into the new scheme. He said that the extremely severe impact on the judges outweighed the benefit of treating them consistently with the rest of the public service.
- Former PFEW National Secretary Andy Fittes said at the time: "As with the firefighters' case, there is nothing which changes the PFEW policy position or that warrants us taking further legal advice at this point. In fact, because of the references to the uniqueness of the judges' situation, it is less relevant to the situation under the police schemes."

#### The FBU case

In summary, the EAT found the aim was legitimate, but that the proportionality has not been proven and must undergo further legal tests. This specific issue was therefore sent back to the Employment Tribunal (ET).

- The appeal judge clearly agreed with the part of the previous ET judgement which ruled that the Government's decision to adopt a social policy which protected those older firefighters close to retirement could be a legitimate aim - even though the transitional arrangements implementing them were discriminatory in terms of age.
- For that age discrimination to be legal, the Government needs to demonstrate that the transitional arrangements used were proportionate.
- But the appeal judge said that the original ET judge was wrong to use a less demanding test based on European case law when he ruled, they were proportionate. The appeal judge said that a more stringent test based on UK case law should be used instead, requiring a more detailed analysis. So he has referred the firefighters' case back to the ET to apply the correct test.
- What the EAT judgement did not do is say that the means used to achieve the legitimate aim were not proportionate. So, it is possible that the ET will look at it again, apply the correct test, and still decide that the means were proportionate and therefore the age discrimination is justified and lawful.

- Former PFEW National Secretary Andy Fittes said at the time: “There is nothing in the judgement which changes the PFEW policy position or that warrants us taking further legal advice at this point.”

The MoJ chose to take its challenge to the Court of Appeal, where both judges' and the FBU cases were combined. The hearing began early November 2018, with a ruling expected in the new year.

### **What has the PFEW been doing?**

We continue to believe that transitional protections are a good thing and are deeply disappointed that this case may have consequences that the litigants did not anticipate, and that would cause pension scheme members to lose money. We believe it is important that we act in the best interests of as many of our members as possible. We believe transitional protections offer a better pension for more members.

More information on police pensions. There are also some new FAQ's about the CARE 2015 scheme, which arose from members' questions raised during our 2017 pay and morale survey.