**Circular: 2018HOC0538SS**

**6 November 2018**

**To: BRIGADE SECRETARIES**

Dear Brother/Sister,

**AGE DISCRIMINATION PENSION CASE COURT OF APPEAL UPDATE: DAY 1 – 5 NOVEMBER 2018.**

You will be aware that the two cases re age discrimination relating to protection (Judges and Firefighters) are being held this week (Judges 5&6 November, 7 November reading day, Firefighters 8&9 November).

Although the first two days primarily relate to the judges, because of the similarity of the case, there may be areas of cross over and points that could impact on both cases. To enable you to be kept up to speed on events as they unfold, you will receive a daily update on proceedings. It is also the intention to provide a full update at the end of this stage to members via an all members circular.

**Brief Introduction**

The Court of Appeal is hearing a total of four appeals over the course of the coming week. They relate to the same issues, raised by 210 judges in one set of proceedings, and a little over 6,000 firefighters in another. Theoretically the judges’ case is being heard first, followed on Wednesday to Friday by the firefighters. In reality, the issues in both cases are the same. So, although today’s hearing was meant to be about the judges, in reality the issues discussed concern both cases.

Because the Government is the appellant in the judges’ case, the first legal team to speak was the Government’s. They took up the whole day.

**A Brief Recap Recap**

There are four appeals because, although we won some issues in the Employment Appeal Tribunal (EAT) and the Government won some, no-one won everything. The Government admitted from the outset that the transitional provisions at the heart of this case discriminate against younger firefighters (and judges), but discrimination is not automatically against the law.

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The Government can legitimise the transitional arrangements if it can show:

* that the transitional arrangements, which meant that some firefighters moved to the 2015 Scheme and some did not (and some have or will transfer at a later stage) was an arrangement made to pursue a ‘**legitimate aim**’; and
* ***if*** there was a legitimate aim, the arrangements were an appropriate and reasonably necessary means of achieving it. This second stage is often abbreviated as a ‘**proportionality**’ test.

In the EAT, the Government won on legitimate aim and lost on proportionality. Hence the multiple appeals: the Government has appealed the proportionality question. We appealed the legitimate aim issue. The judges cross-appealed the legitimate aim issue. The FRAs appealed to support what the Government says.

Although this sounds complicated at the base there are only two questions: was there a legitimate aim, and if there was did the Government satisfy the test for proportionality.

The Government has to cross both bridges, and the burden is on them.

**Day 1 Key Points**

The key issue, according to the Government, is the leeway the law gives it in deciding what aims are legitimate, and if it has a legitimate aim, the leeway the law gives it in deciding what means to use to achieve it. A large part of the day was spent discussing exactly what the Government’s aim was, before going on to looking at whether that aim was legitimate.

The Government says that the aim was ‘to protect those who were closest to retirement from the effects of pension reform’. They say that that is not just another way of saying it wanted to protect older workers – members closer to retirement are by definition older – because it comes down to exercising a moral or political judgment.

As their barrister put it, it “felt right” to protect those who were within ten years of retirement, with a further period of tapered protection for members who were up to 4½ years younger. They accept that the older members have the least to lose (because they have already built up more pension), but what “feels right” is a moral or political judgement which the Government is entitled to call.

In support of that, they say:

* this was a decision taken at the highest level of Government, the Cabinet;
* it was supported by an Act of Parliament;
* providing the transitional protection was not a question of robbing Peter (younger members) to pay Paul – it was paid for by new money;
* if there had been no transitional protections at all the younger members, who have made the claim, would still be in the same position – they would have to transfer to the 2015 Scheme anyway – and the transitional protections protected a large number of members;
* the transitional protections were not a cost-saving exercise, it was an exercise in achieving what “felt right”;
* it was important that the same transitional protections applied to all of the public service pension schemes – it would not be right to single out judges for better treatment because they were the biggest losers (because they lost favourable tax arrangements too), because that would be politically unacceptable.

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This was the Government’s case, and these are fair points. We have not yet had an opportunity to counter them yet in our response, but the questions coming from the Court of Appeal judges were interesting and summarised below:

* it does seem ‘bizarre’ (as the Employment Tribunal put it in the judges’ case) to spend the available resources on those who need it least (answer: a political or moral judgement is not just a matter of money, what “feels right” also reflects the expectations have about their retirement if it is just around the corner or coming up, soon);
* why not spend the same amount of money improving everyone’s position by keeping them in the old scheme for a bit longer, even if that was not ten years (answer: because the aim the Government was aiming at was to protect members closest to retirement, not everybody);
* what was political about the judgement call – was there any deal being done (answer: no, no-one reached an agreement, least of all the FBU);
* is a political judgement the same thing as a moral judgement (answer: it is a call for the Government to make. Everything a Government does is done in a political environment);
* was there any evidence to support the assertion that the Government had to make a call at all (answer: in the case of a moral or political judgement, there is no evidence you can call, it is the Government’s decision to make);
* if there is a social policy aim in mind, does it mean that the Government’s reaction to it (the proportionality issue) is inevitably right in law because that is a political call too (answer: no, because the response might be an illogical reaction, but this one wasn’t);
* does the fact that the judges have an additional reason for being aggrieved – i.e. the loss of their considerable tax advantages – mean that the balance should have swung in their favour (answer: no, there was a need for consistent treatment, and favouring the judges did not get through Cabinet and would not have got through Parliament)

The core legal issue however is whether the Government has this measure of political or moral discretion in the first place. A private sector employer would never get away with discrimination because it “felt right”. Why should the Government?

This is where the key legal battle is. The law ***does*** allow any Government considerable leeway in deciding what social or moral objectives to aim for. Governments might legislate to allow employers to make older employees retire, in order to allow younger employees to enter the workforce for instance; or to avoid having to go through an incapability process which would be distressing for all concerned. Why can’t the Government legislate to allow it to manage its pension costs even if it means making younger employees work for longer?

The Government’s answer is that European law, which UK law follows, allows the Government a wide discretion to achieve broad political or moral objectives which, according to European and UK case-law, the courts cannot interfere with. The courts might disagree, but it is not the courts’ call to make.

But that begs a big question. If the Government is allowed to make these big sweeping judgements when legislating for what employers in general are allowed to do, does it have the same broad discretion when deciding how to deal with its own workforce? The Government says a distinction must be drawn between social policy issues on the one hand, and narrow operational issues on the other. How it deals with its workforce is a social policy issue where the broad discretion applies. We disagree.

Countering the Governments points is the discussion for day 2

Yours in Unity,



**SEAN STARBUCK**

**National Officer** SS/kc