**Circular: 2018HOC0540SS**

**7 November 2018**

**To: BRIGADE SECRETARIES**

Dear Brother/Sister,

**AGE DISCRIMINATION PENSION CASE COURT OF APPEAL UPDATE: DAYS 2 – 6 NOVEMBER 2018**

# **Introduction**

Following on from the update from day 1 (2018HOC0538SS) which outlined the Government’s case, day 2 provided the opportunity to counter their arguments. This update gives an overview of the events of day 2. The nature of the case means that this update covers some points which are complex, but it is important that officials and members alike see the areas that the legal team are challenging on behalf of judges and firefighters.

As previously outlined, the Government has to show it has a ‘legitimate aim’ and that what it did was an appropriate and reasonably necessary means of achieving it. The Government’s counsel said on day 1 that it has a wide discretion when choosing what aims to pursue, and also in choosing how to achieve them. The aims in this case were characterised as ‘moral’ or ‘political’ or ‘social policy’ – “*it felt like the right thing to do*” as he summarised it, and said that the decided cases show that the courts should not interfere with the Government’s judgements on such issues.

# **Day 2**

The counter position to that put forward by Government is to say the key question is the extent of its freedom of action – the extent of its discretion. Governments govern, and are entitled to take the view that their political judgements are not second-guessed by the courts. The question is how this principle plays out when there is a dispute between the Government and its own employees, such as judges and firefighters.

Andrew Short QC, who represents both the judges and the firefighters, carefully went through the cases and made the following points:

* This is a case about UK employment law: specifically the Equality Act 2010 which prohibits direct discrimination on the grounds of age unless that discrimination can be justified.
* What is *potentially* justifiable is constrained by European law. European law permits direct age discrimination, but only if the objective is to secure some broad social policy objective such as the need to manage entry into the labour market or exit from it, or managing older employees with dignity and respect.

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* But that is only the first stage. If the Government has a potentially justifiable objective, **it still needs to go through the same process as any other employer.** It must actually have an objective, and if it does, the means it uses to achieve it must be appropriate and reasonably necessary.
* The fact that the age discrimination legislation originates in Europe does not mean that the bar to discrimination is lower because European law recognises that governments must be free to legislate for broad social objectives. That is an **additional** hurdle for the Government to jump, not an alternative lower one.

There are connected questions raised in cases where the Government is the employer.

* How rigorously should the court cross-examine what the Government has done?
* Should it just be a ‘light touch’ examination of how the Government went about the task; or should it scrutinise its actions more thoroughly?

The answer is essentially the same: where the Government is the employer making employment decisions, it is subject to the same level of scrutiny as any other employer. The tribunal (or court) must examine the reasons relied upon, and reach its own independent view as to whether the aim was legitimate, and if it was, whether or not the means used were appropriate and reasonably necessary. It is not the job of the tribunal to say “well, some employers would, some wouldn’t and this was a reasonable response to the situation”. The tribunal must exercise its own judgement.

Moreover, when reaching that view, the tribunal should expect:

* the employer’s reasons to be concrete and not generalisations;
* those reasons should be clear and precise;
* because the issue is whether or not to deny a legal safeguard that other employees have, the standard of proof required is high;
* saving money can never be enough on its own – it is always cheaper to discriminate; and
* if the reasons are based on the employer’s social or moral views, the tribunal should examine any evidence that justifies their views before simply saying that it is the sort of judgement call for which there cannot be any evidence.

Looking at the specific circumstances. The Government’s original aim was said to be that it wanted to protect those closest to retirement because they have less time to adjust to changed pension arrangements. Even the Government abandoned that when the issue came to court. Those whom are closest to retirement have the least need to make any adjustment – their pension planning has been done.

It therefore moved on and said that employees who are close to retirement will already have concrete plans. But there is nothing to support that assertion, no evidence. This was justification after the event – which is potentially legitimate but needs careful scrutiny.

In terms of what was appropriate and necessary, there is clear evidence that the cost to younger members of having to make up the ground lost by the changes, by making other savings, is very clearly unaffordable. This is a balancing exercise for the tribunal to make: the need for change against the cost to disadvantaged employees. The Government did not analyse that at all.

In that light, the Government’s reason – “it felt like the right thing to do” – looks very thin.

Some of the questions from the judges hearing the case were illuminating.

* You cannot ignore the fact that money is an issue, even if budgetary considerations alone cannot justify discrimination (it is always cheaper to discriminate). But if money is limited, what the law requires is that you spread it fairly. The Government could have spent the available resources by improving the position of older *and* younger members rather than favouring one cohort but not the other.

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* One of the judges (at least) is concerned at the notion that the courts can interfere with large-scale political judgements made by the Government. Andrew Short’s careful analysis shows that where the Government is acting as the employer, it is an employer just like any other. Asda is in court at the moment fighting hundreds of thousands of equal pay cases – does its size mean it can make its own unchallengeable social value decisions?
* Governments have to make political deals, compromising the interests of one pressure group or another for the sake of reaching common ground. That may be true, but that was not what was going on here. There was not a deal being done and the evidence shows that.

This court is quite properly sceptical of the notion that it can undo a carefully packaged set of pension scheme reforms, at enormous cost to the Government (that is, the taxpayer). We are driving them to the view that governments, as employers, have no special privileges to discriminate, and cannot justify their actions on the basis of social values or political expediency. The courts have to examine their actions as employers, just like any other employer, and that is what this case is going to turn on.

Yours in Unity,



**SEAN STARBUCK**

**National Officer**

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