**Circular: 2018HOC00544SS**

**9 November 2018**

**To: BRIGADE SECRETARIES**

Dear Brother/Sister,

**AGE DISCRIMINATION PENSION CASE COURT OF APPEAL UPDATE: DAY 4 - 8 NOVEMBER 2018**

# **Introduction**

The day started with a detailed examination of what is, on any basis, the non-core aspects of the case – sex and race discrimination. We then went on to the core aspects of the firefighters’ case – what was the Employment Tribunal’s reasoning, and why is it wrong?

# **Sex And Race Discrimination**

The sex and race discrimination claims are quite technical. They have already been referred back to the Employment Tribunal to have another look, but everyone in court recognises that, if the age discrimination claims do not succeed, it is unlikely that these subsidiary claims will succeed on their own.

The technical argument is this: if a group of (proportionately younger) women and/or BME members suffer a disadvantage (i.e. being moved to the new scheme) and comparable of (older) white male members are less likely to be moved, do they have to demonstrate a link between their sex or race and the disadvantage? Or is it enough that they prove the disadvantage, and leave it to the employer to justify their action?

A requirement to prove the link feels intuitively right. The case law probably means they do not – it is up to the employer to justify.

# **The age discrimination claim – where did the Employment Tribunal go wrong?**

Andrew Short took the judges through the Tribunal’s decision, paragraph by paragraph, and pointed out the errors:

* Whether the Tribunal had to make up its own mind, as we say, or just lightly check that the Government had a genuine social policy intention, as they say, the Tribunal went wrong because it did not scrutinise the Government’s reasoning at all.

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* The Government’s reason for making the transitional arrangements has chopped and changed. Originally, they said younger members would have time to adjust their finances by making other savings, and older members would not. But that is nonsense: older members would have less need to make any adjustment.
* It is fanciful to think that younger members could make the required savings. They would have to put aside something in the region of £19,000 per annum (which genuinely shocked the court). And making savings is just a different way of inflicting the pain – have less disposable income now, or less disposable income later.
* The problem is aggravated because their frozen FPS pensions are trapped – if you retire at the age of 50/55 your new scheme pension is reduced savagely. If you wait until 60 you lose the FPS pension you could have had at age 50/55 and get a worse commutation rate.
* So they changed tack, and said the reason was not the time available to make adjustments, but the greater expectations that older firefighters had of retiring at their FPS pension age. Even if they did not have this reason in mind when the decision was made, the law says they *can* rely on a reason which they come up with later – but in that case, the Tribunal must scrutinise their reason even more. Here, there was no scrutiny at all.
* They said that the 10 year cut-off is analogous to the 10 years’ advance notice given that the State pension age was going to change. But it isn’t – there, the 10 year warning did give people an opportunity to plan ahead.
* The Tribunal said that the Government “may have had a good reason”, but neither it, nor the Government has said what it was.
* The Tribunal said that the safety valve is that it must still show that the means used must be appropriate and reasonably necessary; but when it got to that stage in its reasoning, it simply said that a line had to be drawn somewhere, and the Government was free to decide where to draw it.
* The result is that, even if the Government was free to decide on social policy issues subject to ‘light touch’ review by the Tribunal, the Tribunal failed in its task – it conducted no review at all.
* The Government’s social policy must be taken into account, but if the disadvantage to younger members is massive, the social policy needs need to be correspondingly massive.

The judges asked a number of times what the reason was – we know what they did, but the reason why they did it remains obscure. All very promising.

Tomorrow the Government gets a chance to reply. Let’s see what they say.

Yours in Unity,



**SEAN STARBUCK**

**National Officer**

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