**Circular: 2018HOC00558SS**

**14 November 2018**

**To: BRIGADE SECRETARIES**

Dear Brother/Sister,

**AGE DISCRIMINATION PENSION CASE COURT OF APPEAL UPDATE: DAY 5 - 9 NOVEMBER 2018**

# **Introduction**

Day 5 was the last day. The parties concluded their arguments on the sex and race discrimination claims, the Government responded to our analysis of the employment Tribunal’s reasoning. The three judges who heard the case will now deliberate and give us their judgment, almost certainly in the spring.

# **Sex And Race Discrimination**

As stated previously, the sex and race discrimination claims are very technical – not in the sense that they are artificial but in the sense that the legislation is complex.

In a nutshell, the case we are making is that (a) the transitional protections adversely affect younger firefighters (they are not protected); (b) female and BME firefighters are more likely to be younger than white male firefighters; so (c) imposing a criterion which identifies who is adversely affected and who is not – i.e. an age criterion – indirectly discriminates on the grounds of sex and race.

Today we got into the statistical basis for making this case. What is clear is that the numbers of firefighters who are BME origin and/or who are women are relatively small, but it is also clear that the proportion of the total firefighter population has been growing. The growth trend helps to make the case that there is a direct link between race and sex on the one hand, and relative youth on the other. Against that, if the absolute numbers are small, can you infer from effect of the age criterion that there is an intrinsic sex- and race-discriminatory effect?

Much of this comes down to which party has to prove what, and there is a lot of recent case-law on that. Two recent Supreme Court cases say that the claimant has to show a link between the protected characteristic (sex and/or race) and the adverse treatment; if a criterion has the effect that a greater proportion of female and BME firefighters lose out, it is up to the employer to prove that the adverse treatment does not in fact have anything to do with the members’ sex/race.

What is clear, however, is that this is a small aspect of the case. If we win on age discrimination, winning on sex and race discrimination as well will not add much. If we lose on age discrimination we could nonetheless win on sex and race discrimination, but that is an outcome that the court would like to avoid.

Contd / ……

# **The Age Discrimination Claim**

The Government’s QC, John Cavanagh, then exercised the government’s right of reply to the detailed criticism of the Employment Tribunal decision that Andrew Short made on day 4. The main points he made were these:

* The firefighters’ case is essentially an attack on the findings of fact that the Employment Judge made – and that is impermissible. The Employment Tribunal’s conclusions on the facts is final (unless they are so bizarre that no sensible tribunal could have reached these conclusions).
* The Employment Judge listed all of the arguments raised by both sides. She might have stated her reasons very briefly, but she heard and understood what was being said to her.
* She did not have to explain *why* she disagreed with Andrew Short in the Employment Tribunal. She just had to say that she did.
* In particular, she understood, as a factual matter, how catastrophic the changes were for younger firefighter – she said what they were in her judgment.
* The catastrophe was not down to the transitional arrangements anyway. It is down to the design of the new scheme. We can’t challenge the new scheme design, only the transition, because it is the transition that is age-related.
* The FBU consistently argued for protection for all existing members during the dispute, but it did not say that it opposed transitional protection because it was age-discriminatory.
* Contrary to what Andrew Short said, the Government’s reason had been consistent throughout.
* The Employment Judge did not abdicate her responsibility and fail to make up her own mind. She just didn’t agree with us.

# **Thoughts In Closing**

As you would expect in a five day trial, addressed by four QCs to three Court of Appeal judges who asked questions of their own, the arguments were detailed and carefully constructed. These short summaries over the last few days could not hope to do them justice.

In the final analysis there are a few key points on which the case will turn:

* Governments have the right to govern, and the courts will be reluctant to second-guess their social policy objectives. But when you are examining the way the Government treats its own workforce, is that a social policy issue or an operational matter? Put another way, does the law about age discrimination in employment apply to the Government in the same way it applies to other employers?
* Related to that, how rigorously must the Employment Tribunal scrutinise the Government’s reasons for doing what it did? Is it a ‘light touch’ review or must the Government identify in concrete, precise, evidence-based terms what its aim is and why that aim is legitimate?
* And in this instance, what exactly were those reasons? They seem to have shifted throughout.
* If the Government does have a broad margin of discretion when deciding its social policy, and if the way it treats its own employees is a question of social policy, does it have the same broad discretion in deciding *how* to achieve its policy? Or must the Employment Tribunal listen to the reasoning, consider the impact on the disadvantaged class, and reach its own independent view as to whether the policy need justifies the impact?

Contd / …..

We will have to wait a few months to get the answers from the Court of Appeal.

Yours in Unity,



**SEAN STARBUCK**

**National Officer**

SS/kc