

Pensions and age discrimination: certain pension schemes changes could amount to age discrimination

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Under the Equality Act 2010, discrimination on grounds of age is unlawful unless it can be objectively justified as a proportionate means of achieving a legitimate aim.

Two recent Employment Appeal Tribunal (EAT) cases provide some clarification for employers who are seeking to objectively justify an age discriminatory practice as being a proportionate means of achieving a legitimate aim. These EAT decisions will be of relevance for private sector employers, even though the cases were brought by members of public sector pension schemes.

The facts

In **Sargeant v London Fire and Emergency Planning Authority and others**, the Employment Tribunal (ET) had originally rejected a claim by 6,000 younger firefighters for age discrimination, equal pay, sex and race discrimination as a result of the introduction of a less generous pension scheme. However, the EAT overturned that decision, concluding that the ET had not correctly applied the objective justification test, or properly considered the issue of proportionality (in order to achieve legitimate aims).

Another judgement was issued by the EAT at the same time, in a similar case involving a group of judges: **McCloud and others v Lord Chancellor and Secretary of State for Justice and another**. Here, taking a line broadly consistent with their conclusion in **Sargeant** above, the EAT rejected an appeal by the Government, that discriminatory measures they had taken were proportionate.

Transitional Protection

As part of ongoing public sector pension scheme reforms, members of both the firefighters' and judicial pension schemes were compulsorily transferred into new arrangements with less favourable retirement benefits, including a lower rate of accrual and a higher normal pension age. Under both schemes, transitional provisions were put in place so that older members of each scheme (i.e. above a particular age) received "full protection" by being allowed to remain as active members of the original and more generous scheme until retirement, whilst slightly younger members, who were between certain ages, received "tapered protection", by being allowed to stay as active members of the old scheme for an additional period before having to transfer to the new less generous scheme. The youngest members received no such protection and were required to immediately transfer to the new and less generous pension scheme for future service.

The Sargeant and McCloud Cases

In both cases, the original claimants argued that the transitional provisions outlined above were age discriminatory, and in fact this was accepted by all parties. The issue in dispute was whether allowing those members above a certain age to remain in the old schemes was a proportionate mean of achieving a legitimate aim (i.e. were the measures appropriate to achieve the relevant aim and reasonably necessary). The Government argued that the transitional protection afforded to older scheme members was justified by the legitimate aim of protecting those closest to retirement, as they were likely to have a greater legitimate expectation that their pension entitlements would not change significantly, and would have less chance to mitigate the adverse impact of moving to the new pension schemes.

In **Sargeant** the ET held that the transitional provisions were not unlawfully age discriminatory as the transitional protection given to older members was a proportionate means of achieving the Government's legitimate aims of (i) protecting those closest to normal pension age from the adverse effects of transferring to the less generous pension arrangements, taking into account the greater legitimate expectation that those closer to retirement would have that their pensions entitlements would not be reduced so close to retirement, (ii) introducing a tapering arrangement to avoid a cliff edge between fully protected and unprotected groups and (iii) and ensuring that there was consistency across the public sector.

However, in **McCloud**, even though the reasoning put forward by the Government in respect of its legitimate aims were similar to those in **Sargeant** the ET found that the transitional provisions were age discriminatory and could not be objectively justified. This was because the tribunal believed that the steps taken by the Government to protect older members of the judiciary were not pursuant to a legitimate aim, as the legitimate aim put forward by the Government that 'older members should be protected because they are nearer to pension age (i.e. older)', was a circular argument without further objective justification.

The EAT decisions

In **Sargeant** the EAT confirmed the ET's finding that the transitional provisions implemented in respect of the firefighters pension scheme were pursuant to a legitimate aim. However, the EAT found that the ET judge had *“failed to consider whether, in the context of the FPS, the application of the transitional provisions and the differential treatment on the grounds of age was a proportionate means for achieving what she had concluded...were legitimate aims of social policy”*. The ET had therefore ‘erred in law’ in its deliberation on proportionality, and the case was sent back to the ET to reconsider this issue.

In **McCloud** the EAT found that the ET was wrong in deciding that the transitional provisions implemented in relation to the judicial pension scheme were not pursuant to a legitimate aim. However, the EAT held that the transitional provisions implemented by the Government in pursuit of this legitimate aim were not proportionate, as the Claimants had suffered undue hardship as a result of the transitional provisions, which went beyond what was reasonably necessary.

What does this mean for employers?

Sargeant has now been sent back to the ET, and even though these decisions may still be subject to further appeal, it is useful that the EAT has reached a consistent position on the issue of whether the Government had a legitimate aim when it introduced transitional provisions for members of the judicial and firefighters pension scheme. These decisions are of relevance to public and private sector employers and trustees when considering implementing any benefit changes which could adversely impact a particular age-group - any such changes must be proportionate and in pursuit of a legitimate aim.

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