

LGA Fire Pensions Annual Conference 2019

Case Law Update

25 September 2019

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Agenda

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- McCloud and Sargeant – Age Discrimination - Update
- Corsham & Others v PCC for Essex & Others – Loss of Protected Pension Age
- The Estate of Mrs N (PO-19673) – Failure to action IHER
- Mr N (PO-27369) – Mistaken Identity (or Nice Try!)

McCloud and Sargeant – Update

Age Discrimination

– Sargeant & Others v London Fire and Emergency Planning Authority & Others

- ET - transitional protections were age discriminatory but could be objectively justified
- EAT - found that the ET was correct in its conclusion that the Government had a margin of discretion in pursuing and implementing social policy, and that therefore it had sufficiently established that it had a legitimate aim in implementing the transitional arrangements. However, the ET had erred by taking the wrong approach to the question of proportionality, in light of previous case law

– McCloud & Others v Ministry of Justice & Others

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- ET - transitional protections were age discriminatory but could not be objectively justified
- EAT - agreed with the ET that the Government had failed to justify the discriminatory effect of the transitional arrangements as a proportionate means of achieving its social policy aims

McCloud and Sargeant – Update

Age Discrimination

Court of Appeal – December 2018

- the manner in which the transitional provisions in the judges' and firefighters' pension schemes were implemented, and under which judges' and firefighters' entitlement to remain active members of their respective schemes were defined by reference to their age, gave rise in both cases to unlawful direct age discrimination which could not be justified
- upheld the decisions of the ET and EAT in the *McCloud* judges' case, but overturned the decisions of those tribunals in the *Sargeant* firefighters' case
- no error in the reasoning of the ET either in its assessment of aims or means in *McCloud*
- no legitimate aims for the transitional provisions in *Sargeant* (contrary to the ET and EAT decisions)

McCloud and Sargeant – Update

Age Discrimination

Current Position

- Cost cap mechanism on public sector pension schemes paused in January 2019 following Court of Appeal ruling
- Supreme Court refused Government permission to appeal in June 2019
- Ministerial Statement in July 2019 on impact across all public sector pension schemes
- Still some way to go in relation to these cases:
 - Further Employment Tribunal Hearings required in relation to remedy
 - Implementation of remedy and changes to public sector pension schemes
 - Cost cap process would then be re-run to take into account any amended benefit structure
- Continued pressure from Trade Unions

Corsham & Others v PCC for Essex & Others

Loss of Protected Pension Age

Protected Pension Age – A Reminder

- Historic Government policy of having a minimum age people can take their pension from (known as the normal minimum pension age - “NMPA”)
- NMPA was set at **50** until HMRC announced changes on **10 December 2003** to raise NMPA
- New NMPA was decided to be **55** from **6 April 2010**
- **BUT**: change of NMPA might be unfair to those planning retirement
- **SO**: the Government gave **transitional protection** for those with the lower NMPA of 50
- This transitional protection is what we call “**Protected Pension Age**”

Corsham & Others v PCC for Essex & Others

Loss of Protected Pension Age

Protected Pension Age – A Reminder

- If a pension scheme allows a member to draw their benefits when a member has not reached their NMPA:
 - it is an unauthorised payment
 - the scheme administrator and the member may be subject to a tax charge (of up to 55%) depending on the circumstances
 - at the extreme (but unlikely) it could affect the status of a scheme as a registered pension scheme
 - potential member complaints via IDRPs and possible referral to Pensions Ombudsman
 - potential public complaints and audit reviews
- Members can lose their PPA in certain circumstances (and the above with then apply)
 - transfers out of the scheme (not in a bulk transfer)
 - retire and re-join the employer

Corsham & Others v PCC for Essex & Others

Loss of Protected Pension Age

Protected Pension Age – A Reminder

- Retirement and re-joining
 - since 6 April 2006 no qualification on retirees being employed / re-employed
 - Government policy is to prevent sham retirement to exploit PPA and take advantage of the various tax advantages (e.g. 25% tax-free lump sum) while working

- Finance Act 2004 reflected in HMRC guidance makes it clear employees can only retain their PPA if, when they re-join their employer:
 - there has been at least a six-month break in employment; or
 - there has been at least a one-month break in employment; and either
 - the new employment is materially different from the previous employment; or
 - the scheme rules provide for abatement (a reduction of the member's pension to reflect his earnings)

Corsham & Others v PCC for Essex & Others

Loss of Protected Pension Age

Previous Pensions Ombudsman Decisions

- Ramsey – employer, trustee and scheme administrator not under any legal obligation to inform a member of the adverse tax consequences of exercising a particular option under the scheme rules
- Cherry and Dodge – PCC should have provided member with information already in its possession regarding the tax implications of re-employment within one month of retirement, and that it owed a duty of care towards the member
- Mr R & Others – A&SPCC and the Chief Constables were not under a duty to inform the member prior to their re-employment in police civilian staff roles, of the tax consequence for the members pension of re-employment with the A&SPCC within one month of retirement as a police officer.

Corsham & Others v PCC for Essex & Others

Loss of Protected Pension Age

High Court – Corsham & Others

- found that a police authority was liable for negligent misstatement where it told members their retirement lump sums would be tax free in circumstances where they actually knew that scheme members were being re-employed shortly after retirement with the result that they would lose their protected pension age and hence be subject to punitive tax charges
- overturned the decision of the Pensions Ombudsman in Mr R & Others
- although not finding it necessary to decide the point, the High Court did not rule out a finding that, even where there is no specific knowledge that particular members would be re-employed within one month, the police authority ought to have included some precautionary words about re-employment within one month of retirement when sending out its standard form letters to every retiring police officer

The Estate of Mrs N (PO-19673)

Failure to action IHER

The facts

- 12 January 2016 - Tier 1 IHER approved - retirement date set for 1 February 2016
- Consequently, the member died in service on 30 January 2016 - complainant was entitled to a lower level of death grant
- The DPO held the scheme employer should have set the member's retirement date to the same day it approved the member's ill-health early retirement application
- By delaying the member's last day of employment, the employer risked jeopardising the member's benefits unnecessarily
- The member did everything she could to get her ill-health application approved as soon as possible
- No justification for the employer's decision to delay the retirement date

The Estate of Mrs N (PO-19673)

Failure to action IHER

The decision

- difference between the IHER benefits and pensioner death grant that would have been received had member retired on 12 January and the death in service grant received

TFC £83,500 + pro rata pension + pensioner death grant £117,900

vs.

DIS lump sum £ 85,700 + income received after 12 January

- interest on award
- tax liabilities on special lump-sum death benefit payment the complainant would incur (after 2 years)

Mr N (PO-27369)

Mistaken Identity (or Nice Try!)

The facts

- May 2001 - Prudential sent a benefit illustration to Mr N's address
- Further benefits statements were sent to Mr N's address in 2003 and 2018
- August 2018 – Mr N's financial adviser requested policy information from Prudential (enclosing Mr N's letter of authority)
- Prudential said the letter could not be accepted as the d.o.b. did not match its records
- Financial adviser submitted further i.d. regarding the d.o.b. and said Prudential's records were wrong
- October 2018 – Prudential responds to say Mr N has never had policy
- November 2018 – Mr N raises a complaint with Prudential

Mr N (PO-27369)

Mistaken Identity (or Nice Try!)

The decision

- No evidence that Mr N ever applied for or had a policy with Prudential
- Mr N should have queried the original statement in 2001
- Not reasonable for Mr N to believe these were his benefits
- Although there were errors by Prudential, these did not cause a loss of expectation to Mr N
- Ombudsman found that Mr N was not a customer of Prudential and has no reason to expect benefits from Prudential

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