

The EAT judgments in the Firefighters' and Judges' cases

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This briefing paper has been prepared for the General Secretary and for members of the INB and INC.

1. BACKGROUND

- These cases did not involve a challenge to the introduction of the new Career Average Revalued Earnings (CARE) pension schemes. They were instead a challenge to the introduction and form of the transitional arrangements brought in at the same time which provided preferential protective treatment to older members of the existing schemes.
- There was no dispute between the parties¹ that the introduction of the transitional arrangements into the schemes constituted direct age discrimination.
- In order to justify the age discrimination caused by the transitional arrangements and therefore make them lawful it is necessary for the Government to demonstrate that they were a *proportionate means of achieving a legitimate aim*.

2. THE FIREFIGHTERS' CASE

In summary, the EAT found the aim was legitimate, but that the proportionality or otherwise of the means has not been proven and must be subject to further test.

- The Employment Appeal Tribunal (EAT) judge clearly agreed with the part of the Employment Tribunal (ET) judgement which concluded that the Government's decision to adopt a social policy which protected those older firefighters close to retirement was capable of being a legitimate aim even though the transitional arrangements implementing them had a discriminatory impact in terms of age.
- In order for the age discrimination attaching to that legitimate aim to be lawful it is necessary for the Government to demonstrate that the means (the transitional arrangements) used were proportionate.
- It was found that in concluding that the means were proportionate the judge in the ET erred in law in applying the less demanding margin of discretion test deriving from European law. The judge in the EAT concluded that a more stringent test based

¹ The Fire and Emergency Planning Authority, the Home Secretary, the Welsh Ministers, the Lord Chancellor, the Justice Secretary and the Ministry of Justice and various individual firefighters and judges.

on UK case law (as discussed in *Seldon v Clarkson Wright & Jakes* [2012] ICR 716) which required a more detailed analysis of the situation was appropriate and therefore the EAT judge referred the case back to the ET to apply the correct proportionality test to the particulars of the firefighters' situation.

- What the EAT judgement did not do is conclude that the means used to achieve the legitimate aim were not proportionate. It is possible that the ET will look at it again, apply the correct test, and still come to the conclusion that the means were proportionate and therefore the age discrimination was justified and lawful.
- It is unclear at this point whether the EAT decision will be appealed.

2.1 PFEW Position

- There is nothing in the judgement which changes our policy position or that warrants us taking further legal advice at this point in time.

3. THE JUDGES' CASE

In summary, the EAT found that there may be a legitimate aim, and that in this case the correct test of proportionality was applied, and the unique circumstances of the judges meant that the measures taken were not proportionate.

- The EAT judge concluded that the ET judge had misdirected himself in his consideration of whether protecting older members of the existing scheme was capable of being a legitimate aim based on social policy and therefore erred in law in concluding that it was not a legitimate aim.
- Although the ET judge had not followed the correct path in concluding that the introduction of the transitional arrangements designed to protect older members of the existing scheme did not reflect a legitimate aim based on social policy, he had nonetheless gone on to address whether, if they had been a legitimate aim, the means used were proportionate and concluded that they were not.
- The EAT judge held that the fact that the ET judge had misdirected himself on the question of establishment of a legitimate aim was not significant because the conclusion that the ET judge had reached on the question of proportionality was correct and the EAT judge agreed that the difference in treatment between the older judges and the younger judges was so great that it was not capable of being viewed as reasonable and necessary and therefore failed the proportionality test. Consequently the appeal by the Ministry of Justice failed.

- The EAT judge went to some considerable lengths to point out the unique nature of the situation in the judges' case. Much of this revolved around the additional adverse tax consequences which arose from the movement of the younger judges into the new scheme.
- It seems likely that the Ministry of Justice will appeal the decision.

3.1 PFEW Position

- As with the firefighters' case there is nothing in the judgement which would lead us to change our policy position or seek further legal input at this point in time. Indeed because of the references to the uniqueness of the judges' situation the finding has less resonance in respect of the position under the police schemes.