Public Sector Pensions Brief – Dec 2022

Age Discrimination

Public sector pensions reforms 'transitional protection' against age discrimination – December 2018

In December 2018, the Court of Appeal ruled that the 'transitional protection' offered to some members as part of the 2015 public sector pension reforms amounts to unlawful age discrimination. At the time the Government said it would seek permission to appeal the decision. However on 27th June 2019 the Government was denied leave to appeal the pensions age discrimination ruling by the Supreme Court.

Government concedes age discrimination will need to be remedied across all public sector pension schemes – July 2019

Interim declarations were made by the Employment Tribunals in respect of the firefighters and judiciary, who made the original legal challenges. The declaration confirms that the claimants are entitled to be treated as members of their legacy pension scheme. For non-claimants, i.e. members in the NHS, Local Government Pensions Scheme (LGPS) or Civil Service public sector pension schemes, the Chief Secretary to the Treasury set out in July 2019 that the discrimination identified by the Court of Appeal (that transitional protection gave rise to unlawful discrimination) will need to be removed from all public service pension schemes.

Deferred choice underpin or immediate choice, HM Treasury consultation – July 2020

The Government proposed to do this by way of legislation and consulted on changes. The intention is for a central consultation covering all public service schemes, except the judiciary and local government where separate arrangements will be made. The two lead working proposals by the Treasury to address the retrospective element of the age discrimination identified by the Court of Appeal are either a deferred choice underpin or an immediate choice.

The National Health Service (NHS) and Civil Service pension Scheme Advisory Boards (SAB) have Unite representation. The Local Government Pensions Scheme (LGPS) is slightly different in that there is an underpin which was written into the rules of the scheme at the time of the 'transitional protections', which means members are protected and therefore members don't have to make a choice. This doesn't mean that there isn't anything for the LGPS to do on this, just that the process will be different. Unite also has SAB representation on the LGPS where we have raised our members' concerns in exactly the same way we have for the NHS and Civil Service. In addition, Unite and other trade unions have meet with HM Treasury officials to make representations on behalf of our memberships.

Deferred choice underpin (DCU) chosen – February 2021

In February 2021 the Government announced that it will implement the deferred choice underpin (DCU). This will give eligible scheme members a choice at the point their pension becomes payable, whether they wish to receive benefits from their legacy scheme or benefits equivalent to those that would have been available under their reformed schemes in relation to their service between 1 April 2015 and 31 March 2022.

In the meantime, eligible members will be deemed to have been members of their legacy schemes for any period of service between those dates. Legacy schemes will close on 31 March 2022. From 1 April 2022, all those who remain in service will do so as members of the reformed schemes that were introduced in 2015. Benefits built up in the legacy schemes will be protected.

There is currently nothing for members to do, as the process of passing legislation and implementation needs to take place. Please see the following link for further information - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033170/PSP_Leaflet.pdf

Cost Cap

Cost cap floor breached – September 2018
A cost cap mechanism is in place for public sector schemes, designed to ensure public service pension schemes remain affordable and sustainable for 25 years. In theory employers pay no less than a fixed floor and no more than a fixed ceiling, and if costs exceed the ceiling then action is taken to bring it back in line with target cost. This is measured every four years in line with other public service valuations. For Public Sector schemes there is a 2% buffer either side of the employer future service contribution rates. Perhaps surprisingly, given the general trend for increasing pension costs, on 6th September 2018 the Treasury announced the floor had been breached, which meant benefit improvements for members were required.

Scheme Advisory Boards (SAB) recommend member benefit improvements – November 2018
Over a number of months Unite alongside other public sector trade unions and employer representatives on the individual SAB for the NHS, LGPS and Civil Service came up with different member improvements for each scheme to recommend to the Government.

Government pause to valuations – January 2019
The Government announced a pause to the valuations of public sector pension schemes following the firefighters and judiciary age discrimination court ruling on part of the 2015 pension reforms. At the time the Government said:

"…given the potentially significant but uncertain impact of the Court of Appeal judgment, it is not now possible to assess the value of the current public service pension arrangements with any certainty. The provisional estimate is that the potential impact of the judgment could cost the equivalent of around £4 billion per annum. It is therefore prudent to pause this part of the valuations until there is certainty about the value of pensions to employees from April 2015 onwards."

This didn't stop the Government from pushing through with the increased employer contributions part of the valuation.

Cost control mechanism pause lifted and valuations update – July 2020
In July 2020 the Government announced that the pause to the cost control mechanism would be lifted, and the cost control element of the 2016 valuations process completed.

The Government has said that the increased value of schemes to members as a result of the McCloud remedy will be taken into account in the completion of the 2016 valuations. This will lead to higher costs than was previously reported above. Early estimates indicate that some schemes could now breach the 2% increase in cost ceiling.

If normal statutory procedures were followed, any ceiling breaches would lead to a reduction in member benefits in order to bring costs back to target. The Government has said that for this one-off 2016 valuation if cost ceiling breaches do occur that benefit levels will not be reduced.

However the Government has said that future cost control policy for future valuations will be set out once the Government Actuary review of the mechanism has concluded and any recommendations have been fully considered by government.

Government cost cap Consultation recommendations – October 2021
The Government has completed its consultation on the public sector pensions cost cap mechanism process. The background to this is that when public sector pension reforms were made in 2015, a cost cap mechanism process was put in place, which was meant to be in place for the next 25 years.

Following the first cost cap mechanism process delivering potential improvements to members' benefits, which the Government doesn't intend to honour, the Government has decided that the new mechanism and supporting discount rate should be looked at again.

Unite and other trade unions responded to the consultation saying that the current cost cap mechanism process isn't broken, so doesn't need fixing. However the Government has proposed changes to the cost control mechanism, which means future costs will focus on the reformed scheme only, there will be a 3% corridor and an economic check. In short, the Government has tried to devise a mechanism that will never lead to member benefit improvements again.

In addition, the Treasury has finalised Directions which confirm the provisions set out in the draft version of the age discrimination McCloud remedy is to be captured as a 'member cost', and that the cost will be spread over a four-year period.

Cost Control Judicial Review (JR) - November 2021
Trade unions including Unite have applied to the High Court for judicial review to challenge our members paying the cost of the Government's age discrimination fallings identified in McCloud.

The case is due to be heard from 30th January to 3rd February 2023.

Any update/developments will be issued to the Unite Executive Council and relevant National Industrial Sector Committees (NISCs) when they become available.