

# AGE DISCRIMINATION IN 2015 NHS PENSION SCHEME TRANSITIONAL PROTECTION ARRANGEMENTS



Access to good quality, stable and sustainable pension provision has been a long-standing aim for the RCN. It is a key tenet of the RCN's emerging pay strategy and a priority area for the Trade Union Committee

This briefing aims to provide you with an update on two legal cases that the RCN has been monitoring for a number of years on the discriminatory nature of transitional protection arrangements introduced with the 2015 public sector pension changes, and on the RCN's position with regard to the impact on the NHS pension schemes.

## Background

Following the publication in 2011 of Lord Hutton's Independent Public Service Pension Commission report, several changes were made to public service pension schemes including the NHS Pension Scheme from 1st April 2015. The schemes changed from "final salary" to "Career Average (CARE)", normal pension age was set equal to state pension age and protection arrangements were agreed that dictated who moved to the new scheme and when. Members closest to retirement determined by their age on 1st April 2012, moved to the new arrangements later, if at all, than younger members.

- Members of the schemes who had less than 10 years before retirement were entitled to full protection, so after the change they retained all the benefits of the old scheme.
- Those with between 10 and 14 years until retirement had tapered protection, meaning they retained some benefits for a limited period.
- Those with more than 14 years until retirement got no protection and were placed immediately in the new scheme.

Two legal cases began in 2015/2016 and considered whether members of the judges' and firefighters' pension schemes affected by the transitional protection arrangements were discriminated against on the grounds of age. This was based on the fact that younger scheme members were eligible to less favourable benefits than older scheme members during a transition period after their pension schemes changed.

The Government accepted it had discriminated against the claimants but argued that this was a proportionate means of achieving a legitimate aim – to protect those closest to retirement.

The judicial claimants were successful in the Employment Tribunal, and later in the Employment Appeal Tribunal and Court of Appeal when the Government appealed the case.

The firefighter claimants were unsuccessful at first because the Employment Tribunal held the transitional provisions were a proportionate means of achieving a legitimate aim. However, when the firefighter claimants appealed this decision, although the Employment Appeal Tribunal agreed with the Employment Tribunal's findings on a legitimate aim, it remitted the case for further consideration as to whether the means to achieve that aim were proportionate.

The Government appealed the decisions to the Court of Appeal which in December 2018, decided that both the judges' and firefighters' age discrimination claims should succeed.

Both claims were sent back to the Employment Tribunal to determine remedy, but the Government requested permission to appeal to the Supreme Court. This application was refused on 27 June 2019 and therefore the Court of Appeal decision stands - that 'transitional protection' gave rise to unlawful discrimination in the Judges' and Firefighters' schemes.

In December 2019, the Employment Tribunal considering the FBU and judiciary cases issued an Interim Declaration to address immediate issues before the Final Declaration is made – expected to be later this year or next. This declaration is specific to these cases and the claimants involved in them. The interim declaration does not have any wider application to the other public sector pension schemes at this time.

#### [What is the RCN view on legal action?](#)

Throughout this time the RCN has been monitoring the situation closely engaging with legal and pension experts, and actuarial advisers. To date, the RCN has taken the view that it was not necessary to seek mass litigation but only to lodge claims where members were in danger of falling foul of legal time limits for action. Members leaving NHS employment were therefore encouraged to seek advice on whether to lodge a claim. The British Medical Association (BMA) and the Prison Officers Association (POA) lodged claims against the NHS Pension Scheme on behalf of some of their members – these were stayed after the Supreme Court ruling.

In a [Ministerial Statement](#) issued on 25<sup>th</sup> March 2020 Government stated that members of public service pension schemes with relevant service will not need to make a claim in order for the eventual changes to apply to them. "Relevant service" has not been clearly defined but is likely to cover all who were in a public sector scheme (like the NHS Pension Scheme) on 1/4/2015.

#### [Impact on the NHS Pension schemes](#)

The UK Government issued a Ministerial Written Statement on 15 July 2019 confirming that it believed that the difference in treatment provided by the transitional arrangements would need to be remedied across all public sector pension schemes including the NHS, civil service, local government, teachers, police and armed forces.

In January 2020 the three Scheme Advisory Boards for the NHS Pension schemes were asked by Government to give a view on options to achieve remedy in the NHS pension scheme – i.e. how to remove the discriminatory factor (transitional protection). There are three NHS

Pension schemes – one for England and Wales (administered by NHS BSA in Fleetwood), one in Scotland (administered by SPPA) and one in Northern Ireland (administered by HSC BSO). The RCN is represented on all three scheme advisory boards and holds the staff side co-chair position in the England and Wales scheme and the Northern Ireland scheme.

Unfortunately, the information provided to the SABs did not have sufficient detail or clarity on key issues which, coupled with an unreasonably short timescale for consideration, has not allowed for meaningful engagement. The England and Wales SAB has therefore decided NOT to make a recommendation to Government on any preferred approach. It is likely that the other SABs will do the same. In a [Ministerial Statement](#) issued on 25<sup>th</sup> March 2020 Government stated its intention to publish a White Paper outlining their proposal for remedy across the public sector later in the year and the SABs and other stakeholders – including the RCN – will have the opportunity to respond at that point.

**UPDATE** – On 16<sup>th</sup> July 202 – HM Government launched a consultation on how to achieve remedy in public sector pensions. We will be engaging members on our response to this over the summer but in the meantime details of the consultation including the proposals can be found [here](#).

Our key priority is to ensure that our members have access to good quality, stable and secure pension arrangements now and in the future.

Nicola Lee, National Officer,

RCN Employment Relations Department

March 2020

Updated July 2020