

ALLEN & OVERY

Pensions in Dispute

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Welcome to our quarterly pensions litigation briefing, designed to help pensions managers identify key risks in scheme administration, and trustees update their knowledge and understanding. This briefing highlights recent Pensions Ombudsman determinations that have practical implications for schemes generally. For more information, please contact pensions.team@allenovery.com.

Correcting underpayments: tax charges

When pensions have been underpaid in error, trustees and administrators need to consider what steps to take to correct the error. In some cases, correcting the payment might lead to tax charges. A recent decision by the Pensions Ombudsman ([Mr E](#)) could provide support for trustees and administrators arguing against the imposition of tax charges.

In this case, the member was told several years after he retired that his benefits had been understated and that his pension would be corrected going forward to make up the difference, but a top-up pension commencement lump sum based on the shortfall would not be paid, as this would be an unauthorised payment (UAP).

The Ombudsman upheld the complaint, ruling that the administrator should calculate the lump sum that would have been payable at retirement (together with interest) and that the trustees should pay any top-up amount plus any related costs and charges (both the member's UAP charge and any related scheme sanction charge).

The Ombudsman drew attention to a provision in the Finance Act 2004 which states that, among other reasons, a UAP will not be scheme chargeable if:

- it is made to comply with an order of a court or of a person or body with power to order the making of the payment; or
- it is made on the ground that a court or any such person or body is likely to order the making of the payment (or would be were it asked to do so).

Helpfully, in relation to the member's UAP charge, the Ombudsman also commented that '[i]f the circumstances are explained to HMRC, it is entirely possible HMRC will make a concession to allow for the fact a genuine mistake occurred in calculating the original PCLS in 2012 given the above provisions in the Finance Act'.

To read more about the decision, see this [post](#) on our PensionsTalk blog.

What does this ruling mean for trustees?

This is the first known example of the Ombudsman ruling on this issue, and it could be used by other schemes to support an argument to HMRC that scheme sanction and/or member UAP charges should not apply in analogous situations.

Prove it or lose it: justification and discrimination claims

Pension schemes are inherently discriminatory, but not all discrimination is unlawful. There is more than one avenue for bringing a discrimination claim, and often (depending on the claim and whether an exemption may apply), the key issue will be whether a discriminatory difference in treatment is justified. The exact test will depend on the type of claim, but in general terms it must be shown that the treatment was a proportionate means of achieving a legitimate aim. Two recent cases highlight the fundamental importance of having good quality evidence to support a valid justification defence to a discrimination claim.

In the first case ([McCloud](#)), over 200 members of the judiciary argued that transitional protections for older members on the closure of the existing scheme constituted unlawful direct age discrimination and (because the judiciary is more diverse amongst younger members) unlawful indirect race and sex discrimination.

The Employment Tribunal was critical of the government's case. The government had acknowledged that there had been no analysis or research (general or specific) behind its decision to include the transitional protections in the judicial scheme.

In the Tribunal's view, it relied on generalisations, assertions and speculation to support its case. This had a significant effect on the government's likelihood of success:

- There was no rational explanation for the decision to treat older members more favourably – not only was there no evidence that these persons would suffer additional hardship, but the evidence was overwhelmingly to the contrary. It had been argued that these members were more likely to have had fixed retirement plans that would be hard to alter, but there was no specific evidence in support of this.
- There was also no evidence that the government could not have achieved its aim by offering lesser protection, nor detailed evidence explaining why the protections had been designed with reference to the age group in question – so even if there had been a legitimate aim, the measures went beyond what was necessary to achieve that aim.

The government has not confirmed if it will appeal. Click [here](#) to read more about this case.

In the second case in the Supreme Court (*Brewster*), the local government pension scheme in Northern Ireland was challenged by the unmarried partner of a deceased member who had been denied a survivor's pension. The rules required her to be nominated to receive this by the member (as well as meeting the other criteria, such as financial dependence/inter-dependence). A similar nomination requirement did not apply to spouses or civil partners. The issue was whether this requirement (which was potentially discriminatory on the grounds of her unmarried status under the European Convention on Human Rights) could be objectively justified.

In this case, the only reason identifiable for introducing the rule was that it was necessary and/or desirable that the Northern Ireland rules reflected the rules for the local government scheme in England and Wales. The government did put forward some 'after the event' justifications, which were considered by the court, but it was not convinced by these: 'Vague suggestions as to the workability of the scheme and the advantages of actuarial predictions were made but these were not supported by evidence'. The court also applied a higher degree of scrutiny because these were not reasons considered at the time. Ultimately, the court concluded that the rule was not objectively justified and that the survivor was entitled to the pension. To read more about this case, see this [blog post](#).

What does this mean for trustees?

These cases are a strong reminder of the need for high quality evidence to support a justification defence – claims that are not backed up by sufficiently strong evidence will be rejected.

1. Check that you have evidence supporting why any potentially discriminatory treatment meets the relevant test for justification, which means meeting all elements of the test. For example, can you establish a 'legitimate aim', as well as why the treatment is a proportionate way of achieving that aim?
2. Ensure that good record-keeping practices are in place, so that historic records can be relied upon at a future date (for example, records detailing the reasons behind the introduction of a rule or practice, and any subsequent consideration of the reasons for retaining the rule). Record-keeping is key to both [avoiding](#) and [managing](#) disputes.
3. Take steps to compile any additional supporting evidence that might be required, such as detailed financial or operational information. Imprecise or general information will likely be unconvincing.

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