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## Court gives important guidance on justifying pension provisions which are potentially discriminatory

The Court of Appeal handed down a decision on 20 December 2018 declaring the government's transitional arrangements in respect of judicial and firefighter pension schemes discriminatory.

### Background

The case concerns transitional arrangements that were brought in to deal with the transition of members from:

- the more favourable Judicial Pension Scheme to the less favourable New Judicial Pension Scheme; and
- the more favourable Firefighters' Pension Scheme 1992 to the less favourable new firefighters' pension schemes.

These transitional arrangements determined which judges and firefighters could remain members of the more favourable pension schemes, and which had to become members of the newer, less favourable, schemes. The criteria determining this was based on the members' age:



The claim was brought by those who were entitled to limited or no protection in respect of the more favourable schemes. It was argued that these transitional arrangements were discriminatory on the grounds of age.

The government acknowledged that these transitional arrangements were age discriminatory. However, direct age discrimination can be justified if it is a proportionate means of achieving a legitimate aim. The government therefore argued that this justification applied. One of the aims of the measures was to address the government's view that the older members (who were therefore closer to retirement) had less time to make adjustments to their financial planning, and therefore required additional protections.

## Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) decisions

Before reaching the Court of Appeal, the cases were heard by both the ET and the EAT.

Claim	Decision of ET	Decision of EAT
<b>Judges' claim</b>	Discrimination was not justified	Discrimination was not justified
<b>Firefighters' claim</b>	Discrimination was justified	Remitted the case to the ET for consideration as to whether measures were proportionate

### Court of Appeal decision

The Court of Appeal held that the transitional provisions did discriminate on the grounds of age and that the aims pursued by the government in adopting these measures were not legitimate. This discrimination was not, therefore, justifiable.

The court acknowledged that it did have to afford the government a margin of discretion in relation to legitimate aims and the means of achieving those aims. The court should, however, determine whether a particular aim is legitimate and the means applied proportionate. The court should then consider if the aim is legitimate in the circumstances of the particular case. The court further held that the legitimacy of aims inquiry required an objective assessment to be carried out by the court, and could only occur with supporting evidence.

The government had not supplied any evidence that protecting the members closest to retirement was a legitimate aim. The court made clear that a moral decision to protect older members because it 'felt right' was "not good enough".

### Comment

This decision is likely to have a substantial financial impact. Further, the decision also highlights that any attempt to justify discriminatory practices should be backed up with supporting evidence and be more than assertions and generalisations. Where directly discriminatory practices are occurring, "the burden of proof of the legitimacy of a claimed aim is a high one".

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