

FREQUENTLY ASKED QUESTIONS

LONG TERM REFORM OF POLICE PENSIONS: THE LEGAL FRAMEWORK

This FAQ document has been prepared to assist recipients in understanding the steps taken by the PFEW in considering a legal challenge to the introduction of the 2015 Career Average Re-valued Earnings (CARE) scheme and the transitional provisions, having taken further advice from leading counsel. It does not represent legal advice and should not be construed as such. Furthermore, it does not seek to explain all the legal intricacies of the opinions given by counsel. Wherever possible it has been written in layman's terms to try and avoid confusion and to aid clarity. However, this FAQ document represents the best advice available to us on the legal status of the 2015 CARE scheme and transitional provisions at the date of issue.

Summary

Throughout the pension reform process PFEW has listened to the views and concerns of members and the Pension Challenge group, and we have taken advice from our lawyers and from leading counsel about the legality of the Government's changes. We have recently taken further advice from leading counsel as to whether the position has changed or is affected by the publication of the Police Pensions Regulations 2015.

All possible challenges have been considered including:

- public law (judicial review: but being primary legislation, this is not subject to this);
- European law and Human Rights law (in several recent cases the European Court of Human Rights has not been swayed by arguments that those on the public service have had to bear the brunt of economic reform);
- and discrimination. (The key challenge here considered was whether these pension changes would be age discrimination: however, the law states that age discrimination can be justified as a proportionate means to a legitimate end, and it is likely to be considered as such in this instance).

At this time, and bearing in mind PFEW's funding criteria, we will not be challenging the introduction of the Police Pension Scheme 2015. However, we will continue to monitor how the scheme operates in practice, and we maintain an open mind should circumstances change that give rise to a potential successful legal challenge.

THE LEGAL BASIS FOR POLICE PENSIONS

1. What has been the Federation's approach?

The Federation has always understood the critical importance of pensions to police officers. The Government's proposals for reform were a matter of very serious concern from the outset. Therefore the approach taken by PFEW has been twofold:

Engagement

In March 2012 the PFEW was a constituent part of the Staff Side of the now disbanded Police Negotiating Board (PNB). The Home Secretary wrote to the Independent Chair of the PNB in March 2012 with her proposals for the CARE 2015 Scheme. This was in accordance with her statutory obligation to **consult** with the PNB about the new scheme. There was no statutory obligation for her to **negotiate** with PNB about the terms of the proposal as pensions were not subject to arbitration in the same way that pay and other negotiable conditions of service were at that time.

Bearing in mind that it was always within the power of the Home Secretary to impose the original terms of the proposal Staff Side, including the PFEW, chose to engage in the consultation process in order to try and influence the Government and obtain an improved proposal for its members.

The PFEW's stance in relation to the issue was set out at length in the response to the Home Office's initial proposals at:

http://www.polfed.org/documents/Letter_HS_to_SS_response_to_pensions_220612.pdf

In the course of the consultation and subsequent discussions Staff Side managed to obtain significant and valuable concessions and improvements including the right to retire at 55 (with actuarial reduction) and tapered protection, which allows more members to remain in their existing scheme for a longer period.

Consideration of possible legal challenges

Throughout the process of the introduction of the pension changes the PFEW has taken advice from its lawyers and from leading counsel on whether there is a legal challenge available to stop the Career Average Re-valued Earnings (CARE) 2015 scheme being introduced, or to prevent it being applied to existing members. The diagram contained in the Appendix to these FAQs shows the timeline and the steps taken.

However, the PFEW has been advised consistently throughout the process that there are no grounds to successfully challenge the introduction of the new regulations. All possible avenues for a challenge have been considered, including public law (judicial review); European law, human rights and discrimination.

The rest of this document explains in more detail the reasons why a successful legal challenge cannot be made.

2. What is the legal basis for police pensions?

The Public Service Pensions Act 2013 ("the Act") applies to pensions across the public service including police pensions.

Section 18 of the Act prevents further pension being earned in the Police Pension Scheme 1987 (PPS) and the New Police Pension Scheme 2006 (NPPS) from 1 April 2015 other than in accordance with transitional arrangements.

This does not affect accrued rights in the PPS and the NPPS.

The detailed rules of the 2015 CARE scheme and the transitional arrangements are found in the Police Pensions Regulations 2015.

SECTION 2 POLICE PENSIONS ACT 1976

3. What about section 2 of the Police Pensions Act 1976?

Prior to the Public Service Pensions Act 2013, the legal basis for police pensions was the Police Pensions Act 1976 and the regulations governing the PPS and the NPPS were made under that Act.

Section 2 provided that any pensions regulations made under the Police Pensions Act 1976 could not worsen the position for serving members in relation to compulsory retirement age or scale of pensions unless members agreed.

The Public Service Pensions Act 2013 negates the effect of the Police Pensions Act 1976. Police pensions are now made under the 2013 Act and section 2 of the 1976 Act does not apply.

4. Can the Government change the law?

Yes. It is a fundamental principle of Parliamentary sovereignty that no government can bind future governments. This means that the Government was able to create new law to avoid earlier legislation, including the Police Pensions Act 1976.

5. Wasn't it unfair to get rid of the protections in section 2?

PFEW considered it unfair and pressed for the changes to apply only to new recruits. However the Government was committed to implementing the changes across the public service for existing workers, subject to the transitional protections.

6. If it is unfair, doesn't that mean it is unlawful?

No. Not everything that is unfair is unlawful. The various possible challenges are considered in the questions below.

JUDICIAL REVIEW

7. Is a judicial review challenge to the Public Service Pensions Act 2013 possible?

No. Primary legislation (i.e. an Act of Parliament) is not subject to judicial review. All angles were considered including tangential challenges to the policy which led to the Act, but we were advised that these would fail.

8. Does a challenge arise because the Regulations were only laid in March 2015?

The Police Pensions Regulations 2015 were only laid before Parliament on 5 March 2015, less than a month before the new scheme came into force on 1 April 2015.

The Federation was disappointed that the regulations were not available earlier, and made this clear to the Home Office. However, the delay does not mean that a challenge arises. The main elements of the scheme were known from September 2012.

HUMAN RIGHTS

9. Is there a breach of EU Human Rights law?

Counsel looked at relevant human rights legislation. The European Convention on Human Rights (“the ECHR”) is incorporated into UK law by the Human Rights Act 1998 (“the HRA”). The legislation protects the rights of people not to be deprived of the peaceful enjoyment of their possessions/property.

Pension rights accrued to date are likely to count as property rights but as these are protected, there is no breach. It is arguable whether members’ expectation of future benefit accrual on the existing basis would count as a property right for these purposes. However, Counsel’s opinion is that even if it did, the interference with those property rights could not be successfully challenged. This is because the changes would be viewed as a proportionate means of achieving a legitimate aim in the public interest and cannot be viewed as manifestly without reasonable foundation or as imposing an excessive burden on the claimants. This is due mainly to the introduction of the transitional arrangements and the provision of the ability to accrue future benefits in the new scheme.

Counsel goes on to note that this view is strengthened by the findings in a number of recent EU cases from Greece and Portugal involving the introduction of austerity measures. In these cases the European Court of Human Rights has not been swayed by arguments that individuals in public service have been unfairly made to bear the brunt of economic reforms.

DISCRIMINATION

Age Discrimination

10. Don’t these changes amount to age discrimination?

PFEW has been advised that a claim that the changes are unlawfully discriminatory is likely to fail. The position is explained in more detail below.

11. Are members being treated less favourably on the grounds of their age?

The central element of pension reform – the replacement of the PPS and the NPPS with a new career average scheme – is not in itself less favourable treatment on grounds of age.

It is the transitional provisions (full and tapered protection) which could be construed to involve such treatment.

The transitional provisions are clearly in part directly linked to an individual's age and, where applicable, the service criterion is indirectly linked to age because generally older members are more likely to have long periods of accrued service.

The most obvious examples of age related less favourable treatment are:

- the fact that members over 45 in PPS and NPPS are fully protected, but those who are under 45 are not; and
- members with 20 years' service in PPS are fully protected, but those with less than 20 years' service are not, and younger members are less likely to have 20 years' service.

12. What would an age discrimination challenge to age related protection and the tapering arrangements achieve?

It is important to understand that an age discrimination challenge would not stop pension reform.

The age discrimination provisions are designed to ensure equal treatment rather than necessarily good treatment.

Even if the age related protection and tapering arrangements were found to be unlawfully discriminatory on grounds of age, the most likely outcome would be the removal of those protections for all members.

However, PFEW has been advised that a claim that the changes are unlawfully discriminatory is likely to fail. The position is explained in more detail below.

13. Why would a claim that the transitional arrangements are age discriminatory fail?

Unlike some other forms of discrimination, less favourable treatment on the grounds of age can be justified.

The test for justification is whether the less favourable treatment is a proportionate means of achieving a legitimate aim.

In considering whether the treatment is justified:

- The focus will be on the particular treatment (i.e. the transitional provisions) and not the general measure (pension reform).
- A legitimate aim will need to be a general social policy objective, but the Government will be given a broad discretion to choose a particular aim in social and employment policy and also in relation to the measures capable of achieving it.

The transitional arrangements arise in the context of the recommendations of the Government's decision to reform public service pensions following the Hutton Review and to move all public service workers on to such schemes.

It is well established that it is legitimate to protect the accrued rights and the legitimate expectations of workers favoured by an earlier system through transitional arrangements and therefore the provision of full and tapered protection will clearly be regarded as meeting a legitimate aim.

In counsel's opinion it will be viewed as proportionate to protect those who are closest to retirement and who have the least amount of time to make adjustments. This approach is similar to that adopted in relation to changes in the State Pension Age.

Also the tapering arrangements avoid a "cliff edge" which would mean that a member's position could vary between full and no protection on the basis of the day he/she was born.

The PFEW is advised that there is, therefore, no realistic chance of a finding that the transitional arrangements are disproportionate.

14. But aren't the limits on transitional protection just about saving money and isn't cost alone incapable of amounting to a legitimate aim?

The Government is entitled to shape long term pension arrangements in accordance with its general social and economic objectives as it has done by passing the Public Service Pensions Act 2013 and making the Police Pensions Regulations 2015. It is also entitled to take the view that as a general principle all police officers should move to the 2015 CARE scheme. Transitional protections are an exception to that principle to provide a "buffer" for the people who will find it most difficult to adjust and those are likely to be the ones who are closer to retirement. Consequently the PFEW is advised that whilst cost saving is clearly a consideration, it is not the only factor, and the introduction of limited transitional protection can be justified for reasons other than cost.

Sex Discrimination

15. Are the reforms likely to amount to sex discrimination?

The pension reforms do not treat men and women differently on grounds of their gender, so there is no direct discrimination on grounds of sex. Any discrimination would be indirect.

The arrangements for members who serve or have served part-time and of members on career breaks were matters of particular concern for the Federation during discussions with the Home Office about the detail of the scheme. The Federation pressed for:

- members who are working part time during a period of tapering protection to be able to extend their tapering period so as to reach the same level of old scheme service (e.g. a part time member doing 50% hours who is entitled to 1 year's tapering should be allowed to have 2 years' part-time tapering, to equate to 1 year's additional pensionable service); and
- members who take a career break which overlaps with all or part of a period of tapering protection to be able to "pause" their tapering period while on the career break;

but the Home Office refused to make these changes.

The position of members who serve or have served part-time and of members on career breaks, and whether their treatment amounts to indirect discrimination because these provisions are more likely to be utilised by female members, has been considered carefully.

APPENDIX

**CONSIDERATION OF POSSIBLE LEGAL CHALLENGES:
TIMELINE AND STEPS TAKEN**

