**The Judges' and fire fighters' pensions' challenges: The Court of Appeal ruling, and background.**

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**Date: 16 January 2019**

**BACKGROUND**

The changes made to pension provision for those across the public services in 2015 stemmed from the Hutton Review which started in 2010 and was cross party. *A timeline of key events since is on page 9.*

Following the findings in the Hutton Review the Coalition Government decided to make wholesale changes to public service pensions due to factors including increased life expectancy, changes in pension provision in the private sector and a need to impose tighter controls on public spending. This gave rise to the Public Service Pensions Act 2013 which provided for the making of regulations introducing the new pension schemes, many of which (including those for fire fighters and police officers) involved a switch from a final salary scheme to a less generous career average revalued earnings (CARE) scheme.

The first position adopted by those representing employees in the public service schemes, including PFEW, was that any new schemes introduced should only apply to new recruits/members and that current members should be allowed to remain in the existing final salary schemes. However, the Government, based on the findings of Hutton (see below), was adamant that this would not be the case as it would not meet its desired objectives.

Ultimately two types of protections for members were put into the new schemes, across the public sector: accrued benefits, and transitional protections.

The Hutton Review had made it clear that as part of any changes introduced it was necessary to ensure that those pension benefits accrued up to the date of change were protected. Provided that protection of accrued pension was enshrined in any changes made, Hutton stated that there was no requirement to provide members with any further protections, and Hutton warned against doing so on the basis that such further protections might be discriminatory. If the Government had followed the Hutton recommendation, then everybody would have moved into the new schemes at the same time regardless of their length of service. Only accrued protections would have been built into the schemes.

The Chief Secretary to the Treasury, Danny Alexander, and most unions, including the TUC, discussed the possibility of additional protections. The government took into account how state pensions had been changed, and the time period for transitional arrangements in that. Following detailed discussions with the TUC the Government decided to introduce transitional arrangements providing further protections for existing members. These meant that any member who was within ten years of retirement would be able to continue in membership of their existing final salary scheme and, to avoid a "cliff edge" scenario arising, those members within a further four years from their date of retirement would be allowed to remain in their existing scheme for a graduated length of time before becoming members of the new scheme.

PFEW engaged in consultations with the Government in order to obtain the best benefits it could for as many of its members as it could. As a result of this, further concessions – similar to those across the public sector - were obtained for police officers including weighted accrual (which takes into account the loss of the ability to accrue at 2/60ths after 20 years of membership) for former members of the Police Pension Scheme (PPS) 1987 and the continued ability to draw a pension at age 55 years.

These transitional arrangements were reflected in the regulations introducing the new schemes across the public service.

It should be noted that transitional protections are a mechanism that staff associations including the PFEW try to achieve for members in numerous consultations / negotiations regarding pay and conditions (e.g. assimilation onto pay scales following the pay freeze; red circling of rent allowance; etc).

Around 67,000 of our members benefit from transitional protections, by having either full or tapered protections.

Following the core PFEW policy of ensuring the best deal for all many members as possible, the PFEW like all other unions took the stance that a deal wherein over half our members benefited was better than the only possible alternative, where ALL members would have had only accrued rights, and therefore no-one would have had a second protection.

**WHAT'S THE LEGAL CASE ABOUT?**

The case was never about the establishment of the new schemes themselves which was entirely legal.
The judges and the Fire Brigades' Union brought a case against the Government on the grounds that the transitional arrangements were directly age discriminatory because they favoured older members as opposed to younger members by giving them additional protections which did not apply to the younger members. They also claimed that the transitional arrangements were indirectly discriminatory on the basis of both sex and race as a result of the younger cohort of both judges and fire fighters, to whom the additional protections did not apply, containing a higher proportion of women and BME members.

The claim was that those who received no additional protection were discriminated against and that those who received tapered protection rather than full protection were also treated less favourably and therefore discriminated against.

The Government never sought to deny that the transitional arrangements were discriminatory. However, discriminatory changes can be legitimised within the terms of the relevant legislation in circumstances where it can be proved that they represent a proportionate means of achieving a legitimate aim. There is a plethora of complex (and potentially contradictory) case law, both under UK and European law which examines and seeks to define precisely what is and is not a proportionate means of achieving a legitimate aim and indeed what constitutes a legitimate aim, including what tests need to be applied to any circumstances and evidence produced to back up such a contention. In the context of changes made by a Government there is both statutory and case law which suggests that governments are allowed a wider degree of discretion than private employers in seeking to apply a social policy which can include; legitimate employment policy, and labour market and vocational training objectives.

The Government, in defending itself against the claim, has sought to argue that:

- the transitional arrangements were part of a consistent social policy applicable across the public sector to the changes made to pension provision;
- that the aim of protecting those closer to retirement was a legitimate aim; and
- that those transitional arrangements were a proportionate means of achieving that aim.

If the Government had not given the more generous treatment to anyone and had instead made everyone move into the new schemes at the same time, then there would have been no discriminatory treatment and no claim.

The claims have been heard in the Employment Tribunal, the Employment Appeals Tribunal and have now been heard in the Court of Appeal.

**WHO IN POLICING MIGHT BE AFFECTED?**

See page 7 for the numbers of officers with full, tapered, or no protection. All officers who were members of either the Police Pension Scheme (PPS) 1987 or the New Police Pension Scheme (NPPS) 2006 as at 1 April 2012 and who were within ten years of their normal pension age were fully protected and entitled to remain active members accruing future pension benefits under their existing final salary scheme.

All officers who were members of either the PPS or the NPPS as at 1 April 2012 and who were within four years of qualifying for full protection, as described above, were entitled to tapered protection meaning that, on average, for every month closer they were to qualifying for full protection, they were entitle to remain an active accruing member of their existing scheme for an extra 53 days past 1 April 2015 before becoming a member of the new CARE scheme.

As at the end of March 2012 there were 43,310 members of the PPS who were not entitled to any form of transitional protection and 23,531 members of the NPPS, making a total of 66,841. All of these members may be entitled to some form of remedy (see below) for discrimination should the claim ultimately succeed.

On top of this 16,709 members of the PPS and 1,394 members of the NPPS, a total of 18,103, received only tapered protection rather than full protection. All of these members who have ceased to be active accruing members of the PPS or NPPS on the cessation of their tapered protection since 1 April 2015 *may* also be entitled to some form of remedy (of varying degrees according to each individual case) should the claim ultimately succeed. Those members who are still benefitting from tapered protection and remain in their original scheme will not currently be entitled to a remedy as they will not be able to demonstrate a loss.

Note, however, that officers who are in the NPPS scheme and have been moved across may actually not be any worse off. That is, their benefits under the CARE 2015 scheme may be as good as those under the NPPS scheme. In that case, they will not be entitled to any compensation. It would have to be worked out for every individual. Notably Leigh Day did not accept claims from this group of people.

**WHAT THE RULING SAYS**

Previously in the Employment Tribunal in the Judges' case it had been found that the introduction of the transitional protections was not a legitimate aim and that even if it had been, the means of achieving it were not proportionate. Subsequently in the Employment Appeals Tribunal it had been found that whilst the introduction might have been capable of being a legitimate aim, because of the unique situation (including tax implications) of the judges the test of proportionality required had not been met.

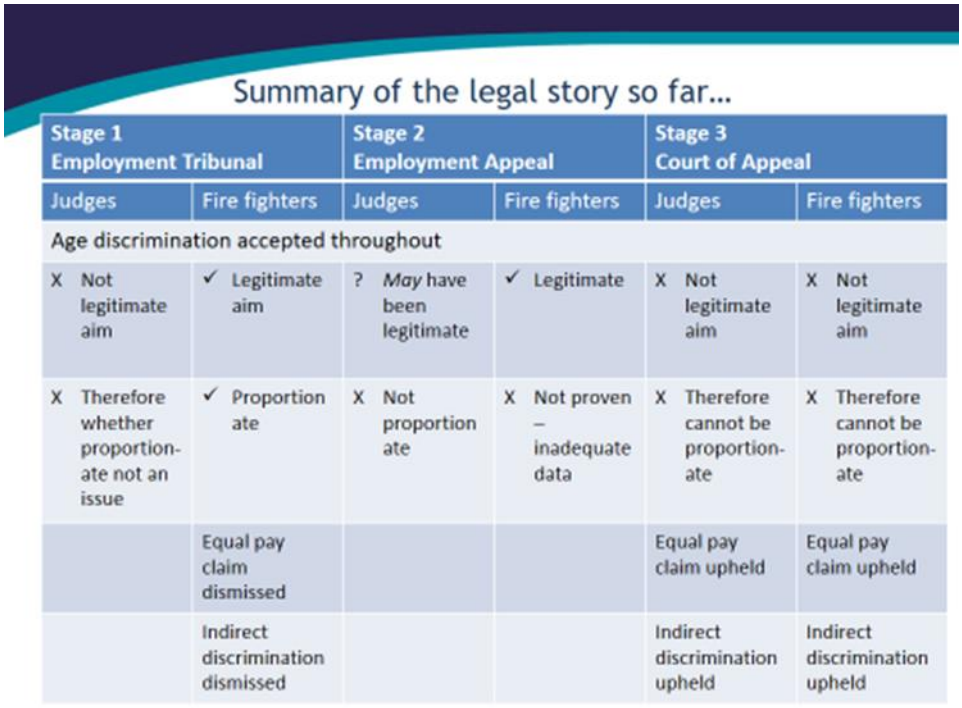
Previously in the Employment Tribunal in the Fire fighters case the introduction of the transitional protections had been found to be a proportionate means to achieve a legitimate aim of social policy. Subsequently in the Employment Appeals Tribunal it was found that whilst it was a legitimate aim the ET had not applied the more rigorous test of proportionality required under UK law and therefore proportionality of the means was not proved.

The Court of Appeal concluded that in both cases the ET and EAT judges had - on one point or other, and to one degree or another - misdirected themselves as to the applicable law. It went on to state that there is no conflict between UK and EU law, and that whilst the Government does have a broader discretion to adopt and implement a social policy, in order for it to constitute a legitimate aim there needs to be a rational evidenced justification for the change rather than a mere reliance on visceral instinct. The Government had failed to provide a rational explanation for the discriminatory treatment and provided no evidence to substantiate their reasons. Instead in attempting to defend its actions it had produced only generalised assumptions not based on any factual foundation, which was not good enough.

Consequently the ruling is that in the absence of evidence required to justify its actions the Government had failed to establish that the introduction of the transitional protections constituted a legitimate aim, and therefore the transitional arrangements were directly discriminatory on the grounds of age.

In the judges' case it also found that there had been indirect discrimination on the grounds of sex and race. In the fire fighters' case the only difference was that - if it had been necessary - (which in the light of its decision on age discrimination the court felt it was not) the decision on proportionality would have been referred back to the Employment Tribunal.

Below is a summary of the legal cases so far.



Summary of the legal story so far...

| Stage 1 Employment Tribunal | | Stage 2 Employment Appeal | | Stage 3 Court of Appeal | |
|---|---|---|---|---|---|
| Judges | Fire fighters | Judges | Fire fighters | Judges | Fire fighters |
| Age discrimination accepted throughout | | | | | |
| X Not legitimate aim | ✓ Legitimate aim | ? *May* have been legitimate | ✓ Legitimate | X Not legitimate aim | X Not legitimate aim |
| X Therefore whether proportion-ate not an issue | ✓ Proportion ate | X Not proportion ate | X Not proven – inadequate data | X Therefore cannot be proportion-ate | X Therefore cannot be proportion-ate |
| | Equal pay claim dismissed | | | Equal pay claim upheld | Equal pay claim upheld |
| | Indirect discrimination dismissed | | | Indirect discrimination upheld | Indirect discrimination upheld |

Unfortunately what this tells us is that the case is finely balanced, with differing arguments winning the day at different points. As the judges in these cases have disagreed on many points, it is therefore difficult for anyone – including counsel – to predict the final legal outcome.

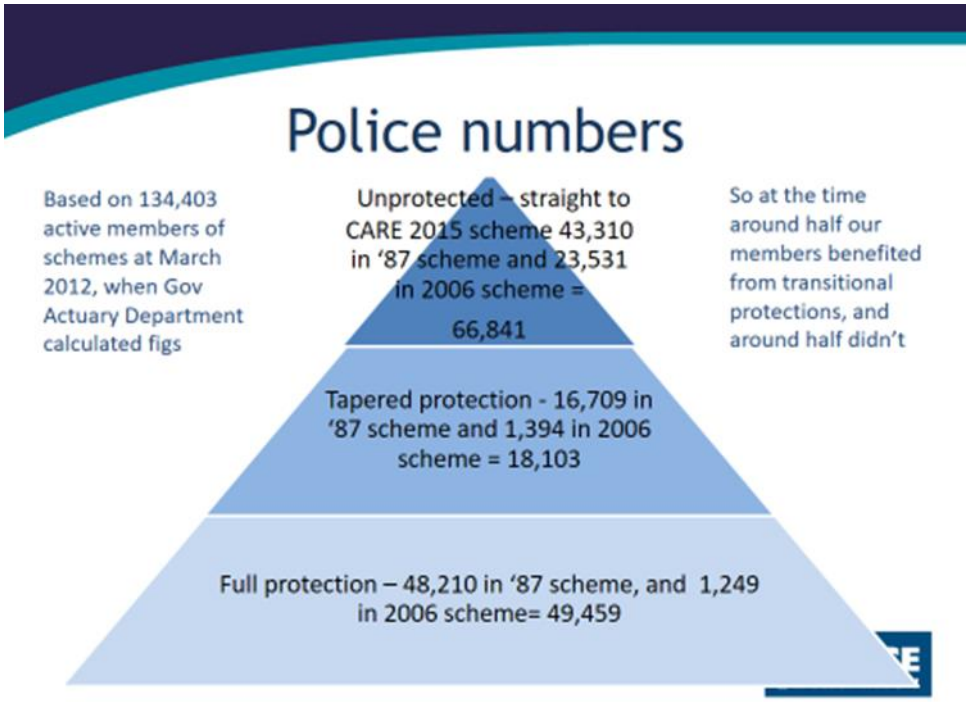
More importantly, the winning of precise legal points in court does not actually tell us what the remedies will be: and that is what will matter to members.

**POSSIBLE REMEDIES**

The Court of Appeal did not rule on the remedies to be provided but rather remitted the decision on that back to the Employment Tribunal.

Since 2015 protected fire fighters and members of the judiciary along with protected members of other public service schemes, including the police, have been benefitting under the terms of the transitional arrangements, the basis for which have been enshrined in the regulations governing their pension schemes, and in doing so have accrued further pension under the existing schemes. Due to protections on accrued benefits provided under law, it is not possible for the Government to now remove those further benefits accrued by protected members since 2015. *Nearly half our members have benefited from this.*

Below is a summary of the numbers of officers with full, transitional, and no additional protections (other than accrued benefits).

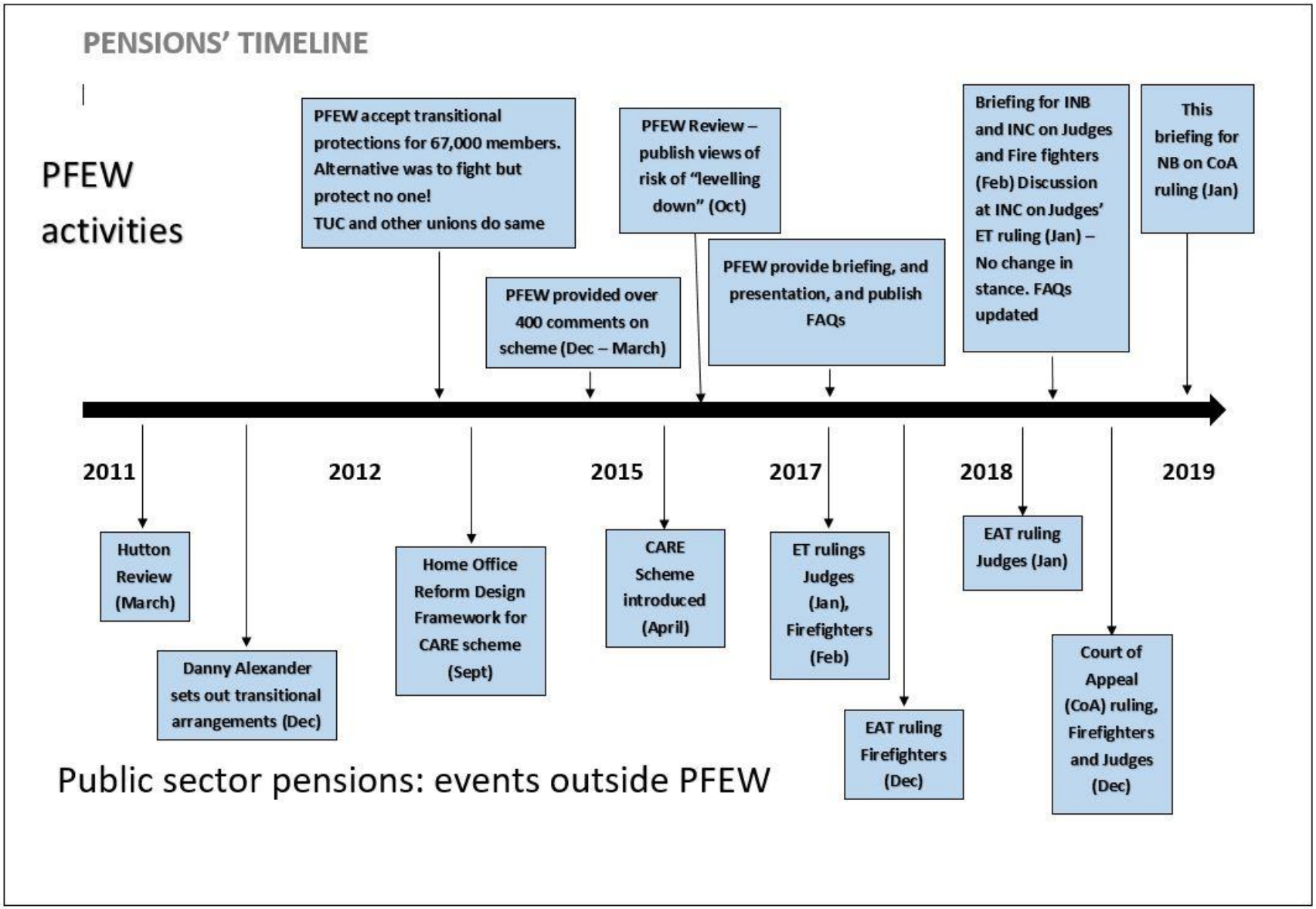



On the face of it, it could be argued that one remedy is that those members who were not benefitted by the transitional arrangements should be treated in the same manner as those who were, by providing them with accrual under their old schemes between 2015 and now. But, bearing in mind that this decision of the Court of Appeal potentially has impact right across the public service, the implications in terms of cost alone for the Government are huge. It seems likely, therefore, that alternative remedies would be sought. We are taking legal advice as to what remedies might be lawful.

Should the challenge ultimately succeed in the final court, there would also be huge implications in terms of practicalities such as necessary changes to regulations, and unpicking administratively what has happened since April 2015. It would also have implications on the funding of the relevant schemes, which might in turn lead to further changes for the future. Also, the Government will have failed in one of its stated aims, being the controlling of public spending, and this may have implications that go far wider than the relevant pension schemes.

Due to the vast implications, both financial and practical, it seems likely that the Government will seek to mitigate the impact by arguing that compensation for the discriminatory treatment should be provided in some other form rather than reinstatement.

The Government is appealing the decision to the Supreme Court.


PENSIONS' TIMELINE
PFEW activities
PFEW accept transitional protections for 67,000 members. Alternative was to fight but protect no one! TUC and other unions do same
PFEW Review – publish views of risk of "levelling down" (Oct)
PFEW provided over 400 comments on scheme (Dec – March)
PFEW provide briefing, and presentation, and publish FAQs
Briefing for INB and INC on Judges and Fire fighters (Feb) Discussion at INC on Judges' ET ruling (Jan) – No change in stance. FAQs updated
This briefing for NB on CoA ruling (Jan)
2011
2012
2015
2017
2018
2019
Hutton Review (March)
Danny Alexander sets out transitional arrangements (Dec)
Home Office Reform Design Framework for CARE scheme (Sept)
CARE Scheme introduced (April)
ET rulings Judges (Jan), Firefighters (Feb)
EAT ruling Firefighters (Dec)
EAT ruling Judges (Jan)
Court of Appeal (CoA) ruling, Firefighters and Judges (Dec)
Public sector pensions: events outside PFEW