Police pensions 2015 - An independent legal analysis of discrimination claims

Prepared for Region 2 (North East)

of the Police Federation of England & Wales

NEON legal

Contents

Executive Summary

The Police Federation of England and Wales (**PFEW**) and the Scottish Police Federation (**SPF**) have reviewed the changes the Government made to police pensions in April 2015, taken legal advice and concluded that that there is no prospect of a successful legal challenge to the introduction of the Police Pension Scheme 2015.

We conducted a legal review of those conclusions for Region No 2 with a leading pensions Counsel, Robert Ham QC. Our review was carried out entirely independently and was separate to that of the work carried out by the PFEW and the SPF and their advisers.

> **The conclusion of our independent review was that we agreed with the PFEW and the SPF that there is no prospect of a successful legal challenge to the introduction of the Police Pension Scheme 2015 for Police Officers.**

We will be providing a report of our review shortly.

We were subsequently made aware that a group of police officers (the Pension Challenge Group) had been advised by another law firm that claims of unlawful discrimination on the grounds of age, race or sex to the Employment Tribunal would be successful in respect of the changes made.

Region No 2 instructed us and leading Counsel, David Reade QC (a recognised expert on employment and discrimination law), to carry out a further independent review which focussed on the merits of any such discrimination claims with a view to supporting these claims if, in our opinion, such claims were viable.

We have reviewed all the relevant publicly available information, applicable legislation and case law and our understanding of the type of claim that lawyers advising the Pension Challenge Group and/or representing any police officer would make.

Our conclusion is that there is no viable challenge to the central change in police pensions (the move to career average earnings) based on claims of age, race or sex discrimination to the Employment Tribunal. There are arguable claims in relation to age, race and sex discrimination around the Transitional or Tapered Protection but they are unlikely to succeed and if successful are only ultimately likely to lead to adverse changes to the Transitional or Tapered Protection.

Our recommendations are:

1. Unless the Pensions Challenge Group and/or their legal advisers are able to present a compelling legal argument for successfully making a claim based on discrimination against the fundamental change in the pension regime (we are not aware of any but would be happy to review any such legal argument) or the current legal position changes, Region No 2 should not financially support or promote any individual claims on this basis at present as this would be an inappropriate use of members' funds and raise false expectations.

2. Region No 2 should continue to support any member who is currently considering taking their own action by providing general information regarding "no win, no fee" agreements together with some questions that their members should raise with any legal adviser they would want to instruct in respect of this matter.

   We attach at the end of this report an overview of damage based agreements and some suggested questions.

3. We note that Region No 2 does not wish to deter any officer that thinks a claim would be in his or her best interests and that it will continue to positively engage with the Pension Challenge Group (and any other police officer who is considering making a claim) to see if it is able to provide any further legal information or is able to assist with the resolution of any legal uncertainties. We recommend that although our advice to it is that any claim is not viable or may lead to adverse changes to the Transitional or Tapered Protection, it continues with its support for all officers in respect of these changes.

Neon Legal

15 September 2015

Introduction and background to this Report

Following publication of the Interim Hutton Report and the Hutton Report on 10 March 2011, 27 recommendations were made to the Government as to how to ensure public service pensions were sustainable and affordable in the long term.

Lord Hutton recommended:

- a move away from final salary to a career average revalued earnings (**CARE**) structure for all public sector schemes, with indexation of such CARE benefits whilst in pensionable service being linked to earnings rather than prices; and

- (for police officers) an increase to the retirement pension age to 60.

The final proposals for the reform of police pensions in England and Wales were announced by the Government on 4 September 2012.

Despite strong opposition to the changes, the Government introduced the Public Pension Act 2013. This Act established a new framework for public service pensions and changed all public sector pension provision so that pension benefits from 1 April 2015 were based on CARE rather than final salary. The Police Pensions Regulations 2015 (SI2015/445) (the **Regulations**) and detailed guidance were published in March 2015 and the Police Pension Scheme 2015 (the **PPS 2015**) was introduced and came into effect on 1 April 2015.

The Regulations require police officers born after 1 April 1967 to leave the two existing pension schemes (the Police Pension Scheme 1987 (the **PPS 1987**) and the Police Pension Scheme 2006 (the **PPS 2006**)) and accrue pension benefits from 1 April 2015 in the PPS 2015. The critical difference between the schemes is that the PPS 2015 provides CARE rather than final salary benefits.

Other than being a CARE scheme, there are a number of other differences between the PPS 2015 and the PPS 1987 and the PPS 2006. Full details of the PPS 2015 can be found in the Police Pension Scheme 2015 Members' Guide and supporting documentation (publicly available to all police officers).

New officers joining the Police Service from 1 April 2015 will automatically join the PPS 2015 and current officers born before 1 April 1967 and appointed before 1 April 2012 or have less than 10 years pensionable service remaining on 1 April 2012 will stay in the two existing schemes (**Full Transitional Protection**).

Some current officers who do not fulfil the criteria for Full Transitional Protection may continue to accrue pension in their existing schemes on a tapered basis (**Tapered Protection**) subject to certain criteria (based on age and length of service). The exact length of the Tapered Protection afforded depends on individual circumstances (see pages 60 and 61 of the Members' Guide for full details).

Once an officer's Tapered Protection expires, he or she will be transferred to the PPS 2015 and accrue further benefits in that scheme.

Current officers who did not qualify for Full Transitional Protection or Tapered Protection ceased to accrue benefits in the PPS 1987 and the PPS 2006 from 1st April 2015 and after that date were automatically transferred into the PPS 2015.

The Police Federation of England and Wales (**PFEW**) and the Scottish Police Federation (**SPF**) took legal advice on the pension changes introduced and concluded that that there is no prospect of a successful legal challenge to the introduction of the PPS 2015.

At the request of Region No 2, Neon Legal conducted an independent legal review of those conclusions with leading pensions Counsel, Robert Ham QC. Our review was carried out entirely independently and was separate to that of the work carried out by the PFEW and the SPF and their advisers. The conclusion of our independent review was that we agreed with the PFEW and the SPF that there is no prospect of a successful

legal challenge to the introduction of the PPS 2015. We will be publishing a report of our review shortly.

We have subsequently been made aware that a group of police officers (the Pension Challenge Group) had been advised by another law firm that claims of unlawful discrimination on the grounds of age, race or sex to the Employment Tribunal would be successful in respect of the changes made.

Region No 2 has instructed Neon Legal and leading Counsel, David Reade QC (a recognised expert on employment and discrimination law), to carry out a further independent review which focusses on the merits of any such discrimination claims with a view to supporting these claims if, in our opinion, such claims are viable.

Our understanding of the advice the Pension Challenge Group has received (or which is currently being promoted) is:

1. there is a good prospect of a successful challenge to the introduction of the PPS 2015 (or the manner in which it was introduced) on the grounds that the terms of the Full Transitional Protection and the Tapered Protection are **unlawfully** discriminatory;

2. As a result, a claim based on unlawful discrimination could (or should) be made by eligible officers (i.e. those officers who do not benefit from Full Transitional Protection) to the Employment Tribunal;

3. The best method by which to make the suggested claim(s) is for officers to enter into a Damages Based Agreement (**DBA**) with the law firm promoting these and the estimated costs range from £500 to £1,500 per officer (dependent on the number of officers who register a claim with the firm);

4. officers could make a claim on their house insurance, group insurance or any other legal insurance in respect of this action;

5. the legal advisers to the Pension Challenge Group expect to submit a number of test cases to the Employment tribunal and stay the remainder of claims pending the result of the lead cases. They also expect to enter into without prejudice meetings with the Government on the basis of the potential claims and the number of officers registered with them and secure for each officer a substantial cash payment; and

6. only those officers who register and make a claim through the law firm will benefit from any negotiated settlement and/or damages paid.

We have not had sight of any legal analysis made by the legal advisers to the Pension Challenge Group or the terms of any DBA or any advice or promotional material suggesting that officers make an insurance claim or pay any other fees. We therefore are unable to comment specifically on the appropriateness of the advice at 3, 4 and 5 above.

However, we have conducted our own independent legal review of the points raised by 1 2 and 6 above and the following section sets out the conclusions of our analysis and legal review.

We conclude this report by setting out some general points regarding DBAs to assist officers wishing to enter into these and questions that members of Region No 2 may wish to raise with any legal adviser that they instruct in respect of this matter.

We are aware of a number of queries that relate to this report and which have been raised by members and we will provide a separate response to these are they are quite specific and may not be of general application. These questions and our response will be made available to all members.

Legal analysis and conclusions

David Reade Q.C.

This is intended to be a brief summary of the legal analysis.

1) Focusing on the introduction of PPS 2015 itself and the move to Care. This is not less favourable treatment because of a protected characteristic under the Equality Act 2010, in particular age, race or gender. The move to PPS 2015 is not therefore of itself direct discrimination.

2) There is a potential issue of indirect age discrimination in the impact on those closer to retirement. This led to the Transitional approach that only officers born after 1st April 1967 would have to leave the scheme. This did of course lead to a position where the effect was that an Officer born on the 2nd April 1967 was being treated less favourably because of his or her age than an officer born on 31st March 1967, this would appear to be direct age discrimination. However, both direct and indirect age discrimination can be justified if it is shown to be a proportionate means of achieving a legitimate aim. As noted above the Transitional arrangements appear to have the legitimate aim of balancing the generational fairness in the impact of the introduction of the changes. There could have been an argument about the "cliff face" element of the 1st April 1967 pivot date but this led to the Tapering.

3) All these elements appear to have gone through consultation and as the Transitional and Tapering arrangements are directed to removing any risk of indirect age discrimination in the change they are likely to be held to be justified age discrimination and not unlawful. If not justified then the obvious remedy would be reducing the scope of the Transitional protection or removing it.

4) There is then the argument based upon sex and or race. I understand that the basis of this argument is an indirect discrimination claim which compares the gender composition of the group those who receive the benefit of the Transitional, and or Tapering provisions, with those that do not. With the moves to increase the diversity of the Police Force a comparison of the race composition or gender breakdown of those who receive Transitional or Tapered protection is likely to reveal a disparity with a higher level of diversity amongst those in the younger groups, who fall outside those protections. The argument would then be that the Transitional and Tapering puts women and minority groups at a particular disadvantage by comparison with the white male Officers who form a greater proportion of the advantaged group.

5) There are two problems with this argument. Firstly who are the proper comparators for this analysis, if it is Officers in the directly parallel position, but of a different race or gender, they will be in the same age bracket and there is no discriminatory effect. The argument only works if the Tribunal can be persuaded that the comparative group is the older grouping of Officers who receive the benefit of Transitional provisions and that is by no means clearly the correct analysis. Secondly there is the justification argument, that these steps are trying to address another potentially discriminatory impact and therefore have both a legitimate aim and are proportionate. Looking at the background of Hutton and the need to effect change the Government will have a strong case on justification, thus even If the Transitional arrangements are found to be potentially indirectly discriminatory they are likely to be held to be justifiable and not to be unlawful.

6) Finally as noted the attack is not on the principle of the move to CARE but rather on the transitional provisions. If the claims are successful it may be that it leads to

those excluded from Transactional protection in the younger group enjoying comparative protection, which would not be the right to any immediate cash payments but potentially the counting of further service under the Old Scheme Rules. However, the Government would, I anticipate, address the mischief, if the Transitional provisions were found to have indirectly discriminatory effect, by changing the Transitional protections so that they were less favourable. The Claim will not lead to a change in the fundamental move to a CARE based pension as the focus of the attack is really the Transitional arrangements.

Damage based agreements

A Damage Based Agreement (**DBA**) is an agreement between a lawyer and his or her client under which the client agrees to pay the lawyer a percentage of sums recovered in a claim. A DBA normally requires payment in the event that sums are recovered either by settling the claim or after trial.

There is a 35% cap on fees for employment tribunal cases and this is inclusive of VAT but not counsel's fees or other disbursements (for example a separate registration fee). DBAs were unlawful for contentious work (except in employment claims) until 1 April 2013.

The Solicitors Regulation Authority requires that a solicitor must act in the best interests of each client. Before a DBA is entered into (that is, signed), the representative must inform the client in writing about certain prescribed information (and provide such further explanation, advice or other information about any of those matters as the client may request).

When it comes to fee arrangements the solicitor must only enter into fee agreements with his clients that are legal and which he considers suitable for the client's needs and take account of the client's best interests.

A solicitor should not recommend a funding arrangement that is likely to be the most profitable to his or her firm unless it is also suitable for the client's needs and is in accordance with the client's best interests.

Where a claim value significantly exceeds costs (i.e. it settles early), the firm will benefit greatly from a DBA. An early settlement means that only relatively small sums will have been incurred by way of costs and a DBA will nearly always provide greater rewards for the solicitor than any other form of retainer if a quick big win is anticipated. In these circumstances clients may query whether they have done quite so well out of it.

Lord Justice Jackson recommended that clients should receive independent legal advice before entering into DBAs but following the consultation period this requirement did not become part of the regulations relating to DBAs. However, we would always recommend that any officer entering into a DBA satisfies himself or herself that they understand all the terms of it and the implications of doing so.

We have set out some questions below that officers may wish to raise before entering into a DBA and/or paying a registration fee to any law firm.

Suggested Questions to raise

a) If the claims are successful is the only remedy that may be awarded damages?

b) If not what are the other possible outcomes and what will my liability for fees be in the event that damages are not the remedy that is awarded?

c) If the claims are successful will this lead to a:

   i) A change in the decision to move to the PPS 2015?
   ii) A change in the transitional arrangements?
   iii) If the latter is possible is any such change likely to make those transitional arrangements more or less favourable?

d) If neither of the preceding remedies arise how, if at all, might a successful claim impact on the pension changes implemented in April 2015?

e) If I do not sign up and the claimants who have registered with you receive compensation from the Government is it not likely that that the Government will apply such compensation to all affected officers as it has done so in previous disputes.

f) Equally if a claim is successful will not any changes it causes apply to all officers and not only those who have signed up.

g) If the preceding two points are true then am I not at a disadvantage in agreeing to pay you a percentage of any compensation I receive whereas officers who did not sign up to the class action will actually receive more than me, because they will not be subject to the terms of the DBA?

h) I understand that as a bare minimum you would like to have 5,000 officers each liable to pay £1,500 of costs to pursue the claims. That amounts to £7.5 million

   i) How much of this £7.5 million will actually be used in pursuing the claims and what is your estimate of costs for the whole class action?
   ii) Are any separate fees or costs payable in addition to the fees you will recover under a DBA?

i) You have estimated that each claimant should receive a substantial compensation payment. Who has calculated this, what is the quantum and on what basis has this quantum been assesed?

j) What if I am not satisfied with the ultimate level of compensation you negotiate for me? Am I forced to accept this?

k) Who in Government has agreed to have without prejudice meetings with you?

l) What about the other legal views which have concluded that any claim would be entirely speculative? Have you been able to counter these?

m) Am I able to instruct a different law firm in respect of the claims?

n) Will I receive part or all of my registration fee back if the action by you is ultimately unsuccessful?

About David Reade QC and Neon Legal

David Reade QC, Littleton Chambers

Silk: 2006 | Call: 1983

Described in Chambers 2009 as: "clear, practical and extremely effective." A "robust and fearless presence," he is "able to deal with really knotty issues." Highlights for this "pleasingly straightforward" lawyer include acting for the lead defendant in a high-value case concerning a team move in the reinsurance industry. In Chambers 2010 he is described as "vivacious, bold and bril- liant" and "pleasingly straightforward". In the Legal 500 it is said of him that he is "helpful in getting you out of a tight spot".

David Reade is a leading employment and commercial law silk noted by clients for being 'Extremely approachable, intelligent, hard working and practical' and for his ability to cut 'right to the nub of an issue'. His practice, which covers the full remit of both employment and commercial litigation matters, has a particular focus on matters relating to restrictive covenants, industrial action and union recognition, discrimination and pension issues.

With over 20 years' experience in the field of employment law, David's practice and has seen him advise major international and UK companies on issues as diverse as part-time pension discrimination claims, pension changes, share options schemes and directors service contracts. David has also advised on collective and transactional issues. He is a joint author of The Law of Industrial Action and Trade Union Recognition" (OUP) and is a contributor to Sweet and Maxwell's "The Law of Transfer of Undertakings".

Recent headline cases include BA v Unite [2010], CWU v Royal Mail Group [2010], Brennan v Sunderland City Council [2009], UKCOAL Ltd v Num and BACM [2007] (EAT); Pennwell Publishing v Ornstein [2007] IRLR 700 (High Court) and TFI Derivatives Ltd v Morgan [2005] IRLR 246 (High Court)

In the field of commercial litigation David has a special interest in credit card related matters and numbers a raft of leading banks and card providers among his clients. Recently David successfully defended a leading clearing bank in connection with claims over the withdrawal of credit card facilities. His broad commercial background particularly equips him to deal with disputes span both employment issues and wider commercial disputes such as minority shareholder, company and partnership disputes.

Practice Areas and Case Law

Restrictive Covenants and Confidential Information

- Standard Life v Gorman [2009] (CA) Garden leave injunctions
- Pennwell Publishing v Ornstein [2007] IRLR 700 (High Court) a confidential information injunction concerning the ownership of databases and related human rights issues for journalistic freedom.
- TFI Derivatives Ltd v Morgan [2005] IRLR 246 (High Court)
- Team moves both for those looking to acquire a team and those seeking to prevent their recruitment.

Restrictive Covenants and Restraint of Competition

He has acted both for and against employees in team moves. In 2007 he represented the alleged leader of a 40 plus team move in the re insurance industry. The litigation included cross border issues and anti suit injunctions. David is familiar with dealing with conflict of laws issues in the enforcement of covenants, "springboard relief" and related issues of competition law.

Collective and Individual Employment Law

A few of David's reported decisions

- CWU v Royal Mail [2010] Collective consultation in TUPE transfers
- Redrow Homes v Buckborough and others [2009]

- Collidge v Freeport [2008] CA compromise agreements and breach
- UKCOAL Ltd v NUM and BACM [2007] (EAT) Consultation on Collective Redundancy in connection with the closure of a coal mine
- Redrow Homes v Wright [2005] IRLR 720 (C.A) Status of workers under Working time regulations
- Roper v Solectron [2004] IRLR 4 (EAT) Group action for collective redundancy and Beckmann claims under TUPE
- Foley v Post Office [2000] IRLR 827 (CA) The range of reasonable responses test in unfair dismissal cases.

David is a Member of Equality and Human Rights Commission panel of approved counsel.

Discrimination Law

- ABN Amro v Hogben [2010] (EAT) Age discrimination
- Zeynalov v BP Exploration Caspian Sea [2009] (EAT) Extra territorial jurisdiction in race discrimination
- Barton v Investec [2003] IRLR 332 (EAT) Burden of Proof in discrimination cases. A pivotal case in the development of UK discrimination Law
- Power v Panasonic [2003] IRLR 151 Disability discrimination psychiatric conditions and the definition of disability
- Rhys Harper v Relaxion [2003] IRLR 22 (HofL) Post termination discrimination
- Harvest Time Circle Ltd v Rutherford [2001] IRLR 599 (EAT) Indirect discriminatory effect of the age limits under the Employment Rights Act and the impact of Community Law
- Dekeyser Ltd v Wilson [2001] IRLR 324 (EAT) One of the earliest cases on the impact of the Human Rights Act upon employment Law with particular relevance to medical evidence in disability discrimination cases

Not of all of his work is, by its' nature, reported. Recent cases have included acting for a nationally known businessman in con- nection with an unfair dismissal claim against his eponymous company, advising the board of a leading PLC on sensitive issues

surrounding its CEO, advising a number of well known firms of solicitors on discrimination issues and on partnership questions. Acting for Baroness Greenfield in her claim against the Royal Institution.

He has advised on and is conducting equal pay litigation both in the private sector and in connection with local authority pay issues. He continues to act for Sunderland City Council in the continuing equal litigation it faces, he is shortly to appear for a fourth time in the case before the EAT. The case involves the first challenge to a job evaluation exercise under "Singles Status". David has also defended equal pay claims for Health Authorities under "Agenda for Change".

He has extensive experience of litigating issues in the context of local government and the health sector including acting in injunctions about disciplinary proceedings both in the Health Service and Education.

David has particular experience of TUPE having acted and advised in numerous transfers. Most recently he appeared in CWU v Royal Mail before the Court of Appeal on the issue of the information and consultation in TUPE transfers,

Industrial Action and Trade Union Recognition

David has advised both employers and unions on collective issues including union recognition and strike action. He most re- cently appeared for BA in its application for an injunction against Unite. He advised in the Gate Gourmet dispute. He has acted in injunction proceedings to restrain industrial action. As noted below he is one of the authors of the OUP work "The Law of Industrial Action and Trade Union Recognition"

Pensions Law

In the Pensions field he acted in connection with the issues surrounding the closure and variation of pension schemes and has litigated pension claims. He has advised on pensions deeds and scheme rules. Has had recently been advising various employers and employer's organisations on the issues facing them in connection with Age discrimination

Commercial

In addition to his employment practise David additionally practises in Commercial Law. The wide background of his commercial experience particularly compliments his employment work as he has acted in Minority Share Holder Disputes, Business Sale Agreements disputes, Company Law and Director's Duty disputes and partnership disputes.

David is therefore entirely comfortable in handling disputes which may have an employment element but extend into broader disputes. By way of example in 2007 he successfully defended a Company, and various shareholding family members, against claims in the Chancery Division which included claims for unpaid salary and attacks against family trusts by way of undue influ- ence and or incapacity. He has also successfully pursued a claim for damages arising out of the misuse of confidential informa- tion by a proposed joint venturer.

He has a particular interest in issues arising from credit cards and has acted for and advised a number of leading Banks and card providers.

Recent cases include (it is in the nature of this litigation that much of it resolves without there being reported decisions and in circumstances where there is considerable sensitivity about the issues):

- Lancore v Barclays Merchant Services [2009]
- Truman v Bank of Scotland [2005] C.C.L.R Four party credit card arrangements and third party processing
- Tuviyahu v American Express (CA 12th July 2000) (acting for Amex)Payment Cards and the application of the Con- sumer Credit Act

He has recently successfully defended a number of other banks in substantial claims and acted for a leading bank in connec- tion with the insolvency of a major retailer and the transaction and charge back issues which arose from the insolvency. He has

particular experience of credit card transactions over the internet and of the issues surrounding "third party processing".

His commercial work embraces a wide range of issues examples of his work include:

- Minter v Julius Baer [2005] Pensions promise and the construction of a pension deed
- Webb and Scarr v Silbury and Petroplas [2005] Breach of warranty and valuation of the sale of a company
- Modelboard v Outer Box (In Liquidation) retention of title clauses and insolvent businesses
- Phelps v Spon-Smith [2000] BCLC Assignment of causes of action and professional negligence
- Lawson v Coombes [1999] Ch 373 constructive trusts

Sports Law

David has experience of a wide variety of sports related ligation. He has advised and acted on a number of managerial issues in the world of football and has experience of contracts including achievement bonuses. On the wider commercial field he has experience of prize indemnity insurance in the field of sport.

He has additionally dealt with legal issues in a wide variety sports ranging from carriage driving to Karate. He has recently being acting against Chelsea PLC for a former senior employee.

David's knowledge and experience of issues such restrictive covenants, competition law and TUPE have all been brought to bear within the field of sports law. For example he acted in connection with the TUPE transfer of part of a Formula 1 team.

In addition to his work he is a frequent lecturer on employment law.

Tushar Bhate, Partner and Head of Pensions Neon Legal

Prior to setting up Neon Legal in 2010, Tushar was formerly a Partner and Head of Pensions at a large, UK Top 100 commercial law firm in the North and before that a pensions solicitor and associate at another UK Top 100 law firm.

Tushar has advised on all types of public and private sector pension arrangements and is consistently recognised by the legal directories as being a leading expert on pensions law in the UK.

Tushar's clients have ranged from public sector pension schemes with funds in excess of £1 billion and 30,000 members to individuals with personal pension plans. He has acted for local authorities, councils, FTSE 250 companies and multi-national organisations in respect of their pension matters.

Tushar is currently the chairman of the Northern Counties Group of the National Association of Pension Funds.

Tushar is often asked by other pension professionals to assist clients with their most difficult pension issues. He has been the lead legal adviser in a number of significant pension cases and regularly advises professional bodies on pensions.

Tushar is known in the industry for his innovation in the provision of pension services and is a full member of the Association of Pension Lawyers.

Tushar has a first class honours degree in Law and prior to his qualification as a solicitor, served 7 years with Northumbria Police as a Police Officer.