

Age discrimination claims

➤ **The Employment Appeal Tribunal has overturned a potentially significant ruling made by the Employment Tribunal, which demonstrates the declining influence of EU law on domestic pension schemes and, perhaps, more widely**

Since 1 December 2006, under the EU's Framework Directive (Directive), it has been unlawful for trustees or employers of occupational pension schemes to discriminate on the grounds of age. However, under the Equality Act (Age Exceptions for Pension Schemes) Order 2010 (Order), there is an exemption for benefits accrued in respect of service before 1 December 2006. This limitation is based on the EU law principle that new law will not be applied retrospectively. However, earlier this year, the Employment Tribunal (ET) held that the exemption under the Order was incompatible with the Directive and should be disapplied. This ruling was notable, resulting in the possibility of historic age discrimination claims being brought against trustees and employers.

The Secretary of State for Work and Pensions appealed the ET's decision, arguing, among other things, that the Directive had not been incorporated into domestic law under the European Union (Withdrawal) Act 2018 (Withdrawal Act) following Brexit and, therefore, the ET had erred in relying on the Directive to disapply domestic law.

The facts

The claimants in this case were members of the T&N Retirement Benefits Pension Scheme (Scheme), all of whom had started to take their pension before 1 December 2006. The Scheme employer entered a PPF assessment period on 10 July 2006. In line with the requirements

of the Pensions Act 2004, members who had reached their normal pension age (NPA) at the date of the assessment period did not suffer a reduction to their benefits; members who had not reached their NPA by this point were entitled to up to 90 per cent of their benefits, subject to the overall compensation cap. As a result, the benefits of some claimants were reduced to less than 50 per cent of their accrued rights under the Scheme. The claimants argued that the capped compensation paid by the trustee amounted to direct age discrimination. Although the impact of the compensation cap had been lessened following the Hampshire and Hughes judgments and the resulting 'uplifts' to their PPF compensation, the ET claim related to awards for injury to feelings and additional sums by way of interest on back payments.

The crucial point to note is the timing of the ET complaints in relation to the Withdrawal Act. Under the Withdrawal Act, the EU Charter of Fundamental Rights, which established the right of non-discrimination, would not be treated as part of domestic law on or after the implementation period completion day, that is, 31 December 2020 (Implementation Day). Moreover, to the extent that the general principle of non-discrimination existed irrespective of the EU Charter and was still to be treated as retained EU law, it could no longer provide a basis for the disapplication of any domestic law found to be incompatible with it. Two claimants

lodged their complaints before the Implementation Day; the rest, afterwards.

The judgment

Recently, the Employment Appeal Tribunal (EAT) agreed with the ET that, in accordance with the Supreme Court's ruling in *Walker v Innospec*, the principle of future effects applied to this case and the point of unequal treatment occurred at the time the pension fell to be paid and not when it accrued. Therefore, the general principle of non-discrimination on the grounds of age applied, even though the claimants' pensionable service was accrued before 1 December 2006.

However, the EAT judge considered that only the claimants who commenced their claims before the Implementation Day could rely on this principle; the claimants who brought their claims after the Implementation Day could not. The reason for this was that, under the Withdrawal Act, the retained general principles of EU law such as non-discrimination could not provide the basis for the disapplication of domestic law on and after the Implementation Day. As a result, the Secretary of State's appeal was upheld in part.

Owing to the EAT's decision, the consequences of the ET's finding are now rather more limited, which should come as a relief to trustees and employers concerned about the possibility of historic age discrimination claims in respect of service before 1 December 2006.



➤ Written by DLA Piper pensions partner, Matthew Swynnerton

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