

# The Pensions Ombudsman's (TPO) approach to McCloud and Sargeant age discrimination complaints

The Government is legislating to remedy the age discrimination in public sector pension schemes which was identified by the Court of Appeal judgments in the McCloud and Sargeant cases. That remedy is expected by October 2023.

This note sets out: a brief background of the issues; TPO's view on what affected members and schemes can do now; and TPO's present approach to complaints and disputes concerning these issues.

## 1. Background

### Impact of McCloud and Sargeant age discrimination cases

The 2015 public sector pension scheme changes included transitional arrangements to mitigate the impact on older members who were nearer retirement. The McCloud and Sargeant judgments held that these transitional arrangements in the judicial and firefighters' schemes were directly age discriminatory and could not be objectively justified.

The Government accepted that steps should be taken to remedy the age discrimination for all statutory public sector schemes, for the period between April 2015 and April 2022 (the **remedy period**). Therefore, most public sector schemes are allowing members (or their dependants if the member has died) the choice of whether the legacy scheme or the replacement scheme should provide benefits for the remedy period. Some schemes differ, for example, in the Local Government Pension Scheme an underpin over a different period will be applied.

### Immediate detriment cases

Meanwhile, some members whose pensions or death benefits are due or have already come into payment, for example, members in ill health, or dependants of deceased members, could potentially suffer detriment before the rollout of the remedy under legislation expected in October 2023 (**immediate detriment** cases).

HM Treasury and Home Office guidance originally acknowledged that the police and firefighters' schemes could use their powers under the Equality Act 2010 to address discrimination in certain types of immediate detriment cases. However, that guidance was withdrawn because it was considered that there are major practical issues (particularly on tax) in dealing with immediate detriment cases in advance of the rollout of the remedy.

Therefore, individual schemes will need to decide how to address immediate detriment cases (after taking appropriate advice). Not all schemes are taking the same approach. For example, each individual Police Force and Fire & Rescue Authority is directly responsible for managing its scheme, and it is for those scheme managers to decide how to deal with immediate detriment cases.

## 2. What you can do now

### What can members do now?

Many members will be comfortable waiting until the remedy is rolled out and will not need to take any action.

If a member has a complaint or dispute, they should first raise it with their scheme. If the member remains unhappy, they can complain under the scheme's internal dispute resolution procedure (**IDRP**). A member can then complain to TPO if the matter is still not resolved but should note *TPO's present approach* set out below.

### What can schemes do now?

Schemes should communicate with affected members about the steps they are taking to address the discrimination and signpost members to their scheme's IDRPs and/or TPO if the matter cannot be resolved. Schemes may review and decide (taking appropriate advice) whether it is practicable for a remedy to be made available earlier for those members that may suffer immediate detriment.

Schemes should contact TPO, for example, if they receive a large number of similar or grouped complaints, and they think there is a reasonable chance those complaints will be referred to TPO.

## 3. TPO's present approach

TPO recognises that: the Government is taking steps to address the discrimination with retrospective effect; interest will be payable on any underpayments; schemes need time to change their administrative systems and provide detailed information to members about their options; and in *most* cases, members will not be adversely affected financially such as would require immediate action.

Bearing in mind the above, presently TPO's general starting position, is that it would not investigate complaints or disputes relating to remedying age discrimination in public sector schemes, but it will carefully look at the facts of each case before making any decision. Examples of where TPO may investigate include, allegations of maladministration, like, failure to explain what is going on and/or engage properly with the member; or investigate where a member is suffering severe financial hardship or other serious injustice and the scheme is not putting in place any interim arrangements to address the injustice within a reasonable period. Any complaint or dispute will be subject to TPO's usual jurisdictional checks, for example, whether court proceedings have started which are the same as the complaint.