



October 2015

The Pensions Challenge: The PFEW position

This document has been prepared in response to the Pensions Challenge that has been set up independently of the PFEW, by a group of officers.

The content of this briefing is based on our understanding of the proposed legal challenge which has been obtained through discussions with some of the likely claimants and their legal advisers, and from the information the legal firm has supplied to officers. It is correct at the time of writing. If information provided to us changes, we will issue updates.

In summary:

Is this a challenge to the introduction of the new pension scheme as a whole?

No, we do not believe so. Our understanding is that it is a challenge to the operation of the transitional protections.

Is everyone going to benefit from this challenge?

No: in fact, we are concerned that ultimately if it were to succeed, many officers who currently enjoy protection would lose it and that the Government might choose, as a result of the challenge, to take pre-emptive action to make further changes to police (and maybe other public service) pension provision for the future, which will be detrimental to both existing and future officers – including those who join this challenge. In short, our main concern is that the challenge will seem on face value to give a short term gain for officers: but that in fact, because of actions the Government are likely to take in response, those same officers will suffer substantial longer term loss.

Does our (PFEW) legal advice suggest that the challenge will succeed?

No: we do not believe the challenge will succeed. Furthermore, we would urge officers to consider what success looks like. Even if the legal challenge on this narrow point is accepted (and our advice suggests it will not be), there is a danger that the Government will take pre-emptive action and “level down” pensions. This will mean that any short term gain is overshadowed by longer term loss, which would affect every serving officer.

Background

1. What reforms have there been to public service pensions?

The review of pensions goes across the public services, and stems from the Hutton Review which started in 2010 and was cross party.

The pension reforms, by their nature, affect younger officers more than older ones. Also, as a result of the nature of the police force changing over the years, it is likely that they also indirectly affect more officers of one gender and of one ethnic background as compared to another. However, they have been made as a result of the findings of the Hutton Report and a perceived need on the part of the Government to change social policy in respect of pension provision in the public services. This is in the context of increased life expectancy, changes to the type of pension provision in the private sector and the need to impose tighter controls on public spending. In the five years since the Hutton Report was published, various cases coming before the courts have confirmed and enforced the view that a government has a right to govern, and make wide ranging changes to laws relating to social policy and that resulting changes (including to pensions) which may on the face of them appear to be discriminatory, can be found to be justifiable as being a proportionate means to achieve a legitimate aim. Whilst such discriminatory action cannot be justified on the basis of cost alone, it can be justified using other arguments. We believe the Government will argue that wide public sector reform is needed to bring balance to the economy, and between retirees from both private and public sector organisations.

Staff Side's starting position in consultations was that any new scheme should only apply to new recruits from 1st April 2015. This was never likely to be achieved bearing in mind the content of the Hutton Report, as it would mean that the full effect of the changes would only be achieved in approximately 2045. None of the public services have been able to achieve this concession.

2. So what is the basis of the proposed challenge?

Our understanding is that the challenge is not to the establishment of the new scheme, but to the operation of the Transitional Arrangements.

We want anyone considering signing up to this challenge to fully understand the basis of the challenge before committing themselves.

The nature of the challenge, as far as we are aware, will affect:

- the number of claimants (and therefore the fees payable by any successful claimants, as the fewer the claimants, the higher the legal costs to each, if the claim is successful);
- the likelihood of success;
- what the government does in response;
- the potential impact on other officers and the other public service schemes.

Although we have not had sight of the legal advice obtained by the Pensions Challenge group, we have spoken with them and their lawyers. We understand from discussions with them that the proposed claim is based on the manner in which the transitional protections operate. It is NOT a challenge to the introduction of the new scheme as a whole: only to that part of it that actually provides protection for many existing officers.

It is based on the fact that those able to access the transitional protections may differ by age, gender and Black and Minority Ethnic (BME) characteristics. The access by age should be self-evident: the access to BME officers would be as a result of the service having fewer BME officers in the past, and therefore in the “old” pension schemes, than today. There is no suggestion that officers joining at the same time have had different access to Transitional Arrangements based on these characteristics.

Please note that, based on our understanding of the proposed challenge, **those who are fully protected have no claim**, and that for those who are in tapered protection the size of any damages awarded should the claim be successful will vary according to their individual circumstances (e.g. when their tapered protection ceases). Also, for those in tapered protection, it is likely that no claim can be made until that protection ceases, as only at that point will they be able to demonstrate a loss.

3. What is the PFEW position in respect of the Transitional Arrangements?

The original, ten years from retirement, protection period part of the Transitional Arrangements was actually a concession that was given by Danny Alexander in 2011 across the public services as a result of discussions with the TUC.

Tapered protection was a further concession obtained as a result of the Staff Side’s engagement with the Home Office in the consultation process. Tapered protection avoids the ‘cliff edge’ scenario whereby an officer one day younger than another would be treated in a radically different way and would have to join the new scheme immediately, whereas the officer who was one day older remained in the existing scheme until retirement. Therefore Tapered Protection gives many existing officers a better deal than that which was originally proposed by the Government.

4. How did the PFEW engage with the Home Office?

Legal advice helped formulate our engagement in the consultation process. We were keen to ensure that we got the best deal possible, for as many members as possible. To that end, we worked to improve the Transitional Arrangements and obtained Tapered Protection amongst other concessions.

Likelihood of success

5. What is the likelihood of success?

Our legal advice is that the chance of any challenge succeeding is low, and therefore we would not fund a claim.

Our legal advisors have informed us that it is likely that any direct age or indirect age discriminatory elements of the transitional protections will be viewed as justified as being a proportionate means of achieving a legitimate aim.

It is worth noting that across Europe, where challenges have been made to changes to pension provision, including the introduction of transitional arrangements, courts have upheld the right of Governments to govern and make such changes in social policy. Recent cases in Greece and Portugal show that the courts will uphold the right for governments to make changes in pension provisions (*Koufaki v Greece*), while cases regarding the introduction of transitional arrangements have also found in favour of the government (*Stec v the United Kingdom*).

We do not believe that the Government will settle this case out of court. As noted, the Government has been preparing for this change, and those to other public service schemes, since 2010. Officers may therefore wish to ask themselves whether it is likely that the Government would embark on such action without ensuring it is robust enough to withstand any challenge.

Officers may also wish to consider the likely cost to the Government were a challenge to succeed. If every officer were to win back £20,000, then assuming similar damages would pertain across all of the public services, the cost to the Government would be approximately £120,000,000,000. This is one reason why we consider the Government will fight this challenge to the very end. We do not believe that they will be open to the possibility of a settlement.

If the Government were, at any point, to reach the conclusion that there was a possibility that the challenge might succeed, we believe that they would seriously consider taking pre-emptive action at that point to cap and mitigate any potential liability. There is no reason to expect that they would wait for the final outcome of the challenge. That action would be

likely to involve a levelling down in some way of the future pension benefits of all officers and this would clearly be of detriment to all – including those officers taking the challenge.

Arguments for and against the challenge

6. Will the PFEW take a similar challenge, or fund this one?

We have taken legal advice repeatedly to establish whether the changes to the pension schemes (including the introduction of the transitional arrangements) can be challenged successfully. **The answer has been that success is highly unlikely.** The government has a right to make new laws, including on matters of social policy including pension provision in the public services and the form of the transitional arrangements are, we are advised, almost certain to be viewed as justifiable by the courts.

The challenge does not, therefore, meet our funding criteria. To be clear, our funding criteria are designed to ensure that we do not spend members' subscriptions on legal challenges that we have been advised have little prospect of success. This is to ensure that any spend that we undertake represents appropriate use of members' money, including balancing risk against the likelihood of winning.

7. What happens to the claimants if they win?

Much has been made of the fact this is a 'no win, no fee' arrangement. It is, at least initially, based on a Damages Based Agreement (DBA), which would seem, at face value, to be a good way for officers to make a claim.

If the claimants win the initial Employment Tribunal, (which we believe unlikely), the Home Office will, we strongly believe, fight this at appeal.

It is important to note that the DBA (the 'no win, no fee' arrangement) clearly states that the costs of appeal are NOT covered. This means that, at that point, claimants will have to renegotiate fee arrangements with the lawyers.

Our understanding is that when and if the challenge proceeds from the Employment Tribunal phase, a different fee arrangement called a conditional fee agreement will be offered to members of the Pensions Challenge Group and that this will incorporate some form of insurance against the awarding of costs should the challenge fail. This is not dealt with in the package that has been issued by the lawyers representing the Pensions Challenge Group and we urge officers considering signing up to the pensions challenge to seek answers and assurances from the lawyers as to how this would work before doing so. This is especially important bearing in mind that the Damages Based Agreement states that

if the claimants end the agreement with the lawyers before the legal firm feel the case is over, the firm has the right to charge the claimant his or her share of the costs incurred up to that point.

Furthermore, if the claimants are required to pay costs to the respondents by the Employment Tribunal, then the costs will be payable by the individuals. Whilst these would only be awarded in certain circumstances, we strongly recommend that the claimants look at these circumstances and consider whether they might apply.

It is also worth considering at what point, and how, the benefit to each claimant will be calculated if the claim is successful, and at what point fees would need to be paid.

8. What is the likely outcome for pensions if the claimants win?

If the challenge succeeded, this would likely affect all public service workers, eventually. The government would have a number of options with regard to pensions:

- wait until the end of the challenge, and pay up more to all; or
- revoke the Transitional Arrangements; and / or
- change the CARE scheme in some other way, to reduce the liability.

Officers may therefore wish to consider whether it is likely that the Government would embark on the CARE scheme without ensuring it is sufficiently robust to withstand any challenge.

As noted, the costs to the Government of a successful challenge might be £120,000,000,000. We believe the Government will fight this challenge. But we also believe that, if the Government believe there is a risk they would lose, they will simply change the scheme (perhaps by revoking Transitional Arrangements) as soon as possible. We do not believe that at any point the claimants or others would be placed back into their old schemes: the Government has a number of other options.

It should be remembered that anti-discrimination legislation is there to ensure equal treatment (or justifiable uneven treatment) rather than fair or generous treatment. If the Transitional Arrangements are found to be unlawful it is, we believe, more likely that the Government **will simply remove the Transitional Arrangements for all and thus ensure equality of treatment that way, rather than reinstate everyone in their old schemes for the future.** What this means is that even if it were to be successful, this proposed challenge would probably cause Transitional Protection to be removed, meaning many officers who are currently protected would lose out, and potentially many other public service workers would as well.

Given this, it is highly unlikely that the Government will settle. There is too much at stake: the principle that the Government has the right to make laws, and the amount of money it would cost.

9. What happens if the claimants lose?

As the initial fee arrangement is a Damages Based Agreement, then if the claimants lose the initial Employment Tribunal, it would appear that they will not incur costs.

However, there is a risk that the Home Office would press for costs, which they could do if the claim were viewed by the Employment Tribunal as being vexatious, abusive, disruptive, or without any reasonable chance of success. If this happened, claimants would be liable for the costs.

We would urge all potential claimants to ask for an evaluation of the likely success of the claim **for their own personal circumstances**. As noted the claims are likely to be on the basis of age, gender, and ethnicity. These are individual characteristics: not everybody will have the same chance of success, nor be likely to be awarded the same level of damages.

Further, the legal firm has stated that if the claimant ends the Agreement before they agree that the claim is ended, claimants will be liable for their share of the total costs. We strongly suggest that potential claimants ask whether this means that if the initial Employment Tribunal case is lost, the DBA ties claimants into an appeal if the firm chooses to pursue one.

We want to ensure that officers considering signing up are fully appraised of the facts:

- this is likely to take many years, as we believe that the Government will fight it;
- It is possible that the Government will choose to take pre-emptive action in order to cap and mitigate any potential liability and any such action is almost certain to be detrimental to the future pension provision of all officers;
- we understand that the fees deducted from any damages awarded should the claim be successful will depend on the numbers of cases taken;
- we believe that not all officers registering an interest will be eligible to make a claim, and furthermore that claimants will have different likelihoods of success, and different sized claims;
- we believe that the claim is unlikely to be successful, and that is the view of our counsel;
- even if the claim were to be successful, this is likely to make the situation much worse for others, while obtaining a relatively small payment for the claimants.

Next steps

We understand that the Pensions Challenge group intends to run roadshows around the country, aimed at informing officers of their perspective.

We understand officers' frustration regarding the pension changes. We are sympathetic to those whose pension provision for the future has been changed. But we would remind you that just because something seems unfair, that does not make it unlawful.

We urge all members to consider their position carefully, before committing themselves.

In particular:

- What are your personal legal grounds for challenge?
- What likelihood have you been advised there is of success?
- What do you expect to be the outcome?
- Do you understand the full liabilities, if you enter a Damages Based Agreement and/or any subsequent fee arrangement?
- Are you willing to engage in this for as long as it takes, which may be several years?
- Although a successful challenge may lead to reinstatement in the earlier scheme for the past, is it likely that the Government will allow that to continue for the future, and if not, what changes will they make?
- Will you ultimately be better off in the long run considering the possible/likely reaction of Government to the challenge, be that reactive or pre-emptive?
- Particularly for former NPPS 2006 members, are you sure that you will actually be better off back in that scheme rather than being in the 2015 CARE scheme? Calculations suggest that some officers are now better off than they were under the 2006 scheme.
- What happens to your pension if you retire in the meantime? How much do you believe you will need to set aside for fees, should this case go to appeal? How will you know?