



R (oao Fire Brigades Union) v HM Treasury

R (oao The British Medical Association) v HM Treasury

[2023] EWHC 527 (Admin)

By Paul Newman KC

Introduction

By s.12 of the Public Service Pensions Act 2013 (“**the Act**”), the Treasury has power to issue directions to control changes in the costs of public pension schemes by modifying members’ benefits and/or contributions should the costs to the employers of future pension provision deviate from prescribed targets. This is known as the Costs Control Mechanism (“**CCM**”).

In 2016, a valuation of the relevant schemes disclosed that the employer costs were below the targets, which under the CCM would have led to an increase in benefits and/or a reduction in member contributions. However, following the need to remedy the discrimination arising from the transitional protection for public pension benefits consequent upon the *McCloud* decision, in 2019 the Treasury issued directions to pause the CCM to enable an assessment of the costs of that remedy (“**the remedy costs**”) to be made. That pause was challenged by judicial review proceedings. The pause was lifted in 2020, at the same time as the Treasury began to consult on its proposals to remedy the discrimination, and the judicial review was accordingly stayed pending the issue of new directions to reflect the remedy costs in the CCM.

By the Public Service Pensions (Valuation and Employer Costs Cap) (Amendment) Directions 2021 (“**the Directions**”), the Treasury sought to bring the remedy costs within the CCM.

By a further judicial review, trade unions acting for members of the Firefighters' Pension Scheme 2015 and the NHS Pension Scheme challenged the legality of the Directions, on a total of eight grounds. These were rejected by Choudhury J in a judgment handed down on 10 March. A summary of the judge's rejection of the challenges follows: references in square brackets are to paragraph numbers of the judgment.

The meaning of "costs" in the Act

It was argued that: (i) the Act only enabled "member costs" to be taken into account for the purpose of measuring changes in the cost of the scheme for CCM purposes, being costs related to the profile of the member such as life expectancy, career, salary, age and gender, and the remedy costs did not fall within those costs; (ii) policy documents and records of negotiations gave rise to a legitimate expectation that costs of transitional protection (which gave rise to the remedy costs) were not member costs and were excluded from the CCM; and (iii) the purpose of s.12 of the Act was to enable the control of the long-term cost of the new schemes, whereas the remedy costs were referable to the legacy schemes.

The judge dismissed these arguments, on the grounds that: (i) "costs" were not defined in the Act and were not to be limited as claimed [107],[122]-[124]; (ii) the documents relied on were not sufficiently clear or unambiguous to give rise to the claimed legitimate expectation [133]-[142] and the large number of potentially affected members rendered it less likely that any enforceable representation was created [144]-[145]; (iii) whilst the overall purpose of s.12 was to measure changes in the costs of the new schemes, the costs of the legacy schemes could also be taken into account in determining the prescribed targets, and in any event the reference to new scheme costs did not intrinsically exclude transitional protection costs, even if they could be described as solely a cost of the legacy schemes [111]-[115].

Legitimate expectation

A further legitimate expectation was claimed, based on a number of statements that the benefits would increase or member contributions would reduce if the costs of providing benefits was below the target, which was said to have been breached when the remedy costs were included

in the CCM, as that meant that the employer costs, which were below the target under the 2016 valuations, would now be above that target. This argument was rejected on the basis that there were no clear and unambiguous representations that the remedy costs would not be taken into account for the CCM [154]-[156].

Frustration of legislative policy

It was argued that the Directions unlawfully frustrated the policy and objects of the relevant legislation, contrary to the principles in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, because there was no warrant, on a proper construction of s.12 of the Act, for the inclusion of the remedy costs as part of the costs to be taken into account for the purposes of the CCM.

The judge noted that this overlapped considerably with the first ground of challenge, which had failed on the construction of the Act [159]. However there was one additional aspect to the argument, which was that the Government was using the CCM to pass on to the members the cost of its own discriminatory conduct, which Parliament could not have been intended. This was rejected, on the grounds that there was nothing in the Act which supported this principle, and that the finding of discrimination did not of itself render it absurd or unconscionable for the remedy costs to be taken into account in the CCM, any more than an increase in costs that were the result of irretrievably poor economic policy choices made by the Government [162].

Breach of the right to a fair trial

It was next argued that the effect of the Directions was the retrospective extinction of the first judicial review following the pause of the CCM, which amounted to a violation of the members' right to a fair trial contrary to common law and Article 6 of the European Convention on Human Rights. The members relied on the "Zielinski principle" (after the European Court of Human Rights' decision in *Zielinski v France* (2001) 31 EHRR 19) that Article 6 rights may be infringed by the enactment of retrospective legislation which affects the outcome of pending proceedings.

The judge rejected the application of the principle, on the basis that the Directions did not have retrospective effect as they did not seek to neutralise or invalidate any earlier valuation [168]-

[169]. The judge also considered the central argument in the first judicial review that the Directions had deprived the members of their right to the operation of the statutory provision which required the Secretary of State to adjust benefits to match the prescribed target following the 2016 valuations, because of the decision to treat the remedy costs as within the CCM: the judge held that that provision did not apply where, as here, the 2016 valuations were only provisional [170]-[172]. In any event, the judge held that any interference with the first judicial review was justified as it went beyond merely cost-saving, and amounted to the appropriate allocation and distribution of finite resources against the background of increasingly costly pension provision [173].

Discrimination

It was argued that the inclusion of the remedy costs within the CCM was indirectly discriminatory in that younger members (and correspondingly those more likely to be women or from an ethnic minority) were put at a particular disadvantage in comparison to older members or those not sharing those protected characteristics. It was said that the Directions adversely impacted all those who would take their benefits from the new schemes for the remedy period and who would not have the option of electing to take benefits in the legacy schemes for that period.

This argument was dismissed for three reasons. First, the disparate impact was a result of the need to provide a remedy for the *McCloud* discrimination (which could not be challenged as it was contained in primary legislation) and not the inclusion of the remedy costs in the CCM [183]. Secondly, the caselaw showed that claims for indirect age discrimination made in the context of a pension scheme were inherently difficult to get off the ground as, by their nature, pensions are linked to age, so that changes which have disparate impacts by reference to age are to be expected [184]-[186]. Finally, any such discrimination was justified, on the basis that it had regard to legitimate concerns about keeping within certain financial constraints, and in particular with a view to ensuring that, in the longer term, pension provision for public sector workers remained affordable and sustainable with the burden being shared fairly between members and taxpayers [191].

Failure to consult

It was argued that the Treasury was under a duty to consult with the unions as to whether the recovery costs should be included within the CCM, on the basis of statements made by the Treasury that “stakeholders” would be “involved” when considering the approach to valuations, and that such consultation should have been included in the consultations on the *McCloud* remedy.

The judge held that a duty to consult would arise only in limited circumstances such as those where a failure to consult would give rise to conspicuous unfairness or where there was a legitimate expectation or established practice of such consultation [202]. The judge went on to say that the statements relied upon did not generate an expectation of consultation [204]-[205] and the manner in which the decision to include the remedy costs in the CCM did not give rise to any conspicuous unfairness [206].

As to the significance of the consultations on the *McCloud* remedy, the judge rejected the proposition that a decision to consult on one topic meant that there must be consultation on a related one [212].

In any event, even if there had been a duty to consult, it would have made no or no substantial difference to the outcome [216]-[219].

Breach of the public sector equalities duty (“PSED”)

Pursuant to the PSED imposed on all UK public bodies by s.149 of the Equality Act 2010, two analyses on the effect of including the remedy costs in the CCM were produced before the Directions were made: an equalities impact assessment, and an actuarial analysis prepared by the Government Actuary’s Department.

It was argued that these breached the PSED in three key respects: (i) the impact assessment was undertaken too late, some 18 months after the decision was effectively taken and two days before the Directions were made; (ii) the analysis was too brief and superficial to amount to the

required rigorous consideration of the duty; and (iii) the fact that no scheme-specific analysis was undertaken necessarily meant that the analysis was overbroad and unspecific.

These were all rejected by the judge, who held that: (i) the analysis was produced before the final decision by the minister, in time for him to change his mind [228]; (ii) the analysis was sufficient to comply with the PSED, as it expressly recognised and acknowledged the differential impact from the outset and went on to consider efforts to mitigate that impact including by limiting the remedy period [239]-[241]; (iii) the actuarial analysis expressly (albeit at a high level) considered how some of the impacts may differ for different schemes [244]. In any event, the judge considered that, even if the PSED had been breached, it is highly likely that the outcome would not have been substantially different had there been a more detailed and/or scheme specific PSED analysis [247].

Failure to obtain and/or to take into account relevant information

Finally, it was argued that, in making the Directions, the Treasury failed to obtain and/or take account of: (i) alternative options for the treatment of the remedy costs; (ii) any other method of quantifying the value to the schemes of the changes resulting from the need to remedy the discrimination; and (iii) a robust assessment of the equalities impacts of the Directions.

The judge dismissed these arguments on the basis of principles identified in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 at [70], namely that: (i) the obligation on the decision-maker is only to take such steps to inform themselves as are reasonable; (ii) subject to a *Wednesbury* reasonableness challenge, it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken; (iii) the court should not intervene merely because it considers that further inquiries would have been sensible or desirable: it should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision; (iv) the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient [249].

As to the third basis of challenge, which the judge said was essentially another way of putting the previous argument, it was rejected because it was merely saying that the assessment ought to have been based on further inquiry, but it was not for the court to strike down the decision to make the Directions on the basis that the assessment was wrong or that it could have been based on further inquiry: such matters are for the decision-maker, unless it can be said that no reasonable authority would have relied on the assessment [250].

As to the other two bases of challenge, it was wrong to say that there was a failure to consider alternative options: the Treasury considered a variety of other options, including the wholesale reform of public sector pensions. No other option, save for simply imposing the entire burden of meeting the recovery costs on the taxpayer, was seriously mooted by the unions, but that was inconsistent with the Government's cost control and cost sharing objectives and it was impossible to say that no reasonable decision-maker would have considered that the range of options was adequate [251].

Conclusion

Despite the wholesale rejection of the unions' cases, and the apparent strength of the judge's analysis underlying that rejection, given the enormous costs involved in the remedial action - estimated to be some £17bn - it is likely that the unions will try to take this case to the Court of Appeal.

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