

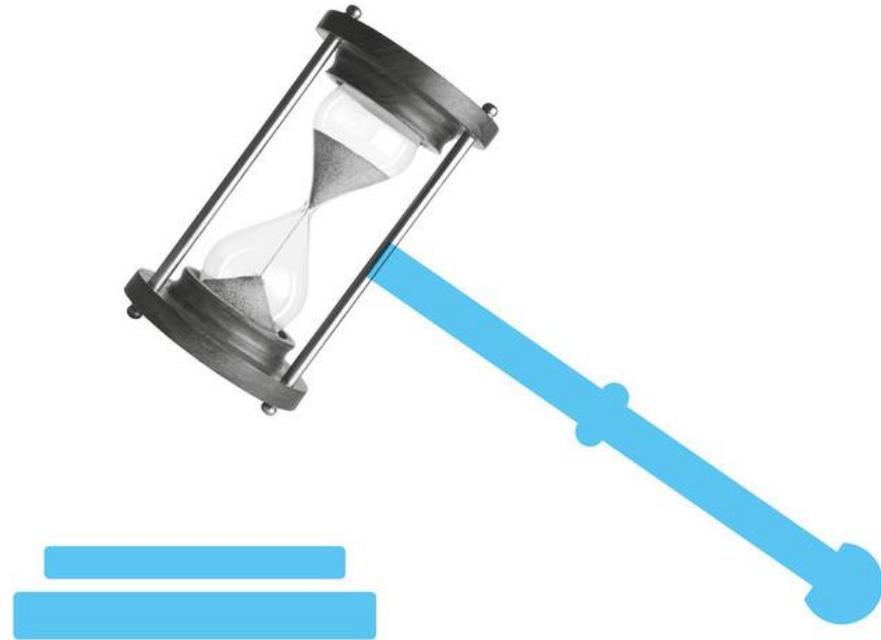
## LGA – Firefighters and Police Local Pension Boards Governance Conference

Case Law Update

**15 May 2019**

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# Agenda

# Agenda

- McCloud and Sargeant – Update
- Booth and Bradshaw – Allowances and Pensionable Pay
- The Estate of Mrs S (PO-19018)
- Miss A (PO-16555)
- TPR Report – Oxfordshire County Council



## *McCloud* and *Sargeant* - Update

# McCloud and Sargeant – Update

## Age Discrimination

### Age Discrimination

- What does the law say about age discrimination?
  - Unlawful since 1 December 2006
  - Can be objectively justified
  
- How does this work in a pensions context?
  - Pensions are age related!
  - Exceptions in Regulations

# McCloud and Sargeant – Update

## Age Discrimination

### – **Sargeant and Others v London Fire and Emergency Planning Authority and Others**

- **ET** – transitional protections were age discriminatory but could be objectively justified.
- **EAT** - found that the ET was correct in its conclusion that the Government had a margin of discretion in pursuing and implementing social policy, and that therefore it had sufficiently established that it had a legitimate aim in implementing the transitional arrangements. However, the ET had erred by taking the wrong approach to the question of proportionality, in light of previous case law.

### – **McCloud & Others v Ministry of Justice**

- **ET** - transitional protections were age discriminatory but could not be objectively justified.
- **EAT** - agreed with the ET that the Government had failed to justify the discriminatory effect of the transitional arrangements as a proportionate means of achieving its social policy aims

# McCloud and Sargeant – Update

## Age Discrimination

### Court of Appeal

- the manner in which the transitional provisions in the judges' and firefighters' pension schemes were implemented, and under which judges' and firefighters' entitlement to remain active members of their respective schemes were defined by reference to their age, gave rise in both cases to unlawful direct age discrimination which could not be justified
- upheld the decisions of the ET and EAT in the *McCloud* judges' case, but overturned the decisions of those tribunals in the *Sargeant* firefighters' case
- no error in the reasoning of the ET either in its assessment of aims or means in *McCloud*
- no legitimate aims for the transitional provisions in *Sargeant* (contrary to the ET and EAT decisions)

# McCloud and Sargeant – Update

## Age Discrimination

### Supreme Court

- permission to appeal to the Supreme Court was not granted by the Court of Appeal
- the Government is seeking to apply directly to the Supreme Court for permission to appeal the Court of Appeal decision

**Booth v Mid and West Wales Fire Rescue Authority; Mid and West Wales Fire Rescue Authority v Bradshaw**

Allowances and Pensionable Pay

# Booth v Mid and West Wales Fire Rescue Authority; Mid and West Wales Fire Rescue Authority v Bradshaw

Allowances and Pensionable Pay

## Facts

- cases concerned pensionable pay under the Firefighters Pension (Wales) Scheme and if allowances, alongside the firefighter's basic pay, constituted pensionable pay
- four firefighters (*Booth, Bradshaw, Jones and Skhane*) made complaints to the Pensions Ombudsman
- *Bradshaw* was a pensioner member of the Firefighters' Pension (Wales) Scheme 1992 and *Booth, Jones and Skhane* were all deferred members of the Firefighters' Pension Scheme (Wales) 2007 and active members of the Firefighters' Pension Scheme (Wales) 2015

# Booth v Mid and West Wales Fire Rescue Authority; Mid and West Wales Fire Rescue Authority v Bradshaw

Allowances and Pensionable Pay

Facts (continued)

— In terms of the allowances:

- *Bradshaw* – received a training allowance which had not been treated as pensionable
- *Booth* - received a daily crew allowance, which was only partly treated as pensionable
- *Jones* - received a self-rostered crewing allowance, which was only partly treated as pensionable pay
- *Skhane* - received an urban search and rescue allowance (USAR), which was not treated as pensionable pay

# Booth v Mid and West Wales Fire Rescue Authority; Mid and West Wales Fire Rescue Authority v Bradshaw

Allowances and Pensionable Pay

## Facts (continued)

- October 2018 – PO upheld the complaints of *Bradshaw* and *Skhane* and dismissed the other claims
- *Booth*, *Jones* and the *Authority* appealed against the Pensions Ombudsman's determination
- The High Court judge therefore had to consider:
  - whether the additional allowances related to work done in performance of the duties of their role; and
  - if so, whether the allowance was sufficiently regular in nature to constitute pensionable pay

# Booth v Mid and West Wales Fire Rescue Authority; Mid and West Wales Fire Rescue Authority v Bradshaw

Allowances and Pensionable Pay

Decision

— *Bradshaw*

- Judge disagreed with PO decision that all of the various allowances were pensionable
- Judge instead took the view that only the allowances from July 2012 were within the meaning of pensionable Pay (after *Bradshaw's* role was confirmed as permanent). Any allowances up to that point were on a temporary basis only
- The Authority's appeal was therefore allowed in part

# Booth v Mid and West Wales Fire Rescue Authority; Mid and West Wales Fire Rescue Authority v Bradshaw

## Allowances and Pensionable Pay

### Decision (continued)

#### — *Booth and Jones*

- considered together as, although they received different allowances, both related to the particular duty system in place at their respective stations
- main consideration was whether the allowances they had received were temporary or permanent
- the Authority submitted that the allowances were temporary, as they did not endure for the entire duration of a firefighters' employment—rather, they were specific to different duty systems and so if a firefighter was transferred to a different station, the allowance would cease
- Judge disagreed with this argument and took the view that 'permanent' need not mean enduring until the end of employment. Although the allowances could change upon transfer between stations, the duties relating to the allowances were nonetheless part of the firefighters' role and were not at any time optional
- Judge also stressed that if a firefighter were never transferred to another station, they would continue to receive the allowance, therefore making it permanent in nature.

# Booth v Mid and West Wales Fire Rescue Authority; Mid and West Wales Fire Rescue Authority v Bradshaw

## Allowances and Pensionable Pay Decision (continued)

### – *Skhane*

- PO considered the allowance to be permanent—Mr Skhane was performing his duties within the USAR team and there was no intention for that team to terminate unless funding was ceased
- PO also relied on notice period in the contract (12 weeks for over 12 years of service) which would not be necessary for a temporary role
- Judge took the opposite view and stated that as the allowance was only payable under the renewable contract, which was separate to *Skhane's* general contractual duties as a firefighter, it was not paid in relation to the performance of his duties as a regular firefighter
- As the contract was subject to renewal indicated that the allowance was temporary. Judge held that permanence had to be assessed by reference to the duration of the main contract for the role of regular firefighter which was permanent in nature as opposed to the secondary USAR contract

# Booth v Mid and West Wales Fire Rescue Authority; Mid and West Wales Fire Rescue Authority v Bradshaw

## Allowances and Pensionable Pay

### Practical Implications

- as the Court has deemed past pay to be pensionable, both the Authority and its employees will have to pay pensions contributions retrospectively
- they will have the option of doing so either by instalments or as a lump sum (and there may be tax relief considerations and potential interest payments on those contributions)
- the decision emphasises the need for clarity over what constitutes pensionable pay. This has the potential to be very complex, especially with the introduction of new types of pay
- the cases indicate the importance of clarity and that once the schemes, employers and unions agree the approach to pensionable pay, that it is accurately recorded by all parties

## **The Estate of Mrs S (PO-19018)**

Incorrect benefit quotations

# The Estate of Mrs S (PO-19018)

## Incorrect benefit quotations

### The Facts

- The member had been employed by the Council as a part-time teacher
- After an extended period of sick leave, she exhausted her entitlement to sick pay in October 2011
- Under the rules of the Teachers' Pension Scheme, this meant that she was no longer in pensionable employment. However, the school's governing body agreed that the member, who hoped to return to work, could stay on its payroll as an unpaid employee and the Council continued to record the member as employed
- As a result, Teachers' Pensions issued benefit statements to the member in 2012 and 2013 incorrectly stating that she was entitled to a death in-service grant
- After the member's death in July 2013, the scheme administrator informed her husband that the death in service benefit was not payable since his late wife's pensionable service had ended more than 12 months before her death

# The Estate of Mrs S (PO-19018)

## Incorrect benefit quotations

### The Decision

- The Pensions Ombudsman upheld the complaint against the Council
- The Council's failure to submit a form to Teachers' Pensions to show that the member had left pensionable employment resulted in her receiving benefit statements which incorrectly stated that she would be entitled to death in service benefits
- The member had relied on the incorrect benefit statements in good faith and, for this reason, did not apply for ill-health retirement which would have provided her and her beneficiaries with significantly higher benefits
- The Ombudsman directed the Council to pay the member's estate the difference between the death benefits already received and the maximum amount of benefits that would have been payable had the member applied for ill-health retirement benefits before her death

**Miss A (PO-16555)**

Cohabiting partners

## Miss A (PO-16555)

Cohabiting partners

### Facts

- Mr D was a member of the Police Pension Scheme 1987 (the 1987 Scheme)
- In 2006, members were given the opportunity to transfer to the Police Pension Scheme 2006 (the 2006 Scheme) in respect of their accrued and future service
- In October 2006, Mr D purportedly signed a form (the Choice Form) stating his intention to opt into the 2006 Scheme
- In 2010, Mr D left Wiltshire Police's employment and in 2016 he passed away
- Miss A sought her survivor's pension but was told she was not entitled as Mr D had not opted into the 2006 Scheme
- Miss A appealed via the IDRPs but this was not upheld

## Miss A (PO-16555)

### Cohabiting partners

#### Decision

- Deputy Pensions Ombudsman (DPO) partly upheld complaint
- DPO held *Brewster* was crucially different from Miss A's case. In *Brewster*, an additional administrative obstacle was imposed on cohabitees that did not apply to married couples. In Miss A's case, the scheme did not provide for survivor's pensions to be paid to cohabitees
- DPO did however recognise that the administrator failed to promptly inform Miss A of the correct IDRPs procedure and lost documents relating to her children's benefits – awarded £500 for stress and inconvenience

# **TPR Report – Oxfordshire County Council**

Regulatory Intervention Report

# TPR Report – Oxfordshire County Council

## Regulatory Intervention Report – Section 89 – Pensions Act 2004

- *September 2015* – breach of law report sent to TPR as no annual statements had been issued to members for 2014-2015
- Three year improvement programme saw 50% of annual statements issued for 2015-2016 and 77% for 2016-2017
- *May 2018* – a Warning Notice issued by TPR to Scheme Manager to take all necessary actions to issue the statements for 2017-18 and agree a plan with TPR to prevent the issue reoccurring in future years
- *August 2018* – an Improvement Notice issued by TPR meant by the end of 2018, 99% of annual statements for 2017-2018 had been issued

# Questions?



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