

RPI/CPI Judicial Review

Post trial briefing from Thompsons Solicitors

November 2011

Introduction

The judicial review trial took place between 25 and 27 October at the High Court in London. Judgment is reserved. It is realistic to anticipate that judgment will be handed down within the next six weeks. This briefing summarises the arguments presented in Court.

The Parties

There are two sets of Claimants with different legal representation, and pursuing different but complementary legal arguments.

We represent PCS, POA, FBU, NASUWT, Unite, Unison and Valerie Piper (a test case member of PCS). Our Counsel are Nigel Giffin QC and Nick Randall.

Russell Jones and Walker (“RJW”) represent the Staff Side of the Police Negotiating Board, the Police Federation, the National Association of Retired Police Officers, FDA, Prospect, the Civil Service Pensioners Alliance, GMB and certain individual Claimants. At the start of the trial, the NUT, the Association of Principal Fire Officers and the National Federation of Occupational Pensioners were added to the Claimants represented by RJW. Their Counsel are Michael Beloff QC and Martin Westgate QC.

The Defendants are the Secretary of State for Work and Pensions, HM Treasury and, additionally for the Claimants we represent, the Secretary of State for Communities and Local Government, the Secretary of State for Education and the Minister for the Civil Service, all of whom are represented by the Treasury Solicitor. Their Counsel are James Eadie QC, lead Treasury Counsel, Clive Sheldon QC and Amy Rogers.

The decisions under challenge

The Secretary of State for Work and Pensions is required each year, under social security legislation (section 150 of the Social Security Administration Act 1992), to review various social security benefits to determine whether they have kept up with general increases in prices in such manner as “he sees fit”. He must then up-rate those benefits by at least the same percentage as the increases in general prices.

The relevant pensions legislation requires the Treasury, in turn, to increase public service pensions by the same percentage as the annual increases to benefits made by the Secretary of State for Work and Pensions.

In June 2010, the Chancellor, in his Budget report, announced that the longstanding practice of measuring the increases in general prices using RPI was to be changed and that, from April 2011, CPI would be used. The rationale for the switch was that CPI was a statistically more appropriate index, which would also save money. The unions have maintained that it is a deficit-reduction measure.

The cost savings by the government and private sector employers

The Chancellor estimated that the savings from public service pensions would be £6 billion in the lifetime of this parliament.

CPI is generally about 1.2% lower than RPI annually. It is estimated that the loss to public service pension scheme members will be in the region of 15%.

But the switch to CPI has also been applied to private sector pensions. The DWP estimates that £73 billion has been wiped off the value of private sector pensions - a windfall for their sponsoring employers.

The arguments advanced by the Claimants in Court

The Claimants we represent advanced wide-ranging arguments under the following headings:

- (i) the government has acknowledged that a substantial part of its purpose in changing from RPI to CPI was to reduce expenditure on pensions and other benefits. This was not a permissible consideration under the relevant statutory provisions. This is the construction argument;
- (ii) many statements had been made in the past by the government, to employees and their unions, that pensions would be adjusted by RPI. These statements gave rise to substantive legitimate expectations that RPI would continue to apply, and procedural legitimate expectations that there would not be a change from RPI without consultation. The Claimants also relied on similar arguments so as to contend that the change from RPI to CPI in relation to accrued rights would amount to a breach of the right to peaceful enjoyment of possessions under Article 1 of the 1st Protocol to the European Convention on Human Rights ("A1P1"). This is the legitimate expectation/A1P1 argument;
- (iii) the government had failed to consider properly the equalities implications of the change, and so had breached its statutory duty under the Equality Act 2010 to have "due regard" to relevant equalities matters (the Equalities Duties argument) ; and
- (iv) the decision to change from RPI to CPI was flawed either as a matter of misdirection or through failure to have regard to relevant considerations (the supplementary misdirection/irrelevant considerations argument).

The Claimants represented by RJW initially advanced a narrower argument. They contended principally that section 150 of the Social Security Administration Act 1992 required the Secretary of State for Work and Pensions to estimate the general level of prices and that CPI did not achieve this because it does not directly consider the percentage by which prices have risen. In Court, these Claimants widened their argument to develop the argument made from the outset by the Claimants we represent that deficit reduction was not a legitimate objective for the purpose of section 150.

In Court, the arguments by the Claimants represented by RJW were presented first because their original claim form was filed with the Court first. Each set of Claimants made it clear to the Court that it adopted the arguments of the other.

The arguments advanced for the Claimants we represent in more detail

(i) The Construction Argument

Section 150 of the Social Security Administration Act 1992 requires the Secretary of State for Work and Pensions, in each tax year to "review" the amounts of various social security benefits:

“in order to determine whether they have retained their value in relation to the general level of prices obtaining in Great Britain estimated in such manner as the Secretary of State sees fit.”

The Secretary of State has to decide in what manner to estimate the percentage increase in the general level of prices, and then to increase certain specified benefits by an equal or greater percentage.

The Claimants argued that, on the evidence in Court, the underlying objective of the government was to generate cost savings and that the appropriateness of CPI as a measure of price increases was advanced after the event. The desire to generate costs savings was not a consideration which should have been taken into account when carrying out the review envisaged by section 150. Case law dictates that even a wide ranging power must only be exercised for the purpose envisaged by the legislation in which it is contained.

(ii) The Legitimate Expectation/A1P1 argument

The Claimants argued that substantive and procedural legitimate expectations arose because of:

- (i) the use of actuarial factors, based on the assumed future use of RPI, in transactions with individuals such as transfers from one scheme to another and the purchase of augmented benefits. The basis on which individuals had, for example, purchased augmented benefits had been changed;
- (ii) statements made in published pension scheme literature, such as guides produced for members; and
- (iii) assurances given to the trade unions in the course of sector-specific negotiations.

Essentially the same assurances were used to argue that individuals' rights under A1P1 had been unjustifiably interfered with.

The Claimants argued that these legitimate expectations, and their breach, had not been properly taken into account before the switch to CPI had been decided on. There was also no consultation.

(iii) The Equalities Duty Argument

The change from RPI to CPI clearly has the potential to impact differently upon groups defined by gender and/or age-for example because women have a longer life expectancy than men.

Prior to 5 April 2011, section 76A(1) of the Sex Discrimination Act 1975 required public authorities, in exercising their functions, to have due regard to the need to eliminate unlawful sex discrimination and to promote equality of opportunity between men and women. From 5 April 2011, public authorities are under a duty, in exercising their public functions, to have due regard to the need to eliminate discrimination prohibited by the Equality Act 2010, and to advance equality of opportunity between persons who share a “relevant protected characteristic” (which include age and gender).

There is no requirement for a formal equality impact assessment (“EIA”) as such. But if the duty to have “due regard” to the relevant equalities considerations is to be discharged, an authority will normally need to have obtained and considered the type of information that a properly conducted EIA would have contained.

The Claimants argued that no EIA was carried out before the Chancellor's announcement and that two subsequent EIA's (the first of which was prompted by the Fawcett Society's judicial review) were wholly inadequate.

The parties are required to make further submissions by 8 November in relation to the Defendants' argument that the equalities duties did not apply because of the exclusion for parliamentary proceedings.

(iv) The supplementary misdirection/irrelevant considerations argument

The Claimants raised four further arguments as to why the Secretary of State's decision was flawed. The first three arose from one of the Secretary of State's stated justifications for the change to CPI - that it was a better measure because it excluded housing costs for the reason that the majority of pensioners own their own homes:

- (i) the Secretary of State based his decision on the supposed characteristics of the group whose benefits would be affected (ie pensioners);
- (ii) it was not correct that a majority of those whose pensions would be affected owned their homes outright;
- (iii) the Secretary of State had failed to take into account that (a) the change affected not only pensions in payment but also the revaluation of deferred pensions; and (b) CPI excludes consideration not only of mortgage interest charges, which are linked to home ownership, but also of council tax payments, which are not; and
- (iv) the formula used to calculate CPI fails to assess the general level of prices on the same basis at the start and the end of the period being assessed. This point was at the forefront of the challenge brought by the Claimants represented by RJW.

The arguments advanced for the Claimants represented by RJW in more detail

The primary case by the Claimants represented by RJW was that the way in which CPI is calculated does not achieve the objective of measuring the increase in prices required by section 150.

The difference between the two measures is caused by several differences in the way that the indices are calculated. They cover different "baskets" of items for comparison and different sections of the population. But the most significant differences derive from the formula used to aggregate prices. This is known as the "formula effect". It takes into account the fact that consumers can mitigate the impact of price changes on their welfare by substituting away from goods which have become more expensive towards cheaper goods.

The Claimants represented by RJW therefore argued that CPI measures consumer response to price increases, rather than the general increase in prices.

The Claimants represented by RJW have also now developed the construction point advanced by the Claimants we represent.

Next steps and judgment

No date has been given by the Court as to when judgment can be expected. Further written submissions on the equalities duties issues are to be made by 8 November. It is reasonable to anticipate that judgment will be given within the next six weeks.

Further information about this briefing and the Thompsons Trade Union Law Group email richardarthur@thompsons.law.co.uk