

**SUMMARY REPORT OF THE DECISION OF THE HIGH COURT IN THE CASE
CHALLENGING THE CHANGE OF INDEX FROM RPI TO CPI
AS IMPACTING ON PUBLIC SECTOR PENSIONS**

Introduction

The decision of the High Court (Lord Justice Elias, Mr Justice McCombe and Mr Justice Sales) was delivered this morning, Friday 2nd December 2011, dismissing the application for Judicial Review.

Michael Beloff QC and Martin Westgate QC appeared on behalf of the Claimants (called hereafter the “PNB claimants”), comprising:-

1. Staff Side of the Police Negotiating Board (together with the Police Federation and, as representative claimant, Ian Rennie)
2. National Association of Retired Police Officers (together with, as representative claimant, Clint Elliott)
3. FDA
4. Prospect
5. Civil Service Pensioners’ Alliance (together with, as representative claimant, James Dunlop)
6. GMB
7. National Union of Teachers
8. Association of Principal Fire Officers
9. National Federation of Occupational Pensioners

The claim of the PNB claimants was joined to be heard with a claim pursued by other parties, including PCS and other Trade Unions.

There were four main bases for challenging the decision of the Secretary of State for the Department of Work & Pensions that the basis upon which state benefits would be calculated, and therefore public sector pensions would be updated, be changed from the retail prices index (RPI) to the consumers prices index (CPI) :

- a. Was CPI an index which the Secretary of State was entitled to adopt?
- b. Had the Secretary of State erred in law in having regard to economic considerations, when considering the switch to the CPI index?
- c. Had there been a breach of a legitimate expectation?
- d. Had there been a breach of the public sector sex equality duty?

1. Was CPI an index which the Secretary of State was entitled to adopt?

The relevant statutory provision is Section 150 of the Social Security Administration Act 1992, which obliges the Secretary of State to review certain sums annually:-

“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 thinks fit.”

The basis of the challenge by the PNB claimants was that the effect of adopting CPI, because of its use of the geometric mean, was that the comparison was not simply

as between prices, but also took into account consumer reaction to increases in prices. It was argued this was an illegitimate approach meaning that the comparison was no longer price as against price (and therefore no longer like being compared with like).

The Court rejected this argument, on the basis of their view that CPI had become a well-established method of establishing the relative increase in prices. The Court noted that both RPI and CPI had to be constructed from basic information about prices, using a process of successive evaluative judgments made by economists and statisticians, and moreover, that in relation to both, the object was “to seek to model the spending patterns and behaviour of average consumers or households, so as to assess the impact of inflation on them”.

The Court rejected the argument, finding that the obligation under Section 150 was to make a comparison of the general level of prices, and this was being done by the use of the CPI methodology. They considered that the use of the geometric mean did not affect this; all that achieved was that the rate of change in price of each item was not weighted equally.

2. Had the Secretary of State erred in law in having regard to economic considerations, when considering the switch to the CPI index?

The PNB claimants submitted that the Secretary of State erred in law in having regard to economic considerations when deciding the switch to CPI. It was implicit in the obligation upon him that the Secretary of State had to make the best estimate of the increase in the general level of prices, and Parliament could not have intended to permit the Secretary of State deliberately to make an inferior estimate, or one which he thought less truly reflected the increase in the general level of prices simply because of the state of the national economy. As Mr Beloff QC on behalf of the PNB claimants put it, “the Secretary of State had put the economic cart before the statutory horse”; meaning that the need to make savings was the dominant factor driving the choice of methodology.

On this issue, the Court dismissed this on a majority decision. It found:-

“If the Secretary of State is satisfied that a particular measure is a fair and genuine method for making the relevant determination, so that it can legitimately be said that it achieves the objective of protecting the purchasing power of the relevant benefits and pensions, he can adopt that method even if his reason for preferring it over other potential candidates is that it draws less on the public purse.”

They went further, to say that even if they were wrong, and the Secretary of State had been obliged to consider the “best” scheme, he would have concluded that CPI did most fairly assess the amount by which pensions would need to be increased to retain their purchasing power.

In a minority decision, Mr Justice McCombe accepted the PNB claimants’ submission that on any fair reading of the evidence, the need for deficit reduction was the driver for the change in index, and the other merits of the CPI were essentially deployed in order publicly to justify the switch. Mr Justice McCombe found that the Secretary of State had at no stage asked the “stand-alone” question which was in his view required to be answered, which was:-

“How can we determine appropriately, for the purposes of the review under Section 150(1), whether benefits/pensions have retained their value in relation to the general level of prices obtaining in Great Britain?”

Mr Justice McCombe further went on to say that having reached that view, he found it difficult to assume that the same decision would have been taken if the appropriate question had been asked, and he would have granted relief quashing the Orders under challenge on this basis. However, this was a minority view.

3. Had there been a breach of a legitimate expectation?

The PCS claimants contended that there had been a series of representations made to relevant Trade Unions and to employees, both through pension scheme guidance documents and in the course of negotiations, to the effect that RPI would continue in the future to be adopted as a method for determining the relevant uprate in pension benefits.

This was dismissed on the basis that the Court found:-

- a. That nowhere was the impression given that the requirements of review contained in the 1992 Act were to be encumbered by an inflexible adherence ad infinitum to RPI;
- b. There was nothing said in the negotiations with Trade Unions which amounted to a clear, unambiguous and unqualified representation that RPI would always be the index adopted; and
- c. Even if a legitimate expectation had been established, any obligation to consult which arose would have been satisfied by the process of debate with the Unions that occurred from June 2010 until the making of the statutory Order in March 2011.

4. Had there been a breach of the public sector sex equality duty?

The PCS claimants submitted that there had been a breach of this duty in the making of the Order under Section 150 and under the Pension Increases Act.

The Court were of the view that the focus of the enquiry had to be on the up-rating Order under Section 150, as once that had been made, the Pensions Order had to follow.

It was evident that there had been a public sector equality impact assessment undertaken by the Treasury, but not by the Department of Work & Pensions. The Court found that the duty could be discharged by a Minister if he was satisfied that the relevant equality assessment had been carried out by another Government Department as well or better placed than his own to undertake that task. This was the case here as the other Department (here, the Treasury), had policy responsibility in relation to the matter under review.

The challenge that the equality impact assessment (EIA) was itself defective (as it did not go into sufficient detail to analyse the full adverse impact on women) was also rejected. The Court found that it was plain from the September 2010 EIA conducted by the Treasury that the Government well understood that, in broad terms, more women would be adversely affected than men.

In addition to these issues, the Court considered the extent to which, if at all, the public sector sex equality duty was engaged. In view of the findings however, this was not critical to the decision reached, though they spent some time considering this issue, and were not convinced that the equality duty was engaged in any event, in the making of secondary legislation, as here.