



**The Professional Trades Union for Prison,  
Correctional & Secure Psychiatric Workers**

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**POA Circular 127/2019**

Action		Information	
England/Wales	<input type="checkbox"/>	England/Wales	<input checked="" type="checkbox"/>
Scotland	<input type="checkbox"/>	Scotland	<input checked="" type="checkbox"/>
Northern Ireland	<input type="checkbox"/>	Northern Ireland	<input checked="" type="checkbox"/>
Special Hospitals	<input type="checkbox"/>	Special Hospitals	<input checked="" type="checkbox"/>
Private Sector	<input type="checkbox"/>	Private Sector	<input checked="" type="checkbox"/>
IRC	<input type="checkbox"/>	IRC	<input checked="" type="checkbox"/>

30th December 2019

Dear Colleagues

**AGE DISCRIMINATION: PENSION CLAIMS**

As you may be aware, four of the parallel claims to our pension discrimination cases have been dealt with in preliminary hearings now. It is a matter of chance which cases are dealt with first – our cases are going to be heard early in the new year. The outcome of the cases which have already been heard give us a very clear idea what the outcome is likely to be for us, because the Orders made by the Employment Tribunals were largely agreed by the Government.

The Government accepts that the rules which required members to transfer from the Principal Civil Service Pension Scheme to the 2015 scheme ('alpha') are unlawful. The same is true for members who were members of the former NHS Pension Scheme. The rules will have to be amended, but that will take time.

However, the Government also accepts that changes will have to be made now, without waiting for new legislation, so that members who leave the Service (or who have done so recently) receive the benefits they are entitled to. That is what the Employment Tribunal can and will deliver although (as explained below) the full remedy may require further hearings.

The Employment Tribunal will also decide what compensation must be paid to members who have lost money as a result of the unlawful discrimination, and what compensation must be paid to members for the upset and anger they have been caused.

In the first instance, the Government may say that the remedies outlined below will only apply to members who have actually made a claim to the Employment Tribunal. If you have not already done so you should do so now. We will be reopening the on-line questionnaire that was on the POA website to enable you to do so. Please look out for further details, which we will publish early in the new year.

## 1. A “Declaration”

A Declaration is a formal order from a Court or Tribunal, stating what the law is. The Government will have to abide by the terms of the Declaration which the Employment Tribunal makes, whatever the scheme rules say.

In the cases which have already been dealt with for Judges, Police Officers and Firefighters, the Government has already consented to a Declaration being made by the Employment Tribunal, the effect of which is to override the rules. In our cases the wording is likely to be agreed. It will say that all members who did not satisfy the age-based requirements for full protection (i.e. they were too young) are entitled to be treated as if they did satisfy them. That would mean that all members of the Principal Civil Service Pension Scheme who were in Service on 31<sup>st</sup> March 2012 would be entitled to be treated as if they had never left. The same would apply for members of the former NHS Pension Schemes.

Note that the wording is “*entitled to be treated ...*” not “*must be treated ...*”. Our Lawyers have carefully analysed the differences between the schemes. In most circumstances a member who has a choice between the Principal Civil Service Pension Scheme and Alpha, or a choice between the former NHS Pension Schemes and the 2015 Scheme will be better off the terms of their former scheme. That’s not necessarily the case for all members, particularly for former members of the Nuvos section of the Civil Service Scheme – in some circumstances they would be better off if they are treated as if they are a member of Alpha. The Government accepts that no-one should be worse off as a consequence of unravelling the 2015 changes.

The final position might be that all members who joined before 1<sup>st</sup> April 2012 will be given a one-off choice between their old scheme and the 2015 Scheme. It might mean that they don’t have to make a choice now – they are simply entitled to whichever benefit structure is better for them when they retire. That is a question which will have to be resolved in a further hearing.

The important point is that, provided that you were employed before 1<sup>st</sup> April 2012, if you were in the pre-2015 Scheme you will be back in the pre-2015 Scheme, provided that it is a better pension scheme for you.

## 2. Compensation

We have made a claim for compensation for members who have lost money as a consequence of the 2015 changes. This is not likely to affect many members. The only clear exception is for members who have lost money because they have had to retire on the terms of the wrong pension scheme. That is outlined in more detail below. We will ask all members who believe that they have suffered a financial loss for further details of their claim early in the new year.

We have also claimed compensation for the non-financial damage which has been caused. This is called “injury to feelings” by Lawyers, and covers issues such as anger, upset, anxiety and, in severe cases, depression. In most cases the degree of injury to feelings will be the same for everyone. Again, we will ask all members who believe that they have suffered more than most for further details of their claim early in the new year.

## 3. In practical terms: what does this mean now?

The retirement plans for most members of the pre-2015 Schemes will not yet be affected by the changes made in 2015. Either they remained in the pre-2015 Scheme (because they are older

than the members who had to transfer) or they were transferred to the 2015 Scheme, but are not yet old enough to retire. But there are some exceptions.

The clearest cases are for members who have applied to retire early on the grounds of ill-health. The criteria used to decide whether a member qualifies for ill-health retirement are more favourable in the pre-2015 Schemes, and the ill-health benefits in the pre-2015 Schemes are different too, and in some cases they are better. This means that some members might have applied for an ill-health pension and not succeeded because the pre-2015 Schemes rules were not applied. It also means that some members might have retired on ill-health grounds, but their pension is smaller than it should be.

Once the Declaration has been made, the Prison Service will have to re-examine the ill-health applications they have dealt with since 31<sup>st</sup> March 2015. If any member is worse-off because the 2015 Scheme rules were applied, their benefits would have to be improved, retrospectively. Any new applications will have to be dealt with under the terms of the correct scheme. That should apply immediately.

#### 4. When will this all take effect?

The Declaration will be binding as soon as it is made. The Government should treat all of the Employment Tribunal claimants under the correct scheme rules even before the Declaration is made.

Similar Declarations will need to be made by the Scottish Employment Tribunal and the Northern Ireland Industrial Tribunal, but that will inevitably follow (probably without the need for a hearing at all).

It may take the employers a little time to redesign the forms they use for processing retirements, on the grounds of ill-health or otherwise, and we have started the process of getting that implemented. But your retirement terms do not depend on the forms that are used. So:

- If you are going through the ill-health retirement process at the moment, you can insist that the pre-2015 Scheme rules are applied if you were a member of a pre-2015 Scheme and it provides a better outcome for you.
- If you have retired recently on the grounds of ill-health you should tell the employer that you want your case reconsidered. You should also tell us if you have not done so already – the Government has asked us to assist with identifying all of the members who might have been retired on the wrong terms.
- If you were a member of one of the pre-2015 Schemes, when you reach the age when you could have retired under old scheme rules, you should consider whether you want to do so now. This might apply, in particular, to members in the NHS pension schemes. If you do, tell the employer, and tell them that you want to retire under the terms of the pre-2015 Scheme. Tell us too.

Sorting out the issues relating to compensation for financial losses and for injury to feelings will take a little longer. The Government is likely to resist these claims and it may take until the autumn of next year to get them resolved.

5. ... and in the longer term

As explained above, the Government will need to amend the legislation. The discriminatory provisions must be removed. What cannot happen is that members who had to transfer to pre-2015 Schemes are transferred to them again retrospectively.

We must anticipate that the Government and devolved administrations will try to worsen benefits earned by future service at the same time, to recoup some of their losses. We have the right to be consulted before any changes are made, and we will engage in the process vigorously, as we did last time.

We will keep you informed of developments. In the meantime you will find a "frequently asked questions" sheet attached which we hope will assist with any immediate concerns.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S Gillan', written in a cursive style.

STEVE GILLAN  
General Secretary

ENCLOSURE

## **PENSIONS AGE DISCRIMINATION: FREQUENTLY ASKED QUESTIONS**

Head Office has already received a number of queries around about what needs to be done to remedy the age discrimination which the Courts have found when the 2015 changes were made, what the next steps are.

You will find below a summary of some of the frequently asked questions so far and the answers that we can give at this stage.

### **1. If I am not a claimant, am I affected?**

Members who have made a claim to the Employment Tribunal are directly covered by the Declaration which will be made as to how the pension schemes must be operated. The POA currently has around 2,600 registered claims. The Government has already said that non-claimants will be treated in a similar way after consultation.

If you have not made a claim, the POA is already preparing to reopen the on-line claim process. This will be on the POA website in the near future and an announcement will be made. If you have not already submitted a claim, please take this opportunity to do so.

### **2. How will the Declaration affect members who would be better off in the 2015 Scheme?**

The position is complex. In some circumstances, members would be better off if they are treated as if they are a member of the 2015 Scheme. The Government accepts that no-one should be worse off as a consequence of unravelling the 2015 changes. The immediate effect of the Declaration will not apply to members in these circumstances, but a formal Declaration will be made as to the law applying to them at a future hearing. It should say that they are entitled to be a member of whichever of the pre-2015 Scheme and the 2015 Scheme is better for them.

### **3. How do I make the Prison Service aware that I am affected?**

The only members who are currently affected are members who have applied to retire on the grounds of ill-health (or who retired recently on the grounds of ill-health. If you are not in this position, there is no need for you to take immediate action. If you are, your position is dealt with in the next questions.

### **4. How will ill-health cases be dealt with?**

We are discussing this with MyCSP.

All claimants are entitled to be treated as if they are members of the pre-2015 Schemes and as such are entitled to be dealt with under pre-2015 Schemes rules. However, there may be some instances whereby a member is better off being treated under 2015 Scheme rules.

Our position is that individuals should be assessed against the old and the new rules, and then be given the right to choose whichever result suits them. This will be discussed in more detail.

**5. I retired since 1<sup>st</sup> April 2015 on ill-health grounds – what should I do?**

If you were previously a member of the pre-2015 Schemes but had to transfer to the 2015 Scheme, your case should automatically be reassessed. The employers may take time to deal with previous retirements. If you are in this position you should contact your previous employer and the POA.

**6. What if I could have retired under the pre-2015 Scheme rules, but I am now in the 2015 Scheme?**

This might apply, in particular, to members of the 1995 NHS Pension Scheme who had MHO status.

This had not yet been decided. If you are in this position and you want to retire you should contact your employer. You should also tell us. Some employers will not yet be up to speed and may be slow to respond correctly. If your employer does so, bear in mind that you can still retire – any pension you have accrued in the pre-2015 Scheme will not be reduced but any pension you have in the 2015 Scheme might be. If a reduction is made, it will have to be repaid later.

**7. This whole exercise has caused me a lot of distress and anger. Will I be compensated for that?**

We are pursuing this. The position is not yet certain. We will be asking claimants about the injury to feelings that they have suffered early in the new year.

The issue will be dealt with at another hearing, probably later in 2020.

**8. What about the financial losses I have suffered?**

We are also pursuing this. Some out-of-pocket losses such as arrears of underpaid pension must be repaid, but the precise legal mechanism is not clear. Arrears should be paid automatically. Other expenses may be less clear. We will be asking claimants for further details early in the new year.

This issue will be also dealt with at another hearing, probably later in 2020.

**9. Are there any tax implications?**

Yes. Once the administrators recalculate your pension, HMRC may question whether the increased amount should be treated as in excess of the annual allowance permitted for tax relief.

This is also being discussed but you should not be out of pocket. Please note that this should not affect or delay any plans to retire. It may just mean that immediate retirements and previous retirements will have to be reassessed.

**10. I opted out of the scheme altogether when the changes were made in 2015. What do I need to do?**

We are not able to advise you whether you should apply to re-join if you have not done so. Only an independent financial adviser can do that.

We are discussing the claims which members in this position can make with our Lawyers. If you are in this position, please let us know.

**11. What about longer term solutions?**

The final remedy will require amendments to the legislation. There will also be further hearings, probably towards the end of next year, to deal with the recovery of any out-of-pocket losses members may have suffered, and compensation for injury to feelings.

**12. What do I do if I am not immediately affected?**

If you are not one of the immediate cases highlighted in this circular you do not have to take any action other than to ensure that if you have not submitted a claim do so when the process reopens. Keep an eye on all POA circulars and briefings.