

FEE PAID JUDICIAL PENSIONS SCHEME: EQUALITY STATEMENT

Introduction

1. This Equality Statement (ES) considers the potential equality impacts arising from the draft regulations for establishing the Fee Paid Judicial Pension Scheme (FPJPS). It should be read alongside the Government's response to the consultation on the draft regulations and the actual regulations.

Background

2. The UK courts and tribunals have considered the terms and conditions of current and former fee-paid judicial office holders in a number of cases, including the case of *O'Brien*¹ and *Miller*. They found that a historic lack of pension and other specified benefits amounted to less favourable treatment of some fee-paid judicial office holders in comparison to salaried judges doing the same or broadly similar work. This less favourable treatment was on grounds of their part-time status and it was not justified on objective grounds. In particular, they found that eligible fee-paid judicial office holders were entitled to pension benefits that were no less favourable than those provided at the time to salaried judges by the scheme established under the Judicial Pensions and Retirement Act 1993 (JUPRA). The judicial offices which have been found to be eligible for membership of the FPJPS are listed in Schedule 1 to the FPJPS regulations.

Policy objective

3. The Ministry of Justice has committed to implement a remedy – a Fee-Paid Judicial Pension Scheme (FPJPS) – in respect of reckonable fee-paid service by eligible judicial office holders from 7 April 2000 to 31 March 2015 (and service from 1 April 2015 for those qualifying for transitional protection).
4. The aim of the FPJPS is therefore to provide pension benefits for eligible current and former judicial office holders in respect of their service in the relevant period, which mirror as far as possible the pension arrangements which existed for salaried judges under the Judicial Pensions and Retirement Act 1993 (JUPRA). Where it is not possible to mirror the arrangements under JUPRA, the intention is that the FPJPS will be no less favourable than JUPRA.
5. The starting date of the relevant period of service is 7 April 2000 (or the judicial office holder's appointment date, if later) because this was the date by which the UK was required to implement the Part-Time Workers Directive, which prohibited unjustified less favourable treatment of part-time workers on ground of part-time status. For approximately 31% judicial office holders, the end date of the period of reckonable service will be 31 March 2015 (or their retirement date, if earlier). This is because, following wider public service pension reform, a new Judicial Pension Scheme (JPS) was introduced on 1 April 2015. The JPS provides pension benefits in respect of service from 1 April 2015 for eligible fee-paid (and salaried) judicial office holders, except where the judicial office holder benefits from transitional or tapering protection.
6. Therefore the FPJPS will provide pension benefits in respect of service from 7 April 2000 to 31 March 2015. In addition, for some categories of judicial office holders who qualify for transitional or tapering protection, the FPJPS will provide pension benefits in respect of service from 1 April 2015. The rules on transitional and tapering protection mirror the rules in JUPRA. In particular, the FPJPS mirrors the rules in JUPRA that salaried judges who were:

¹ <https://www.judiciary.gov.uk/judgments/obrien-moj-judgment-20082013/>

- holding office on 1 April 2012 and were within 10 years or less of scheme retirement age (65) were allowed to remain in their current pension arrangements. This was in recognition of the fact that they would have very little time to make alternative arrangements;
 - holding office on 1 April 2012 and were within 13.5 years of scheme retirement age were entitled to transitional protection to avoid a cliff-edge impact on those just outside the unchanged group;
 - holding office on 1 April 2012 with more than 13.5 years to retirement OR were appointed after 1 April 2012 joined JPS 2015.
7. The Equality Impact Assessment (EIA) on the Judicial Pension Scheme 2015 explains these changes in more detail.²

Key features of the scheme

8. The main features of FPJPS mirror the arrangements in JUPRA as far as possible. Where this is not possible due to particular characteristics of fee-paid working the intention is that the FPJPS arrangements are no less favourable than those in JUPRA. FPJPS provides an automatic pension lump sum, defined benefit basis for benefits dependents benefits, it is not registered and has the same contribution structure as JUPRA

Equality duties

9. Section 149 of the Equality Act 2010 (“the Act”) sets out the Public Sector Equality Duty (PSED). This is a legal duty that requires Ministers and the Department, when exercising their functions, to have ‘due regard’ to its three limbs:
- a) the need to eliminate discrimination, harassment, victimisation and other conduct that is unlawful under the Act;
 - b) the need to advance equality of opportunity between those who share a relevant protected characteristic and those who do not; and
 - c) the need to foster good relations between those who share a relevant protected characteristic and those who do not.
10. The relevant protected characteristics are race, sex, disability, age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment. The characteristic of marriage and civil partnership is relevant only when considering the first limb of the duty.

Equality considerations

Characteristics of the fee-paid judiciary

11. The Judicial Diversity statistics, which are published annually, contain some information on the protected characteristics of the fee-paid judiciary in England and Wales. MoJ does not hold reliable data on other characteristics. It has begun to gather disability statistics however less than a full year is available, and several years would be necessary for any sort of baselining. Sex, age & ethnicity were the only criteria looked at in the EIA for the original policy on salaried judicial pensions which we are mirroring.
12. A further complicating factor in tracking appointments is that many fee paid judiciary hold multiple offices and so might be double or triple counted, whereas tracking the population as a whole gives a more accurate figure.

² <https://consult.justice.gov.uk/digital-communications/judicial-pension-scheme-2015-consultation/>

13. As of 1 April 2016, women made up 35% of the fee-paid judiciary (compared with 51% in the general population). Around 8% of fee-paid judges were from BAME groups. Different parts of the fee-paid judiciary are more diverse than others. So, for example, in the tribunals 43% of fee-paid office-holders are women and 10% are BAME.
14. In addition, the Ministry of Justice holds some data about the age of the fee-paid judiciary. Of those identified on 1 November 2016 as entitled to a pension:
 - a. 51% were in post by 1 April 2012 and aged 55 or over on that date;
 - b. 18% were in post by 1 April 2012 and aged between 51½ and 55 as at that date; and
 - c. approximately 31% were either not yet 51½ on 1 April 2012 or had been appointed since 1 April 2012.
15. In addition to the data held by the Ministry of Justice further data has been obtained from the devolved administrations for this purpose of this Equality Statement.
16. Figures have been obtained for Scottish court judiciary and include devolved tribunals judiciary. They do not include those fee-paid tribunal judiciary who sit in Scotland but where the offices are reserved i.e. employment judges, immigration and asylum, social security judiciary. 26% of the salaried judiciary and 19% of the fee paid judiciary in Scotland are female. 68% of the fee paid judiciary and 51% of the salaried judiciary are over 60 in Scotland. Figures have been rounded to the nearest percentage point.
17. As of 1 April 2016, women made up 46% of the fee-paid judiciary in Northern Ireland (compared with 43% in the judiciary of Northern Ireland as a whole, compared with 47% female of the Northern Ireland economically active population aged 16-74 (figure taken from the 2011 Census). Females account for 45% of fee-paid tribunal members and 48% of fee-paid court members (including Lay Magistrates). Of the total fee-paid judiciary in post as of 1 April 2016, 98% are White, 2% Other and 4% have declared that they have a disability. Of the fee-paid tribunal judiciary in post as of 1 April 2016, 98% are White, 2% Other and 4% have declared that they have a disability. Of the fee-paid court judiciary in post as of 1 April 2016, 99% are White, 1% Other and 3% have declared that they have a disability. Figures have been rounded to the nearest percentage point.
18. The Ministry of Justice acknowledges that it does not have a complete set of data in respect of each protected characteristic for fee-paid judicial office holders. The Ministry of Justice nevertheless has undertaken an analysis of the potential impact of the proposals in respect of each protected characteristic below, taking into account the available information.

Direct discrimination

19. Direct discrimination occurs when someone is treated less favourably than another person because of a protected characteristic. This includes cases where the person has a protected characteristic themselves, where they are thought to have a protected characteristic and where they associate with someone who has a protected characteristic. Where the protected characteristic is age, less favourable treatment is not prohibited if it is a proportionate means of achieving a legitimate aim. Less favourable treatment because of any other protected characteristic cannot be justified.
20. The FPJPS is being introduced to remedy historic less favourable treatment of part-time workers. Whilst being a part-time worker is not a protected characteristic under the Equality Act 2010, the starting point is that the FPJPS is designed to eliminate discrimination between fee-paid and salaried judicial office holders.

21. The key provisions in the FPJPS are the same for all judicial office holders, regardless of protected characteristics. Therefore there are very limited circumstances in which there is any potential for direct discrimination to arise.
22. Some of the provisions of the FPJPS are more favourable for judicial office holders who are unable to sit because of ill health (many of whom will be a disabled person for the purpose of the Act). For example, the FPJPS includes provisions for ill health retirement. The Act permits this type of less favourable treatment of persons who are not disabled in comparison to those who have a disability.
23. Some of the provisions of the FPJPS require the judicial office holder to have a spouse or civil partner in order to qualify for a particular benefit. This is not prohibited by the Act, which only prohibits direct discrimination where those who are married or in a civil partnership are treated less favourably than those who are not.
24. In some respects, the pension entitlements under the FPJPS depend on the age of the judicial office holder. For example, an eligible judicial office holder becomes entitled to receive a pension at a particular age. This is not prohibited by the Act. Age is also relevant to the transitional and tapering protection in the FPJPS. The general rule is that service up to 31 March 2015 is reckonable under the FPJPS, but service from 1 April 2015 is reckonable under the JPS. Where judicial office holders are entitled to transitional or tapering protection, their service from 1 April 2015 is reckonable under the FPJPS rather than the JPS. For eligible fee-paid judges who retired before 31 March 2015, their pensionable service will be dealt with entirely under FPJPS. For those who continued to hold eligible office after that date, the pension they receive will depend on their age on 1 April 2012:
 - a. Fee-paid judges who were in office on 1 April 2012 and were over 55 will be able to remain in FPJPS until retirement. This is approximately 51% of those fee-paid judges with a pension entitlement as at 1 November 2016;
 - b. Fee-paid judges who were in office on 1 April 2012 and were aged between 51½ and 55 will benefit from tapering/transitional protection and be able to remain in FPJPS for a time limited period. This is approximately 18% of those fee-paid judges with a pension entitlement as at 1 November 2016;
 - c. Fee-paid judges who were in office on 1 April 2012 and were under 51½ or who were appointed after 1 April 2012 will only be eligible for the Judicial Pension Scheme 2015 from 1 April 2015. This is approximately 31% of those fee-paid judges with a pension entitlement as at 1 November 2016.

The FPJPS is more favourable in some respects than the JPS and therefore those judicial office holders who are not entitled to transitional/tapering protection are treated less favourably than others because of age. However, the government considers that this less favourable treatment is lawful because it is a proportionate means of achieving a legitimate aim. These arrangements reflect those in place for salaried judges in JUPRA and the issues have been the subject of a separate Equality Impact Assessment (relating to the implementation of the 2015 Judicial Pension Scheme), which is not repeated here. This question of whether the government's view is correct has recently been considered and rejected by the Employment Tribunal in the case of *McCloud v MoJ*. The government is appealing that decision.

Indirect discrimination

25. Indirect discrimination occurs where a provision, criterion or practice applies to people with a particular protected characteristic and also to people who do not share that protected characteristic, but where it puts the people who share that protected characteristic at a particular disadvantage and it is not a proportionate means of achieving a legitimate aim.

26. The FPJPS will introduce a pension entitlement for eligible fee-paid judicial office holders that broadly mirrors the pension entitlement for salaried judicial office holders. The provisions of the FPJPS generally apply equally to men and women regardless of race, disability, marital status and other protected characteristics. For the vast majority of the provisions in the FPJPS, the government considers it clear that there is no potential for the FPJPS to put those people sharing a particular protected characteristic at a particular disadvantage to others.
27. In addition, some of the features of the FPJPS will have positive aspects from an equalities perspective. For instance, there is provision for pension to be paid to dependent children in the event of death in service or during retirement and provision for medical retirement. These features support fee-paid judges with caring responsibilities and/or who retire early on the grounds of ill-health (which may amount to a disability).
28. The government is aware that the transitional/tapering protection (discussed above) benefits some groups more than others. For example, only 22% of the fee-paid judicial officer holders who are eligible for transitional protection are female, whereas 35% of the total fee-paid judiciary are female. Similarly, only 4% of the fee-paid judicial officer holders who have transitional protection are BAME, whereas 8% of the total fee-paid judiciary are BAME. This reflects the fact that recent appointments to the fee-paid judiciary have been more diverse, and therefore female and BAME fee-paid judicial office holders are more likely to be younger. The government has paid due regard to the impact of these arrangements which reflect those in place for salaried judges in JUPRA and the issues have been the subject of a separate Equality Impact Assessment, which is not repeated here. In *McCloud v MoJ* the Employment Tribunal found that these provisions unlawfully indirectly discriminated against female and BAME members of the judiciary. As noted above the government is appealing that decision.

Discrimination arising from disability

29. The Act prohibits unfavourable treatment of a person because of something arising in consequence of their disability, where the treatment is not a proportionate means of achieving a legitimate aim and where the disability is known (or could reasonably have been expected to have been known).
30. The government does not consider that any of the provisions of the FPJPS have the potential to treat an eligible judicial office holder less favourably because of something arising in consequence of their disability. In fact, the FPJPS includes relevant favourable provision (for example, provision for ill health retirement). If any provision when considered in isolation is said to be unfavourable, then the government considers that it is justified taking into account the overall package of support for disabled judicial office holders and the legitimate aim of ensuring that the judiciary operates effectively.

The duty to make reasonable adjustments

31. The Act requires the government to take reasonable steps to avoid any substantial disadvantage placed on a disabled person by a relevant provision, criterion, practice or physical feature. A failure to do so constitutes unlawful discrimination.
32. The government does not consider that any provision of the FPJPS places disabled persons at a substantial disadvantage. However, if the provisions relating to ill health put disabled persons at a substantial disadvantage then the government considers that it takes reasonable steps to avoid that by way of the terms and conditions relating to sick pay (which counts as pensionable pay for the purpose of the FPJPS), the provisions in the FPJPS relating to ill health retirement and the other adjustments made on a case by case basis to support disabled judicial office holders.

Harassment and victimisation

33. We do not consider there to be a risk of harassment or victimisation within the meaning of the Act as a result of these proposals.

Advancing equality of opportunity

34. The Act requires the government to have due regard to the need to advance equality of opportunity between those who share a relevant protected characteristic and those who do not. This includes the need to remove/minimise disadvantages connected to a protected characteristic, the need to take steps to meet the needs of persons sharing a relevant protected characteristic, and the need to encourage people sharing a relevant protected characteristic to participate in public life (and other activities where participation by such persons is disproportionately low).

35. The FPJPS provides equally favourable pension benefits to eligible judicial office holders as to salaried judicial officers. This increases the value of the overall package of remuneration for eligible judicial office holders in respect of the period from 7 April 2000 to 31 March 2015 (and beyond, for those judicial office holders eligible for transitional/tapering protection). Public awareness of this change, remedying historic discrimination, may encourage greater diversity in future applications for fee-paid judicial office. Further, the provision of pension benefits in respect of past service may encourage fee-paid judges (including those with a particular protected characteristic) to remain in the judiciary. The FPJPS has been designed to meet the needs of judicial office holders sharing a relevant protected characteristic, for example by including provision for ill health retirement.

Fostering good relations

36. The Act requires to government to have due regard to the need to foster good relations between those who share a relevant protected characteristic and those who do not. This includes having due regard to the need to tackle prejudice and the need to promote understanding.

37. We have considered this objective but do not think it is of particular relevance to the proposals.

(ii) Duty not to discriminate against holders of public office and against members of an occupational pension scheme

38. In addition to the general duty to have due regard to the matters specified in section 149 of the Act, there are other duties under the Act which the Department must comply with. These include:

- Section 50 under which the Department is under a duty not to discriminate against a person it appoints as a public office holder in the way any benefit is received; and
- Section 61 under which a non-discrimination rule is included in an occupational pension scheme and sections 64 to 71 of the Act which provides for equal pay for equal work