

## Ombudsman's Determination

Applicant	Mr R
Scheme	The Civil Service Pension Arrangements – Alpha ( <b>Alpha</b> )
Respondent	The Ministry of Defence ( <b>MOD</b> )

### Complaint Summary

1. Mr R has complained that:-
  - The MOD reneged on its alleged contractual commitment to finance the cost of his effective pension age (**EPA**) election.
  - He was given misleading information that indicated the MOD had arranged to finance a retrospective EPA election.

### Summary of the Ombudsman's Determination and reasons

2. The complaint is upheld because:-
  - The funded EPA formed part of the deal offered by the MOD in return for the Defence Police Federation, (the **DPF**), agreeing to other changes to the terms and conditions of employment. Agreement was reached for this to take effect from 1 April 2016. Failure to fund the EPA amounts to breach of contract.
  - The MOD gave Mr R the reasonable expectation that it was implementing the funded EPA. However, it failed to do so and the failure amounts to maladministration justifying a separate and additional award for non-financial injustice.

## Detailed Determination

### Material facts

3. Section 10 of the Public Service Pensions Act 2013 contains provisions for the normal pension age (**NPA**), and deferred pension age, of members of most public service pension schemes to be the greater of their State pension age (**SPA**) and age 65.
4. The Public Service Pensions (Civil Servants and Others) Regulations 2014, (the **Alpha Regulations**), created “Alpha”, a career average revalued earnings (**CARE**) scheme.
5. Mr R is a police officer and a member of the Ministry of Defence Police Force (**MDP**). The MDP was established under the Ministry of Defence Police Act 1987 (the **1987 Act**).
6. Mr R was moved from the Classic Section (**Classic**) of the Principal Civil Service Pension Scheme (**PCSPS**), to Alpha with effect from 1 April 2015. Classic provides final salary benefits while Alpha provides CARE benefits. Mr R’s NPA under Alpha is 67 while under Classic his NPA was age 60. Alpha also has a higher accrual rate than Classic and there are also other differences in benefit structure, for example the level of spouse’s pension.
7. The Alpha Regulations provide two mechanisms for Alpha members to elect for a lower NPA: The enhanced effective pension age (**EEPA**) option and the EPA option.
8. Under paragraph 34 of schedule 1 to the Alpha Regulations, the Scheme Manager must publish a list of employments in respect of which members may opt for the EEPA option. Members in employments included in that list may elect an effective pension age of 60, provided that was their NPA under the PCSPS. Otherwise, they may elect for an effective pension age of 65.
9. Paragraph 25 of schedule 1 to the Alpha Regulations, provides that any active member of Alpha can exercise the EPA option for an effective pension age of one, two or three years below NPA (without employer consent). The member cannot elect for an EPA below age 65. An excerpt from paragraph 25 is displayed at Appendix One.
10. For any scheme year in which a member makes periodical payments for an EPA option, the member is entitled to payment of a retirement pension or partial retirement pension as if his Normal Pension Date were his EPA Election Date. Accordingly, an actuarial reduction will only be applied in respect of any part of his pension attributable to that scheme year to the extent the date of retirement precedes the chosen EPA Election Date. Regulation 136 of the Alpha Regulations provides that the employer may make contributions on the member’s behalf in circumstances determined by the Scheme Manager, namely the Minister for the Civil Service.

11. Section 3(2) of the 1987 Act states that the DPF shall represent members of the MDP in all matters affecting their welfare and efficiency, other than questions of discipline affecting individuals, except as provided by Section 3(3), and questions of promotion affecting individuals.
12. Regulation 8 of the Ministry of Defence Police (Defence Police Federation) Regulations 1988, provides that:

“Representatives of the Federation shall continue to have access to Ministers of the Ministry of Defence in accordance with such consultation machinery as may be agreed from time to time between the Secretary of State and the Federation”.
13. A Memorandum of Agreement between the MOD, the Civil Service Department and the DPF, dated 8 September 1977, (the **MOA**), recognises that the DPF has the right to make representations on behalf of its members. The MOA says that the DPF is granted sole recognition in respect of all ranks of the MDP below the rank of Assistant Chief Constable. This includes determining conditions of service, remuneration, and superannuation.
14. The standard contract of employment for members of the MDP states:

“The terms and conditions under which you are appointed are set out in Ministry of Defence Policy, Rules and Guidance (PRG) documents, Ministry of Defence Police Force Orders, and any collective agreements that are in force.

...

The recognised body within the Ministry of Defence Police, that has collective bargaining rights, is the Defence Police Federation”.
15. Where agreement is reached by the DPF on any change in contractual terms, the amendments are incorporated into the members’ individual contracts of employment. Alternatively, reference is made to the relevant policy change in their contracts.
16. In May 2012, the DPF and the MOD commenced negotiations on the MDP officers’ terms and conditions of employment. A letter from the Cabinet Office to the DPF, dated 20 June 2012, referred to ongoing discussions with the MOD concerning the issue of the EPA. The letter also referred to maintaining the principle of linking NPA to SPA.
17. The MOD terms of reference for the review of the MDP terms and conditions of service (**TACOS**), states that the review will consider the full MDP remuneration and conditions of service package.
18. On 26 February 2014, the DPF wrote to the MOD in connection with a review of the MDP’s TACOS. The DPF indicated that it was in the process of issuing a response to the Cabinet Office on provisions that would allow members in eligible employments to be entitled to the EEPA option.

19. On 12 March 2014, the MOD highlighted that the EEPA option was a ministerial decision, which had not yet been made. It acknowledged that it was committed to working with the MDP to identify the most appropriate way to achieve an NPA of 65. This had been superseded by the TACOS review, which included investigating the possibility of a lower NPA. Consequently, any discussions on a lower NPA would be taken forward in that context.
20. On 27 March 2014, the Cabinet Office held a meeting with the DPF. The notes of that meeting record that:

“If the MDP are an eligible employment group for EEPA and the individual member then pays the additional contributions to buy out the actuarial reduction the member then effectively has an EEPA of 60. Should, for whatever reason, the individual then have [SIC] to retire between minimum pension age (55) and EEPA, the actuarial reduction is based on the time to 60. The factors to be used will be actuarially fair, but have not yet been provided and so the maximum reduction is not currently certain.

[The Cabinet Office] confirmed that any reduction paid for by the member (i.e. 65-60) is cost neutral to the Department”.
21. In the period that followed, negotiations continued between the MOD and the DPF. On 17 October 2014, the MOD set out its “formal” proposal on the MDP TACOS. The MOD advised that this did not include the issue of the NPA, which was being considered by Ministers.
22. The MOD indicated that the various elements of the proposal represented a single offer and must be addressed in the context of an overall package.
23. On 23 October 2014, the Minister of State for Defence Personnel Welfare and Veterans at the MOD advised that the Secretary of State was consulting with Cabinet colleagues on various options. This included an EPA of 65, to be funded by TACOS changes.
24. On 17 March 2015, the Minister of State for Defence Personnel Welfare and Veterans at the MOD wrote to the DPF. The Minister advised that:

“As you know, the Defence Secretary has consulted Cabinet colleagues regarding an unreduced early retirement pension for MDP officers. The consultation is now complete and I am able to inform you that Government has agreed to an Effective Pension Age (EPA) which will be a maximum three year actuarial reduction from State Pension Age. This means that based on a state pension age of 68, the MDP normal pension age will be 65. This will be funded in full by the Department, provided that it forms part of an overall agreement on revised terms and conditions for the MDP”.
25. The Minister indicated that an EEPA would be inconsistent with the key principle of the Government’s pension reform. Consequently, the Government was unable to



agree an EEPA of 60. Following an exchange of correspondence, the Minister stated in her letter of 25 March 2015 that:

“On the issue of pensions, the decision to offer the MDP an Effective Pension Age which will be a three year actuarial reduction from State Pension Age to be funded in full by MoD subject to agreement on revised terms and conditions of service (TACOS) following lengthy consultation with senior colleagues across Government is final.

On the issue of pay, I can confirm that the Government is committed to implementing an average 1% pay rise for MDP officers in line with the new pay scales introduced by the Home Department forces last year, at the agreed relativity of 95% as part of the new TACOS package. But this must be accompanied by other TACOS reforms since otherwise MDP pay would exceed the agreed 95%. I cannot therefore agree to a pay rise without the accompanying reforms”.

26. That same month, the MOD set out the changes it was proposing to make to the TACOS. The MOD indicated that the changes were “as a condition of the proposed pension change.” The changes included:-
- The requirement for all MDP officers to take an annual fitness test as a condition of service.
  - Redeployment/exit of officers who are unable to meet the MDP’s operational requirements.
  - New pay scales.
  - An increase in the working week from 40 to 42 hours.
  - The abolition of “Net Pay Deduction [**NPD**]”.
  - A two-year freeze on automatic pay scale progression for officers below the top of their pay scale.
  - The linking of pay progression to performance.
  - Changes in entitlement to overtime.
  - The abolition of bonus payments, double increments, and post-related allowances for certain ranks.
27. On 13 April 2015, the DPF advised that the latest proposals did not meet its needs or that of its members. The DPF stated that it still wanted to pursue the EEPA option. Failure to implement the EEPA would impact on all the other aspects of the TACOS

and should be reconsidered. Under the EEPA option, as noted in the letters of 17 March and 25 March 2015, the DPF were pursuing an EEPA of age 65 funded by the employer with an opportunity to reduce the EEPA to age 60 funded at the member's expense. The MOD had previously advised in its letter of 17 March 2015, that it was willing to agree to an EPA funded by the employer but the EEPA option was not acceptable. In other words, the MOD maintained its previous position that all that it was willing to offer was an EPA option.

28. On 8 July 2015, the MOD issued a formal proposal setting out the changes the MOD intended to make to the TACOS as a condition of the offer of the EPA. The MOD repeated that the individual elements of the letter formed a mutually dependent package. The MOD also repeated that the offer of a maximum three year actuarial reduction from SPA (in other words the EPA option) would be funded by the employer in full, provided it formed part of the overall agreement on revised terms and conditions of service.
29. On 9 July 2015, the DPF issued a circular to its members. It advised that the MOD had made a formal proposal in respect of their terms and conditions of service. The circular advised that the offer of the EPA was at no cost to members but was subject to an agreement on an overall TACOS offer.
30. The DPF subsequently notified the MOD in August 2015, that it was unable to accept the formal proposal following a ballot of its members.
31. On 16 November 2015, the MOD made a revised offer on changes to the MDP TACOS (the **November Letter**). The MOD advised that the proposal represented its full and final offer. The MOD restated the terms in its previous offer and that the individual elements of the package could not be accepted in isolation. The letter stated at paragraph 4 that:

**EFFECTIVE PENSION AGE**

4. The then Minister (DPWV) wrote to you before the General Election setting out the Government's position on effective pension age for the MDP. The Secretary of State has confirmed that the terms offered in that letter remain extant. To recap, the Government is offering an effective pension age which will be a maximum three year actuarial reduction from State pension age. This means that on a State pension age of 68, the normal MOD pension age, for those who do not have protected rights to an earlier pension age, will be 65. This will be funded in full by the Department provided that it forms part of an overall agreement on revised Terms and Conditions of Service for the MDP".

32. The pay and performance related elements contained in the November Letter included:-
  - The requirement to meet a fitness standard to take advantage of pay scale progression.

- The proposal that officers on limited duties for more than twelve months may be subject to 8% reduction in pay.
  - A two-year freeze on automatic pay scale progression for officers who joined before April 2012 and were not on the top of their pay scale on 1 April 2016.
  - The abolition of “Special Priority Payments”.
  - The abolition of NPD.
  - The extension of the MOD’s powers to conduct tests for alcohol or drugs.
33. The MOD also proposed that, subject to the agreement of the overall TACOS package, all elements of the package with a “financial effect” would come into force on “1 April 2016.” The MOD indicated that if they failed to reach agreement, the individual elements outlined in the November Letter would become “invalid.”
34. On 7 December 2015, the DPF made a counter-proposal (the **7 December Letter**). The DPF advised that it would accept the new terms and conditions of service from 1 April 2016, subject to three conditions. The first was that the Secretary of State would negotiate with the Cabinet Office for an EEPA for MDP officers (**Condition One**). The second condition was that an element of the fitness testing would commence from the same date as the date of the abolition of NPD (**Condition Two**). The third condition related to the payment of the “Unsocial Hours Allowance” (**Condition Three**). The DPF’s counter-proposal for the EEPA was effectively still a proposal that there should be an EEPA of 65 funded by the employer and an EEPA of 60 for those members who wanted to take advantage of the option of age 60.
35. On 17 December 2015, the MOD advised that the Secretary of State would raise the issue of the EEPA, provided the DPF confirmed its acceptance of the rest of the TACOS package (the **17 December Letter**).
36. On 18 December 2015, the DPF confirmed that “should the EEPA be agreed, [the DPF] will accept the other elements, as amended.”
37. On 14 March 2016, the Minister advised that the Government was not able to agree to the DPF’s request for an EEPA. The offer of an EPA of a maximum of three years before SPA which was set out in MOD’s offer on changes to MDP TACOS in the November Letter was therefore the “final position.”
38. The MOD also advised that there was “no prospect of movement.” It indicated that its TACOS proposal was the most the Government could offer. The MOD encouraged the DPF to accept this proposal (the **March Letter**). The DPF said that it would ask the MOD’s Head of HR Policy and Reward to meet as soon as possible with the DPF with a view to concluding the negotiations and agreeing a final way ahead.
39. On 1 April 2016, the DPF issued its response (the **April Letter**). The DPF acknowledged in the April Letter that the March Letter detailed the MOD’s “final position on the pension issues raised” and stated:

“After a lengthy wait, the only element outstanding was the issue surrounding our members [SIC] pensions, the first two conditions being met.

The letter, from the Minister of the 14<sup>th</sup> March 2016 sets out the Department’s final position on the pension issues raised. That is understood. The relevant pension schemes are statutory and, subject to the discussions we have had, it is a matter for Minister for the Civil Service to make decisions upon those within the relevant statutory provisions. There is no requirement for agreement in respect of those and the issue for our members to consider is the legality of the proposed course of action... Provisional indications are that there may well be very significant legal issues and we are exploring these further... we will not hesitate to bring legal proceedings if so advised.

Different considerations arise in connection with our members [SIC] conditions of service. These are not statutory and the negotiation process in respect of these is governed by the Memorandum of Agreement (MOA). You are required to seek our agreement in respect of proposed changes to conditions of service and the MOA provides for the relevant process where agreement cannot be reached. In respect of these matters, I am pleased to inform you that we do agree with the changes negotiated and set out in the letters of the 16<sup>th</sup> of November 2015 and 7<sup>th</sup> December 2015. As set out above this agreement applies to conditions of service, not statutory pension matters which are subject to a different process.

...

This has been a lengthy and difficult process, not least of which for our members. We thank you for your and [Richard Clancy’s] time on this and hope matters can now move forward, with clarity for our members and a clear set of agreed Terms and Conditions for the future”.

40. DPF were therefore proceeding in the April Letter on the basis that there was a binding agreement which took effect from 1 April 2016 and the issue of “statutory pension matters” would now be dealt with outside TACOS. I will consider later in this Determination as to what is meant by “statutory pension matters”.
41. As part of the investigation process my investigation team have asked what information was issued to the parties about the terms of the agreement on 1 April 2016 and the implementation of those terms. The MOD’s lawyers responded as follows:

“We attach an update on the implementation of the changes to MDP terms and conditions of service issued through the Ministry of Defence Police chain of command on 3 May 2016. The wording was agreed by the Defence Police Federation. The update was also placed on the Force intranet page at the salient time. My client is not in a position to comment on the information provided by the Defence Police Federation to its members. The changes to terms and conditions of service have been incorporated into Policy Rules and

Guidance (where appropriate) as well as other Force policy documents in the usual way with changes to Ministry of Defence Police conditions of service”.

42. The update on the implementation of the changes to the MDP terms of service (the **Memorandum**) was headed ‘Briefing note on the Implementation of Agreed Changes to MDP Terms and Conditions of Service’. The Memorandum was issued by Mr Clancy of the MDP TACOS review (who I understand would have had authority to issue the Memorandum on behalf of the MOD). The first three paragraphs of the Memorandum stated:

- “1. As advised previously, the implementation of the agreed changes to MDP Terms and Conditions of Service as a result of the negotiations between the Department and the DPF is now being taken forward.
2. Defence Business Services (DBS) are working on the implementation of the agreed changes to pay and allowances, which will require some changes to the MOD payroll system. I am expecting DBS to provide me with their timescales for completing the required changes later this month and as soon as I get this confirmation I will advise officers accordingly in a future update.
3. In the meantime I thought it would be useful to confirm the various changes that have been agreed with the DPF and how these will be implemented: [emphasis added in red text]”.

43. The Memorandum then listed the various changes which had been agreed including the following:

“Effective Pension Age

The TACOS proposal included the Government offer to reduce the effective pension age for MDP officers to a maximum of 3 years below the State pension age. This will affect all officers who are members of the new Alpha pension scheme and means that based on a State Pension Age of 68 the effective pension age for MDP officers would be 65, with all associated costs being met [by] the MOD”.

44. The Memorandum also stated that:

“The work needed to implement the change to Effective Pension Age will be taken forward by the Pensions Policy team in MOD Civilian HR organisation who will liaise with the Pension Scheme Executive in the Cabinet Office. Once I receive more information on how the implementation process will work in practice I will advise the Force accordingly but this will inevitably take some time given the complexities involved”.

45. In July 2016, the DPF issued a further update to its members on the implementation of agreed changes to the TACOS.

46. On 1 August 2016, the DPF requested an update on the implementation of the EPA option. The DPF noted that progress was being made to implement the other elements of the revised TACOS package.

47. On 9 August 2016, an employee of the MOD, appointed Deputy to the person responsibility for taking forward the implementation of the agreement reached with the DPF, explained in a letter to the DPF that:

“I am currently working with the Cabinet Office and pension scheme administrators to determine and agree the mechanism for implementing and funding the revised EPA. This is the first of this type of arrangement and we need to ensure that this [is] implemented properly. I would like to assure you that we are dealing with this as quickly as we can given the effective date of 1 April 2016”.

48. In October 2016, I understand the MOD held a meeting with HM Treasury. It was decided at that meeting that an offer for a member funded EEPA could not be made.

49. On 10 November 2016, the DPF expressed concerns about the lack of progress being made to implement the EPA. The DPF advised that it wanted to ensure that processes were in place for the current scheme year.

50. In response, in a letter dated 22 November 2016, the MOD said:

“1. Thank you for your letter... seeking an update on the implementation of an employer funded Effective Pension Age for Ministry of Defence Police (MDF) officers in the ‘alpha’ pension scheme.

2. You will be aware that the Cabinet Office and Treasury are leading a review of the Effective Pension Age for MDP officers and we are anticipating an outcome of that review by the end of the year. Once the outcome is known I will be in a position to provide you with an update”.

51. On 22 November 2016, on receipt of this letter the DPF responded as follows:

“Thank you for your response to my letter of 10th November 2016. As you will no doubt expect, we are concerned that your response suggests a review of the Effective Pension Age (EPA) for MDP officers and does not talk [of] the review of the Enhanced Effective Pension Age (EEPA), which we were [SIC] understood to be under review.

Clearly, by Ministerial agreement, the recent TACOS negotiations concluded with a settlement which, from the Departmental and Government side included an EPA of 65 or three years below State Pension Age (SPA) for MDP officers in the Alpha scheme. We are unhappy with this position and looked to review this position - specifically the refusal by Government to include an EEPA option for our members - through law, but were asked to hold on this whilst the position was clarified.

Your letter now suggests that this is not the case and that in fact the EPA is being reviewed. As such we would welcome clarity on whom within the Cabinet Office or Treasury is leading on this, so that we might approach them directly, as to this point, this person, or persons, has not been identified to us...”

52. The DPF then wrote on 6 December 2016, to the Director of Civil Service Workforce Strategy and Inclusion (which is a post at the Cabinet Office) seeking further clarification on the position.
53. On 15 December 2016, The Pensions Ombudsman’s Office (**TPO’s Office**) understands that a submission paper was sent to HM Treasury and the Cabinet Office in connection with a review of the EEPA. TPO’s Office also understands that it was decided that an EEPA of 60 for the MDP could not be agreed. The MOD was notified of that decision in March 2017.
54. On 7 April 2017, the MOD wrote to the DPF as follows:
  - “1. I wrote to you on 16 November 2015 confirming the Department’s offer as part of the TACOS review to fully fund an EPA of 65 for MDP Officers. In your response dated 1 April 2016 you agreed to all aspects of the TACOS offer except those related to pensions.
  2. Subsequently the Government agreed to review allowing an EEPA for MDP Officers which also included revisiting the EPA of 65. The Chief Secretary has now written to the Minister(DPV) advising him of the outcome of that review.
  3. The Chief Secretary has concluded that he is not able to support an EEPA of 60 for MDP Officers. He explains the EEPA would go a step further than the fully funded EPA concession which has already been agreed by PEX(PP) committee, which remains the right decision given the particular circumstances and important work carried out by MDP. However, there is insufficient evidence overall to justify establishing any kind of new precedent on pension ages.
  4. The Chief Secretary considered all of the representations provided by the DPF, including the proposition that it would come at no cost to the Government since it would be funded by individual officers. When payments are made in full towards the EEPA, a member establishes a legal right to retire with an unreduced pension at age 60. The Government bears the risk of State pension age rises or longevity increases, meaning that the individual’s retirement may well be longer than anticipated. In those circumstances the member-funded EEPA would not be cost neutral to the Government.

...

  6. On this basis I am now able to renew the offer in my letter of 16 November 2015 of an effective pension age which will be a maximum three year actuarial reduction from State pension age. This means that on a State pension age of 68, the age at which MDP officers will be able to take a pension without actuarial reduction, for those who do not have protected rights to an earlier pension age will be 65. I should

[be] grateful if you would let me know whether you wish to accept that offer by 2 May 2017”.

55. On 25 April 2017, the DPF wrote to the MOD. The DPF said as a result of the agreements reached on the TACOS review, the EPA for MDP officers was awarded to all affected officers from 1 April 2016. “This was obviously part of the package that was negotiated and was not able to be separated out.” Consequently, “this EPA” will have applied to its affected officers from that date.
56. On 15 June 2017, the MOD disputed that the offer of the EPA had previously been accepted by the DPF. The MOD advised that it had remained on the table and would come into effect from the date an agreement was reached.
57. In the exchanges that followed, the MOD maintained that the DPF had accepted most of the proposed TACOS changes, except for the offer of the EPA. The MOD reiterated that it remained open for the DPF to accept but could not be backdated to 1 April 2016.
58. In November 2017, Mr R applied to the scheme administrators for the EPA option. He was informed that he had missed the deadline for the 2017/2018 scheme year.
59. During subsequent exchanges regarding the question of whether EPA had been agreed, the DPF advised on 20 November 2017 that it had accepted the offer of an EPA on condition that the Secretary of State would negotiate for an EEPA. The Secretary of State had agreed to do so. The DPF stated that if the MOD still questioned the position, the DPF accepted the offer of the EPA and had accepted it in 2016.
60. Unable to reach a resolution with the MOD, Mr R brought his case to TPO’s Office for independent review. TPO’s Office has received a second complaint that raises similar issues.
61. The Court of Appeal held in the McCloud and Sargeant judgments (2018] EWCA Civ 2844) (the **McCloud Judgment**), that the transitional arrangements in place to mitigate the impact of the public sector pension scheme changes on members nearer NPA in the judicial and firefighters’ schemes, were directly age discriminatory and could not be objectively justified. The more favourable treatment of older members breached the non-discrimination rule included in occupational pension schemes by the Equality Act 2010. The Court of Appeal found that the younger members, who were moved to the new arrangements, were being discriminated against on grounds of age compared with those older members who retained protected status.
62. In June 2019, the Government’s application for permission to appeal the ruling was refused by the Supreme Court.
63. In July 2020, HM Treasury published its consultation document following the McCloud Judgment (the **Consultation Paper**). The Consultation Paper sets out options for removing the discrimination between scheme members for most of the affected public



sector schemes, including Alpha. Broadly, the proposals will apply to members in service on or before 31 March 2012 and on or after 1 April 2015.

64. In respect of the period April 2015 to April 2022, the Government consulted on two possible approaches to remedying the age discrimination arising out of the transitional arrangements. Namely:
- an immediate choice (**Immediate Choice**) option, given within two years after April 2022 on whether to opt for benefits from the legacy or reformed pension schemes (so members can choose which scheme is better for them); and
  - a deferred choice underpin (**DCU**) option, under which members of the reformed pension scheme will be re-enrolled into the legacy scheme. They will then be given an option at retirement to opt for legacy or reformed pension benefits.
65. An excerpt from the Consultation Paper is displayed at Appendix 2 to this Preliminary Decision. The Government has confirmed in its response to the Consultation Paper in February 2021 that it intends to adopt the DCU option.
66. Members of the PCSPS who were moved to Alpha will under the DCU option at point of retirement be offered the choice of remaining in Alpha in relation to the remedy period or being reinstated in the PCSPS in respect of this period. Members of the PCSPS will at the point of retirement (and at regular intervals before then) be given a comparison of the benefits payable under either option. The availability of the EPA option (or otherwise) will therefore be relevant to the issue of which option is more favourable and still therefore needs to be determined to resolve the dispute. If Mr R is able to make retrospective elections for an EPA and then elects to re-join the PCSPS he will not benefit from the EPA elections. If he elects to remain in Alpha the EPA elections (funded by the MOD) will benefit him.

### **Summary of Mr R's position**

67. Mr R's main submissions are summarised below:-
- His terms and conditions of employment incorporate the terms of collective agreements negotiated between the MOD and the DPF, without the need for a new contract.
  - The MOD failed to implement the offer of the EPA with effect from 1 April 2016. That failure amounts to a breach of law and maladministration.
  - Agreement was reached to provide the EPA as part of the TACOS negotiations. The TACOS package was subject to a ballot of the membership, and a detailed breakdown of the offer was sent to members. The element that was not settled was the question of an EEPA.

- The DPF made clear that it was seeking an EEPA. This is not inconsistent with agreeing to an employer funded EPA option.
- The DPF did not ask the MOD to grant an EEPA at any time. It was agreed that offering an EEPA was beyond the MOD's powers.
- The issue of the EEPA was to be taken forward separately as it did not fall within the DPF's statutory negotiating remit. The DPF made its position clear on 1 April 2016. The DPF acknowledged that the agreement applied to conditions of service not to statutory pension matters.
- The only statutory pension matter subject to a separate process was the issue of the EEPA.
- All that the DPF could ask of the MOD was a willingness on the part of the Secretary of State to raise the issue of the EEPA. The Secretary of State did so, as required under the terms of the agreement on the revised TACOS.
- Apart from the employer-funded EPA, the entire TACOS package has been implemented. The MOD's position had always been that the EEPA or EPA issue could not be separated from the rest of the package. Furthermore, if the rest of the TACOS package had been implemented, that necessarily meant the MOD had agreed that the EEPA/EPA issue had been resolved too.
- The MOD's conduct after the November Letter supports the view that the negotiations had ended. Until April 2017, the MOD had indicated that it was working on the basis that agreement had been reached on the EPA.
- The August Letter gave him a reasonable expectation that all that was outstanding was how to implement the offer of the EPA. He was aware that it was a complex issue, so he was happy to leave the matter with the relevant parties to resolve.
- In November 2016, he highlighted to the MOD that the offer of the EPA had already been agreed. The MOD failed to confirm the correct position until April 2017. As a result, he was denied the opportunity to make an EPA election in respect of the 2016/2017 scheme year.
- The MOD failed to take steps to implement the EPA for subsequent scheme years.

### **Summary of the MOD's position**

68. The MOD's main submissions are summarised below:-

- Mr R's complaint is complex and subject to ongoing litigation. The MOD disputes that he has a contractual right to an EPA.

- The dispute does not concern the administration of a pension scheme. Consequently, the Pensions Ombudsman does not have the power to make a direction awarding damages for breach of contract.
- The MOD is certain that the DPF did not accept any offer in respect of the EPA as part of the TACOS changes.
- There was no contractual agreement reached on the issue of the EEPA or EPA. Both are statutory pension matters and fall outside the terms the DPF accepted on 1 April 2016.
- The offer of the EPA was not agreed and was not incorporated into Mr R's contract of employment. There was uncertainty over whether the DPF had accepted the EPA Offer; the effective date of any such acceptance, how it would be implemented, and the implications of the McCloud Judgment.
- Without a method and timescale for implementing the offer of the EPA, no agreement had been reached. It would not have made business sense for the MOD to fund the EPA when there was an ongoing issue concerning the EEPA.
- The DPF had made its position clear on 1 April 2016. Namely, that the DPF agreed the proposals that related to conditions of service but not those relating to "statutory pension matters." Consequently, the MOD was certain that the DPF had not accepted any offer on the EPA as part of those proposed changes.
- The fact that there was no implementation date for what was allegedly agreed in respect of the EPA strongly indicates that agreement was not reached on the EPA. The fact that the MOD has implemented the agreed elements of the proposed TACOS package further supports this view.
- The only elements that have not been agreed concern the EPA and proposed changes to the policy on the management of officers on limited duties.
- The August Letter erroneously implied that the MOD had accepted that the offer of the EPA would take effect from 1 April 2016. The employee who issued the August Letter no longer works for the MOD. Consequently, it has not been possible to identify the reason for that statement.
- A plausible explanation is that the statement was made against a background in which the MOD was working with the Cabinet Office and the scheme administrators in good faith on the mechanism of funding any EPA options. The effective date and agreement to proceed was still to be determined.

- Members can purchase EPA by making periodical contributions. Any alleged financial loss is as a result of Mr R failing to take appropriate action.
- Mr R is entitled to be treated as a member of the Classic section of the PCSPS. Consequently, his complaint has been addressed.

69. I issued a Preliminary Decision on 14 May 2021. The parties made further representations in response to that Decision.

## Conclusions

70. Mr R's dispute is connected to the wider issue of the agreement reached by the MOD and the DPF in respect of the revised TACOS. I note that the MOD has questioned the appropriateness of the Pensions Ombudsman determining this complaint.

71. Under section 146(1) of the Pension Schemes Act 1993 (the **1993 Act**), the Ombudsman may, among other things, investigate and determine:

- any complaint made to him by an actual or potential beneficiary who alleges he has sustained injustice as a result of maladministration in connection with any act or omission of a person responsible for the management of the scheme; and
- any dispute of fact or law in relation to an occupational pension scheme between an actual or potential beneficiary and a person responsible for the management of the scheme.

72. Under section 146(3) of the 1993 Act, the definition of "a person responsible for the management of a scheme" includes an employer.

73. I am satisfied that both the complaint of maladministration and the dispute of law I am being asked to determine are within my jurisdiction. They concern the MOD's agreement, in its capacity as the employer, to fund the EPA option available under Alpha. So the complaint and dispute relate to an occupational pension scheme. This Determination only deals with the question of whether the alleged contractual terms, relating to the funding of the EPA option, were incorporated into Mr R's contract of employment. The parties do not dispute that the other wider TACOS terms were accepted. Both parties have always proceeded on the basis that all the other TACOS terms were agreed with effect from 1 April 2016.

74. I acknowledge that the MOD's position is that there was no binding contractual agreement to fund Mr R's EPA. Mr R submits that there is a binding contractual obligation to offer him an EPA fully funded by the MOD.

75. The DPF and MOD dispute, among other things, whether the reference in the DPF's April Letter to "statutory pension matters" applied solely to the EEPA or to both the EPA and EEPA. I will consider this issue first in my Determination and then go on to consider more generally what evidence there is that the offer to provide and fund the

EPA was a term of the contractual agreement entered into with effect from 1 April 2016.

76. Where changes to the terms and conditions of employment of DPF members are agreed, these will generally be automatically incorporated into their terms and conditions of employment. This is not in dispute.
77. The DPF is the recognised body within the MDP that has collective bargaining rights. There is no dispute that the terms under the TACOS proposals were agreed and incorporated into Mr R's contract of employment. This was completed as part of the collective bargaining process. The only issue in dispute is whether the DPF accepted the offer of the EPA submitted by the MOD on 17 March 2015.
78. The principles of English law which the court must apply in interpreting the relevant contractual provisions are also not in dispute. These have recently been summarised by the Supreme Court in *Wood v Capita Insurance Services Limited* ([2017] UKSC 24; [2017] AC 1173) and are as follows:-
  - In interpreting a contract and applying normal principles of contractual interpretation, the court is required to consider the ordinary meaning of the words used, in the context of the contract as a whole and any factual background.
  - Where there are conflicting interpretations, the court should also consider their commercial significance and which interpretation is more consistent with business common sense. The relevant weight to be given to these various factors depends on the circumstances.
  - In general, it may be appropriate to place more emphasis on the textual analysis when interpreting a detailed and professionally drafted contract. Equally, it is appropriate to place more emphasis on the context where the contract is brief, informal, and drafted without skilled professional assistance.
  - Where the parties have failed to achieve a clear and coherent text in the case of detailed and professionally drafted contract, then considerations of the context and commercial common sense may be of more importance.
79. In a subsequent case it was established that written instruments should be construed in the same way using these high-level principles. However, the relevant general interpretation principles must be applied having regard to the nature and circumstances of the instrument (Lord Hodge in *Barnardo's v Buckinghamshire* [2018] UKSC 55 paragraphs 13-18).
80. In the context of pension schemes, Lord Hodge noted in the *Barnardo's* case, after reviewing earlier authorities, that the courts have indicated that greater weight should be attached to the textual analysis and attaching less weight to the background factual matrix than might be appropriate to certain commercial contracts. However, this principle is generally applied when examining scheme rules rather than to

wording in contracts such as this. It is therefore appropriate for me to have some regard to the surrounding factual matrix regarding the negotiations when interpreting what was agreed.

81. The DPF indicated in the April Letter that contractual issues had been agreed. The DPF also indicated that it would take “statutory pension matters” forward separately as they were outside the scope of the contractual negotiations. A key issue I need to form a view on is whether the reference to the agreement on the EPA was a statutory pension matter, or contractual.
82. There is, unfortunately, no single professionally drafted contract setting out the agreed terms that the DPF allegedly accepted on 1 April 2016. The April Letter is not a separate contractual document setting out all the agreed TACOS changes. It is the culmination of a series of exchanges setting out the proposals and counterproposals regarding what had and had not been agreed. Therefore, the April Letter must incorporate by reference the November Letter: The MOD’s EPA Offer, and the 7 December Letter: The DPF’s counteroffer.
83. The November Letter advised that the Government had agreed to provide an EPA option, fully funded by the MOD, subject to agreement on revised TACOS for the MDP.
84. In response to the MOD’s statement in the March Letter that the final offer remained the EPA, the DPF did not say unequivocally that it had accepted the offer of an EPA in the April Letter. Rather, that agreement had been reached. The EPA and EEPA provisions form part of Alpha, which is a statutory scheme. I consider that the DPF could have been more explicit on what it considered to be “statutory pension matters”.
85. The DPF indicated in the April Letter that “statutory pension matters” would be taken forward separately. If this statement is looked at in isolation, the issue of the EPA might reasonably be construed as a statutory pension matter. In which case, agreement had not been reached on either the EPA or the EEPA, as they concern a statutory scheme.
86. The distinction drawn by the DPF is that an EEPA option for the MDP could only be agreed by the Minister for the Civil Service; it fell outside of the negotiation process. An EPA option could be delivered contractually and dealt with as part of TACOS proposals. Consequently, it was not a “statutory pension matter”.
87. If I accept that both the EPA and EEPA are regarded as “statutory pension matters” for the purposes of the April Letter, rather than contractual issues, there cannot have been a binding agreement reached on 1 April 2016.
88. In the context of the contract, the background to the commercial negotiations, past exchanges between the parties, and reference to “statutory pension matters,” it is also arguable that the April Letter can only logically be interpreted as referring solely to the EEPA.

89. The other points in the negotiations on the TACOS were conceded in return for the lower EPA. Several of the revised terms had potentially negative consequences for the DPF's members. The fact that those other terms and conditions were incorporated into Mr R's contract of employment is material to the outcome of this complaint.
90. There is no commercial logic for the DPF to agree the other terms on behalf of its members without some guarantee of what they would receive in return. It does not follow that the MOD would have to offer the funded EPA in the absence of any contractual agreement to do so if the Minister for the Civil Service did not agree to provide the EEPA option.
91. It is, however, not necessary for me to reach a conclusion on whether the reference to "statutory pension matters" in the April Letter includes an obligation to fund the EPA in isolation. There is subsequent, almost contemporaneous evidence that a contract has been agreed with effect from 1 April 2016 and that the contract included an obligation on the MOD to offer and fund the EPA.
92. Looking at events from December 2015 onwards, rather than as a rejection of the "full and final offer", the MOD took the DPF's 7 December Letter as an invitation to continue negotiating. The MOD effectively accepted Conditions Two and Three on 17 December 2015. The MOD offered to raise the issue of the EEPA with the Cabinet Office. This was on the proviso that if an EEPA option was agreed, all the other elements of the package would be agreed. The DPF confirmed its agreement on 18 December 2015, subject to resolution of the position on the EEPA. This amounted to a further counter-offer which was rejected by the MOD on 14 March 2016 when the MOD confirmed that the Government could not agree to the DPF's request for an EEPA and that this represented the MOD's final position. There then seems to have been some further direct contractual discussions between the parties to try and break the deadlock and to enable the TACOS changes to be implemented on 1 April 2016 as planned.
93. The DPF submits that a contract was concluded on 1 April 2016, with its letter of 1 April 2016, when it purported to accept the MOD's final offer of 14 March 2016. The DPF further submits this was on the basis that agreement on the EEPA was a statutory pension matter, which needed to be dealt with outside the scope of the negotiations on the TACOS. I do not consider, on balance, that this is correct as a matter of law. My view is that the DPF's April Letter was a further counter-offer to the MOD's 14 March proposal. It is very similar to earlier counter-offers which had already been rejected. If the MOD did not agree to this counterproposal, the MOD should then have come back and rejected the DPF's proposal yet again. The MOD has submitted, however, that they proceeded on the basis that the reference to "statutory pension matters" included both EPA and EEPA. Consequently, there was a contractual agreement.
94. This interpretation of events is, however, not supported by the other documentation I have seen. The best nearly contemporaneous evidence that exists of the contractual

terms agreed is the Memorandum. I note there has never been a dispute between the parties that there was a binding contract. The Memorandum sets out the agreed terms which includes the agreement to fund the EPA. The Memorandum was issued on behalf of the MOD chain of command with the agreement of the DPF. If the MOD were proceeding on the basis that the reference to statutory pension matters in the DPF's letter of 1 April 2016 included both the EPA and EPPA the Memorandum would not have referred to the EPA at all.

95. It is clear from the earlier documentation that all the changes with financial implications were to take effect from 1 April 2016. There is a mechanism built into the Alpha Regulations under which an employer can fund an EPA. So, in terms of implementation all that needed to be worked through was a mechanism for communicating the option to affected members and for the scheme administrators to notify the MOD how much it needed to pay in order to fund the EPA.
96. There is, in my view, sufficient certainty of terms for the agreement to provide and enforce the employer-funded EPA to come into effect from 1 April 2016. If it did not, there could not have been a binding contract in relation to all the other issues, which I doubt either party would wish to argue. It has been confirmed in a number of cases that it is possible to have a completed agreement even though it is not worked out in meticulous detail. In *Attrill v Dresdner Kleinwort Ltd* 2011] EWCA Cvi 229, on appeal the Court of Appeal rejected an argument that the agreement in that case was too uncertain to be enforced even though there were some loose ends.<sup>1</sup> In this case, all that needed to be done to implement the agreement was to finalise a mechanism for communicating the option to eligible members. In addition, for the scheme administrators to notify how much the MOD needed to pay in order to fund the EPA (See paragraph 94).
97. The MOD indicated in subsequent correspondence that it was taking steps to implement the funded EPA with effect from 1 April 2016. The MOD's position is that the employee who wrote the August Letter, to indicate the EPA had been agreed and that steps were being taken to implement the EPA proposal, did not have authority to do so. The August Letter is, however, entirely consistent with the Memorandum, which I understand was issued following discussions with the Cabinet Office. I also understand that the individual who sent the letter had ostensible authority to issue it. I am satisfied that there is a sufficient certainty of terms for a binding contract to have come into existence with effect from 1 April 2016. It is not open to the MOD to unwind the agreed contractual terms after they have been agreed without a further formal variation of contract agreed by both parties.
98. I am also satisfied that the employment terms agreed with the DPF were incorporated into Mr R's contract of employment automatically once agreement had been reached between the MOD and DPF under the collective contractual bargaining mechanism in

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<sup>1</sup> There is a detailed consideration of the caselaw relating to when agreements have sufficient certainty of terms to be enforceable in *Chitty on Contract* Chapter 2-121 Volume 1 (2018 Edition). All contracts however need to be construed individually by reference to the surrounding evidence.



place. Therefore Mr R has a contractual right to an EPA funded by the MOD from 1 April 2016.

99. By failing to implement an EPA funded by the MOD, the MOD has acted in breach of law for the purposes of section 146(1)(c) of the 1993 Act, since it has not complied with the agreed contractual terms. In my Preliminary Decision, I concluded that Mr R had sustained injustice as a consequence of maladministration comprising of a breach of contract for the purposes of section 146(1)(a) of the 1993 Act. The MOD submitted that section 146 (1) draws a distinction between “maladministration” and “any dispute of law”. Accordingly, an error of fact or law will not of itself amount to “maladministration”. The MOD quoted paragraphs 16 to 19 of the High Court ruling in the case of *Glossop v Copnall* [2001] PLR 263, which cited, among other things, the following passage from *Miller & KC Independent Trustee v Stapleton and the Pensions Ombudsman* [1996] PLR 67:

“If the trustees, acting on proper advice, believed their view of the law to be correct they were entitled to assert that position before the Ombudsman. This is a normal and proper part of good administration. It might be otherwise if they had adopted a perverse stance or failed to take appropriate legal advice...”

100. The MOD further submits that it genuinely believed, having conscientiously reviewed the position on advice, that there had been no concluded contract on the EPA issue. The MOD accepts, in the light of my preliminary findings, that there was a mistake of law (and/or fact). However, it considers that there is no basis for a finding of maladministration.
101. The summary of the law in relation to my jurisdiction in the MOD’s latest’s submissions is not quite correct. There is extensive case law that there is overlap between sections 146(1)(a) and (b) of the 1993 Act. This was recognised early on in *Westminster City Council v Haywood and others*:

“There is a considerable degree of overlap between the two subsections. Most complaints of maladministration will involve disputed questions of fact and law (including, it may be, the proper ambit, in a pensions context, of ‘maladministration’). That is reflected in the terms of [section] 150(7) of the 1993 Act”.

102. In many cases, breach of law will also amount to maladministration. However, the case law relating to my jurisdiction also confirm that breach of law and maladministration are neither synonymous nor coterminous (*Hillsdown Holdings v Pensions Ombudsman* [1997] 1 All ER 862, Knox J at paragraph [73]). In *City of County of Swansea v Johnson* [1999] PLR 187, Mr Justice Hart agreed with Mr J Walker’s statement in *Westminster County Council v Haywood* that “not all breaches of law amount to maladministration”. This would include, for example, where trustees or an employer act on a given interpretation of law or fact having taken legal advice which subsequently proves to be incorrect.

103. I do not have access to any contemporaneous advice received by the MOD on whether a contract had been concluded at the time. I am prepared, however, to accept (as is the DPF) that the failure to implement the agreed terms of the contract does not amount to maladministration only a breach of contract. I consider, however, that the MOD gave Mr R the reasonable expectation, for a period of several months, that it was implementing the funded EPA. It failed to take steps to do so, and the failure amounts to maladministration justifying a separate award for non-financial injustice in addition to any award for breach of contract.
104. In cases where there has been a breach of contract, I would usually direct, under section 151(2) of the 1993 Act, that a payment for financial injustice should be made in respect of the financial loss sustained or that the parties give effect to the terms of the contract (in so far as this is legally possible). Regulation 136 of the Alpha Regulations provides that the employer may make contributions on the member's behalf in circumstances determined by the Scheme Manager. The offer to fund an EPA was re-offered by MOD in respect of future service. This is supported by subsequent exchanges between the parties, referenced at paragraph 57 of this Determination. So there is no issue regarding whether this is possible in respect of future elections for a reduced EPA. A retrospective EPA election funded by the MOD would, however, need to be agreed by the Minister for the Civil Service, or his or her delegate.
105. Generally where there has been a breach of contract I should be seeking to direct, insofar as possible, that compensation should be paid to put the applicant in the position he would have been in if the contract had been properly performed. Alternatively, I would seek to direct performance of a specific action where damages do not provide an appropriate remedy. The appropriate remedy to direct in this case is also complicated by the fact that this is a statutory public sector scheme and the steps taken to address the age discrimination identified in the McCloud case have not yet been finalised, and indeed are yet to be set out in legislation.
106. Under the current proposals, at some point in the future, either in a couple of years' time or at point of retirement, Alpha members will be given the choice of:
- (a) being readmitted to membership of their old civil service scheme in relation to the "remedy period"; or
  - (b) remaining in Alpha in respect of the "remedy period".
107. As noted earlier in the Determination, the option which is best for Mr R will be determined at the point of his retirement when he will be given the choice of options to adopt.
108. My preference would be to direct, if it can be confirmed that this is an available option with the Scheme manager (or his delegate), that Mr R should be offered a retrospective EPA with effect from 1 April 2016 funded by the MOD in accordance with the terms of the Memorandum. This would then enable Mr R to make a choice as

to whether to remain in Alpha, with the option of an EPA, or to re-join the Classic Section of the PCSPS in relation to the remedy period.

109. If it is not possible to put Mr R in the position he would have been in, if there had been no breach of contract, I would need to award financial compensation. The purpose of this would be to compensate Mr R for the loss which he may suffer as a result of the failure to offer the funded EPA. For the purpose of my directions below, the reference to Scheme Manager includes any person with delegated responsibility to make decisions on behalf of the Scheme Manager in respect of the EPA options.
110. Mr R has experienced significant non-financial injustice. The Memorandum, and subsequent communication from the MOD, incorrectly indicated that the offer of the EPA was being implemented. I find that the provision of misleading information on the part of the MOD amounts to maladministration (separate from any breach of contract which I have found does not amount to maladministration). This has likely compounded matters. It would be appropriate for the MOD to pay £500 to Mr R in respect of the significant inconvenience its maladministration has caused him.

### **Directions**

111. Within 28 days of the date of the Determination, I direct that the MOD shall:
- I. confirm whether the Scheme Manager will allow Mr R to apply for a retrospective EPA option of three years below Normal Pension Age.
    - a. if the Scheme Manager confirms that a retrospective EPA option can be provided through the Scheme on this basis, fund an EPA election for Mr R in respect of scheme years 2016/2017, 2017/2018, 2018/2019, 2019/2020; 2020/2021 and, 2021/2022; or
    - b. if the Scheme Manager does not agree to retrospective EPA elections, ask the Scheme Actuary to calculate a capital amount, (the Pension Shortfall), equal to his best estimate of the difference between the capital value of the notional pension benefits Mr R would have accrued in Alpha if he had made an EPA election funded by the MOD taking effect from 1 April 2016, up to the date of the end of the tax year in which this Determination falls; and the capital value of Mr R's accrued pension benefits. The MOD shall pay an amount equal to the Pension Shortfall into a registered pension scheme nominated by Mr R for this purpose. If the payment results in Mr R incurring an annual allowance charge, the MOD shall pay Mr R redress equivalent to the amount of that tax charge; and

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- II. pay £500 to Mr R in recognition of the significant non-financial injustice this matter has caused him.

**Anthony Arter**  
Pensions Ombudsman  
3 August 2021

## Appendix One

### The Public Service (Civil Servants and Others) Pensions Regulations 2014

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#### SCHEDULE 1 Payments for extra pension

##### PART 1 General

...

#### PART 3 Effective pension age payments

##### CHAPTER 1 Exercising the effective pension age option

#### **Effective pension age option exercisable by the member**

**25.—** (1) This paragraph applies if an active member of this scheme in relation to a continuous period of pensionable service has a normal pension age above 65 years.

(2) Subject to sub-paragraphs (3) and (4), the member may opt to make periodical payments for an effective pension age of 1, 2 or 3 years below the member's normal pension age (“effective pension age option”).

(3) An effective pension age option may not be exercised to achieve an effective pension age below 65 years.

(4) The member may opt to make periodical payments for an effective pension age of any period up to 3 years below the member's normal pension age if that would achieve an effective pension age of 65 years.

(5) An effective pension age is—

(a) relative to normal pension age; and

(b) automatically adjusted to reflect any change in normal pension age.

##### PART 4

#### Enhanced effective pension age payments

##### CHAPTER 1

#### Eligibility for enhanced effective pension age option

#### **Eligibility**

**34.—**(1) The scheme manager must publish a list of scheme employments in respect of which an enhanced effective pension age option may be exercised (“eligible employments”) and, in relation to each employment, the date by which persons in that employment or the dates by which specified persons within that employment must exercise the option.

(2) An enhanced effective pension age option may only be exercised by a person to whom paragraph 35 or 36 applies.

(3) A member may only exercise an enhanced effective pension age option once.

(4) A tapered protection member of the PCSPS (T) to whom paragraph 28(1) of Schedule 2 applies may only exercise the enhanced effective pension age option if T has opted to begin pensionable service under this scheme on the day after the scheme closing date(4).

### **Opting for enhanced effective pension age of 60**

**35.**— (1) This paragraph applies to a transition member with continuity of service who—

- (a) is in pensionable service under this scheme in an eligible employment;
- (b) began that pensionable service on the day after the scheme closing date; and
- (c) has a normal pension age of 60 under the PCSPS.

(2) The member may opt, in relation to that pensionable service, to make periodical payments for an enhanced effective pension age of 60.

### **Opting for enhanced effective pension age of 65**

**36.**— (1) This paragraph applies to a person (P)—

- (a) who is in pensionable service under this scheme in an eligible employment; and
- (b) whose normal pension age under this scheme is above 65.

(2) P may opt, in relation to that pensionable service, to make periodical payments for an enhanced effective pension age of 65.”

## **Appendix Two**

### **Public service pension schemes: changes to the transitional arrangements to the 2015 schemes consultations:**

“Executive summary

Removing discrimination arising from transitional protection

In April 2015 the public service pension schemes were reformed; the cost of the legacy schemes had significantly increased over the previous decades, with most of those costs falling to the taxpayer. The introduction of new schemes, with career average design and increased Normal Pension Ages and the introduction of a cost control mechanism, were important steps to protect against unsustainable increases in cost. They were also progressive, providing greater benefits to some lower paid workers. Even with these reforms, public service pensions continue to be among the very best available, rewarding those who dedicate their working lives to public service.

As part of the 2015 reforms, those within 10 years of retirement remained in their legacy pension schemes. This transitional protection was provided following negotiations with member representatives and was intended to protect and give certainty to people who were close to retirement. In December 2018 the Court of Appeal found that this part of the reforms unlawfully discriminated against younger members of the judicial and firefighters’ pension schemes in particular, as transitional protection was only offered to older scheme members<sup>1</sup>. The Courts required that this unlawful discrimination be remedied by the Government. This document sets out the Government’s proposals for doing so.

The proposals set out within this consultation will apply to all members who were in service on or before 31 March 2012 and on or after 1 April 2015, including those with a qualifying break in service of less than 5 years, across all affected public service schemes<sup>2</sup>. This is irrespective of whether they have submitted a legal claim or

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not, or whether they are currently an active, deferred or pensioner member.

Depending on a person's circumstances, many scheme members are likely to be better off in the reformed schemes rather than the legacy schemes. The Government believes it is therefore not fair to simply move everyone back into the legacy schemes, even though this would be sufficient to remove the unlawful discrimination identified by the Court of Appeal. The Government therefore proposes to provide members with the option to choose between receiving legacy or reformed scheme benefits in respect of their service during the period between 1 April 2015 and 31 March 2022. This is referred to as the remedy period. This consultation seeks views on that proposal and especially on which of two possible."