

## Discrimination – Where Are We Now?

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### Ways to discriminate - old and new

- Sex discrimination:
  - unequal pension ages
  - actuarial factors
  - equal access
  - LEL off-sets
  - GMP equalisation
  - same sex couples/unmarried partners
- Part time workers
- Fixed term workers
- Racial discrimination
- Religious discrimination
- Age discrimination
- Disability discrimination
- Human Rights Act 1998

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### Sex discrimination: unequal pension ages

- Article 141 EC Treaty
- Barber (17 May 1990)
- Past pension payments
- Transfers

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## Part-timers - what's the problem?

- Pension scheme practice
- Indirect discrimination
- Regulations (1 July 2000)

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## The story so far

- 1976 - *Defrenne*
- 1986 - *Bilka Kaufhaus*
- 1990 - *Barber*/Maastricht Treaty Protocol
- 1994 - *Vroege* and *Fischer*
- 2000 - Prevention of Less Favourable Treatment Regulations
- 2001 - *Preston* (continuing)

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## Time limits

- *Preston* (Equal Pay Act)
  - 6 months after leaving employment
  - but claim back to 8 April 1976
- Pensions Ombudsman
  - 3 years?
  - *Shillcock*

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## Hurdles for part-timers

- Indirect discrimination? (pre 1 July 2000 service)
  - objective justification
- Arrears of employee contributions
- Tax position

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## LEL offset (aka 'clawback')

- LEL=£4,108
- Part-timer (working 1/3 normal hours) earns £5,000
- Scheme imposes offset so only £892 is pensionable (18% of salary)
- Compare to full-timer on £15,000
  - £10,892 pensionable (or 73% of salary)
- *Shillcock*
  - in above example, PO thought only 1/3 LEL should be deducted
  - High Court disagreed!

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## Shillcock

*"court should not be over-ready, at least in cases of alleged indirect discrimination, to substitute its own view for that of the employer and trustees"*  
(High Court)

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## GMP equalisation

- *Williamson*
  - cannot equalise a “GMP”
  - inconsistent legislation
- Government view
- Transfers and pensions
- Clarification? (PO no jurisdiction)
- GMP simplification?
- Winding up (*Leadenhall Independent Trustees v Welham*)

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## Racial discrimination

- *Barclays Bank v Kapur*
- Gurkhas



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## Fixed Term Workers

- Regulations effective 1 October 2002
- Categories of workers affected
- Defences

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## Human Rights Act 1998

- 2 October 2000
- Direct claims only against a 'public authority'
- Example – Article 1 - "*the peaceful enjoyment of his possessions*"
  - *Singer* – annuity at 75
  - *Carson* – indexation of state pension for ex-pats

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## Religious discrimination

- Regulations effective 2 December 2003
- Apply to scheme trustees
- Equality rule
- How could it arise in a pension scheme?

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## Sexual Orientation

- Regulations effective 1 December 2003
- Equality rule
- Marital status exemption

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## Disability Discrimination

- Disability Discrimination Act 1995 and 2003 Regulations
- Disability must have a "*substantial and long-term adverse effect on the ability to carry out normal day-to-day activities*"
- Schemes have a "non-discrimination rule"
- Less favourable treatment (eg exclude or restrict some benefits)
  - currently OK if reason is "material" and "substantial"
  - changes effective 1 October 2004

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## Age discrimination – the next *Barber*?

- Equal Treatment Directive – 2 December 2006 deadline
- "*Member States may provide that the fixing ... of ages for admission or entitlement to retirement or invalidity benefits... and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age.*" (Art 6)
- Potential impact

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## So can you discriminate?

Retirement ages	No (except pre- <i>Barber</i> service)
Race	No
Same-sex partners	No
Religion	No
Actuarial factors	Yes (if actuarially justified)
LEL offset	Yes (if establish <i>Shillcock</i> defence)
Old/young	Yes (but will change)
Unmarried partners	Yes
Fixed-term workers	Depends
Disabled	Depends
Part-timers	Depends
GMP related inequalities	? (PO and Lord MacKay said no)

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