

UPDATE

# Age discrimination update for approved Jersey pension schemes

Update prepared by Ed Devenport (Partner, Jersey) and Carly McIver, (Senior Associate, Jersey).

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When age became a protected characteristic under the Discrimination (Jersey) Law 2013 (the **Law**), an exemption was created to the effect that occupational pension schemes would be exempt from claims of age discrimination. In this update, we look at the decision of Jersey's Employment Tribunal with regard to its treatment of the exemption for pension schemes in respect of age discrimination.

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By paragraph 33 of Schedule 2 to the Law, it is stated that the '*provision and the terms of an occupational pension scheme, or any personal or group personal pension scheme, do not contravene this Law in relation to the protected characteristic of age*' (the **Exemption**).

This exemption has been subject to some discussion as it was not wholly clear what was covered by '*terms*' of an occupational pension scheme. Additionally, there were concerns with regard to the extent of its application as the matter had not been considered by the Jersey courts.

Some clarity, however, was provided in this respect by the Jersey Employment And Discrimination Tribunal in the matter of *Le Cocq v States Employment Board* [2019] TRE 037 (the **Tribunal**), published in November 2019. This case was the lead case in a collective dispute by members of the Fire and Rescue Service Association in which it was claimed that younger members of a public sector occupational pension scheme had been discriminated against on the grounds of age as a result of changes which left them in a worse position than older members.

The Tribunal held that the Exemption had the effect of enabling the Respondent to introduce any occupational pension scheme provisions, irrespective of their actual or potential impact on certain groups. Unusually, however, the Tribunal noted its '*discomfort*' in reaching this decision and noted that the provision has the effect of stifling any claim in respect of the relevant scheme on this ground.

The Tribunal did not have cause to consider whether the exercise of a discretion under a power included within an occupational pension scheme would fall within the scope of the Exemption. Following the Tribunal's comments regarding its scope, it would be prudent to assume that the Tribunal might seek to interpret the Law narrowly should it have cause to consider the Exemption in this context.

Additionally, the occupational pension scheme at the heart of this matter is a public sector arrangement and, as such, changes are not made using an amendment power, but by the introduction of new legislation. Given the difference in construction, there is a small risk that the application of the Exemption may vary in respect of a private employer's occupational pension scheme.

There has not been any response from the Government as to whether it wishes to review the terms of the Exemption. Whilst the Exemption therefore remains valid for now, care should still be taken if relying on it as the Tribunal is uncomfortable with its application in practice.

Mourant Ozannes would be happy to advise trustees with regard to age discrimination issues specific to pension schemes and the application of the Exemption in respect of their own arrangements.

## Contacts

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