JUDICIARY OF
ENGLAND AND WALES

FDA, Prospect & others v Secretary of State for Work and Pensions & HM Treasury

Court of Appeal (Civil Division)

20 March 2012

SUMMARY TO ASSIST THE MEDIA

The Court of Appeal has today dismissed an appeal by several public service unions challenging the Government's decision in 2011 to increase public sector pensions by reference to the Consumer Price Index rather than the Retail Price Index.

The background

Under section 150 of the Pensions (Increase) Act 1971, the Government has to adjust (or 'up-rate') public service pensions every year (normally in April) to take account of inflation. Up to and including 2009, the up-rating had generally been effected in accordance with the Retail Price Index ('RPI'), an index published since the 1950s. In 2010, RPI was actually lower than the previous year largely due to the fall in interest rates and the consequent reduction in the cost of mortgages. However, the Government nonetheless decided to increase public service pensions by 1.5%

In 2011, the Government decided to change the basis upon which public service pensions were normally increased from RPI to a different index, Consumer Price Index ('CPI'). CPI is an index which was introduced in 1996 to enable comparison of inflation levels in different European countries. It has been used by the Bank of England as the headline measure for price inflation in December 2003.

CPI and RPI each measure increases in prices, and they are both calculated by reference to hundreds of representative goods and services. CPI differs from RPI in a number of respects. Most notably (i) RPI excludes the expenditure of certain households, including pensioner households; (ii) the two indexes do not include precisely the same items: thus, unlike RPI, CPI does not include TV licence costs or housing costs (or mortgage payments), but it does include university costs; (iii) RPI uses an arithmetic mean to combine prices within each category of product, whereas, for 70% of products, CPI uses a geometric mean.

These proceedings

A number of applicants, who include public service trades unions and individuals, challenged the Government's 2011 decision to use CPI rather than RPI as the basis for up-rating public service pensions. Two arguments were advanced.

The first argument was that CPI was not a permissible index for the Government to use for up-rating, as it did not measure whether such pensions 'have retained their value in relation to the general level of prices', to quote the language used in section 150 of the 1971 Act. This argument was based on the point that, by using the geometric mean, the CPI effectively assumed that, if one category of product increased in price more than another category of the same product, consumers would tend

to switch from buying the former category to buying the latter category. Accordingly, it was said, CPI simply does not measure what section 150 requires.

The second argument was based on the point that, when deciding to use CPI as the basis for up-rating, the Government had been influenced, indeed driven, by the fact that it would result in a significantly lower increase in public sector pensions, and would therefore benefit the national economy.

In the High Court, both arguments failed (although one of the three Judges was in favour of the applicants' second point). The applicants appealed to the Court of Appeal.

The Court of Appeal's decision

The Court of Appeal (Lord Neuberger Master of the Rolls, Lord Justice Maurice Kay, and Lord Justice Sullivan) unanimously dismissed the applicants' appeal.

On the first point, they held that CPI was a perfectly proper index to use for the purpose of up-rating under section 150 of the 1971 Act. As a matter of ordinary language, CPI measured what the section required, and this was supported by the way CPI was described in publications issued by the Office for National Statistics, how it was used by the Bank of England, and how it and equivalent indexes were used in other countries and in the European Union.

The Court of Appeal rejected the second point for two reasons. The considered that where, as here, there were two different indexes, either of which could perfectly properly be used for the purpose of up-rating public sector pensions, it was permissible for the Government, when choosing between them, to take into account the effect on the national economy, at least if the effect was significant and there was a need to benefit the economy. In any event, even if the effect of the selection on the national economy was not a legitimate factor to take into account, the Court of Appeal considered that the Government would have used CPI anyway. This was because the evidence established that the Ministers and senior civil servants in the Department of Work and Pensions, supported by the Treasury, had concluded that the differences between RPI and CPI described above, plus the fact that CPI was less volatile than RPI, and because CPI was used by the Bank of England and an equivalent index was used by other countries, meant that CPI was a more appropriate index to use for up-rating than RPI.

The Court of Appeal refused to grant the applicants permission to appeal to the Supreme Court, but it is open to the applicants to ask the Supreme Court for such permission.

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This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.