

# PARLIAMENTARY DEBATES

HOUSE OF COMMONS  
OFFICIAL REPORT

Seventh Delegated Legislation Committee

DRAFT JUDICIAL PENSIONS AND FEE-PAID  
JUDGES' PENSION SCHEMES (CONTRIBUTIONS)  
(AMENDMENT) REGULATIONS 2020

*Tuesday 3 March 2020*

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**The Committee consisted of the following Members:**

*Chair:* MR LAURENCE ROBERTSON

† Baillie, Siobhan ( <i>Stroud</i> ) (Con)	† Mumby-Croft, Holly ( <i>Scunthorpe</i> ) (Con)
† Chalk, Alex ( <i>Parliamentary Under-Secretary of State for Justice</i> )	† Pursglove, Tom ( <i>Corby</i> ) (Con)
Charalambous, Bambos ( <i>Enfield, Southgate</i> ) (Lab)	† Qureshi, Yasmin ( <i>Bolton South East</i> ) (Lab)
† Duffield, Rosie ( <i>Canterbury</i> ) (Lab)	† Spencer, Dr Ben ( <i>Runnymede and Weybridge</i> ) (Con)
† Eagle, Ms Angela ( <i>Wallasey</i> ) (Lab)	† Sturdy, Julian ( <i>York Outer</i> ) (Con)
Hendrick, Sir Mark ( <i>Preston</i> ) (Lab/Co-op)	† Trott, Laura ( <i>Sevenoaks</i> ) (Con)
Hodge, Dame Margaret ( <i>Barking</i> ) (Lab)	† Wild, James ( <i>North West Norfolk</i> ) (Con)
† Hopkins, Rachel ( <i>Luton South</i> ) (Lab)	† Young, Jacob ( <i>Redcar</i> ) (Con)
† Metcalfe, Stephen ( <i>South Basildon and East Thurrock</i> ) (Con)	Kevin Candy, <i>Committee Clerk</i>
	† <b>attended the Committee</b>

The following also attended, pursuant to Standing Order No. 118(2):

Smith, Jeff (*Manchester, Withington*) (Lab)

# Seventh Delegated Legislation Committee

Tuesday 3 March 2020

[MR LAURENCE ROBERTSON *in the Chair*]

## Draft Judicial Pensions and Fee-Paid Judges' Pension Schemes (Contributions) (Amendment) Regulations 2020

2.30 pm

**The Parliamentary Under-Secretary of State for Justice (Alex Chalk):** I beg to move,

That the Committee has considered the draft Judicial Pensions and Fee-Paid Judges' Pension Schemes (Contributions) (Amendment) Regulations 2020.

What a pleasure it is to see you in the Chair, Mr Robertson, and it is an honour to serve under your chairmanship.

The draft regulations before the Committee relate to judicial pension schemes member contribution rates. The purpose of the draft regulations is to amend the current member contribution rates and earnings thresholds in two different traditional pension schemes for subsequent financial years. The first is the judicial pension scheme, which was established by the Judicial Pensions Regulations 2015 following wider public service pension reforms. The second is the fee-paid judicial pension scheme, which, following the Supreme Court's 2013 decision in the case of *O'Brien v. Ministry of Justice*, was established by the Judicial Pensions (Fee-Paid Judges) Regulations 2017 in order to provide fee-paid judges with a pension.

Both the 2015 and 2017 regulations make provision for contributions payable by members and set a different rate of contribution dependent on the salaries or fees earned by a judge in a year. The regulations being debated today maintain the current member contribution rates in both schemes for the financial year 2020-21 and each year thereafter, until such time that alternative provisions are made. They also uprate the earnings thresholds under £150,001 per annum in the member contribution rate structure for both schemes on 1 April 2020, in line with the consumer price index. Additionally, the regulations provide that the related earnings thresholds will be automatically uprated each year in April in line with the consumer prices index rate of the previous September.

The reason for making these amendment regulations is that the current provisions for member contribution rates will expire on 31 March 2020. The draft regulations are needed to specify the member contribution rates which will apply from 1 April onwards. The regulations will enable us to ensure the continuing operation of the schemes by deducting the appropriate member contributions from judicial salaries and fees. Given the ongoing uncertainty about the value of public service pensions after April 2015 due to both recent litigation and the consequential decision to pause one element of the actuarial valuation of the schemes, the Government propose to maintain existing contribution rates from 1 April 2020 onwards.

Following the reform of public service pension schemes in 2015, and under the current legislative framework, Departments are required to undertake valuations of public service pension schemes, including the judicial pension scheme, every four years. The valuation does two things. First, it informs the employer contribution rates. Secondly, it tests whether the value of the schemes to current members has moved from target levels and needs to be adjusted to bring it back to that point, which is known as the cost control mechanism.

Work was undertaken in March 2016 on the first such valuation of public service pension schemes to analyse the provisional results of the valuation for each affected scheme. The work was affected by the age discrimination cases brought to court by members of the judicial and firefighters' pension scheme—the McCloud litigation. That litigation concerned the transitional protection policy that was applied by the Government in implementing the 2015 public sector pension scheme reforms. The courts found that the transitional protection policy amounted to unlawful age discrimination, and in June 2019 the Government's application for permission to appeal was refused by the Supreme Court.

In January 2019, the Government took the decision to pause the cost control element of the valuation. They were prudent to do so, because the effect of the McCloud litigation on public sector pension schemes was unclear. Although the outcome of the litigation is now known, addressing the discrimination, including settling the details of tax treatment, is a complicated process and involves decisions across Departments; it will take some time to deliver. The pausing of the cost control mechanism will therefore continue until the McCloud remedy is finalised.

In order to avoid the need to make further interim regulations, it is proposed in the regulations that the current rates will continue to apply, with no specific expiry date. Once the McCloud resolution work is complete and the outcome of the cost control element of the valuation is known, the Government will reconsider whether further changes to member contribution rates for these schemes are required.

Turning to the issue of earning thresholds, no changes were made to thresholds for member contribution rates as part of the measures put in place for the year 2019-20. However, the Government are mindful that it would not be desirable for the earning thresholds to fall significantly out of step with salary or fee rates. That is why the regulations provide that all earning thresholds below the top £150,001 threshold are uprated each year in line with CPI. This approach is consistent with various other aspects of public service pensions, and in recent years increases to public service pensions in payment have been in line with the September to September increase in CPI.

CPI is already used to annually uprate the earning thresholds in other public service pension schemes such as the local government pension scheme and the teachers' pension scheme. The £150,001 band will not be increased, because in the 2015 scheme the rates were designed to align with the top rate of income tax in such a way that the net of tax contribution rates were broadly the same above and below the £150,001 threshold. The total contribution rates are broadly the same in the case of the fee-paid 2017 scheme, when the member and dependent contribution rates are taken together. Additionally, the

Government consider it desirable to maintain broad parity between the Judicial Pensions and Retirement Act 1993 and the two sets of judicial pension regulations being amended, as the £150,001 threshold is common across all judicial schemes.

As the regulations provide that the lower earning thresholds below will be uprated automatically each year, similar provisions will not be needed next year. However, the Government will revisit the issue of appropriate levels of contribution rates and thresholds once wider pension issues have been resolved.

The relevant legislation, section 22 of the Public Service Pensions Act 2013, requires the Government to fulfil a number of procedural requirements prior to making changes to features of the scheme under the 2015 regulations, which are classed as “protected elements”.

**Ms Angela Eagle** (Wallasey) (Lab): How long will it take this Government to come up with the McCloud remedy?

**Alex Chalk:** I am grateful to the hon. Lady; that is a fair challenge. It requires careful consideration. The McCloud judgment is not a case of simply saying that everyone was better off under the old scheme, and therefore a matter of making a simple adjustment in that regard. It is more complex than that. Those on the new scheme might be better off, and it has to be treated in a more granular, detailed way than one might consider. It has been considered with great concern and all due diligence and expedition. We will be hearing an outcome in due course.

**Ms Eagle:** A non-answer.

**Alex Chalk:** I thought it was an extremely good answer, but thank you.

Turning to the consultation, member contributions are one such “protected” element and as such cannot be altered without the Government first consulting the persons or representatives of those persons affected, with a view to reaching an agreement. I can confirm that the Ministry of Justice issued a four-week consultation from 25 October 2019 to 22 November 2019. The Ministry of Justice consulted representative judicial organisations with a view to reaching agreement. An additional statutory requirement for changes to “protected” elements is that an accompanying report must be laid before Parliament setting out the rationale for the amendment. I can confirm that such a report has been laid, and I refer Members to the report for details of the consultation responses.

Separately, we also satisfied the requirement to consult the Secretary of State for Scotland in relation to judicial offices with Scottish jurisdiction, and he was content with the proposal. Furthermore, as the judicial pension schemes to which these regulations relate are UK-wide, we have kept the devolved Administrations informed of progress, and they support our proposed approach. We will continue to engage closely with them on further developments.

Drawing the threads together, under this further interim measure the cost of accruing pension scheme benefits will remain the same for most members but will be reduced for some members, as they will pay contributions at a lower rate than they would have done had no changes been made to the earning thresholds.

I conclude by reinforcing the point that the existing arrangements for member contribution rates expire on 31 March 2020 in relation to both the 2015 and the 2017 judicial pension schemes. That is why these draft regulations are a necessary further interim measure to continue the effective operation of these pension schemes until a long-term solution is put in place.

2.40 pm

**Yasmin Qureshi** (Bolton South East) (Lab): It is a pleasure to serve under your chairmanship, Mr Robertson. I can confirm that the Opposition are not seeking a Division on this particular statutory instrument. We accept the reason for it to be passed and, in fact, I attended a similar Committee last year for the relevant 2019 judicial pensions statutory instrument.

Taking on the point made by my hon. Friend the Member for Wallasey (Ms Eagle), I want to ask the Government about when the McCloud judgment will be implemented. I heard the Minister say that it is a complicated matter and that he needs to work through this but, to be frank, this has been going on for some time now and it is important to remember what the McCloud judgment was all about.

The Fire Brigades Union and the judiciary were able to hold this particular legislation as unlawful because the tribunal found that the provisions were discriminatory, in that younger judges were more often women and members of the black and minority ethnic community, while it also had ageist effects. It is important that this matter is addressed sooner rather than later, because we have a big shortage of judges and especially High Court judges. In the latter case, a number of senior lawyers and members of the judiciary are not applying for these jobs because of the changes in the pension regulations, while other judges’ positions are also not being filled. One of the reasons holding people back from applying is that, ultimately, they do not know what their pensions will be.

I know things are complicated, but it is not that complicated to work things out so as to come to a resolution. The Court passed a judgment years ago and the Ministry needs to get its skates on and deal with this particular long-standing issue, and I urge the Ministry to direct its mind to this matter seriously in order to resolve it. In the meantime, we are not calling for a Division on the statutory instrument itself because it is clearly necessary.

2.42 pm

**Ms Eagle:** It is a pleasure to serve under your chairmanship today, Mr Robertson. I have a few questions for the Minister, since he has come to us with a status quo position following a judgment made in 2018—two years ago—that the Government then tried to appeal to the Supreme Court, only to be told last year that they had no grounds for doing so. One assumes his civil servants were able to advise him that that was a likely scenario, so they would have had time to start working on the solutions to this issue—what he called the McCloud remedy—and the fact that it has torn a hole through the Government’s plans for public sector pensions and their reform, albeit in only two of the schemes. Will the Minister confirm that the judgment has very strong implications for all public sector pension schemes where

[Ms Angela Eagle]

new arrangements for those who joined after the changes are different from and less generous than the arrangements for those who were already in the scheme—something that, in this instance, has been ruled unlawful by the courts?

Does the non-appearance of the long-awaited McCloud remedy have more to do with the implications for other public sector pension schemes than with complication? Will the Minister give his view on that? I have been a Minister in some quite complicated Government Departments, and in my experience complication was never a reason to be so tardy in producing the response to a legal judgment that the Government had acted unlawfully. I can see in the Minister's expression and response to my questions some recognition that I might be on the right track about that.

Obviously, no one can deny that keeping the status quo is appropriate while the Government decide what on earth to do about the conundrum that the courts have presented them with. Rather than saying it is all very complicated and there will be a response along some time in the far future, though he has no idea when, will the Minister give a bit more information on when this matter is likely to be resolved? As my hon. Friend the Member for Bolton South East said, this is causing uncertainty and problems with recruitment.

There are many other public sector pension schemes, not least those with members who joined on much less generous pension provision than public servants had in the past. They are very interested in the Government's response to this important legal judgment. Before we approve the statutory instrument, I would appreciate some indication from the Minister of the direction the Government will go in and when they will do so.

2.45 pm

**Alex Chalk:** I thank those who have spoken for their helpful contributions to the debate. To address the points made a few moments ago, of course the implications are significant; that is precisely why they have to be considered with care. As a courtesy to the hon. Member for Wallasey, I would like to say a little more about the McCloud litigation. The first thing to emphasise is that the Government have been working at pace to develop the McCloud remedy, bearing in mind that the decision in McCloud does, as the hon. Lady rightly pointed out, read across to other public service pension schemes.

If there were ever a example of something that needs to be thought through with care, this is it. In addition, a final remedy hearing in relation to the judicial scheme was held on 10 January 2020, when declarations were made for salaried and fee-paid judges, with the effect of giving litigants entitlement to membership of the relevant legacy scheme from 1 April 2015. The MOJ has already gone some way to addressing the discrimination for claimants. It has not been sitting on its hands. Most significantly, the claimants have been moved to the JUPRA scheme, which is the pre-2015 scheme, effective from 1 December 2019. Furthermore, the Ministry of Justice has stopped judges from tapering from the JUPRA scheme into the NJPS scheme from October 2019.

The next hearings in the employment tribunal are on injury to feelings in June 2020 and then financial losses in October 2020. Those hearings should settle the detail

of how past discrimination will be rectified. Officials in the Department are continuing to work hard, engaging with the employment tribunal on that process.

The MOJ is also committed to addressing discrimination for judges in the same legal and factual position as McCloud claimants, and officials are working at pace to develop proposals for how that discrimination will be addressed. Those proposals will be consulted on in spring this year. Before the formal consultation, the Ministry of Justice will undertake non-technical discussion with the scheme advisory board and pensions board, and engage with the wider judiciary.

In summary, there are a lot of moving parts. This has to be handled in stages and with care. Those are the principles that underpin the approach that is being taken.

**Ms Eagle:** The Minister is giving us some useful detail about the work that the Government are undertaking. What lessons has he learned as a Minister from this debacle, with particular reference to the Government's aim, which the Opposition support, to have a more diverse set of people putting themselves forward to be judges? What has he learned about what happened, which is that the Government discriminated illegally against people who have not traditionally been seen as judges—younger people, black and minority ethnic people, women? What message does he think it sends out to younger lawyers who might aspire to get to the bench and to be judges in future that the Government have somehow managed, at the same time as saying that they want a more diverse bench, to introduce policy found to be unlawfully discriminatory against those very people?

**Alex Chalk:** I am disappointed that the hon. Lady felt it necessary to take that tone. This Government are proud of the fact that, in terms of recruits to the judiciary, we have the most diverse judiciary ever. We are on the right path to making it more diverse and more representative of the people whom that judiciary serve.

A judgment has gone against the Government, but judgments go against all Governments of all stripes. I am sure that even when the hon. Member for Wallasey was a Minister, judgments went against the Government. What matters is how the Government respond to that; that is the hallmark of a good Government. We are responding with care, thought and consideration to ensure a scheme is in place that can stand the test of time. That is what we are focused on, and it is precisely the right approach.

The draft regulations are an interim measure until such time as the long-term solution is in place. They will specify member contribution rates from 1 April 2020. Under the measure, the cost of accruing pension scheme benefits remains the same, but will be reduced for some members, as they will pay contributions at a lower rate than they would have done had no changes been made. That is why passing this interim measure is the right thing to do. I hope that the Committee agrees that the regulations are necessary to continue the arrangements for member contribution rates and for the effective operation of the judicial pension scheme.

*Question put and agreed to.*

2.52 pm

*Committee rose.*



