

Cost Management, Benefit Design and Administration Committee

Meeting of the Committee 24th May 2018

ITEM 8 Paper C

Partner's benefits in the LGPS

1. A number of legal judgements have been handed down recently which question the rules of pension schemes with regard to benefits payable to partners of scheme members. The three most important cases are summarised below.

Brewster v NILGOSC

2. In February 2017, the Supreme Court held that the nomination requirement for a survivor pension to be paid to unmarried partners in the NI LGPS was unlawful under European discrimination law and that any such requirement should be disapplied with immediate effect.
3. Nomination forms for co-habiting partners were a requirement in the LGPS in E&W since 2008 but was dispensed with when the new scheme was introduced in April 2014. Since then, the payment of a survivor pension to a co-habiting partner has to be paid regardless of whether or not any nomination has been made provided that the various qualifying conditions are satisfied.
4. The primary concern for the E&W LGPS, and one which remains unanswered, is whether or not the Brewster judgement, being made under EU law, has a direct read across so that any requirement for a nomination in any public service pension scheme, including the LGPS, must be dis-applied.
5. If the read across exists administering authorities will need to determine whether or not payment of a survivor's pension between 2008 and 2014 was denied or if no claim was made because no nomination existed. Furthermore if full children's pensions are in payment these would need to be reduced to take account of any partner's pension now being paid.
6. In the immediate aftermath of the Brewster judgement, HM Treasury advised the then DCLG, as the scheme's responsible authority, that scheme managers could be advised to make these payments and in

Cost Management, Benefit Design and Administration Committee

doing so, could take comfort from section 3 of the Human Rights Act 1989.

7. DCLG deferred any direct guidance pending the outcome of a similar case that is E&W LGPS specific (Elmes v Essex CC). That case was determined by the High Court in January 2018 but as of the date of this paper, no summary of the judgement has been published. MHCLG has made it clear that it will not consider making any statement or announcement until the full judgement has been published.
8. We are also aware that one administering authority has obtained Counsel's opinion confirming that making any payment as a result of Brewster prior to a change in the E&W regulations would be ultra-vires.
9. The current, unhelpful position, is that some administering authorities have made payments in the spirit of the Brewster judgement whereas others have decided not to do so until the scheme's regulations are amended to remove the nomination requirement between 2008 and 2014.
10. In view of the growing uncertainty, a survey was conducted amongst the LGA's Comms group. As expected, this showed that a minority of administering authorities were taking proactive action to trace Brewster/Elmes type cases and to make payments but that a small majority were either doing nothing in the absence of any MCHLG advice or guidance or taking minimal action only when contacted by affected individuals.
11. To assist administering authorities, the following statement was circulated to authorities by the LGA on the 8th May 2018 :-

"It has come to our attention that there is some confusion about the status of regulations 24 and 25 of the LGPS (Benefit, Membership and Contributions) Regulations 2007 following the Elmes V Essex High Court judgement. To confirm, the High Court judgement handed down by Mr Justice Walker on 22 January 2018 strikes out the requirement to nominate a cohabiting partner under the regulations. The judgement states:

"The requirement to nominate a person under regulations 24 and 25 of the LGPS (Benefit, Membership and Contributions) Regulations 2007 is incompatible with Article 1 of the first protocol to, and Art 14 of, the European Convention on Human Rights and must therefore be disapplied."

Cost Management, Benefit Design and Administration Committee

As confirmed in bulletin 166, in our view the judgement now enables administering authorities to pay a cohabiting partner's pension where the member left the LGPS (England and Wales) between 1 April 2008 and 31 March 2014 (and died before 1 April 2014) without a nomination form, provided the cohabiting partner criteria in Schedule 1 of the LGPS 2013 regulations are met. We have amended the [timeline regulations](#) accordingly.

We are aware some administering authorities are still not making payment to affected cohabittees. Whilst each administering authority is responsible for the interpretation and application of regulations and judgements in relation to them, not making payment would, in our view, place the authority at risk of the Pensions Ombudsman ruling against it should a cohabiting partner appeal a decision where payment of a survivor's pension is refused because a nomination form is not in place. We therefore recommend that authorities advertise the judgement on websites and in newsletters, as appropriate."

Walker v Innospec Limited

12. On 12 July 2017, the Supreme Court handed down its judgment in the case of *Walker v Innospec Limited*. In a landmark ruling, it overturned the Court of Appeal's 2015 judgment, and unanimously agreed that Mr Walker's husband should be entitled to a full survivor's pension
13. The Supreme Court ruled that an exemption in the Equality Act 2010 ("EA10"), which permits the restriction of survivors' benefits for same-sex partners, is incompatible with EU Directive 2000/78/EC ("the Framework Directive") and must be disapplied.
14. Occupational pension schemes must now provide civil partners and same-sex spouses with the same survivors' benefits as opposite sex married couples.
15. In the LGPS active members' partner benefits are equal for same and opposite sex marriages and civil partnerships however for post-retirement partnerships the situation is different.
16. For post-retirement marriages same sex and male spouses of female pensioner members receive a pension based on the member's service back to 1988 whereas female spouses of male members get a pension based on service back to 1978.
17. For post-retirement same and opposite sex civil partnerships survivor benefits are based on membership after 5 April 1988, or on all

Cost Management, Benefit Design and Administration Committee

membership if the member became a pensioner before 1 April 2014 and made an election before 1 April 2015 for pre 6 April 1988 membership to also count.

18. The situation with regard to post retirement co-habiting partners is further complicated by the requirement for members to have paid additional contributions for membership prior to 1988 to be included.
19. Therefore on one measure (same sex and male spouses and all civil partners) the 'same benefit' is offered by the LGPS however as female spouses receive benefits based on service back to 1978 there is a potential point of challenge.
20. If a male spouse of a female member should win a case arguing that benefits should be calculated on all service back to 78 as it would for a female spouse of a male partner then because of Walker the benefits for same sex spouses and civil partners would therefore have to follow suit.
21. Even as things stand there is an argument that benefits are not the same in principle even if they do not directly contravene Walker – a male survivor gets the same benefits from both a same and opposite sex post retirement marriage or civil partnership.

O'Brien v Ministry of Justice

22. This case concerns the treatment of part time service prior to the introduction of EU legislation and UK domestic legislation on part time workers but is similar in principle to the Walker v Innospec case.
23. However, the Supreme Court was unable to reach a clear verdict and referred the matter to the EU Court of Justice where a decision has yet to be given.

Recommendation – that the committee notes the above report and asks the Board to maintain pressure on MHCLG to come forward in a timely manner with clear and authoritative advice or guidance on the handling of relevant cases.