

Teachers' Pension Scheme Conference 2019

Examining the Key Issues – Legal Update

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What we will cover

Cases

- McCloud and Sargeant – Age Discrimination - Update
- Walker v Innospec – Survivors benefits for same sex marriages and civil partnerships
- Brewster – Surviving cohabitees' benefits

TPO

- Mrs S (PO-19018) – misquote/misinformation
- Ms S (PO-21084) – misquote/misinformation
- Ms E (PO-23830) – misquote/misinformation
- Miss S (PO-25441) – ill health early retirement
- Mr Y (PO-23018) – death benefits

McCloud and Sargeant
Age Discrimination



Cases

McCloud & Others v Ministry of Justice & Others

Facts

- Transitional provisions intended to mitigate effect of compulsory pension changes on older workers.
- McCloud as representative of segment of younger Judges who did not benefit from full transitional protection that older Judges did.

Decisions

- **ET** - transitional protections were age discriminatory and could not be objectively justified.
- **EAT** - agreed with the ET that the Government had failed to justify the discriminatory effect of the transitional arrangements as a proportionate means of achieving its social policy aims.

Cases

Sargeant & Others v London Fire and Emergency Planning Authority & Others

Facts

- Transitional provisions intended to mitigate effect of compulsory pension changes on older workers.
- Sargeant as representative of segment of younger Firefighters who did not benefit from full transitional protection that older Firefighters did.

Decisions

- **ET** - transitional protections were age discriminatory but could be objectively justified.
- **EAT** - found that the ET was correct in its conclusion that the Government had a margin of discretion in pursuing and implementing social policy, and that therefore it had sufficiently established that it had a legitimate aim in implementing the transitional arrangements. However, the ET had erred by taking the wrong approach to the question of proportionality, in light of previous case law.

Cases

Cases

COURT OF APPEAL: Lord Chancellor v McCloud; Secretary of State for the Home Department v Sargeant

- CA heard Government appeals together (December 2018) and dismissed both, but on different grounds to EAT: government failed to show that it was pursuing any legitimate aim.
- Purported to be protecting those closest to retirement from effects of pension reform, as they would have least time to prepare before retirement - no evidence to support this.
- Restored judgment of ET in the judges' case and substituted a finding of unlawful age discrimination in the firefighters' case.

PRINCIPLE:

- Any employer operating directly age discriminatory policies must be able to evidence the legitimacy of its stated aims.
- Older employees actually least affected by the changes (as benefits already accrued under old schemes for past service were protected). ET entitled to find that provisions irrational.

Cases

Lord Chancellor v McCloud; Secretary of State for the Home Department v Sargeant

UPDATES

- Permission to appeal not granted by CA.
- Cost cap mechanism on public sector pension schemes paused in January 2019, pending SC decision on right to appeal.
- 27 June 2019: Supreme Court refused permission to appeal against the CA's decision on ground that the applications do not raise an arguable point of law.
- Government estimated that the judgment could cost the equivalent of approximately £4 billion per annum.
- Still some way to go in relation to these cases:
 - Further ET Hearings required in relation to remedy;
 - Implementation of remedy and changes to public sector pension schemes;
 - Cost cap process would then be re-run to take into account of any amended benefit structure.
- Continued pressure from Trade Unions.

**Walker v Innospec
and Brewster**

Survivors' benefits



Cases

Walker v Innospec: **SAME-SEX PARTNERS**

Facts

- Mr Walker (W) retired in 2003. Been with his partner since 1993. Entered into a civil partnership in January 2006, subsequently married.
- Scheme applied Equality Act 2010 exemption limiting benefits payable to Civil Partners to post 5-December 2005 service.
- W's spouse's pension entitlement if had been female: about £45,700pa.
- W's Husband entitled to £1,000pa based on contracted-out rights only.
- Successful claim in ET, overturned by EAT. CA upheld EAT decision – entitlement judged by reference to law in force at the time pension accrued. W appealed to the Supreme Court.

ISSUE:

- **Should service prior to the relevant legislation (in this case, Civil Partnership Act 2004) be taken into account in calculating a same-sex spouse's entitlement to a surviving spouse's pension?**

Cases

Walker v Innospec

Decision

- UKSC held the Equality Act 2010 exemption was incompatible with the EU Framework Directive.
- W's spouse entitled to Spouse's pension based on his full period of pensionable service.

PRINCIPLE:

- Barber line of cases not relevant to EU Framework Directive. Time limits introduced by them were an exceptional measure.
- Conduct that was lawful when it occurred can retrospectively become unlawful.
- What about other temporal limits? *Note: O'Brien case*
- Government Actuary's Department (GAD) report - *Fee-paid judicial litigation*.

Cases

Brewster v NILGOSC: **COHABITEES**

Facts

- Miss Brewster's (B) co-habiting partner died unexpectedly.
- Spouse's pension payable to "a surviving spouse, nominated cohabiting partner or civil partner".
- No nomination form completed (not required for married couples or civil partners).

ISSUE:

- **Whether there was objective justification for interference with B's entitlement to survivor's benefits on the basis of the nomination requirement.**

Cases

Brewster v NILGOSC

Decision

- Supreme Court held that NI LGPS had no convincing justification for the nomination form policy.
- Nomination requirement amounted to unequal treatment on grounds of marital status in breach of Art.14 ECHR.
- **Did not** decide whether the NI LGPS could properly have refused to make any provision for cohabitants' pensions in the first place.

PRINCIPLE:

- Where a scheme has additional qualification requirements for a co-habitee that would not be imposed on a spouse, it should consider the reason for those conditions and whether they can be justified.

A hand holding a silver and black pen is positioned over an open spiral notebook. In the foreground, a silver calculator is being held by another hand, with a finger resting on the 'M+' button. The calculator's display shows a series of vertical bars. The background features a financial chart with blue and orange bars, and a pie chart with green and orange segments. The overall scene suggests a professional or financial context.

The Pensions Ombudsman
Misquotes/Misinformation

The Pensions Ombudsman

Mrs S (PO-19018)

Facts

- Complaint by Mrs S' husband (Mr S) on behalf of Mrs S' Estate against the School, the Council and TP.
- Mrs S was given a benefit statement prior to her death stating that an in-service death grant of £114,830.70 would be payable.
- After Mrs S passed away an out-of-service death grant of only £18,703.62 was paid.
- Also issues around the School's actions when Mrs S exhausted her sick pay and left pensionable service which were raised.

ISSUE:

- **Whether Mrs S' pensionable service ended on 16 October 2011 under Regulation 7 of TPS Regs.**
- **Depending on the answer to the above, what benefits was Mrs S/her estate entitled to?**

The Pensions Ombudsman

Mrs S (PO-19018)

Decision

- Mrs S' paid sick leave, and therefore her pensionable employment, ended on 16 October 2011, despite arrangement by which she remained contractually employed in the hope that her health would improve.
- No duty on School to inform Mrs S of right to apply for IHER.
- Council should have known it was recording pensionable service incorrectly. Could have queried with TP at time and asked for clarification.
- Council acted negligently, causing TP to provide an incorrect benefit statement to Mrs S, which resulted in her choosing not to take IHER.
- Council ordered to pay Mrs S' estate a sum equal to the difference between the amount already paid by the Scheme as an out-of-service death grant and the maximum amount of benefits payable to/in respect of Mrs S had she applied for IHER in March 2013, with simple interest.

PRINCIPLE:

- TPS Regs. require a member to be on a minimum of half-pay to be in pensionable service.
- If decision-makers are unclear on how the Regs. apply, should check so they can accurately inform members of their options.

The Pensions Ombudsman

Ms S (PO-21084)

Facts

- Ms S employed by LBM. On 14 August 2017, she rang TP to query the process for purchasing Additional Pension.
- Ms S said she was told she could elect to buy AP at any date prior to leaving pensionable employment. Due to leave on 31 August.
- TP said it was unlikely an election could be completed in that time.
- 25 August: Ms S submitted election to LBM.
- September – November 2017: TP and LBM processing election.
- Beginning of November: Ms S discovered AP election rejected.
- Miss S appealed through both stages of IDRPs - complaint was rejected at first stage, and again at the second stage.

ISSUE:

- **Should TP and LBM have processed the election?**

The Pensions Ombudsman

Ms S (PO-21084)

Decision

- No written notice from TP before leaving - election not accepted.
- TP's receipt of election insufficient - must be made and accepted.
- Reasonable for TP and LBM not to have processed election - 4 working days not enough time for LBM to complete its section of the form and for TP to process the election.
- Ms S was misinformed about the success of her election when she telephoned TP but this did not cause significant distress and inconvenience. TP's £250 offer was reasonable.

PRINCIPLE:

- Member being entitled to or having the option to make an election within a certain timeframe is subject to the member doing so within reasonable amount of time to allow that election to be processed in full.

The Pensions Ombudsman

Ms E (PO-23830)

Facts

- Ms E contacted TP several times in 2015 requesting information as she was planning for retirement.
- She contacted TP again in November 2017 stating her intention to start taking benefits in February 2018.
- She relied upon online annual benefit statements from TP.
- TP told Ms E on 5 February 2018 that they had overstated her retirement benefits payable from the Scheme.
- Ms E said this led her to retire in August 2015, instead of on 14 February 2018 at age 60.

ISSUE:

- **Did the error in the statements produced by TP cause a financial detriment to Ms E?**

The Pensions Ombudsman

Ms E (PO-23830)

Decision

- TP should have corrected the error sooner as it was duplicated over many years.
- However, Ms E did not suffer a financial detriment as she was never entitled to the overstated amount.
- Reasonable to assume that Ms E not solely reliant on the income from the Scheme as she chose to retire early.

PRINCIPLE:

- Financial detriment is not indicated purely by administrative error – a member will not become entitled to payment of overstated benefits due to this alone.
- Need to show irreversible financial decisions were made which detrimentally affect the member.
- If a member was not entitled to an amount they have been made aware they would receive, they have not sustained a loss.

A stethoscope with a silver chest piece and a blue tube lies on a white surface. In the background, a blue pen and a clipboard with papers are visible. The scene is brightly lit, creating soft shadows.

The Pensions Ombudsman

Ill Health Early Retirement & Death Benefits

The Pensions Ombudsman

Miss S (PO-25441)

Facts

- Miss S worked at a school.
- Handed in her notice in order to care for her mother in August 2010.
- Applied for ill-health early retirement in March 2017.
- Referred to occupational health – concluded Miss S unlikely to be capable of returning to teach in a busy school, but had shown she could home-tutor on a part-time basis.
- Not possible to say she was permanently incapacitated, and her ability to work not impaired by more than 90%, so application was rejected.
- Miss S appealed through both stages of the IDRP. Her complaint was rejected at first stage, and again at the second stage.

ISSUE:

- **Should Miss S have been awarded IHER?**
- **Had TP and DoE correctly followed the regulations?**

The Pensions Ombudsman

Miss S (PO-25441)

Decision

- TPO agreed with adjudicator's opinion.
- Must have left employment because of her incapacity or ill-health to be eligible for IHRP. However, she left to care for her mother.
- To be awarded IHRP, must satisfy either
 - Conditions 1, 2 and 3 (In-Service); or
 - Condition 4 (Out-of-service).
- Miss S correctly assessed against the out-of-service ill-health criteria i.e. that the applicant be incapacitated for **all forms of work**. Miss S incapacitated from teaching work, but not all forms of work.

PRINCIPLE:

- Date someone becomes eligible for IHER is date medical advisor confirms incapacity, not date of diagnosis.
- Where someone leaves employment for reason other than incapacity or ill-health, only eligible for IHER if incapacitated from **all forms of work**.

The Pensions Ombudsman

Mr Y (PO-23018)

Facts

- November 2006: Ms L started employment with a university. She opted out of TPS.
- February 2013: University sent Ms L a letter confirming her membership of the Scheme.
- The University erroneously made deductions from her salary throughout the period from 2006 - 2013. Ms L died in May 2016.
- August 2016: Mr Y (Ms L's husband) applied regarding the benefits payable in respect of Ms L. Received a letter from TP confirming no further payments were payable as Ms L had opted out in 2006.
- May 2017: Mr Y raised a complaint - not upheld. Mr Y appealed.
- Department of Education responded that the appropriate course of action was to repay the contributions – rejected Mr Y's appeal.

ISSUE:

- **Was TP correct to disregard Ms L's service from 2006 - 2013 in the calculation of Mr Y's widowers' pension benefits?**
- **Did the fact that pension contributions had been taken from Ms L in error impact this decision?**

The Pensions Ombudsman

Mr Y (PO-23018)

Decision

- Opt-out form and letter of acceptance issued by TP made it clear that Ms L opted out of the Scheme.
- Ms L did not elect to rejoin at any time.
- No provision in the TPS Regs. which would allow for a retrospective opt-in request to be accepted without a Scheme member's consent.
- TP reasonable in insisting that Ms L's service from 2006-2013 be excluded from the calculation of Mr Y's widowers' pension.

PRINCIPLE:

- TPS Regs. do not allow for retrospective opt-in without member consent.
- Mere act of taking deductions for pension contribution will not negate an opt-out declaration.
- Need to take note of opt-out declarations and follow these.

Questions?



Eversheds Sutherland Education Events

Webinar for Colleges and Academies

15 October 2019

Pensions Education Conference

15 November 2019

Birmingham

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