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Legal Update

Public sector pensions – two key developments

Executive summary

This month has seen two key developments that are likely to have a wide-reaching ongoing impact on pensions across the public sector.

Firstly, in a landmark Judgment, the Court of Appeal held in *Langford v Secretary of State for Defence* that it was unlawful discrimination to deny survivor's benefits to the long term partner of a deceased member of the Armed Forces Pension Scheme (AFPS), on the basis that she was still married to another man.

Separately, in the long running case of *Lord Chancellor and Secretary of State for Justice v McCloud and others* the Government has been refused permission to appeal to the Supreme Court, against the Court of Appeal's finding that transitional provisions in relation to both the 2015 Judicial Pension Scheme and the 2015 Firefighters' Pension Scheme, intended to protect older judges and firefighters from the impact of compulsory pension reforms, in fact discriminated against younger judges and firefighters on the grounds of age.

This means that the earlier decision of the Court of Appeal will stand, and the Government will now need to think carefully about the potential impact of this judgment on public service pensions and the best way forward.

Langford – What happened?

The Claimant in this case had lived with her long term partner, a serving RAF officer, for more than 15 years in a relationship "akin to marriage". However, when he died in service, she was denied access to survivor's benefits under his pension scheme, on the basis that she had not obtained a divorce from her former husband (although the couple had been estranged for 17 years).

The rationale for this was that, while the AFPS allows dependants to claim survivor's benefits even if they are not married to the deceased scheme member, this is only the case if they are in an "exclusive" relationship. A similar rule is included in many other public service pension schemes. Dismissing her claim, back in 2015, the High Court held that the claimant's subsisting marriage to her former partner meant that she was not in an "exclusive" relationship with her current partner (the AFPS scheme member). The High Court held that, if the surviving partner of a service member was still married to somebody else, they could "in the majority of cases" seek financial support from their estranged spouse.

However, the Court of Appeal reversed this decision, holding that this broad exclusionary rule contravened the Claimant's human rights. The Court accepted that the Claimant did not receive and had not claimed any financial support from her former partner and that she and the deceased scheme member had publically declared an intention to marry. The claimant had demonstrated that she and her deceased partner had been "in a substantial, exclusive and financially dependant relationship in practice".

The Court of Appeal held that one of the legitimate aims of the scheme was to make sure that dependants were treated equally, whether they were married to scheme members or not. Against, that backdrop, it was not appropriate to create "different classes" of dependants who were not married to scheme members, by excluding those who had not yet formally dissolved previous relationships.

McCloud – The end of the road for the Government's appeal

As we have previously reported, the Court of Appeal separately held in December 2018 that transitional provisions in relation to the judges' and firefighters' pension schemes were directly discriminatory on the grounds of age. Both groups were moved onto new pension schemes in 2015, subject to transitional provisions intended by the Government to cushion the impact on older scheme members (who were closer to retirement and therefore arguably less able to re-organise their affairs). Broadly speaking, members who were within 10 years of retirement were permitted to remain members of their old, more generous, schemes with "tapered" protection being put in place for members between 10-14 years from normal retirement age. Again, similar provisions apply across all main public service pension schemes.

The Court of Appeal (upholding previous decisions of the employment tribunal and EAT) held that the provisions were discriminatory. The Government had failed to show that protecting older scheme members was a "legitimate aim", relying on "nothing more than assertions and generalisations" and therefore the discriminatory effect of the transitional provisions could not be justified.

The Government sought permission to pursue a further appeal against this decision to the Supreme Court, which is the highest Court in the UK. However, permission has now been refused, meaning that there is no further avenue for the Government to challenge the finding of discrimination.

What does this mean for me?

Both of the decisions above will inevitably mean increased costs for public service pension schemes, particularly in relation to the *McCloud* judgement.

The apparent extension of pension scheme benefits in *Langford* to surviving partners who remain married to former spouses at the date of death may result in increased survivor's benefits being paid out across the main public service pension schemes, as most contain similar rules in relation to cohabiting couples. We will need to wait and see whether changes to the public service pension scheme regulations are proposed by the Government as a result of this case.

Interestingly though, the Court of Appeal's decision does not completely close down the possibility of a similarly broad exclusionary rule being found to be lawful in another case. The Government argued that allowing surviving cohabiting partners in this position to claim pension benefits raised the risk of "double recovery", if they were also entitled to benefits under a spouse's pension (i.e. if their former spouse who they remained married to was also a member of the same pension scheme), which would result in increased costs and administrative inconvenience. However, the Government adduced limited evidence to back up these statements, causing speculation that a more robustly defended case might in future lead to a different result.

The Supreme Court's decision in *McCloud* is unsurprising, given that the Court of Appeal had also previously refused to grant the Government permission to appeal. However, now we know that the case will not progress any further, the legal position is much more certain.

In light of this, Elizabeth Truss (former Chief Secretary to the Treasury) issued a written statement to confirm that, as similar "transitional protection" was offered to members of all the main public service pension schemes, the difference in treatment will need to be remedied across the board. This includes schemes for the NHS, civil service, local government, teachers, police, armed forces, judiciary and fire and rescue workers. Initial estimates suggest that remedying this discrimination, in the *McCloud* case and more broadly, will add around £4bn per annum to scheme liabilities.

The *McCloud* case is also a reminder that, in any case where pension scheme rules appear to be age-discriminatory, employers and pension trustees must be prepared to defend these rules with reference to a cogent "legitimate aim" supported by focussed and detailed evidence.

The Court of Appeal's findings in both *Langford* and *McCloud* is likely to mean that some pension scheme re-design in the public sector may be necessary in the imminent future, bringing disruption and an increased administrative burden for administering authorities and pension scheme administrators.

If you would like to know more about our legal update or have any questions, please contact Jane Marshall (Partner) on 0161 214 0508, or jane.marshall@weightmans.com.

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