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BREWSTER AND *MCCLOUD V MOJ* – UNJUSTIFIED DISCRIMINATION

In both *McCloud v MOJ* and *Brewster*, UK legislation setting down conditions for benefits under public sector pension schemes has been found to be in breach of discrimination law and the justifications offered have been rejected. The cases are in other respects very different.

MCCLOUD V MOJ

This is an Employment Tribunal decision. The case was brought by 200 judges in relation to changes made to their pension terms by regulations in 2015, reducing the benefits they would earn from future service. Transitional provisions allowed older judges to continue to earn benefits on the previous, more generous terms either until retirement or on a tapered basis until 2022. Around 85 per cent of judges would receive some sort of protection to their pension.

The judges brought a claim of indirect age discrimination in relation to the transitional provisions. They argued that the transitional provisions treated younger judges less favourably. Arguments were also put that they indirectly treated ethnic minority and female judges less favourably (as there are fewer amongst older judges). The case was put on the basis of the EU Equal Treatment Framework Directive (the directive establishing a general framework for equal treatment in employment and occupation). The directive is directly applicable to government departments.

Less favourable treatment can be justified under the Equal Treatment Framework Directive as a proportionate means of achieving a legitimate aim. In this case, the MOJ argued that their legitimate aim was to protect judges closest to retirement from the adverse change.

It was argued that they had less time to make necessary lifestyle changes and financial adjustments and they were more likely to have made fixed and concrete plans for retirement. The justification was rejected as the justification itself, "being closer to retirement", simply defined the group being treated more favourably. It was also noted that while they had less time to make any adjustments, they also had less need to make adjustments, as the change to future pension terms would have less impact on them.

The court found there was no evidence of disadvantage suffered by the protected older judges which might call for redress and provide a social policy objective as justification. It also found there had not been proper consideration of alternative non-discriminatory options.

The court found the transitional provisions were not a reasonable means of achieving a legitimate aim. Shielding older workers from pension changes will often justify challenge from younger workers.

BREWSTER

This is a decision of the Supreme Court. It relates to the regulations governing the Northern Ireland Local Government Pension Scheme.

It concerns the hard-luck case of a fiancée whose partner died unexpectedly two days after getting engaged, after a 10 year committed relationship in which they had bought their home together. The regulations provided that for unmarried partners to receive the dependant pension, a nomination form had to be sent by the member to the scheme administrators (prior to death) in addition to the unmarried partner providing evidence of certain cohabitation and financial interdependency conditions. The required nomination form had not been sent. All other conditions were met. Arguably, this was a meritorious case being denied on a formality.

As the Equal Treatment Framework Directive and the Equality Act only prohibit less favourable treatment on grounds of marriage where it is a married person or civil partner who suffers the less favourable treatment and not where an unmarried partner suffers less favourable treatment, the case was pursued under the European Convention on Human Rights (ECHR).

Article 14 of the ECHR prohibits discrimination according to "status" in relation to relevant rights. Previous case-law established that being unmarried is a protected status. It also established that the right not to be deprived of possessions applies to a legitimate expectation of a benefit as a "possession".

The Supreme Court found that the nomination requirement which applied only to unmarried couples was a discriminatory interference with the claimant's right to a dependant's pension. Having regard to the objective of the particular provision, which it identified as the removal of the difference in treatment between a long-standing cohabitant and a married or civil partner of a scheme member, the Supreme Court found that the nomination requirement was an interference with her right to a pension and that it was not a proportionate means of achieving the objective of removing differences.

It was argued that the nomination requirement was intended to reduce administrative costs and facilitated actuarial valuations. The Supreme Court rejected this on the basis that there was no contemporaneous evidence of such aims. It found that the nomination form served no useful purpose as there were other conditions that met the need for evidence of a stable, long-standing relationship equivalent to marriage.

NO DIRECT APPLICATION TO PRIVATE SECTOR SCHEMES

The ECHR does not apply directly to private sector schemes. However, the tests for objective justification of discriminatory treatment under the Equality Act have similarities. The case emphasises the need for contemporaneous evidence for any rationale that may be used to justify differences in treatment. "Vague" assertions are not enough.

So long as the Equality Act permits less favourable treatment on the grounds that a person is neither married nor in a civil partnership, private sector schemes may be able to maintain different criteria for paying dependant pensions and lump sum death benefits to unmarried partners. Some caution is required, however, over the use of beneficiary nomination forms.

WHAT NEXT?

The appeal in the case of *Innospec v Walker* is being heard by the Supreme Court. The Court of Appeal held last year that the disregard of pensionable service completed before 5 December 2005 in the calculation of dependant pensions for civil partners was lawful. This was on the grounds that EU law is not "retroactive": discrimination that had been lawful before 5 December 2005 could not become unlawful through a later change in law.

In another case last year, *Parris v Trinity College Dublin*, the CJEU held that a rule, which made the right of a surviving civil partner to receive benefit subject to the condition that the civil partnership was entered into before the member reached age 60, was not discrimination on grounds of sexual orientation or age, even though, under national law, civil partnership did not become available until after the member reached age 60.

The appeal in *Innospec v Walker* may give us a clearer answer on the fault line between the Equality Act and the ECHR in relation to dependant pensions.

Precisely what differences in treatment may still be permitted under private sector schemes may then be clearer.

CONTACT DETAILS

If you would like further information or specific advice please contact:

CAMILLA BARRY
PARTNER
PENSIONS
DD +44 (0)20 7849 2238
camilla.barry@macfarlanes.com

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MACFARLANES LLP
20 CURSITOR STREET LONDON EC4A 1LT

T +44 (0)20 7831 9222 F +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com