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Essential pensions news

Updater

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Introduction

Essential Pensions News covers the latest pensions developments each month in an "at a glance" format.

TPR publishes its finalised prosecution policy

Of general interest is the publication by the Pensions Regulator (TPR) of the finalised version of its prosecution policy.

In our January 2016 update, we reported that TPR had published for consultation its draft prosecution policy. One of TPR's statutory objectives is to maximise employers' compliance with their legal obligations in providing pension benefits. Examples of situations where TPR will intervene include non-compliance with auto-enrolment duties, the provision of false or misleading information, or where an individual has acted as a trustee while prohibited or suspended. Where such non-compliance cannot be resolved by guidance, support or advice from TPR, there are a number of enforcement options available, including criminal proceedings.

The policy says that TPR will apply its "risk-based approach" to prosecution decisions and consider each case on its particular facts. This, TPR states, means that it will not seek to secure a conviction at all costs in any given case, but will approach each stage in a fair and impartial way. In circumstances where TPR decides to bring criminal proceedings in England and Wales, it will consider and apply the basic principles set out in the Code for Crown Prosecutors. In some less serious cases, TPR may avoid prosecuting a matter and instead refer it to the police with a recommendation that the police issue a formal caution.

In light of this publication, TPR's existing compliance and enforcement strategy and policy documents relating to its auto-enrolment powers have been slightly revised and re-published. The only changes compared to the previous versions reflect publication of the separate prosecution policy document.

Response from TPR is currently awaited on the wider draft compliance and enforcement policy for occupational DC schemes generally. The consultation closed on May 3, 2016.

View the prosecution policy.

TPR's new DC Code of Practice comes into force

Of interest to all schemes providing DC benefits is TPR's new DC governance code of practice which came into force on July 28, 2016.

The revised code was finalised earlier this year following consultation and we summarised its contents, along with the key points of the six new accompanying guides covering key areas of the code, in our April 2016 update.

TPR has also published online the final versions of the six guides, together with its consultation response, to coincide with the implementation of the revised code. In addition, there is an online "self-assessment template" tool to help trustees assess their scheme against the standards in the code, enabling them to identify any areas in need of improvement.

Comment

The revised, shorter code was welcomed generally as it was seen as a simpler version than the predecessor Code in which much of the content had been rendered out of date by legal developments. TPR's clear distinction between legal requirements and its actual expectations was also viewed positively. The new guides have also been described as a positive development, focusing on outcomes rather than process. TPR continues to emphasise that good administration plays an essential part in achieving good outcomes for members.

TPR also reminds DC administrators that the guides are not intended to be prescriptive, but indicate what TPR considers to be best practice. They provide examples of approaches that could be taken and factors to be considered, which trustees will welcome. The intention behind keeping the guides separate from the new code is to enable new or revised guidance to be produced as the need arises or in response to industry demand, which seems sensible given the speed of change generally in the pensions arena.

TPR publishes discussion paper on "21st century trusteeship"

Of interest to all scheme trustees is the publication of TPR's latest consultation paper which seeks views on how standards of trusteeship could be raised. The consultation period ends on *September 9, 2016*.

Key issues on which TPR seeks comments include

- Should there be qualification requirements for professional trustees? TPR's research confirms a trend in the "professionalisation" of trustees, with the proportion of schemes without a professional trustee decreasing in the last five years due to increased governance and the "greater complexity associated with running pension schemes".

- Do standards of trustee chairmanship need to be raised? Acknowledging the key role the chair has in supporting and leading scheme trustees, the paper outlines options to be considered to ensure effectiveness. These include requiring the chair to have a minimum level of qualification, suitable experience, or to belong to a professional body. Commenting on the requirement for a chair's statement for DC schemes from April 6, 2015, TPR asks whether DB schemes could benefit from a similar regime.

- How can TPR ensure that trustees apply the trustee knowledge and understanding (TKU) framework? Possible solutions to improve trustees' knowledge and skills include a mandatory "pass" in all relevant modules in the trustee toolkit within six months of appointment, or a six-month probationary period for new trustees, subject to demonstrating sufficient TKU. TPR also asks for feedback on what further education tools and products it could provide.

- What should be done with schemes unwilling or unable to deliver good governance and member outcomes? In particular, TPR asks if small schemes should be encouraged or forced to exit the market or to consolidate into larger schemes? Specifically, is regulatory intervention required to facilitate this or can it be achieved through existing market forces?

View the consultation paper.

HMRC publishes issues 79 and 80 of its pension schemes newsletter

Of general interest are the two most recent editions of the pensions schemes newsletter issued by HMRC.

In edition 79, HMRC has announced that Royal Assent for the Finance Bill 2016 is to be delayed. In recent years, the Finance Bill has received Royal Assent in the July after its publication. HMRC states that as the Public Bill Committee's consideration of the Finance Bill 2016 concluded only on July 14, 2016, Royal Assent would be later than usual this year. Further information on the exact legislative timetable is to be announced when available.

View Newsletter no. 79.

Edition 80 sets out details of the newly launched lifetime allowance (LTA) protection system.

This is the new online service for use by scheme members to apply for protection from the LTA charge, in light of the reductions in the LTA that took effect in April 2014 and April 2016. It covers claims for both of the latest forms of protection being enacted in the current Finance Bill (fixed protection 2016 (FP 2016) and individual protection 2016 (IP 2016)), as well as claims for individual protection 2014.

From now on, claims for protection may only be made online. Successful claimants will no longer receive a paper certificate, but will be able to print their online protection details if they wish.

The interim application process for FP 2016 and IP 2016 will no longer be available and any interim applications which were made after *July 31, 2016* will be returned, with claimants directed to use the new online system. Interim applications on hand as at *July 31, 2016* will

be processed by HMRC and claimants given permanent protection notification numbers, with no need to re-apply.

In the longer term, the newsletter reports that HMRC is developing a lifetime allowance look-up service, allowing scheme administrators to check the lifetime allowance status of their members. HMRC hopes the service will become available later in the year.

View Newsletter no. 80.

HMRC consults on salary sacrifice for the provision of benefits in kind

Of interest to all employers offering the option of some form of salary sacrifice to their workforce is the publication by HMRC on *August 10, 2016* of a consultation on the use of such schemes as part of an employee's remuneration package.

HMRC recognises that although the majority of employees are rewarded mainly with cash remuneration, many employers now have in place salary sacrifice arrangements and options for benefits in kind (BIKs) in many different formats. Such arrangements mean that the employee sacrifices cash pay for another benefit such as a pension contribution, which may result in a saving of both employer and employee tax and national insurance contributions (NICs). Other popular benefits include private medical insurance (which is liable to both tax and employer NICs) and additional annual leave. The growth of the way in which BIKs are provided, along with an increase in flexible benefit packages, represents an increasing cost to the Exchequer.

The Government indicated its concern about the rising costs of such arrangements at the Summer Budget of 2015. In the Autumn Statement of 2016, it announced that further evidence would be gathered, with a view possibly to limiting the range of benefits that attract income tax and national insurance contribution advantages when offered as part of a salary sacrifice arrangement.

The consultation proposes that the tax and NIC effectiveness of many salary sacrifice arrangements is removed with effect from *April 6, 2017*. However, it makes clear that

- Pension saving
- Employer-provided pension advice
- Employer-supported childcare
- The cycle-to-work scheme

should continue to benefit from income tax and NIC relief when provided through salary sacrifice arrangements. These are benefits which the Government specifically wants to encourage employers to provide, and views on these BIKs are not being sought.

The growth areas on which the limitation of a tax and NIC advantage is being considered include cars, health screening and the provision of assets such as mobile phones, TVs, computers and white goods. The proposal does not seek to prevent employers from providing such BIKs but to reduce the tax and NIC advantages currently applying to them.

Employers who offer (or who are considering putting in place) a wide range of BIKs through salary sacrifice arrangements may wish to review the overall package, as it is possible some elements could become unsustainable in the long term.

The consultation closes on *October 19, 2016*.

View the consultation paper.

FCA statement on pensions transfer redress methodology consultation

Of interest to schemes providing DB benefits, is the statement published on *August 3, 2016* by the Financial Conduct Authority (FCA) announcing a proposed consultation for *autumn 2016* on proposals to update the methodology used to calculate the levels of redress due where unsuitable advice is given on transfers from DB schemes to personal pension schemes.

The FCA has decided to consult on whether to update the current redress methodology used by the industry and the Financial Ombudsman Service (FOS), which was originally developed in the 1990s. The FCA it is concerned that it may no longer achieve the intended objective of putting consumers back in the position they would have been in had they stayed in the DB scheme.

The statement reminds firms of their obligations to investigate complaints regarding advice given in connection with pensions transfers competently, diligently and impartially and to assess complaints fairly, consistently and promptly. These obligations continue to apply in the period up to the completion of the consultation, and any changes made as a result of it.

If an offer of redress is required under the current methodology, the FCA does not expect it to be fair for the firm to attempt to settle the complaint on a "full and final" basis. It expects the firm to write to the customer explaining why it is not in a position to provide a final response.

The firm should also consider what options may be available for dealing with the complaint fairly on an interim basis. One option may be for the firm to offer provisional redress initially, with a view to providing a final response and any further redress (where appropriate) once the outcome of the consultation is known.

The FCA recognises that for some consumers the consultation may cause a delay in redress. To minimise this delay, the FCA expects to reach a conclusion by *spring 2017*.

PPF publishes information paper on insolvency risk model for third triennium

Of interest to schemes providing DB benefits and paying the Pension Protection Fund (PPF) levy is a published update on the PPF's plans for the third levy triennium, which is the three-year period beginning on *April 1, 2018*. Work has been ongoing to consider what changes to the Experian insolvency model might be appropriate.

Any changes are not expected to be fundamental, but the review shows that the PPF intends to focus on developing its insolvency risk model, in the main to improve predictability.

A number of areas are highlighted where work is being undertaken to consider whether changes might be appropriate for 2018/19 onwards.

- The use of credit ratings and industry-specific scorecards for regulated financial services providers as the PPF's model is "less predictive for this group".
- Using information from the Charity Commission to refine the not-for-profit scorecard.
- Developing a means to integrate information on ultimate parent companies (derived from ratings) with scores on unrated subsidiaries.
- A potential change to the current scorecard system to take account of the new FRS102 accounting standard. The PPF will analyse the effects on the first 500 DB sponsors filing on an FRS102 basis for the first time in 2016 to inform its decision making. Any proposals will be covered in the consultation for the third triennium, "at the turn of the year".
- Changes to better address the way companies submitting small accounts are reflected in the scorecards.

Limited work on the following areas is also being considered.

- The handling of investment risk, with a view to achieving consistency between the treatment of standard and bespoke investment risk stresses.
- Guidance in relation to deficit reduction certifications.
- The operation of the certifying regimes for contingent assets and asset-backed funding structures.
- Potentially simplifying all the above requirements for smaller schemes.

The timetable for the review and potential reform is outlined below.

- *Late 2016/early 2017* – consultation on the rules generally, for the three years from 2018/19, including any proposed changes to the insolvency risk model. Insolvency scores for use in the third triennium would not begin to be collected for use in the levy until 2017/18, but will be presented through the portal in "draft" form at this stage.
- *Autumn 2017* – consultation on the final levy rules for 2018/19, to reflect the conclusions of the first consultation.
- *December 2017* – finalised rules.

The PPF intends that the draft levy rules and levy estimate for 2017/18 will be published as normal in the autumn. Reflecting the PPF's commitment to providing stability and predictability in the levy rules, the update reiterates the intention only to make major changes to the rules as part of the three year cycle. Accordingly, changes for 2017/18 are likely to be limited.

See the review information paper.

PPF publishes technical news bulletin

Of interest to DB schemes in assessment periods or schemes which qualify for the Financial Assistance Scheme (FAS), is the publication of the PPF's latest edition of its technical news bulletin.

The newsletter highlights the following

- Changes made to the PPF entry requirements and compensation rules by amending regulations that came into effect on *April 6, 2016* (the Pension Protection Fund and Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2016). The bulletin contains a useful summary table detailing the lump sums that may be paid before, during and after a PPF assessment period.

- That the full range of actuarial factors set each year by the PPF have now been finalised and are available on its website. While the compensation cap was revised (up from its current level of £36,401.19, to £37,420.42) with effect from *April 1, 2016*, revisions to several other factors were delayed until *October 1, 2016* to allow members time to obtain quotes using the new factors before they come into force.

- That the PPF is often asked about the position of scheme members who have taken a standard early retirement pension even though they might have been entitled to an ill-health pension.

This situation can arise where a scheme applies an early retirement discount to ill-health pensions, meaning the member is no better off receiving an ill-health pension compared to a standard early retirement pension. The issue for the member is that if their scheme enters the PPF, the compensation cap applies to standard early retirement pensions, but does not apply where a member retired on ill-health grounds. In these circumstances, the newsletter says that the member will usually be treated by the PPF as having taken standard early retirement and subject to the compensation cap.

Scheme administrators and trustees should bear this point in mind when advising members suffering from ill health about their early retirement options.

View the PPF bulletin.

HMRC publishes Countdown Bulletins 18 and 19

Of interest to all schemes formerly contracted-out on a DB basis is the publication of issues 18 and 19 of HMRC's Countdown Bulletin.

Issue 18 includes

- FAQs on the online GMP calculator
- Details of HMRC pension forums scheduled for September 2016
- Information on the DWP's new online pension tracing service.

View Countdown Bulletin 18.

Issue 19 includes further information on both the GMP calculator and the September pension forums.

View Countdown Bulletin 19.

Pensions Ombudsman to expand its participation in appeals

The Pensions Ombudsman Service has published a statement saying it plans to widen its approach to participating in appeals. The Pensions Ombudsman (PO) said it decided to review its position following the appeal case of *Hughes v Royal London* on which we reported in our February 2016 update. (In *Hughes*, the High Court overruled on appeal a June 2015 decision of the PO, and held that an insurer – the provider of a personal pension scheme of which Ms Hughes was a member – had no right to block her pension transfer request where it suspected the receiving scheme was a pension liberation vehicle).

The PO's statement said: "Our practice of looking to intervene will now be extended beyond participating in an appeal which raises questions affecting our legal jurisdiction or internal procedures. Our participation will be more pro-active and will be considered against the backdrop of seeking to assist the court."

The PO is rarely a party to an appeal against one of its own determinations. If permitted by the court, the PO can be a party to an appeal and, although there is no right as such, it is expected that permission will be freely given.

The PO's practice as to whether to appear at appeals has varied over time. The current PO, Anthony Arter, has continued the practice of his predecessor, by normally appearing at appeals only which raise questions affecting the PO's own legal jurisdiction or its office procedures.

Following the appeal case of *Hughes v Royal London* earlier this year and its wider implications, the PO decided it would be timely to review its position on when to apply to participate in an appeal.

Royal London did not wish to make representations on the statutory transfer point but did so simply because it was instructed by the court. When the role of the Pensions Ombudsman was established by Parliament in 1990 the intention was for the Ombudsman to be an accessible alternative to the Courts.

Examples of increased participation may include where the decision could have a wider impact on the pensions industry, such as pension liberation or auto-enrolment, or where there is a significant concern over access to justice and participation is necessary to properly present and argue the points – the Principle of Equality of Arms.

Each case will be individually considered. The PO will not look to participate in all appeals or to set any precedent when making a decision about participating.

Claire Ryan, Legal Director at the Pensions Ombudsman Service said, "Widening the circumstances where the Ombudsman may look to intervene in appeals of determinations was carefully considered and is supported by the Department for Work and Pensions. We believe that the pensions industry and parties to complaints will welcome the change."

Auto-enrolment transitional periods for contributions – the Employers' Duties (Implementation) (Amendment) Regulations 2016

Of interest to all schemes is the coming into force on *October 1, 2016* of regulations making amendments in respect of employers' auto-enrolment duties. The changes *for DC schemes* will extend the two transitional periods during which minimum contribution levels for auto-enrolled jobholders are phased in.

At the 2015 Autumn Statement and Spending Review, the Government announced an extension to the current transitional timetable. The extension is intended to simplify pension administration by aligning the transitional periods with the start of the tax year.

As a result of the changes, the transitional periods applying to an occupational or personal DC qualifying scheme will be as follows:

- The first transitional period will run from an employer's staging date until *April 5, 2018* (instead of September 30, 2017, as currently). In this period, total contributions must equal at least two per cent of a jobholder's qualifying earnings in a relevant pay reference period, of which the employer must contribute at least one per cent.

- The second transitional period will run from *April 6, 2018* to *April 5, 2019* (instead of 30 September 2018). In this period, total contributions must equal at least 5 per cent of a jobholder's qualifying earnings in a relevant pay reference period, of which the employer must contribute at least two per cent.

From *April 6, 2019*, the full contribution requirements will apply (that is, total contributions must equal at least eight per cent of qualifying earnings, of which the employer must contribute at least three per cent).

Employers with DC schemes should note that if they decide to implement the transitional periods which effectively delay (to the start of the next tax year) the increases in contributions to an auto-enrolment qualifying scheme, this does not amount to a "listed change" under the regulatory consultation requirements. The change would therefore not require a formal consultation with members. However, in the interests of best practice, employers should notify members of any changes made to the contribution timetable via their regular scheme newsletter or website, at the next opportunity.

The amending regulations also make a minor textual amendment to clarify that the transitional period for *DB and hybrid schemes* will end on *September 30, 2017*. Currently, regulations provide that the period will end five years and three months after section 3 of the Pensions Act 2008 came into force. The DWP explains that this alteration is not substantive, but is intended merely to ensure that the regulatory wording is "clear beyond doubt".

Insurance Act 2015 – new legislation affecting the way information is provided to insurers

Of interest to all employers intending to put in place insurance contracts for benefit provision is the Insurance Act 2015 (the Act), which came into force on *August 12, 2016*.

The new legislation affects all insurance contracts other than those between

- An individual entering the contract wholly or mainly for purposes unrelated to his/her trade, business or profession.
- A person who carries on the business of insurance and who becomes a party to the contract by way of that business.

This means that the insurance of benefits by employers under contracts such as buy-ins and excepted life policies falls within the ambit of the Act.

New duty of "fair presentation"

The Act is considered a codification of the previous legal position, taking into account decisions in recent cases. There is a new duty of "fair presentation" which is imposed on the insured, and which replaces the former duty of disclosure. The new duty requires the party seeking insurance to make a fair presentation of the risk to be insured before entering the contract of insurance. The stated aims of the new duty include encouraging further co-operation between the insurer and the insured during the pre-contract stage, and to avoid passive underwriting.

A fair presentation under the Act is one that satisfies requirements regarding both the *content* of the data presented to the insurer pre-contract and the *form* in which it is supplied (emphasis added). The new requirements relating to data presentation are intended to deal with "data dumping" where vast amounts of information are provided to a potential insurer without highlighting areas which may represent particularly high risk.

Content

As far as the content is concerned, the Act provides that a fair presentation is one where the insured

- Gives disclosure to the insurer of every material circumstance which the insured knows or ought to know or, failing that, gives disclosure of sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.
- Ensures that every material representation as to a matter of fact is substantially correct and every material representation as to expectation or belief is made in good faith.

Therefore, the Act retains the duty of an insured to volunteer material information without being asked, and this is an obligation which is not present in most commercial contracts. However, the Act expressly provides that the insured will satisfy this requirement even if it does not provide minute disclosure of every material fact.

The insured complies with the duty of fair presentation as long as it discloses sufficient information to put a prudent insurer on notice of the need to make further enquiries for the purpose of revealing those material circumstances. This amounts to a codification of the old law as it stood in the light of recent court decisions, specifically, that an insured was obliged to provide a fair and accurate presentation of material facts that enabled a prudent insurer to form a proper judgment, either on the presentation alone, or by asking questions if it wanted to know further details.

Form

In addition to its obligation not to make misrepresentations and to disclose material information to the insurer, an insured must present this information in a reasonably clear and accessible manner. An insured party would not be able to demonstrate compliance with the duty of fair presentation just because, buried among a vast amount of information provided to an insurer, a material fact could have been read. The relevant information must be presented by, for example, being indexed and categorised clearly.

The obligation imposed by this facet of the duty of fair presentation is new. It is intended to deal with the practice of 'data dumping' by an insured party which could lead to an insurer missing something important simply because vast amounts of indigestible information had been presented with no guidance.

Employers will therefore need to take care that they comply with their obligations to supply the insurer with relevant scheme information as set out under the Act, to avoid breaching the duty of fair presentation.

Please contact your usual Norton Rose Fulbright adviser for further information.

Hampshire v PPF – Court of Appeal orders reference to ECJ on whether the PPF compensation cap is compatible with Article 8 of the Insolvency Directive

Summary

The Court of Appeal (CA) has ordered a reference to the European Court of Justice (ECJ) in the ongoing claim by a member in the case of *Grenville Holden Hampshire v the Board of the Pension Protection Fund* [2016] (Hampshire).

The member, whose early retirement pension was reduced by two-thirds on the Scheme's entry to the PPF, argued that the statutory cap on compensation payable by the PPF did not give full effect to Article 8 of the EU Insolvency Directive. Article 8 requires national governments to take "the necessary measures" to protect the interests of employees and former employees in relation to immediate or prospective rights under occupational pension schemes. The member relied on the ECJ decisions in *Robins* and *Hogan*, which on his interpretation require UK legislation to ensure that every individual employee of every scheme receives a minimum of 50 per cent of their scheme benefits in the event of their employer's insolvency.

Initially, the High Court ruled against the member, but this decision was overturned on appeal to the CA. While the High Court had taken the view that the relevant passage in the *Hogan* judgment should not be taken literally, the CA ruled the ECJ "meant what it said". On that basis, the PPF compensation cap had not "correctly or adequately transposed the provisions of Article 8 into domestic law". Noting that the point was "not, however, entirely free from doubt", particularly given that the statutory provisions considered by the ECJ in *Robins* and *Hogan* were very different from the PPF compensation arrangements, the CA held that the proper meaning of Article 8 was unclear and therefore referred the matter to the ECJ, alongside the question whether Article 8 has direct effect on the PPF.

Comment

The apparent persuasiveness of the PPF's argument that Article 8 imposed a "system obligation" as opposed to an obligation towards each and every individual scheme member may seem surprising. On looking again at its own comments in the *Hogan* decision, the ECJ may decide that it did not in fact mean to impose a minimum of 50 per cent of benefits for every individual member in the event of the scheme sponsor's insolvency.

Mr Hampshire will no doubt hope that the ECJ determines the reference one way or another before the UK leaves the EU, given current uncertainty about the extent to which ECJ decisions will apply after a "Brexit" takes effect. Opinions differ, but the general view appears to be that ECJ decisions handed down before the formal exit date will be binding on UK courts in relation to the past, but will only have persuasive force for the future. In addition, after exiting the EU, UK courts will presumably no longer wish (or need) to refer matters to the ECJ, and EU Directives will only apply to the extent they are already incorporated into UK legislation. Questions as to whether Directives have direct or indirect effect will also be a thing of the past as far as the UK is concerned.

MB (Appellant) v Secretary of State for Work and Pensions (Respondent) [2016] – Supreme Court considers eligibility of male-to-female transsexual member for state pension from age 60

Summary

The issue in this appeal was whether MB (the appellant), a post-operative male-to-female transsexual, was entitled to a state pension from the age of 60 as a result of the Equal Treatment Directive.

On May 31, 2008, MB turned 60. In July of that year, she applied for a state pension, backdated to her 60th birthday. On September 2, 2008 the Secretary of State for Work and Pensions (the respondent) refused the MB's state pension claim for the period from the day after her 60th birthday until her 65th birthday. This was on the basis that the appellant did not hold a full gender recognition certificate (GRC) and therefore could not be recognised as a woman for the purposes of state pension entitlement. In other words, her entitlement was assessed as if she remained a man.

Under the terms of the Gender Recognition Act 2004 which applied at the time, MB was unable to obtain a GRC on the basis that she remained married to a woman. She therefore challenged the compatibility with the Equal Treatment Directive of that approach.

The First-tier Tribunal, Upper Tribunal and Court of Appeal all agreed with the respondent. MB appealed to the Supreme Court (SC).

Legal background

The Equal Treatment Directive provides that there shall be “no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status”. However, Member States are entitled to include in national law a provision excluding from the scope of the Directive the level of pensionable age for the purpose of granting state old age and retirement benefits. The United Kingdom has exercised that right.

Under UK law, a woman born before April 6, 1950 is eligible for the statement pension at the age of 60, and a man born before December 6, 1953 is eligible at the age of 65. For people born after those dates, the ages will converge over a period of time. At the time relevant to this appeal, the acquired gender of a married transsexual person was not recognised for the purpose of determining their qualifying pension age.

Before 2005, the position under UK law was that a person’s legal status was dictated by their gender at birth. In 2002, the European Court of Human Rights deemed that position incompatible European human rights legislation (that is, the right to a private and family life and, in so far as it prevented a transsexual person from marrying a person of the same gender, incompatible with the right to marry and found a family).

The Gender Recognition Act 2004 (which came into force on April 4, 2005) amended the situation so that a person’s acquired gender would be legally recognised if they satisfied certain criteria. If a full GRC was issued to the individual, their entitlement to a state pension would be decided according to the rules that applied to the acquired gender. If, however, a person was married, because same-sex marriages were not at that time recognised, they received only an interim GRC which did not change their legally recognised gender but, first, entitled them to have their marriage annulled after which a full GRC would follow. Once the Civil Partnership Act 2004 came into force in December 2005, a married person who changed their gender could have their marriage annulled and subsequently enter a civil partnership with their former spouse.

In 2014, that situation was changed by the implementation of the Marriage (Same Sex Couples) Act 2013. The Gender Recognition Act 2004 was amended so that a full GRC could, from then on, be issued to a married applicant with the consent of the applicant’s spouse.

So far as MB was concerned, she was registered at birth as a man but had lived as a woman since 1991 and underwent gender reassignment surgery in 1995. She had not applied for a full GRC because she and her wife were married and wished to remain so. At the relevant time, this meant the conditions for obtaining a full GRC were not satisfied.

The decision

The SC was divided on the issue and, since there was no European authority directly on the point, referred the question to the ECJ.

Reasons for referral to ECJ

The question referred to the ECJ was whether the Directive prevents a Member State imposing a national legal requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, the individual must also be unmarried in order to qualify for a state pension.

MB argued that the ECJ had recognised that the Directive prohibits discrimination between persons of a particular birth gender and people who have acquired that gender. Although it was for Member States to determine the conditions by which someone may acquire a gender, that only applies to physical or psychological characteristics and not to marital status. The UK's imposition of a marital status condition on a person who satisfies the state's physical and psychological criteria must therefore be unlawful, and cannot appropriately affect eligibility for a state pension. MB therefore argued that the Gender Recognition Act 2004 discriminated against her directly on the grounds of sex, and indirectly because the great majority of people who have undergone gender reassignment have been reassigned from male to female.

The respondent argued that the UK criterion of requiring a GRC to be obtained in order for a change of gender to be officially recognised was lawful. There was no reason that the conditions for the acquisition of a gender should be limited to satisfaction of physical and psychological criteria. Conditions could properly reflect social factors such as the status of marriage, which may include a definition of marriage as between a man and a woman. The respondent argued that no question of indirect discrimination arose.

Comment

While this is an unfortunate situation for MB and other male-to-female transsexuals in a similar position, it is inevitable that there will be winners and losers when the law develops over time to reflect social changes. Presumably, there are female-to-male transsexuals who will have benefitted from the changes and who will receive their state pension on the basis of their female birth gender at age 60.

MB will no doubt hope that the ECJ determines the reference one way or another before the UK leaves the EU, given current uncertainty about the extent to which ECJ decisions will apply after a "Brexit" takes effect. Opinions differ, but the general view appears to be that ECJ decisions handed down before the formal exit date will be binding on UK courts in relation to the past, but will only have persuasive force for the future. In addition, after exiting the EU, UK courts will presumably no longer wish (or need) to refer matters to the ECJ, and EU Directives will apply only to the extent they are already incorporated into UK legislation. Questions as to whether Directives have direct or indirect effect will also be a thing of the past as far as the UK is concerned.

Discrimination and pensions – Walker v Innospec appeal to be heard in Supreme Court

In our Stop Press of October 2015, we provided an update in the case of *Walker v Innospec Ltd and others*, in which Mr Walker, who retired in 2003, claimed that his employer Innospec had discriminated against him as the employer's scheme provided a spouse's pension to a member's civil partner, but only in relation to service on and after 5 December 2005, which was the date the Civil Partnership Act 2005 came into force. The Court of Appeal had ruled unanimously that the calculation of pensions for surviving civil partners could be restricted to the period of the member's service on and after the implementation of the relevant law.

We also reported in our June 2016 update on the case in which the European Court of Human Rights rejected an appeal by a Spanish applicant that he had been discriminated against on the grounds of sexual orientation contrary to Article 14 (the prohibition of discrimination), in conjunction with Article 8 (the right to respect for private and family life) of the European Convention on Human Rights. The applicant had been denied a survivor's pension following the death of his partner in 2002, with whom he had lived in a de facto marital relationship for twelve years.

We understand that Mr Walker's appeal is to be heard in the Supreme Court in November 2016.

Contacts

If you would like further information please contact:

Peter Ford
Partner, London
Tel +44 20 7444 2711
peter.ford@nortonrosefulbright.com

Lesley Browning
Partner, London
Tel +44 20 7444 2448
lesley.browning@nortonrosefulbright.com

Lesley Harrold
Senior knowledge lawyer
Tel +44 20 7444 5271
lesley.harrold@nortonrosefulbright.com

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People worldwide

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Legal staff worldwide

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Offices

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Key industry strengths

- Financial institutions
- Energy
- Infrastructure, mining and commodities
- Transport
- Technology and innovation
- Life sciences and healthcare

Europe

Amsterdam, Athens, Brussels, Frankfurt, Hamburg, London, Milan, Moscow, Munich, Paris, Piraeus, Warsaw

United States

Austin, Dallas, Denver, Houston, Los Angeles, Minneapolis, New York, Pittsburgh-Southpointe, St Louis, San Antonio, San Francisco, Washington DC

Canada

Calgary, Montréal, Ottawa, Québec, Toronto

Latin America

Bogotá, Caracas, Rio de Janeiro

Asia

Bangkok, Beijing, Hong Kong, Jakarta[1], Shanghai, Singapore, Tokyo

Australia

Brisbane, Melbourne, Perth, Sydney

Africa

Bujumbura[3], Cape Town, Casablanca, Dar es Salaam, Durban, Harare[3], Johannesburg, Kampala[3]

Middle East

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