

CAMBRIDGESHIRE PENSION FUND



Pension Committee

Date: 19 October 2017

Report by: Head of Pensions

Subject:	Pensions for cohabiting partners without nomination (2008-2014)
Purpose of the Report	To present the committee with an update on a matter included within the Governance and Legislation Report presented at the 29 June 2017 meeting.
Recommendations	The Committee are asked to note the content of the report
Enquiries to:	Name – Jo Walton, Governance and Regulations Manager E-mail – jwalton@northamptonshire.gov.uk

1. Background

- 1.1 Pension entitlement for surviving nominated cohabiting partners of members with active membership of the Local Government Pension Scheme in England and Wales (LGPS) on or after 1 April 2008 was introduced from that date.
- 1.2 The need for such members to nominate a cohabiting partner in order for them to be entitled to a survivor pension was removed for deaths on or after 1 April 2014.
- 1.3 Similar provisions were introduced for the Local Government Pension Scheme in Northern Ireland (LGPSNI) from 1 April 2009.
- 1.4 Ms Brewster, a surviving cohabiting partner of a member of the LGPSNI who died in December 2009 without having made a nomination, challenged the decision not to award her a survivor pension on the basis that the absolute requirement of nomination constituted unlawful discrimination.
- 1.5 On 8 February 2017 the Supreme Court gave their judgement in Ms Brewster's favour, concluding that the requirement for a nomination be disapplied, and that Ms Brewster was entitled to receive a survivor's pension under the scheme as she met all other qualifying criteria.
- 1.6 The judgement itself changed nothing for the LGPS. Government, however, had to consider what, if any, impact there should be for all public service pension schemes.

2. Details and position to the point of the Supreme Court Judgement

- 2.1 Prior to the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (the 2007 Regulations) coming into effect on 1 April 2008 there was no survivor pension provision for cohabiting partners in the event of the death of an LGPS member.
- 2.2 The 2007 Regulations extended survivor pension provision from spouses and civil partners to also include nominated cohabiting partners.
- 2.3 The extended provision did not apply to members that had left active membership of the LGPS prior to 1 April 2008 however, so long as they had active membership on or after that date, the provision applied to members that died while active, deferred or pensioner members.
- 2.4 Regulation 25 of the 2007 Regulations set out the meaning of nominated cohabiting partner. The full Regulation is reproduced in Appendix 1 for context, but in order for a cohabiting partner to be entitled to a pension upon a member's death, the following would all have to apply:
- the member had nominated the partner to receive a survivor benefit
 - the nomination had been given to the administering authority and included a declaration, signed by both the member and the partner that "the condition" was satisfied and had been satisfied for a continuous period of at least 2 years
 - The nomination had effect when it was made and had not ceased to have effect, and
 - The surviving partner satisfies the administering authority that "the condition" was satisfied for a continuous period of at least 2 years immediately prior to the member's death.

"The condition" is as set out in subparagraph (3) of Regulation 25. All four aspects must be met for the condition to be satisfied, and they are:

- the member is able to marry, or form a civil partnership, with the partner,
 - they are living together as if they were husband and wife or as if they were civil partners,
 - neither is living with a third person as if they were husband and wife or as if they were civil partners, and
 - the member's partner is financially dependent on them, or they are financially interdependent.
- 2.5 Similar provisions came into effect for the Local Government Pension Scheme in Northern Ireland (LGPSNI) from 1 April 2009, and the nomination requirement aspect has been successfully challenged by Ms Brewster, a surviving cohabiting partner of a member, Mr McMullen, who died in December 2009 without having made a nomination.

- 2.6 Ms Brewster had challenged the decision of the Northern Ireland Local Government Officers' Superannuation Committee, the relevant administering body, not to award her a survivor's pension and applied for judicial review on the basis that the absolute requirement of nomination imposed upon unmarried partners as a condition of eligibility for a survivor's pension constituted unlawful discrimination contrary to Article 14 of the European Convention on Human Rights and Fundamental Freedoms when read in conjunction with article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms.
- 2.7 On 8 February 2017 the Supreme Court gave their judgement in Ms Brewster's application for judicial review relating to the position for the LGPSNI. The conclusion was that the requirement in the 2009 Regulations that the member and the partner should have made a nomination be disapplied, and that Ms Brewster was entitled to receive a survivor's pension under the scheme as she met the other qualifying criteria.
- 2.8 The judgement did not directly affect the position for the LGPS in England and Wales or other Public Service Pension Schemes that had nomination requirements and therefore Government, and in particular HM Treasury, had to consider the impact of the judgement and any action that would be required.
- 2.9 As a result of changes to the LGPS from 1 April 2014, the potential impact in relation to the nomination requirement can only affect cases where a member died on a date between 1 April 2008 and 31 March 2014 (inclusive).

3. Position following the Supreme Court Judgement

- 3.1 Without knowing where the Government would draw the lines regarding scope of any impact for the LGPS, no work to identify potential cases was undertaken by LGSS Pensions Service following the Judgement in favour of Ms Brewster.
- 3.2 A cohabiting partner of a member of the Cambridgeshire Fund who died while an active member in May 2011 without having made a nomination made contact with LGSS Pensions Service in February 2017, one week after the Supreme Court Judgement was given.
- 3.3 It was expected that the DCLG would be drafting amending legislation and/or issuing statutory guidance in due course once the Government position had been determined on the impact of the judgement, and this is what the potential beneficiary was told.
- 3.4 LGSS Pensions Service were routinely in contact with the Secretariat to the Local Government Pensions Committee to check on progress. DCLG were contacted directly on 25 April 2017, and on several occasions subsequently, in an attempt to establish the process being followed and when a resolution was to be expected; their responses were non-committal and cited the calling of the General Election as a factor delaying matters.
- 3.5 In May 2017 the cohabiting partner of the member that died in May 2011 made an application through her solicitors for adjudication of a disagreement under Stage 1 of the administering authority's Internal Dispute Resolution Procedure (IDRP) claiming that she should be awarded a survivor pension in light of the Supreme Court Judgement. Agreement was reached that the standard 2 month period for the adjudicator to make a decision be extended given that the matter was being considered by Government.

3.6 On 17 August 2017 Chris Megainey from Local Tax and Pensions at DCLG issued a letter headed 'Implications for the Local Government Pension Scheme of Brewster Decision'. This letter is reproduced in Appendix 2.

3.7 The letter said that it was intended to provide "some guidance" however was absolutely explicit that it constituted neither statutory guidance nor legal advice and should not be construed as such. It put forward that

"Most public sector pension schemes that have, or have had, such a nomination requirement for unmarried partners, are now taking the view that scheme managers can rely on this judgment and section 3 of the Human Rights Act 1998 as the legal basis for not requiring that a surviving adult partner be nominated in order to receive survivor benefits. This section of the Act provides that, as far as possible, regulations such as those covering the LGPS must be read and given effect in a way which is compatible with the European Convention on Human Rights. This approach is also being applied to applications which have previously been rejected. In these circumstances, schemes are also being encouraged not to require survivors to claim within any specific limitation period.

We consider that this approach is reasonable in the circumstances and that LGPS funds should give careful consideration to adopting a similar approach to relevant cases".

3.8 In light of the letter from DCLG providing suggestions rather than the statutory guidance or the definitive legislative way forward that was anticipated, LGSS Pensions Service sought independent legal advice on two specific questions on behalf of both the Cambridgeshire and Northamptonshire Funds:

1. Does section 3 of the Human Rights Act 1998 have the overriding effect of giving an administering authority the vires to award, and make payment from the fund it administers of a survivor's pension under Regulations 24, 33 or 36 of The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 to a person that has not been nominated but otherwise meets all other requirements to satisfy the meaning of "nominated cohabiting partner" as set out in Regulation 25?

2. Where no survivor's pension is payable to a surviving spouse, nominated cohabiting partner or civil partner, any child's pension is payable at a greater rate than would have been the case had a survivor's pension also been awarded. If a pension were now to be awarded retrospectively to a "nominated co-habiting partner" that had not been nominated, does the administering authority have the vires:

a) To reduce the current level of child's pension to the rate it would have been had the survivor's pension been awarded at the outset, and

b) Regardless of whether the child's pension is still in payment or has ceased, to seek recovery of the overpayment of child's pension.

3.9 LGSS Law sought advice from a barrister with a specialist pensions and employment law practice Outer Temple Chambers. They reported back Counsel's opinion to LGSS Pensions Service on the questions posed and the record of this is attached as Appendix 3.

3.10 The opinion received makes it clear that there is no statutory basis for making the award of a survivor's pension in the surviving cohabiting partner that had made contact, since there was no nomination in place, and this requirement is not altered by Section 3 of the Human Rights Act 1998, since that Section is counteracted in the case of public authorities by Section 6(2)(b). Section 6(1) and (2) of the Act read as follows:

“6 Acts of public authorities

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*
- (2) Subsection (1) does not apply to an act if--*
 - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*
 - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.”*

3.11 Following receipt of this opinion, the Secretariat to the Local Government Pensions Committee were consulted by LGSS Pensions Service. It is understood that the Secretariat are considering how to take the matter forward with DCLG, potentially with the involvement of the Scheme Advisory Board.

3.12 LGSS Pensions Service also contacted DCLG, initially to ask if they would share the legal opinion that had led them to reference Section 3 of the Human Rights Act in their letter, but not the impact of Section 6. The request was refused.

3.13 Since independent legal advice has been obtained on behalf of the Cambridgeshire Fund which unequivocally states that the administering authority cannot make payment of a survivor's pension in the circumstances of the surviving cohabiting partner who had made the application under the IDRPs within the terms of the legislation in place, and DCLG are not prepared to provide details that support an argument that this advice is not correct, the Head of Pensions as adjudicator made the stage 1 IDRPs decision not to uphold the individual's appeal that she was now due a pension. The decision was notified in a letter dated 18 September 2017 and the individual has been told that if statutory provisions were to be put in place that alter the requirements that apply to her case, and others like it, the matter would of course be reviewed.

3.14 LGSS Pensions Service will continue to engage with the Secretariat to the Local Government Pensions Committee, and others as appropriate, in an attempt to resolve the position in a manner that meets what appears to be the Government's intention while not breaching the administering authority's statutory duty.

4. Relevant Pension Fund Objectives –

Have robust governance arrangements in place, to facilitate informed decision making, supported by appropriate advice, policies and strategies, whilst ensuring compliance with appropriate legislation and statutory guidance. <i>Objective 1</i>
Manage the Fund in a fair and equitable manner, having regard to what is in the best interest of the Fund's stakeholders, particularly the scheme members and employers. <i>Objective 2</i>
Ensure the relevant stakeholders responsible for managing, governing and administering the Fund, understand their roles and responsibilities and have the appropriate skills and knowledge to ensure those attributes are maintained in a changing environment. <i>Objective 3</i>

5. Finance & Resources Implications

5.1 Not applicable

6. Risk Implications

a) Risk(s) associated with the proposal

Risk	Mitigation	Residual Risk
Report to note no proposal contained within		N/A

b) Risk(s) associated with not undertaking the proposal

Risk	Risk Rating
No risk – acting within the Local Government Pension Scheme Regulations	Green

7. Communication Implications

Direct Communications	None
Website	None

8. Legal Implications

8.1 Not applicable

9. Consultation with Key Advisers

9.1 Legal advice obtained from LGSS Law and from Outer Temple Chambers.

10. Alternative Options Considered

10.1 Not applicable

11. Background Papers

11.1 Not applicable

12. Appendices

12.1 Appendix 1 - Extract from The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007

12.2 Appendix 2 - DCLG letter from Chris Megainey 17 August 2017

12.3 Appendix 3 - Counsel's opinion obtained by LGSS Law from Lydia Seymour, Outer Temple Chambers.

Checklist of Key Approvals	
Is this decision included in the Business Plan?	Not applicable
Will further decisions be required? If so, please outline the timetable here	Not applicable
Is this report proposing an amendment to the budget and/or policy framework?	No
Has this report been cleared by Chief Finance Officer/Section 151 Officer?	Sent to Sarah Heywood – 29 September 2017
Has this report been cleared by Head of Pensions?	Mark Whitby – 22 September 2017
Has the Chairman of the Pension Fund Committee been consulted?	Sent to Councillor Hickford – 29 September 2017
Has this report been cleared by Legal Services?	Sent to Quentin Baker – 29 September 2017

Extract from:

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007

Meaning of “nominated cohabiting partner”

25.—(1) “Nominated cohabiting partner” means a person nominated by a member in accordance with the terms of this regulation.

(2) A member (A) may nominate another person (B) to receive benefits under the Scheme by giving to his administering authority a declaration signed by both A and B that the condition in paragraph (3) has been satisfied for a continuous period of at least 2 years which includes the day on which the declaration is signed.

(3) The condition is that—

- (a) A is able to marry, or form a civil partnership with, B,
- (b) A and B are living together as if they were husband and wife or as if they were civil partners,
- (c) neither A nor B is living with a third person as if they were husband and wife or as if they were civil partners, and
- (d) either B is financially dependent on A or A and B are financially interdependent.

(4) But a nomination has no effect if the condition in paragraph (3) has not been satisfied for a continuous period of at least 2 years which includes the day on which the declaration is signed.

(5) A nomination ceases to have effect if—

- (a) either A or B gives written notice of revocation to the administering authority,
- (b) A makes a subsequent nomination under this regulation,
- (c) either A or B marries, forms a civil partnership or lives with a third person as if they were husband and wife or as if they were civil partners, or
- (d) B dies.

(6) B is A’s surviving nominated partner if—

- (a) the nomination has effect at the date of A’s death, and
- (b) B satisfies the administering authority that the condition in paragraph (3) was satisfied for a continuous period of at least 2 years immediately prior to A’s death.

(7) For the purposes of this regulation, two people of the same sex are to be regarded as living together as if they were civil partners if they would be regarded as living together as husband and wife if they were not of the same sex.

(8) In this regulation, “member” means an active member or a former active member who has become a deferred or pensioner member in accordance with these Regulations.



Department for Communities and Local Government

17 August 2017

Dear Pensions Manager

Implications for the Local Government Pension Scheme of Brewster Decision

A number of funds have been in touch now regarding the implications of the Supreme Court’s ruling earlier this year in the case of Brewster. This letter is intended to provide some guidance to those managing funds. It is not statutory guidance, as we have no power to issue statutory guidance on this point, and neither is it intended to be, and should not be construed as, legal advice. As you will appreciate, the correct interpretation of LGPS regulations is a matter for the courts and not government departments.

In the case of Denise Brewster, she successfully challenged the requirement in the Local Government Pension Scheme (Northern Ireland) that a surviving adult partner had to be formally nominated in order to be entitled to payment of survivor benefits. The Court ruled that this administrative requirement constituted unlawful discrimination and a breach of the European Convention on Human Rights. As the other underlying scheme conditions were met then it should be disapplied.

Most public sector pension schemes that have, or have had, such a nomination requirement for unmarried partners, are now taking the view that scheme managers can rely on this judgment and section 3 of the Human Rights Act 1998 as the legal basis for not requiring that a surviving adult partner be nominated in order to receive survivor benefits. This section of the Act provides that, as far as possible, regulations such as those covering the LGPS must be read and given effect in a way which is compatible with the European Convention on Human Rights. This approach is also being applied to applications which have previously been rejected. In these circumstances, schemes are also being encouraged not to require survivors to claim within any specific limitation period.

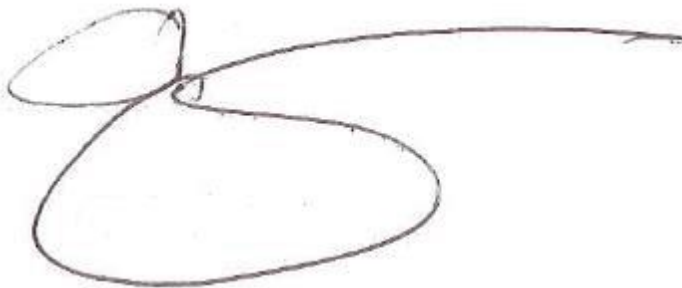
We consider that this approach is reasonable in the circumstances and that LGPS funds should give careful consideration to adopting a similar approach to relevant cases. In adopting this approach a fund accepts that a power to pay these benefits already exists in the LGPS regulations when read and given effect in a way which is compatible with Convention rights and that the tax status of them is no different from any other payments made under the scheme.

We suggest that LGPS funds should consider the following:

- Relevant cases will be those in the period between 2008 and 2014 when a “nominated cohabiting partner” test was applied to restrict survivor benefits. Any relevant case presenting now for a survivor’s pension, who can demonstrate that they were, at the point of their partner’s death, in a relationship with an LGPS member and met all the underlying conditions apart from the nomination requirement, should be awarded a survivor’s pension, appropriately backdated;
- Funds should take reasonable steps to identify cases where an application for a survivor’s pension was rejected for want of a nomination. Such cases should be reviewed to check whether there is evidence that the underlying conditions may have been met at the time and whether a survivor’s pension should now be considered;
- Where a new claim for a survivor’s pension is accepted but a child’s pension was being paid at the higher rate (due to an adult survivor’s pension not being paid) the fund should advise as soon as possible the recipient of the child’s pension that its intention would be to reduce it once the adult survivor pension is being paid;
- In these circumstances, technically there will have been an element of overpayment in the child’s pension. Decisions on whether to attempt recovery should be handled sensitively, having regard to the need to avoid hardship or injustice, the fund’s own policy on overpayments and general guidance on the appropriate use of public money;
- We expect that funds will not be able to offset overpayments of a child’s pension against the adult survivor’s benefits given that they are separate individual entitlements.

Some cases will inevitably raise complex issues and it is not possible to provide guidance on the application of the judgment in all circumstances. Accordingly, scheme managers should seek their own independent legal advice if they are in any doubt as to how to proceed.

Yours sincerely,

A handwritten signature in dark ink, consisting of a large, stylized 'C' followed by a long horizontal stroke that loops back down and under the 'C'.

Chris Megainey

Chris Megainey
Local Tax and Pensions
Department for Communities and Local Government
chris.megainey@communities.gsi.gov.uk
Tel : 0303 444 3145

LGSS Law Ltd

Attendance Note

Matter Number : LGS007/140
Client : LGSS Employee Services Pension
Matter Description : IDRП - Advice re Death Benefit Nomination Form
Date & Time of Attendance: 22 August 2017 at
Duration of Attendance : 20 minutes
Other Parties : Lydia Seymour, Outer Temple Chambers

Details:

Telephone call from Counsel. The solution currently is simple. While the Supreme Court may well rule that the nomination requirement in previous regulations is incompatible with a convention right that does not in itself mean that the provision requiring a nomination form is invalid – that is Section 6(2)(b). Section 6(1) and (2) reads

6 Acts of public authorities

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if--
 - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
 - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

It follows then that, while the Administering Authority has sympathy for the Appellant it cannot make any payment to them under the legislation as it stood at the time. The Administering Authority is however awaiting guidance from HM Treasury and is prepared to review the matter again depending of course upon what it says.

The wording of Section 6(2)(b) gives CCC a defence against any claim brought because there is no breach of statutory duty and no unlawful act which would be the subject of any claim for judicial review (which would be out of time anyway – such claims need to be brought promptly and certainly no later than 3 months from the act complained of)

Counsel went on to consider what would happen if HM Treasury decide to do something to help claimants for whom there was no nomination form. She said it will depend upon how they do it: -

1. The creation of ex gratia set of rights; or

2. Retrospectively rewriting the regulations. The latter is complicated for public sector pensions and will need the consent of affected persons under Public sector Pensions Act 2005 section 23.

As to claiming against bereaved beneficiaries for overpaid pension counsel described it as expensive, difficult unmeritous and unpalatable. An actuary should take a view on the prospects of that course.

Initials: RGM Date: 22 August 2017