

Ombudsman's Determination

Applicant	Ms R
Scheme	Anglian Water Group Pension Scheme (the Scheme)
Respondents	The Trustees of the Anglian Water Group Pension Scheme (the Trustees) Anglian Water Services Limited (AWS)

Complaint Summary

Ms R has complained that:-

- The Trustees and AWS wrongly refused to reconsider her claim for a dependent's pension in the Scheme following the judgment of the Supreme Court in the matter of an application by Denise Brewster for Judicial Review (Northern Ireland) [2017] UKSC 8 (**the Brewster judgment**).
- AWS also improperly decided not to make a discretionary payment into the Scheme, as requested by the Trustees, and failed to direct them to grant her a dependant's pension in the Scheme.

Summary of the Ombudsman's Determination and reasons

The complaint is not upheld because it is my opinion that:-

- The Brewster judgment does not assist Ms R with her complaint against the Trustees and AWS.
- AWS followed the correct principles in taking a decision when considering the Trustees' request to make an additional payment into the Scheme so that a dependant's pension could be awarded to Ms R. Its decision to decline the request was therefore made correctly and within the bounds of reasonableness.

Detailed Determination

Material facts

1. Mr N was Ms R's partner of 15 years until his death in August 2003.
2. He worked for AWS from January 1991 until 31 March 2000.
3. When Mr N joined the Scheme in 1991, the Scheme Deed and Rules in force at the time specified that a spouse's pension would be payable only to a legally married spouse on the death of a member after retirement. The Scheme Deed and Rules were amended in 1996 to permit payment of a dependent's pension to a long-term "Dependent Partner" on death after retirement.
4. The Scheme Deed and Rules dated 30 April 1998, as amended (**the Scheme Rules**), applied at the time of Mr N's death and the definition of Dependent Partner was:

"...any person **nominated** to the Trustees by the Member and who was, in the opinion of the Trustees, involved in a long-term permanent relationship which included cohabitation with the Member and was financially dependent or partly dependent on the Member or with whom the Member was financially interdependent at the time of the Member's death or retirement."
5. If there was no evidence that a nomination had been made, a member's partner did not consequently qualify as a Dependent Partner.
6. Under Rule 13.1, Schedule 3 of the Scheme Rules (**Rule 13.1**), which is set out in the Appendix, AWS had the power to direct the Trustees to grant new or additional benefits in respect of a member. Rule 13.1 provided that the Trustees shall implement any direction from AWS in accordance with the specific conditions set out in Rule 13.1. One such condition was that the Trustees would implement the direction if AWS made a special contribution into the Scheme.
7. When Mr N died in 2003, Ms R applied for a dependant's pension from the Scheme.
8. After searching their records, neither the Trustees nor AWS found any evidence that Mr N had nominated Ms R as a Dependent Partner or ever contacted them on any issue whilst he was a member of the Scheme.
9. The Trustees subsequently notified Ms R that her application had been unsuccessful.
10. Ms R alleges that the Trustees did not provide her with details of how to appeal the decision in 2003. She says that they first drew the Scheme's Internal Dispute Resolution Procedure (**IDRP**) to her attention in 2012. Ms R appealed the Trustees' decision under the IDRP, and the Trustees did not uphold her appeal. In its Stage Two IDRP decision letter dated 13 July 2016 to Ms R, the Trustees stated that:

"In the absence of any evidence that a nomination has been made, a member's partner does not qualify as a Dependent Partner and therefore is not entitled to a

spouse's pension. There are no provisions in the Scheme Rules which provide the Trustees with discretion to make a payment to a partner who does not qualify as Dependent Partner without AWS's agreement. AWS has informed the Trustees that it is not willing to make a discretionary payment in this case."

11. Following the Brewster judgment, Ms R asked the Trustees to reconsider her application for a dependant's pension in the Scheme. The Trustees did not uphold her appeal at Stage One IDRPs because:-
 - They accepted the advice from their legal advisers that the Brewster judgment did not affect the law for private sector schemes such as the Scheme.
 - The rationale for this legal advice was that the Human Rights Act 1998 (**HRA 1998**) did not apply the provisions of the European Convention of Human Rights (**ECHR**) directly to private pension schemes in the way it did for statutory public sector schemes such as the one involved in the Brewster case, that is, the Northern Ireland Local Government Pension Scheme.
 - The Brewster judgment consequently had no impact on Ms R's application.
12. Ms R appealed this decision, and the Trustees considered her appeal at Stage Two IDRPs. In her appeal, Ms R disputed the Trustees' conclusions on the application of the Brewster judgment to her case. She also alleged that the Trustees had discriminated against her because they could not find a nomination form even though they had clear evidence that Mr N had recorded her name on his company file as his spouse.
13. In their letter dated 1 March 2018, the Trustees informed Ms R that:-
 - Regarding the application of the Brewster judgment, they did not uphold her complaint for essentially the same reasons they gave at Stage One IDRPs.
 - Discrimination is not unlawful unless it is in respect of a protected characteristic. Marriage was a protected characteristic but since Ms R was not married to her partner she had not been unlawfully discriminated against.
 - The position under the Scheme Rules remained unchanged. The Scheme Rules required that a pension may only be paid to the unmarried partner of a deceased member if, the deceased was not married to the partner at the date of death, and the deceased had nominated the unmarried partner as a potential recipient of a pension. It carried out an investigation after Mr N passed away, and no evidence was found of Mr N having made such a nomination in respect of Ms R.

Summary of Ms R's position

14. AWS is a "statutory undertaker" carrying out a public function and as such, it is bound by the HRA 1998. The water industry was privatised under the Water Industry Act 1991 and AWS was appointed as the water and sewage undertaker for the Anglian

region. It performs the duties of a public company, and should it fail, the government would take over its duties.

15. In the cases of (a) *Fish Legal vs Information Commissioner (IC)*, *United Utilities Water plc*, *Yorkshire Water Ltd*, and the Secretary of State for the Environment, Food and Rural Affairs (2015) and (b) *Emily Shirley vs IC*, *Southern Water Services Ltd* and the Secretary of State for the Environment, Food and Rural Affairs (2015), an upper tribunal found these water companies in England to be public authorities because they have been given special legal powers to enable them to carry out their functions.
16. In her view, AWS is therefore a “pseudo public authority” or “quasi-public authority” because of the many special powers it holds to carry out the essential nature of its activities. In accordance with the HRA 1998, it is unlawful for a public authority to act in a way that is incompatible with a person’s rights under the ECHR.
17. Section 6(3) of the HRA 1988, as set out in the Appendix, defines a “public authority”, including clause 6(3)(b), as any person whose functions are of a public nature.
18. Water companies in Scotland and Northern Ireland remain public authorities. She is therefore at a disadvantage compared to other people in her position within the United Kingdom if AWS is not considered as a “quasi-public authority”.
19. Her complaint is virtually identical to the Brewster case which involved a breach of the HRA 1998. The Brewster case illustrated the unfairness shown to unmarried couples, particularly that:-
 - Married or civil partners do not have to be living together to benefit from a pension scheme.
 - Furthermore, they do not have to be in an exclusive, long term relationship for a minimum of two years before a survivor’s pension can be paid.
 - A survivor’s pension will also be paid automatically to married or civil partners without the requirement of a nomination form.
20. By insisting on the need for a completed nomination form, she has therefore not been treated as her married counterpart would have been. As such, she has been discriminated against under article 14 of the ECHR.

Summary of the Trustees’ position

21. The statements made by Ms R in her submissions concern the status of AWS and whether any of its functions might be considered as public in nature for the purposes of section 6(3)(b) of the HRA 1998.
22. The Trustees collectively, however, are a separate legal entity to AWS and the issues raised by Ms R do not consequently change their stance that the Brewster judgment did not affect the law applying to private sector schemes such as the Scheme.

23. The Scheme was established in 1988 and offered to all new employees of AWS. When Mr N joined AWS in 1991, it had already been privatised. But even if Mr N had joined AWS prior to privatisation, he would have been a member of the same “private occupational pension scheme” and the Brewster judgment would therefore still not apply to Ms R now. There is no reason why the Scheme will no longer be available to AWS employees in the unlikely event that it was renationalised in the future.
24. Mr N was a member of the Water Pension Section (**WPS**) of the Scheme. Rule 13.1 provides AWS with the power to direct the Trustees to augment a WPS member’s benefits. The exercise of this power may include granting new or additional benefits in respect of that member. Any direction from AWS for the Trustees to augment a member’s benefits under Rule 13.1 would not give the Trustees the discretion to award a dependant’s pension. The Trustees would have to pay the dependant’s pension in accordance with the conditions set out in Rule 13.1.
25. The Trustees asked AWS to exercise its power to permit a payment to be made to Ms R, but AWS was not willing to exercise its power.
26. The Trustees also say that:

“The Scheme is an occupational pension scheme established under irrevocable trusts. It is therefore governed by the terms of a trust deed, which contains detailed provisions about the Scheme's constitution and administration.

AWS is the current principal employer under the terms of the Scheme’s trust deed and has been the employer of the vast majority of members of the Scheme over its life-time.

Although two of the Trustees are employees of AWS, none of the Trustees are directors or officers of AWS. One other Trustee is an employee and director of another company within the Anglian Water Group (**AWG**).

The Scheme was created by an interim trust deed dated 27 September 1988 and established with effect from 1 October 1988. It was created by Anglian Water Authority so as to enable its private sector successor, Anglian Water plc, to provide pension benefits for those of the future employees of Anglian Water plc (and related companies including AWS) who were never employed by Anglian Water Authority, i.e. for individuals who were not employed in the public sector before the privatisation of the water industry. Employees of Anglian Water Authority whose employment was to transfer to Anglian Water plc at privatisation were provided with pension provision through the then separate Anglian Water Mirror Image Pension Scheme (“**AWMIS**”), which broadly mirrored the provision of the Water Authorities Superannuation Fund, which was part of the statutory Local Government Superannuation Scheme (now the “**LGPS**”). However, they were permitted to opt to join the Scheme instead of AWMIS if they wished. In 1998, the assets and liabilities of AWMIS were transferred into the Scheme. Since then, the benefits for members of

AWMIS have been provided through the Scheme but with separate benefit structures having been maintained.

...the Scheme was set up by Anglian Water Authority and it ceased to have any involvement in the Scheme post privatisation in September 1989 when its operations etc. were transferred to Anglian Water plc. Since then, responsibility for rule changes has sat with the Scheme's principal employer, now AWS, but subject to the need for the consent of the Trustees.

Prior to privatisation of the water industry in 1989, employees of Anglian Water Authority were members of the Water Authorities Superannuation Fund, which...was part of the LGPS. The Scheme was not itself privatised;it was created as a trust based occupational pension scheme in 1988 and has always been the responsibility of private individuals who are its trustees.

...the complainant's deceased partner was never employed by Anglian Water Authority; he was employed by AWS and joined the Scheme in 1991 so some years after the privatisation of the water industry."

Summary of AWS' position

27. The relevant rules applicable to Mr N's benefits in the Scheme at the time of his death were the Scheme Rules. At the time of his death, Mr N had left the employment of AWS and was a deferred member entitled to a preserved pension in the Scheme. Rule 15 of the Scheme Rules provided that where a member entitled to a preserved pension died before it came into payment, a spouse's and children's pension would be calculated and payable.
28. In the Scheme Rules, the member's "Spouse" is defined as the person (if any) to whom a deceased member was married at the date of his/her death or, if no such person exists, the person who is a Dependent Partner.
29. Ms R did not meet these requirements because she was neither married to Mr N, nor was she his Dependent Partner because, despite extensive searches at the time, there was no record that he nominated her to the Trustees, as required by the Scheme Rules.
30. In addition, the Scheme Rules do not include a specific provision which allowed or required either AWS or the Trustees to specifically consider granting a pension to a partner who did not qualify as a Spouse or Dependent Partner.
31. It was not therefore required, nor did it have discretion, under Rule 15 to consider the payment of a spouse's pension to Ms R as she did not meet the definition of Spouse or Dependent Partner.
32. The Scheme is currently governed by the Definitive Deed and Rules dated 29 March 2012 (**the Current Rules**). Like the Scheme Rules, the Current Rules contain a provision at Rule 12.1 of the WPS Schedule which stipulates that AWS (as principal employer) may direct the Trustees to grant new or additional benefits under the

Scheme to or in respect of any member. This provision is by no means restricted to cases of dependants' pensions and is instead the general augmentation rule designed for all purposes of the Current Rules in respect of WPS members.

33. The Trustees asked if AWS would consider exercising its augmentation power to grant a pension to Ms R as if she had satisfied the definition of Dependent Partner.
34. AWS gave due consideration to the Trustees' request and decided that it was not able to do so. The reasons for its decision included consistency of treatment in relation to previous exercises of its discretion (including decisions not to exercise such discretion), and the possibility of setting a precedent that it would be unable to apply consistently in the future. In addition, the Scheme has a considerable funding deficit which, when combined with the funding concerns of its own regulator, meant that AWS must ensure that the promised benefits in the Scheme are sufficiently funded. AWS is therefore unable to agree to provide enhanced benefits for individual members at the present time.
35. The Brewster case related to the LGPS in Northern Ireland and Ms Brewster brought an application for judicial review of the decision claiming a breach of her human rights under the ECHR as enacted by the HRA 1998. More specifically, the Brewster case considered the legality of certain rules of the LGPS for Northern Ireland which were then in force, that is, regulations 24–25 of the LGPS (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009, which required a surviving co-habiting partner to be included on a nomination form completed by the deceased member in order to claim a survivor's pension. Under the HRA 1998, the ECHR applies to the interpretation of UK legislation and acts of public authorities, including persons whose functions are of a public nature, and the above LGPS regulations were therefore incompatible with the ECHR.
36. AWS is a private limited company with ultimate ownership by a consortium of investors. The Scheme is a private sector pension scheme, governed by the Current Rules (as amended) and the provisions of applicable pensions law, including the Pension Schemes Act 1993, the Pensions Act 1995, the Pensions Act 2004, and the Finance Act 2004.
37. The ECHR does not apply to AWS as a private limited company. Further, although AWG is a regulated group of companies, AWG and AWS are private companies governed by the Companies Act and are not "pseudo public authorities", a term which has no legal status.
38. Therefore, the decision in Brewster, in particular the incompatibility of the scheme's rules with the ECHR, cannot be reflected in the application of the Current Rules of the Scheme (or the Scheme Rules which were in force when Mr N became a deferred member) which provided for the requirement that any Dependent Partner be nominated to the Trustees in writing.

39. AWS and the Trustees have at all times acted in accordance with the Scheme Rules which have been properly and correctly applied in relation to the payment of benefits in respect of Mr N.

Conclusions

40. The Trustees are obliged to distribute Scheme funds in accordance with the Scheme Rules unless the Scheme Rules are overridden by the law. Ms R suggests, by implication, that the decision in Brewster overrides the nomination criteria in the Scheme Rules. It is my view that Brewster can be distinguished on its facts from Ms R's case.
41. The question in Brewster was whether the requirement of completing a nomination form amounted to unlawful discrimination contrary to Article 14 of the ECHR, when read in conjunction with Article 1 of the First Protocol to the ECHR (A1P1). A1P1 protects a person's right to property and the peaceful enjoyment of possessions, and Article 14 requires that all rights and freedoms set out in the ECHR shall be secured without discrimination. The Court found that there was no objective justification for the nomination requirement, and it concluded that the scheme in question had unlawfully discriminated against Ms Brewster.
42. There is, however, a key feature that distinguishes Ms R's case from the case of Brewster.
43. The deceased partner in Brewster was employed by the Northern Ireland Public Transport Service, a public sector employer, and the scheme was the Northern Ireland Local Government Pension Scheme. In effect, the individual was employed by the State and the pension scheme was provided for by the State, whereas the Scheme in this case is a private pension scheme governed by the Trust Deed and Rules.
44. The Supreme Court in Brewster disapplied the nomination requirement within the context of a public sector pension scheme, but the Court did not go on to rule more generally that nomination requirements in all pension schemes (including private pension schemes) are discriminatory. I am conscious that the law on discrimination continues to evolve, however I am required to determine complaints in light of the laws in force at the relevant time and I have not seen any clear authority either in the reported case law or legislation that would lead me to conclude that the Brewster decision has been extended to apply to private sector pension schemes.
45. Ms Brewster pursued her claim under the ECHR against parties who were public authorities bound by the ECHR. The rights and freedoms protected by the ECHR are incorporated into UK Law by the HRA 1998. Section 6 of the HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. A public authority is defined as "any person...whose functions are functions of a public nature" but does not include a person engaged in an act of a private nature. The provisions of the ECHR are directly enforceable only against public sector institutions.

46. Ms R argues that AWS is bound by HRA 1998 because it carries out public functions as a statutory undertaker and in view of its public functions, it is a public authority within the meaning of section 6(3)(b) of the Act. I do not believe that this argument succeeds in her complaint.
47. I have no reason to reject the Trustees' submissions that they collectively are a distinct legal entity from AWS. In my view, this means that even if AWS (as sponsoring employer of the Scheme) could be regarded as a public authority for the purposes of the HRA 1998 (and I make no finding in that regard), it does not follow that the Trustees as an entity ought also to be regarded as a public authority carrying out functions of a public nature.
48. Consequently, in order for Ms R to rely on the HRA 1998 in this complaint, she will need to show that the Trustees in their capacity as trustees of the Scheme can be regarded as a public authority for the purposes of the HRA 1998. This is in accordance with the approach of the Court of Appeal in *Heather, Ward and Callin v Leonard Cheshire* [2002] EWCA Civ 366. In that case, the Court of Appeal stated that the key question in determining whether or not the defendant care provider was a public authority was: whether in providing accommodation for the claimants, the care provider was performing a public function. The Court decided that the provision of accommodation was not a public function within the meaning of section 6(3)(b) of the HRA 1998 and the status of the care provider as a private body was not altered by the fact that the claimants' care was funded by the Local Authority. The Court of Appeal stated at paragraph 35 of its judgment that:
- “The fact that LCF is a large and flourishing organisation does not change the nature of its activities from private to public...While the degree of public funding of the activities of an otherwise private body is certainly relevant as to the nature of the functions performed, by itself it is not determinative of whether the functions are public or private.....There is no other evidence of there being a public flavour to the functions of LCF or LCF itself. LCF is not standing in the shoes of the local authorities. Section 26 of the NAA provides statutory authority for the actions of the local authorities but it provides LCF with no powers. LCF is not exercising statutory powers in performing functions for the appellants.”
49. I find that there is no evidence of a “public flavour” to the functions the Trustees carried out in respect of the deceased member's benefits and in responding to Ms R's complaints. It appears to me that the functions the Trustees have carried out are functions of a private nature falling within the scope of the day-to-day activities of Trustees, and there is no evidence that these are functions of a public nature. I do not consider that the Trustees can be regarded as a public authority for the purposes of the HRA 1998, therefore as opposed to Ms Brewster, I do not believe that Ms R can rely on the HRA in her complaint against the Trustees.
50. It is clear, however, that the Trustees are bound by the requirements of the Equality Act 2000 (**the Equality Act**). Ms R alleged in her IDR application that the Trustees

had discriminated against her simply because they could not find a nomination form even though they had clear evidence that Mr N had recorded her name on his company file as his spouse. Ms R makes her discrimination argument generally.

51. I have not seen in the available papers that Ms R has specifically referred to the provisions of the Equality Act. Nevertheless, I have also considered her complaint against the Trustees in accordance with its provisions. Ms R's complaint appears to be a complaint of direct discrimination. In order for her complaint against the Trustees to succeed under the Equality Act, Ms R will need to show that they treated her less favourably than a person in a comparable situation because she possesses a protected characteristic.
52. I find that Mrs R's complaint of discrimination cannot succeed under the Equality Act. This is because although marriage and civil partnership are protected characteristics under the Equality Act, the status of a cohabiting partner, or the status of not being married or not being in a civil partnership, are not protected characteristics.
53. Finally, I note that under Rule 13.1, the Trustees could grant new or additional pension benefits in respect of a WPS member if the Trustees were directed to do so by AWS. I have not seen either within Rule 13.1 or elsewhere in the Scheme Rules any provision that grants the Trustees the power to award Ms R a pension without a direction from AWS.
54. The Trustees have confirmed that they asked AWS to exercise its power under Rule 13.1 to permit a payment to be made to Ms R, and AWS was not prepared to exercise its power. The Trustees also confirmed in its July 2016 IDR response to Ms R that AWS did not make a discretionary payment into the Scheme under Rule 13.1.
55. Having considered the explanation which AWS has given for its decision, I am satisfied that it followed the correct principles when considering the Trustees' request. In my view, its decision to decline the request was therefore made correctly and within the bounds of reasonableness.
56. AWS did not make a direction to the Trustees under Rule 13.1 and there is no evidence that the Trustees could make a payment under the Scheme Rules without a direction from AWS. In these circumstances, I find that there is no evidence of maladministration in the Trustees' decision that it could not pay Ms R a pension.
57. Although I sympathise with Ms R's circumstances, it is my decision that neither the Brewster Judgment nor the provisions of the Equality Act assist Ms R with her complaint against the Trustees and AWS.

PO-13671

58. I do not uphold Ms R's complaint.

Anthony Arter

Pensions Ombudsman
5 July 2021

Appendix

Human Rights Act 1998

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) In this section “public authority” includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

.....

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

Relevant Section of the Scheme Rules

Schedule 3 – Rules Applicable to all Members Other than Former MIS Members

13. New and Increased Benefits

13.1 Extension of existing benefits and grant of new benefits

The Principal Employer may direct the Trustees to increase or extend any benefit or benefits under the Scheme, or to grant new or additional benefits to or in respect of any Member, employee, director or any former employee or director, or any group of such persons, or to increase or to extend such benefits. The Trustees should implement the Principal Employer’s direction if:

- (a) the Principal Employer pays any sum or sums required under General Rule 2.4 or if the Actuary certifies that the Fund is sufficient without any additional payment; and
- (b) the increase, extension or grant would not prejudice Revenue Approval.