

Ombudsman's Determination

Applicant	Mr S
Scheme	Teachers' Pension Scheme (the Scheme)
Respondent	Teachers' Pensions (TP)

Outcome

1. I do not uphold Mr S' complaint and no further action is required by TP.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr S is complaining that TP is acting unfairly in refusing to award him a dependent's pension from the Scheme, following the death of his partner, Ms N, in October 2017.

Background information, including submissions from the parties

4. Mr S was the partner of Ms N, a member of the Scheme. Mr S and Ms N were not married but had been in a serious relationship for over six years.
5. Ms N was diagnosed with terminal cancer in October 2016, and Mr S gave up work to care for her at home. Ms N was paid a serious ill health lump sum from the Scheme.
6. Mr S was already married at the time but had been separated from his wife for over seven years and was seeking a divorce. He planned to marry Ms N as soon as his divorce was finalised.
7. On 14 July 2017, Mr S' divorce finally came through and his wedding with Ms N was booked for 24 July 2017 at St John's Church, Yeadon.
8. Before the wedding could take place, Ms N's condition worsened suddenly. On 21 July 2017, she was taken into hospital and the wedding was postponed.
9. Ms N's health subsequently continued to deteriorate, and hospital staff and social services said she lacked capacity to marry and the wedding was further delayed.
10. On 5 October 2017, Ms N sadly died, before she could marry Mr S.

11. As Mr S and Ms N had been living together for three years before her death, Mr S applied for a dependent's pension from the Scheme.
12. On 27 November 2017, TP refused Mr S' application for a dependent's pension because he did not satisfy the requirements of regulation 90 of the Teachers' Pension Scheme Regulations 2010 (**the Regulations**). TP said he was not free to marry Ms N during the two-year continuous period prior to her death, as required by regulation 90 (2)(a), as he was still married until July 2017. TP also confirmed that no further pensions or lump sums were due to Ms N's estate.
13. On 15 December 2017, Mr S appealed against the decision, through Macmillan Cancer Support (**Macmillan**). Macmillan accepted that the Regulations were correctly applied to Mr S and agreed he did not satisfy regulation 90(2)(a).
14. However, Macmillan claimed that it would be "fair" and within the "spirit" of the Regulations on family pensions, for TP to award Mr S a pension, in the circumstances, because he fulfilled three out of the four requirements in regulation 90(2) (a) to (d). Macmillan said Mr S and Ms N had been living together, as if they were husband and wife, for over two years before her death, and they were financially dependent or interdependent on each other. His long and committed relationship with Ms N was genuine and akin to marriage, and he would have automatically qualified for a dependent's pension if he had married Ms N, as planned, on 24 July 2017.
15. Macmillan also referred to a recent case (not named but presumably Ms D Brewster's application for judicial review in February 2017 [2017] UKSC 8 (**Brewster**)), that outlawed discrimination between married and unmarried couples when applying for survivors' pensions. Macmillan suggested it would be "fair" to award Mr S a pension, taking into account the decision made in this case.
16. On 27 November 2017, TP gave its final response, confirming Mr S could not be awarded a dependent's pension because he did not satisfy all the requirements of regulation 90. He was not free to marry Ms N during the two-year continuous period prior to her death and he had not provided sufficient evidence that he was cohabiting with Ms N or that they were financially dependent or interdependent, to satisfy other requirements.
17. Macmillan, on behalf of Mr S, appealed against this decision to the Department for Education (**DfE**) under the Scheme's internal dispute resolution procedure.
18. On 10 May 2018, DfE rejected the appeal. DfE was satisfied that TP had applied the Regulations correctly in denying Mr S a dependent's pension. It confirmed there is no discretion in the Regulations allowing TP or DfE to award a pension in cases where one or more of the conditions in regulation 90 are complied with, but not all.
19. DfE also said the Brewster case is not relevant. The Scheme had removed the requirement in regulation 90 for a nomination form to be completed, in response to the Brewster case, which is all that is required. The Brewster case does not affect the qualifying criteria for a dependent's pension.

20. Mr S was not satisfied with this response and he brought his complaint to this office, through Macmillan.

Adjudicator's Opinion

21. Mr S' complaint was considered by one of our Adjudicators who concluded that no further was required by TP. The Adjudicator's findings are summarised below:-
- Regulation 90 of the Regulations sets out the requirements for the payment of a dependent's pension. Its provisions are set out in the Appendix to this Determination. Regulation 90(2)(a) requires an individual to be free to marry for a two-year continuous period prior to death. Regulations 90(2)(b) to (d) provide additional requirements. All the conditions in (a) to (d) must be satisfied throughout the two years prior to death before a dependent's pension may be awarded.
 - In the Adjudicator's view, Mr S had acknowledged that he did not satisfy the conditions for a dependent's pension in regulation 90(2)(a) because he was not legally free to marry Ms N throughout the two years prior to her death. Based on this evidence, the Adjudicator agreed with TP's decision that Mr S was not entitled to a dependent's pension.
 - The Adjudicator also accepted TP's decision that a death grant was not available from the Scheme as Ms N commuted all her pension benefits in favour of a serious ill health lump sum. Accordingly, no further pensions or lump sums need be paid to her estate or to Mr S.
 - The Adjudicator did not agree with Mr S when he said it is unfair and contrary to the "spirit" of family pensions in the Regulations, to deprive him of a dependent's pension when he fulfilled three out of four criteria in regulations 90(2)(a) to (d). In the Adjudicator's view, regulation 90 requires all the conditions (a) to (d) to be satisfied throughout the two years prior to death, before a dependent's pension may be awarded. The Adjudicator's opinion was that these conditions are clear and unambiguous.
 - The Adjudicator noted that Mr S has asserted that TP should take account of the Brewster case and award him a dependent's pension to ensure fairness and non-discrimination between married and unmarried couples. However, in the Adjudicator's view, the judgment in the Brewster case requires schemes to waive applications for nominations so that married and unmarried couple are treated equally but has no other impact on the conditions for a dependent's pension in regulation 90.
 - In the Adjudicator's view, the Regulations must be strictly applied and, regretfully, no discretion is available to TP or DfE, either to waive one or more of the conditions in regulation 90, or to award a dependent's pension in deserving cases.

- Accordingly, the Adjudicator did not believe that there was maladministration by TP in refusing Mr S a dependent's pension and, therefore, in the Adjudicator's opinion, the complaint could not be upheld.

22. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided no further comments and relied on the arguments he had made previously through Macmillan. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points previously made by Mr S for completeness.

Ombudsman's decision

23. I have reviewed Mr S's complaint in light of the Regulations applying to a dependent's pension for a surviving partner under the Scheme.
24. I agree with the Adjudicator's Opinion that Mr S is not entitled to a dependent's pension because regulation 90(2)(a) required Ms N to be legally able to marry Mr S throughout the continuous period of two years prior to her death on 5 October 2017. Mr S has acknowledged that this condition was not satisfied because he was not divorced from his then wife until 14 July 2017.
25. Mr S also contends that it is unfair and contrary to the "spirit" of family pensions in the Regulations, to deprive him of a dependent's pension when he fulfilled three out of four criteria in regulations 90(2)(a) to (d). In particular, he asserts he had co-habited with Ms N throughout the previous two-year period and planned to marry her.
26. While I do not dispute that Mr S co-habited with Ms N and intended to marry her, I agree with the Adjudicator's opinion that all the conditions in regulations 90(2)(a) to (d) must be satisfied throughout the continuous period of two years prior to the member's death before a dependent's pension may be awarded. I find, unfortunately, that there is no discretion in regulation 90 that would allow TP to pay a dependent's pension to Mr S when he does not satisfy all the required conditions.
27. I do not agree that Mr S' case is comparable to the Brewster case. The Brewster case related to the unfairness of a condition that required unmarried but not married couples, to complete a nomination form. The issue here is whether Mr S fulfilled the substantive conditions in regulations 90(2)(a) to (d).
28. Consequently, I find that TP has applied the Regulations correctly in refusing Mr S' application for a dependent's pension.
29. I extend my sympathies to Mr S who has found himself in this extremely unhappy situation. But, regrettably, there is no scope within the Regulations for me to direct TP to pay him a dependent's pension when he does not fulfil all the statutory requirements.

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30. Accordingly, I do not uphold Mr S' complaint.

Anthony Arter

Pensions Ombudsman
24 January 2019

Appendix

Teachers' Pension Scheme Regulations 2010 [SI 2010/990]

Regulation 90 (Nomination of surviving nominated partner)

- (1) A person (A) may nominate another person (B) to receive a pension by giving the Secretary of State a declaration signed by both A and B that the condition in paragraph (2) is satisfied.
- (2) The condition is that—
 - (a) A can marry, or form a civil partnership with, B,
 - (b) A and B are living with each other as if they were husband and wife or civil partners,
 - (c) neither A Nor B is living with a third person as if they were husband and wife or civil partners, and
 - (d) either B is financially dependent on A or A and B are financially interdependent.
- 3) A nomination ceases to have effect if—
 - (a) either A or B gives written notice of revocation to the Secretary of State,
 - (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 civil partners, or
 - (d) B dies.
- (4) B is A's surviving nominated partner if—
 - (a) the nomination has effect at the date of A's death, and
 - (b) the condition in paragraph (2) was satisfied for a continuous period of at least 2 years ending on A's death.