

## Ombudsman's Determination

Applicant	Mr S
Scheme	Teachers' Pensions Scheme (the <b>Scheme</b> )
Respondent	Teachers' Pensions

## Outcome

1. I do not uphold Mr S' complaint and no further action is required by Teachers' Pensions.

## Complaint summary

2. Mr S contends that the Scheme is discriminatory: male teachers automatically accrued partner pension cover from 1972, while female teachers automatically accrued cover from 1988.

## Background information, including submissions from the parties

3. With effect from 1 April 1966, male teachers could elect to provide family benefits by paying additional pension contributions.
4. Automatic family cover was introduced for male and female members from April 1972 and April 1988 respectively. Female members could only elect to have pre April 1988 service count towards family benefits at a cost to them.
5. Mr S' late wife was employed as a teacher between 1959 and 1996. Mr S is receiving a dependant's pension under the Scheme.
6. Mr S says it is unfair that female teachers only automatically accrue family cover from 1988. He should be receiving a pension equivalent to 50% of his late wife's pension; he is only receiving 13%.
7. Mr S' position is summarised below:-
  - His late wife contributed to the Scheme from 1960 until the mid nineties.

- He questions whether it is fair that the pension contributions his wife paid prior to April 1988, do not count towards family cover. This seems discriminatory on the grounds of gender.
- The Scheme was inherently discriminatory when it introduced widows and children's pension cover for male teachers from 1966.
- The issue was further compounded when male teachers were automatically offered widows' and children's pension cover in 1972. This change was introduced after the Equal Pay Act 1970, which should have ensured equal pay in the workplace for men and women.
- Teachers' Pensions cannot produce a record of an election by his late wife for family cover. Consequently, her family benefit entitlement should be backdated to 1972. This would put his late wife back in the position she would have been in, had she not been discriminated against.
- The fact that Teachers' Pensions is unable to provide documentary evidence of his late wife's election, further compounds the discrimination caused by the Regulations that govern the Scheme.

8. Teachers' Pensions' position is summarised below:-

- Mr S is receiving his correct entitlement based on his late wife's pensionable service from 6 April 1988.
- The changes to the spouse's pension provisions, were widely publicised. Female members in service were informed via their employers that they could elect to pay to cover previous service for partner benefits. Mr S' late wife was in service at the time. Consequently, she had the opportunity to make an election.
- The Government considered that it was not justifiable to backdate automatic cover for widowers to 1972 on the grounds of costs. This remains the Government's position.

## **Adjudicator's Opinion**

9. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Teachers' Pensions. The Adjudicator's findings are summarised below:-

- Based on the relevant case law, Mr S' complaint is unlikely to succeed on the grounds of gender discrimination.
- A similar issue has already been decided by the High Court, in R (Ian Cockburn) v Secretary of State for Health [2011] EWHC 2095 (Admin) (**Cockburn**). The

Claimant had argued that the scheme regulations, which discounted a widower's pension for service predating April 1988, was discriminatory on the grounds of gender and breached Article 14 of the European Convention on Human Rights (**ECHR**).

- Article 14 of ECHR says that the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- It was accepted in Cockburn that, under the NHS Regulations, the Claimant was treated differently from how he would have been treated had he been a woman. However, the Court said that there was an 'objective and reasonable justification' for the 1988 changes to apply prospectively only, and not retrospectively. Mainly because of the cost implications for members or tax payers. At paragraph 71 of the decision, the Judge stated that:

"...it was and remains a matter of Government policy that improvements to public sector pension schemes are not given retrospective effect, and that if retrospection is to be introduced the cost of it would have to be borne by current contributors or the taxpayer. It was made clear to staff representatives that if there was to be the change to the NHS Pension Scheme that the GPs desired, the cost of it would fall on the current members. No doubt it was for this reason they did not support it."

- Any gender discrimination, arising from the requirement for female teachers to pay for pre 1988 family cover, rather than for such service to automatically be recognised as was for male teachers, can similarly be 'objectively and reasonably justified' on the grounds of costs.
  - The Judge referred to the facility allowing female members the choice to bear the cost of funding the pre 1988 service, as one of several measures that softened any difference in treatment by sex and supported the argument that the NHS was within the margin of 'objective and reasonable justification'.
  - Similar considerations would also apply if Mr S were to bring a complaint under the Sex Discrimination Act 1975 or the Equality Act 2010, as the claim would not likely succeed for the same reason as set out in the Cockburn Judgment.
10. Mr S did not accept the Adjudicator's opinion and the complaint was passed to me to consider. Mr S has provided his further comments, but these do not change the outcome. I agree with the Adjudicator's opinion and I will therefore only respond to the key points made by Mr S for completeness.

## **Ombudsman's decision**

11. Mr S concedes that his complaint is unlikely to succeed in light of the Court Judgment in the case of Cockburn. Mr S has asked that I review his complaint and consider the issue he has raised concerning the alleged failure to notify his late wife that she could select family benefits for her earlier service. Mr S says he suspects that most female teachers failed to choose this option because they were not properly consulted.
12. The matter of the alleged failure to provide information to Mr S' late wife, falls outside the scope of the complaint we agreed to look at. I therefore do not comment or make any findings in relation to such issues, it would have to be the subject of a separate complaint.
13. The complaint that has been accepted for investigation, concerns the alleged direct discrimination on the grounds of Mr S' gender. Namely, that a widow in an identical position would have a higher pension entitlement for service completed before April 1988.
14. As explained by the Adjudicator, the question of gender discrimination that Mr S' complaint raises has been considered by the Court. While I empathise with Mr S' position, his complaint is not one that I can reasonably uphold given the relevant case law on the issue.
15. I do not uphold Mr S' complaint.

**Anthony Arter**

Pensions Ombudsman  
29 July 2019