

Ombudsman's Determination

Applicant	Mr R
Scheme	Teachers' Pension Scheme (the Scheme)
Respondents	Teachers' Pensions (TP)

Outcome

1. I do not uphold Mr R'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 R's dispute with TP is about the amount of his pension to which he is entitled under the Scheme. Mr R says that he has been treated unfairly by TP because it awarded him only a nominated partner's pension instead of a full widower's pension on the basis that he was not married to his late partner. Mr R says the judgment of the Supreme Court in *Brewster* [2017] UKSC 8 means that such discrimination between married and unmarried couples is now prohibited.

Background information, including submissions from the parties

4. Mr R was the male partner of Dr K, a female member of the Scheme. They cohabited for many years but never married.
5. Widowers' pensions were introduced by the Scheme from 6 April 1988 and nominated partners' pensions were added from 1 January 2007. Dr K nominated Mr R to receive a surviving partner's pension on her death.
6. Sadly, Dr K died in January 2011. TP informed Mr R that he would receive a "nominated partner's pension". Under the statutory regulations governing the Scheme this was calculated by reference to Dr K's reckonable service from 2007, much less than the pension that Mr R would have received as a widower, which would have been based on Dr K's 38 years of reckonable service.
7. In 2012 Mr R made a complaint to us [PO-649] about the amount of his pension. The then Pensions Ombudsman did not uphold the complaint, taking the view that Dr K had been given adequate information by TP about the death benefits payable by the

Scheme. He concluded that the decision of Dr K and Mr R not to marry each other was based on an incorrect assumption that they had made, and this was not due to the explanatory literature provided by TP.

8. The Supreme Court's judgment in the *Brewster* case was handed down on 8 February 2017.
9. In a letter dated 13 February 2017 Mr R asked TP to review its position regarding the amount of his pension. He said *Brewster* prohibited pension schemes from discriminating between married and unmarried couples.
10. In its response dated 20 April 2017 TP said: "Our understanding is that the *Brewster* case referred to the need for a member to make a formal nomination in favour of their partner in order that they receive a pension. In the case of Mr [R], his partner unlike the partner of Ms Brewster, made a nomination such that he, unlike Ms Brewster, has been in receipt of a partner's pension from the outset. Accordingly, it is our view that the *Brewster* ruling is not relevant to this case."
11. TP explained that widowers' pensions were provided by the Scheme from 6 April 1988; all service accrued by female members from that date automatically counted towards a widower's pension. Members in service had the option to purchase family benefit cover for their previous service. From 1 January 2007 pensions were payable by the Scheme to unmarried partners nominated by members; members in service at the time of nomination could purchase cover for their service backdated to 6 April 1988 if they so wished, but Dr K had not done so.
12. Mr R then contacted The Pensions Advisory Service (**TPAS**), who recommended that he should invoke the Scheme's internal dispute resolution procedure. Mr R's complaint was then referred to the Department for Education (**DfE**). In a letter to TPAS on 30 May 2017 DfE rejected the complaint. It concluded that TP had correctly applied the statutory regulations governing the Scheme. DfE said that the *Brewster* judgment did not require the partner's pension calculation to be backdated to cover the deceased member's period of service before partners' pensions were introduced. The letter continued; "This means the *Brewster* judgment only applies from the date partner pension provisions were introduced to the relevant scheme and, as such, only gave Ms Brewster an entitlement to benefits calculated on service from that point onwards. Mr [R] is already in receipt of benefits calculated on service from the date partner pension provisions were introduced to the [Scheme] and, therefore, he is already in the position that Ms Brewster has now attained."
13. Mr R later contacted us. He said that TP's decision amounted to blatant discrimination between married and unmarried couples: "it is submitted that the overriding principle from *Brewster* is that discrimination in pension schemes between married and non-married couples is a breach of human rights, and so unlawful." He also said: "my claim will be for the payment of a proper widower's pension from now on, and for a lump sum back payment of the due pension, this payment from the time of [Dr K's] death in January 2011". Mr R also asked for the reimbursement of legal fees that he incurred,

with appropriate interest added. Mr R also cited the case of *Walker v Innospec* [2017] UKSC 47, as supporting his case.

14. We accepted the applicant's complaint as a new complaint, because the Supreme Court's judgment in *Brewster* had not been handed down at the time of his previous complaint to us.

Adjudicator's Opinion

15. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by TP. The Adjudicator's findings are summarised briefly below:-

- The benefits payable to Mr R were governed by the Teachers' Pension Regulations 2010 (**the Regulations**). These were statutory provisions. TP, as Scheme administrator, was required to pay only the benefits set out in the Regulations, and had no discretion to provide more generous benefits.
- The Pensions Ombudsman's role in this complaint was to consider whether in awarding the applicant a nominated partners' pension, TP had identified the correct legislation and interpreted the Regulations correctly. In addition, whether as alleged, the Respondent applied the Regulations to the applicant incorrectly and in a discriminatory manner contrary to the Regulations and relevant caselaw in force at the relevant time.
- Paragraph 4 of Schedule 8 to the Regulations set out the terms and conditions for the payment of benefits to a surviving nominated partner and how this was to be calculated. The full text to paragraph 4 is set out in the attached Appendix. Paragraph 4(1) provided that paragraph 4 "applies where D's surviving adult is a surviving nominated partner".
- On the death of Dr K, Mr R was a surviving nominated partner and he received a nominated partner's pension from the Scheme, in accordance with paragraph 4. A nominated partners' pension was the correct benefit under the statutory regulations as Mr R was a nominated partner but not a widower. He was not entitled to a widower's pension as he was never married to Dr K.
- In addition, paragraph 4 of Schedule 8 made it clear that only service from 1 January 2007 counted towards the pension calculation for a deceased member's surviving nominated partner. Therefore, Mr R was not entitled to a pension calculated by reference to a greater period of service.
- Mr R had said that notwithstanding the wording of the Regulations, the overriding principle from *Brewster* was that discrimination between married and unmarried couples was unlawful, so he should be entitled to a widower's pension.

- The Adjudicator did not share Mr R's view on this. In *Brewster*, it was held that a scheme requirement for a cohabiting unmarried member to complete a nomination form as a condition of eligibility for a survivor's pension amounted to unlawful discrimination, because there was no similar nomination requirement for a married or registered civil partner, and the discriminatory effect of that rule could not be objectively justified. However, *Brewster* did not go as far as saying that qualification criteria in pension schemes that properly distinguished between different categories of beneficiaries were discriminatory such that a cohabitee in Mr R's position automatically qualified for a widower's pension.
- As TP had explained in its letter of 20 April 2017, it awarded a pension to Mr R (who had been nominated for a pension) which put him in the same position as the successful claimant in *Brewster*, who had not been nominated for a pension.
- Mr R made a further argument in reliance on *Brewster*, namely that the Regulation that required Dr K to pay increased pension contributions as a condition of eligibility for a widower's pension was discriminatory and outlawed by *Brewster*. The Adjudicator disagreed with Mr R that the requirement for Dr K to pay increased pension contributions was discriminatory and outlawed by *Brewster*. In the Adjudicator's view, the requirement appeared to relate more to scheme funding to ensure the Scheme was properly funded to meet its pensions obligations under the Scheme. In circumstances where a member sought an enhanced benefit (in this case a pension equivalent to a widower's pension for an unmarried partner), the Adjudicator did not see anything in the *Brewster* decision or the law generally that prevented the Scheme from requesting increased contributions as a means of funding those enhanced benefits.
- Mr R had also cited the *Walker* case as supportive of his claim for a widower's pension. *Walker* concerned an exemption in the Equality Act 2010 which entitled employers and trustees to disregard employment service accrued before 5 December 2005 when calculating the amount of survivor's pension to award a same sex spouse or civil partner. This exemption in the Equality Act did not apply to the calculation of survivors' pension for married heterosexual couples, whose pension was based on the full pensionable service of the deceased member. Unlike the claimant in *Walker*, Mr R was not married to Dr K or in a civil partnership with Dr K, nor was the issue in this complaint concerned with the Equality Act exemption or the duration of pensionable service upon which to base the calculation of Mr R's pension. Therefore, the Adjudicator did not consider that *Walker* was a relevant legal precedent.
- It was therefore his opinion that this complaint would not be upheld, if it were to be referred to me for a final, binding determination. This was on the basis that, for the reasons set out above, TP's decision to award the applicant a nominated survivors' pension and not a widower's pension was not perverse, nor was there any evidence of discrimination in the Regulations or TP's application of the Regulations to Mr R's case.

- Lastly, Mr R had sought to recover his legal costs as one of the remedies in this complaint against TP, but as the Adjudicator did not think that I would uphold the main complaint he would not expect me to award those costs. He noted that I normally took the view that legal costs were not recoverable because assistance from TPAS and our service was available to applicants free of charge.
16. Mr R did not accept the Adjudicator's Opinion, and the complaint was passed to me to consider. Mr R provided his further comments which 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 R for completeness.
 17. In his reply to the Opinion, Mr R reiterated that the overriding principle from *Brewster* was that there cannot be any discrimination between married and non-married couples, as this would be in breach of Human Rights. Mr R also said that the Adjudicator had opined incorrectly that *Brewster* did not outlaw all discrimination but permitted different levels of discrimination. In Mr R's view, discrimination is discrimination, whatever the extent of it, and *Brewster* sets the precedent that discrimination of any level or extent is not compliant with the Human Rights Act 1998.

Ombudsman's decision

18. Having reviewed this matter in detail, I am satisfied that neither the Human Rights Act 1998 nor *Brewster* contain any provisions in support of Mr R's case that non-married couples are entitled to receive the same pension benefits as married couples. I should clarify firstly that the Adjudicator did not state in his Opinion that *Brewster* did not outlaw all discrimination but permitted different levels of discrimination. The Adjudicator identified that the nomination requirement in *Brewster* amounted to unlawful discrimination because there was no similar nomination requirement for a married or registered civil partner, and the discriminatory effect of the requirement could not be objectively justified.
19. The Adjudicator did not state that *Brewster* permits different levels of discrimination, rather that *Brewster* does not prevent pension schemes from introducing and enforcing criteria that properly distinguish between different categories of beneficiaries. I agree with the Adjudicator that such criteria are not discriminatory and they fall outside the scope of *Brewster*. In fact, Lord Kerr at paragraph 30 of his judgment in *Brewster* states "One can understand why the procedural requirements designed to establish that a genuine and subsisting relationship existed had been included..." It is clear from this statement that *Brewster* does acknowledge that eligibility requirements can be lawfully made and the decision does not go as far as saying that all requirements are discriminatory.
20. For this reason and the Adjudicator's reasons as summarised above, I find that Mr R has been awarded the nominated survivors' pension to which he is entitled under the Scheme, and I do not agree that the requirement for Dr K to pay increased pension

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contributions was discriminatory either under *Brewster* or the Human Rights Act 1998. I have seen no evidence that TP's decision to award Mr R a nominated survivors' pension and not a widower's pension was perverse, or any evidence of discrimination in the Regulations or TP's application of the Regulations to Mr R's case.

21. Therefore, I do not uphold Mr R's complaint.

Anthony Arter

Pensions Ombudsman
16 August 2018

Appendix

Paragraph 4 of Schedule 8 to the Teachers' Pension Regulations 2010

"4 Pensions for surviving nominated partners

- (1) This paragraph applies where D's surviving adult is a surviving nominated partner.
- (2) D's family benefit qualification service is the total of the following-
 - (a) any period of pensionable employment after 31st December 2006;
 - (b) any period beginning after 31st December 2006 in respect of which contributions have been paid under regulation C9 of TPR 1997 or regulation 19;
 - (c) where a transfer value has been accepted from a comparable British scheme, any period which consists of, or is attributable to, employment which would, immediately before the acceptance of the transfer value, have counted in the scheme for a pension for a person (other than D's surviving spouse or surviving civil partner) with whom at the date of D's death D was living as if they were husband and wife or civil partners;
 - (d) where D entered pensionable employment after 31st December 2006 and a transfer value (other than one mentioned in paragraph (c)) has been accepted, any period counting as reckonable service by virtue of the acceptance of the transfer value;
 - (e) any period in respect of which D paid contributions under Schedule 5 (family benefit contributions) provided that at the time when the relevant election was made D had nominated a surviving nominated partner."