



PUMP COURT

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The Judgment in McCloud: Implications for family lawyers

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Neutral Citation Number: [2018] EWCA Civ 2844

Case Nos: A2/2018/0635, A2/2018/0636, A2/2018/0505 & A2/2018/0647

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HONOURABLE SIR ALAN WILKIE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2018

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE SIR COLIN RIMER
and
THE RIGHT HONOURABLE SIR PATRICK ELIAS

Between:

Case No: A2/2018/0635

- 1) **THE LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE** **Appellants**
2) **THE MINISTRY OF JUSTICE**
- and -
1) **V MCCLLOUD & OTHERS**
2) **N MOSTYN & OTHERS**

Respondents
and Cross
Appellants

Case Nos. A2/2018/0636, A2/2018/0505 & A2/2018/0647

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT, THE WELSH MINISTERS & OTHERS **Appellants**

-and-
R SARGEANT & OTHERS

Respondents
and Cross
Appellants



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- Impacts about 3,000,000 public sector employees whose pension CEVs are likely to be uncertain until **at least** 2023.
- This talk aims to:
 - Explain the judgment from a high level view.
 - Explain what the government is doing in response.
 - Discuss how this impacts on couples going through divorce.
 - Suggest how family lawyers should respond.

The Judgment

- In a nutshell:
 - Changes to public sector pensions made by the coalition government in 2015 were found to be age discriminatory and, as a result, the government has agreed to unravel these.
- In something slightly bigger than a nutshell:
 - In 2010, the government determined that the cost of public sector pensions were unsustainable so set up a commission chaired by the former labour minister, Lord Hutton.
 - The new schemes implemented following the commission's recommendations were linked to career average earnings (rather than final salaries) and to normal retirement age (rather than 60 or 65).
 - Across most schemes a tapering system was put in place to insulate older members from the changes.

The tapering arrangements in the NHS

- Those within 10 years of retirement would see no change in their pension provision as they remained on the original scheme.
- Those with more than 14 years to retirement were not protected from the reforms and were moved to the new 2015 schemes.
- Those with between 10-14 years moved from the old to the new schemes on different dates according to their dates of birth.

Where is the discrimination?

- Those who remained in the old schemes were not discriminated against.
- Similarly those who joined after 2015 are all members of the new schemes and have not been discriminated against.
- However, those between 10-14 years from retirement were moved to the new schemes at different dates meaning that two members of the scheme born two years apart could end up with differing benefits on the basis of age.

Who is affected by the judgment?

- Anyone who was a member of a public sector pension scheme on 31.03.2012 and continued in service between 01.04.2015 and 31.03.2022 (or their retirement date, if earlier).
- This means the following are not affected:
 - Those who first joined the schemes on or after 01.04.2012
 - Those who have had a break in service for more than 5 years.
 - Those who were not employed between 01.04.2015 – 31.03.2022
 - Those who retired before 01.04.2015

What is the government going to do about this?

- The government has accepted the judgment and committed itself to unravelling the reforms to correct the discrimination.
- It accepts the solution cannot be as simple as putting everybody back onto the old schemes as that might lead to a danger of fresh discrimination.

The solution:

- Affected members will be offered the choice (usually at retirement) between taking the benefits they would have built up in the old scheme between 2015 - 2022 or the benefits they would have built up in the new scheme in the same period.
- This solution is known as the Deferred Choice Underpin (DCU) and the period between 2015 – 2022 as the Remedy Period.
- After 2022 the old schemes will close and everyone will then be enrolled into the new schemes. The remedy intends to bridge the gap.



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What about divorce?

From autumn 2023 (at the earliest) CEVs will be calculated as though the pension debit member has elected to transfer their pension rights at the relevant date so that the transfer value will be based on whichever scheme produces the higher amount in respect of service given during the remedy period.

2 issues for family lawyers:

1. Schemes do not have to produce updated CEVs until at least 2023.
2. PSOs already implemented may be subsequently uplifted.
3. Anyone who looks to offset a public sector pension is liable to lose out.

NHS disclaimer:

It is expected that, in due course, eligible members with membership of a public service pension scheme between 1 April 2015 and 31 March 2022 may be entitled to different pension benefits in relation to this period. This may affect the CETV set out in this communication. This CETV is calculated based on current pension benefits and actuarial factors therefore it is important the recipient of this CETV is aware the amount quoted may change in future.

NHS Example

	Member A	Member B	Member C	Member D
Salary in 2015 (pa)	£100,000	£100,000	£30,000	£30,000
Salary increase between 2015 -2021	5% p.a.	5% p.a.	1% p.a.	1% p.a.
Promotion	None	£20k p.a. in 2020	None	£10k p.a. in 2020
Combined CEV on new and old schemes (pre-McCloud)	£1,222,390	£1,402,306	£306,948	£393,585
CEV on 1995 scheme if benefits in new scheme returned	£1,245,124	£1,449,998	£307,606	£406,140
Benefit (in CEV terms) of McCloud	£22,734	£47,691	£658	£12,555
As a %	1.9	3.4	0.2	3.2

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Further Headaches for accountants/tax advisors

- Lifetime allowance tax (where benefits taken).
- Annual allowance.
- Benefits already paid (those who have already retired).
- Benefit accrual for active or retiring members.
- Ill health or survivor's pensions.

What is the impact on Financial Remedies?

- Suspect not very much from the court's perspective.
- Biggest winners of McCloud seem to be the highest earners who probably have other assets.
- Unlikely to undermine an order.
- But advice must be given .
- Avoid offsetting where possible.



- Red Flags = Recent promotions and/or long service combined with a high income.
- Sharing isn't likely to cause problems. Offsetting may unless client is warned.
- Crucial to have a record of advice given to clients about McCloud.
- Keep an eye out for updated commentary

Suggestions...





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