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Should the Irish Government "CARE" about the UK *McCloud* case?

The *McCloud* Decision- what happened?

McCloud concerned the introduction of new pension schemes for both judges and firefighters. The reformed schemes provided less valuable retirement benefits as the level of pension at retirement would now be based on the average earnings *throughout* the member's entire career (also known as CARE schemes) rather than on the earnings close to retirement. All serving judges or firefighters at the time were transferred into these new schemes, but transitional provisions were put in place whereby:

- judges over age 58 and firefighters over age 45 were permitted to remain within the old scheme until retirement;
- tapered protection was available for judges aged 55-58 and firefighters aged 41-45; and
- judges younger than 55 and firefighters younger than 45 had no protection and went straight into the new schemes.

The age discrimination claims were based on the UK equivalent to the Irish Employment Equality Acts. The Court found these measures were manifestly discriminatory as those with tapering or full protection were paid significantly more than unprotected younger firefighters and judges. In both cases, the way the transitional measures were implemented gave rise to unlawful direct age discrimination

Pension Reform in Ireland

The Irish public service pension system was altered by the Public Service Pensions (Single Scheme and Other Provisions) Act 2012 (the Act). Broadly, it provided that public servants recruited after 1 January 2013 would become members of the Single Public Service Pension Scheme (the Single Scheme). The Single Scheme operates a career average defined benefit model. The bulk of public servants recruited prior to 2013 were not required to join the Single Scheme and continue to accrue benefits on an arguably more generous final salary basis.

What does this mean for such a case here?

A distinction can be drawn between the implementation of public sector pension reforms in the UK and Ireland. The transitional measures in *McCloud* resulted in direct age discrimination. In Ireland, the Act did not introduce age-based transitional provisions akin to those in *McCloud*. Instead, differing pension benefits are determined based on date of entry into the public service.

However, this has resulted in the pension entitlements for younger public sector workers being arguably less favourable than those provided to older public sector workers. As such there is a risk of a claim based on indirect age discrimination.

Indirect age discrimination is permissible if it can be objectively justified by reference to a legitimate aim and where the means of achieving that aim are appropriate and necessary. As many public sector employers have discovered on the retirement age issue, successfully establishing an objective justification defence when it comes to age-based claims is not straightforward.

There is already disquiet in the public sector regarding what is perceived as a two-tier pension system. The disparity in pension benefits for younger teachers hired since 2013 is something that teachers' unions have been lobbying the Government on as part of recent pay disputes.

For now, it remains to be seen whether the *McCloud* decision may prompt similar legal challenges to public sector pension reforms in Ireland.

Pensions and Employer Insolvency: New poverty threshold test suggested by CJEU

The Bauer Decision – What happened?

This decision concerned a case before the CJEU regarding the interpretation of Article 8 of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer **(Article 8).**

Mr Bauer's former employer had entered insolvency proceedings and was unable to restore his full pension entitlements, which had been reduced due to the pension fund running into financial difficulties.

There was some concern that the CJEU would follow the recommendation in the opinion of Advocate-General Hogan **(AG).** The AG concluded that Article 8 required Member States to provide 100% protection for accrued pension entitlements on employer insolvency.

The CJEU disagreed with the AG and broadly followed previous case law in holding that Article 8 requires 50% protection for accrued pension entitlements on employer insolvency.

However, the CJEU went on to introduce a new requirement whereby any 50% reduction must not be *"manifestly disproportionate".* The CJEU held that the current minimum level of protection (i.e. 50%) is too low if it means that the former employee is living below the *"at risk of poverty"* level in the relevant Member State, as measured by Eurostat.

Comment

Unlike the position in some other EU Member States, there is no life-boat fund in Ireland for insolvent pension schemes. The Pensions Act 1990 (the **Pensions Act**) was amended in 2013 to deal with a double insolvency situation, i.e. where an employer becomes insolvent at a time where its pension scheme may not be fully funded. Broadly, section 48A of the Pensions Act enables trustees to effectively seek a payment from the State to cover underfunding on a double insolvency scenario if there is less than 50% coverage for member benefits.

This regime was consistent with EU law up until the Bauer decision. However, the 50% level of protection within the Pensions Act may now in certain circumstances be too low if it creates an *"at risk of poverty"* situation.

What this means in practice is difficult to predict. Eurostat's latest *"at risk of poverty"* statistics put the threshold at circa €15,000 for individuals in Ireland. State pensions may go a long way to meet this poverty test, but it is unlikely that this will be the case for everyone.

Thankfully, the funding level within defined benefit pension schemes in Ireland has recovered strongly since 2013. Based on the Pensions Authority's 2018 data, almost 85% of schemes met the statutory funding standard. Very few, if any, schemes would at present have coverage below the 50% threshold.

However, until we have a real test case which puts the spotlight on the current regime, the full implications of the Bauer decision for Irish pension plans is likely to remain uncertain.

Pensions Regulatory Update - In Brief

1. Pensions Authority 2020 Engagement Programme

As part of its IORP II related transition to a *"forward looking risk based approach to supervision"*, the Pensions Authority (the **Authority**) has recently confirmed that it will be issuing questionnaires to some of the large defined benefit schemes and defined contribution (**DC**) master trusts later this year. The purpose of the exercise will be to gather information on how well these schemes are governed. It will involve follow up meetings with trustees leading to a findings report and potential recommendations for improvement. This is a move that had been signaled by the Authority late last year as it gears up to take a more pro-active approach to its engagement with trustees. However, it is interesting to see the Authority moving ahead with the initiative in advance of both IORP II being transposed and the publication of proposed codes of conduct for DC master trusts.

2. Possible State Pensions Reforms

One of the many surprises thrown up in General Election 2020 was to see pension policy become a central election issue. The increase in the State pension age to 66, with increases to age 67 and 68 due to follow in 2021 and 2028 respectively, has created a "pensions gap" which is creating hardship for many employees who find themselves contractually required to retire at age 65. As a temporary measure to address this "gap", many such retirees have been required to apply for Jobseeker's Allowance. Given the unpopularity of these measures, and the increasing number of retirees affected, many of the main political parties have proposed reforms in this area. The reforms range from returning the State pension age to 65 to prohibiting mandatory retirement ages entirely. It is too early to tell what reforms will emerge but there is a strong expectation that we will see some changes in this space once a new Government has formed.

3. Beneficial Ownership of Trusts Register

The Department of Finance has been given responsibility for preparing legislation in relation to the transposition of the 5th Anti-Money Laundering Directive into domestic law. This legislation, which is expected shortly, will make provision for the establishment of a central register of beneficial ownership for trusts. The Revenue Commissioners has indicated that it is likely to be the body tasked with operating this central register. It is hoped that the new legislation will provide clarity regarding what constitutes a *"beneficial owner"* when it comes to pension trusts, something that has given rise to differing interpretations in the context of the European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2019.

4. Financial Services and Pensions Ombudsman (FSPO)

The FSPO recently published its digest of decisions covering 2019, which included some interesting pension related decisions. One such decision concerned a complaint about a delay by an administrator in processing a transfer to an approved retirement fund on the retirement of a DC scheme member. The member suffered a loss due to that delay. The administrator had made a payment to the member to address the loss and, despite the member disputing the date used by the administrator in calculating the loss, the complaint was not upheld.

This decision is a good example of one of the common risks with DC scheme administration; transfer and disinvestment delays. Trustees should ensure they have detailed service level agreements in place with their administrators which clearly define the time limits for processing member requests. The fact that there was a time limit for processing the member's transfer request clearly assisted the administrator in dealing with the complaint in this case.

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