

news

New rights for transsexuals

From 4 April 2005, post-operative transsexuals will finally be entitled to legal recognition in their acquired gender. This ground-breaking legislation¹ is the culmination of several high-profile cases in recent years before the legal heavy-weights, the European Court of Human Rights, the European Court of Justice and the House of Lords. Here we consider some of the implications for trustees and employers of occupational pension schemes.

The Background

Breach of human rights

- There are estimated to be 5,000 transsexuals currently living in the UK.
- Until now, it has not been possible for transsexuals to change their birth certificate to recognise their acquired gender.
- This lack of recognition is regarded as a breach of the European Convention on Human Rights².

Gender Recognition Act

General implications

- In general, the implications of the Act are that it will be possible for transsexuals to:
 - obtain a Gender Recognition Certificate (akin to a new birth certificate) recognising their acquired gender;
 - marry in their acquired gender;
 - receive benefits (including state pension) in their acquired gender.

Gender Recognition Panel

Obtaining a certificate

- The Act establishes a Gender Recognition Panel consisting of judicially trained legal and medical members.
- An applicant who successfully demonstrates to the Panel that he / she has taken decisive steps towards living fully and permanently in their acquired gender can obtain a Gender Recognition Certificate.

Pension schemes

Some of the main issues

- Two of the issues faced by pension schemes with transsexual members are:
 - how and when should scheme records be updated?
 - how should benefits be calculated to take account of a change in gender?

1 The Gender Recognition Act 2004

2 Article 8 (respect for private and family life) and Article 12 (the right to marry and to found a family)

Changing scheme records

What evidence?

- Before changing scheme records, trustees should see a copy of the Gender Recognition Certificate.
- Pending the production of such a certificate, trustees may wish to make a note on a member's record of their transsexual status.
- Specific member consent is likely to be required to enable trustees to hold and process this information, as it is likely to be sensitive personal information for data protection purposes.

Calculating pension benefits

What basis?

- With the exception of GMPs³, calculating pension benefits is likely to prove complex.
- Individuals are to be treated as though they have always been of their acquired gender.
- However, the Act also says that "things done or events occurring" before a Gender Recognition Certificate is issued are not affected by the change of gender (including past pensionable service?).

NB: a transsexual member could bring a possible claim against an employer under the Sex Discrimination Act 1975 if he / she suffers a detriment (e.g. a reduction in benefits).

Conclusions

Get advice

- Trustees presented with Gender Recognition Certificates will need to deal with members sensitively.
- But because of the current lack of clarity regarding benefits payable in respect of transsexuals, they should also seek advice. (We suspect that the ultimate answer may be for schemes to "level up" benefits.)

³ Guaranteed Minimum Pensions should be treated as having accrued in an individual's birth sex but be determined (when payable) according to their acquired sex

This edition of Sackers Extra News is one of a series produced by our Employment Team to draw your attention to important employment aspects of pensions law. If you would like further information on gender recognition please contact:

Employment Team employmentunit@sackers.com

SACKER^S
& PARTNERS

Solicitors specialising in pensions law

Sacker & Partners LLP
29 Ludgate Hill
London EC4M 7NX
Tel 020 7329 6699
Fax 020 7248 0552

enquiries@sackers.com
www.sackers.com