

news

Lindorfer – Are sex-based actuarial factors an endangered species?

In the shifting sands of pensions regulation, the bedrock for pensions professionals is legal certainty. Since the 1993 case of *Neath v Hugh Steeper*¹, pension schemes have not questioned their ability to calculate a cash equivalent transfer value (CETV) using sex-based actuarial factors. But the recent European Court of Justice (ECJ) case of *Lindorfer* has unearthed new doubts in this area.

Neath v Hugh Steeper (1993)

The case history

- Like many schemes, the Hugh Steeper pension scheme used sex-based actuarial factors to calculate CETVs (and also when converting pension into lump sums on retirement).
- Mr Neath claimed this was discriminatory because, for example, a male employee was entitled to a lower CETV than a female.
- The ECJ disagreed, stating that “the use of actuarial factors differing according to sex in funded defined benefit occupational pension schemes does not fall within the scope of Article 119”² and was therefore lawful.

Lindorfer³

Background

- Ms Lindorfer, an employee of the Council of the European Union, applied to have benefits from her Austrian pension scheme transferred into the Council’s own scheme (the Community scheme).
- As different factors for men and women were used to calculate transfer credits in the Community scheme, Ms Lindorfer complained.
- The European Communities Court (which first heard the case) decided that any discrimination was objectively justified “by the need to ensure sound financial management of [the] scheme”.

Ms Lindorfer’s appeal

The ECJ decision

- The ECJ agreed with Ms Lindorfer that the formula used to convert her transfer value into transfer credits in the Community scheme was discriminatory on the grounds of sex⁴.
- It also rejected any justification of the difference in treatment based on sound financial management, noting that men and women paid identical levels of contributions and the scheme had subsequently adopted unisex actuarial factors in any event.

¹ [1994] 2 All ER 929

² Now Article 141 of the EC Treaty

³ *Lindorfer v Council of the European Union*, Case C-227/04

⁴ Her other arguments, including a claim based on age discrimination, were dismissed

Neath or Lindorfer?

Which is right?

- Although the ECJ in Lindorfer only refers to *Neath v Hugh Steeper* in passing, it seems to have directly contradicted this earlier ruling.
- But the ECJ may have wanted to set a higher bar for the Community scheme or have been swayed by the fact that it included a very specific equal treatment rule.

UK law

The current position

- The Pensions Act 1995 contains a general equal treatment rule which overrides all occupational pension scheme rules.
- However, certain exemptions⁵ allow the use of sex-based actuarial factors when calculating transfer credits and CETVs, and when converting pension into lump sums.

What should schemes do?

Possible action

- Given the above, there are good arguments for schemes using sex-based actuarial factors to take no action at present.
- Nevertheless, trustees may generally wish to explore the extent to which such factors are used (and possibly ask their actuary to cost the introduction of gender neutral factors).
- On transfers in, trustees should also request information on the factors used to calculate CETVs (as receiving schemes may inherit responsibility for addressing any discrimination).

What should schemes do?

The future?

- For the moment, the ability of pension schemes to use sex-based actuarial factors remains embedded in UK law.
- Looking ahead though, *Lindorfer* may be seen as the beginning of the end for sex-based actuarial factors.
- Only time will tell whether it is confined to its own facts.

⁵ Section 64(3)(b) and the Occupational Pensions Schemes (Equal Treatment) Regulations 1995, regulation 15