Bereavement benefits remedial order

Personal tax

30 November 2021

LITRG reviews proposals to extend bereavement benefits to surviving partners with children after the death of a partner to whom they were not married or in civil partnership.

Widowed parent's allowance (WPA) was available until April 2017, at which time the entire bereavement benefit regime (including WPA but also bereavement allowance and bereavement payment) was replaced by bereavement support payment (BSP). A higher rate of BSP is payable where claimants have dependent children.

Hitherto, eligibility for all of these benefits included a requirement for the surviving partner to have been married to, or in civil partnership with, the deceased.

However, in the February 2020 case of Jackson and Simpson v SSWP [2020] EWHC 183 (Admin) the High Court ruled that denying higher rate BSP to unmarried (or non-civil partner) cohabiting parents breached their children's human rights. This followed the McLaughlin [2018] UKSC 48 judicial review ruling made by the Supreme Court in August 2018 in relation to WPA.
Following those cases, on 28 July 2020, the government announced that it would make a remedial order to extend WPA and BSP to cohabitees with children. A proposed draft of this order (see tinyurl.com/2w4zez3y) was not, however, forthcoming until July 2021.

The proposal as it stands is to extend eligibility to claimants back to 30 August 2018 – the date of the Supreme Court judgment in McLaughlin. When the details are finalised and the order commences, claimants will be able to access lump sums of WPA or BSP as applicable to their circumstances.

For those whose partner died on or after 6 April 2017 (when BSP was introduced), LITRG believes that the current wording of the order will mean they get a back payment of the full amount of BSP, so £9,800. However, other information from the Department for Work and Pensions (DWP) suggests that this sum is to be pro-rated

where the death occurred before 30 August 2018. Clarity on this point is needed.

LITRG has been looking at the tax and benefit interactions of these back payments of benefit. WPA is taxable and typically assessable as income in means tests, whereas BSP is not taxable and is typically disregarded as income in benefits means tests. We have some concerns that those in receipt of the £9,800 BSP amount may trigger unexpected benefit interactions if, for instance, they save and 'capitalise' the money. However, our main concern is that the potential tax and benefits complexities for claimants of WPA have not been thought through.

WPA is taxable as social security pension income under Income Tax (Earnings and Pensions) Act 2003 ss 577-579. It is paid gross by DWP. Like the state retirement pension, WPA is taxable based on the amount accruing in the tax year, specifically without regard to when the amounts are actually paid. It is assumed that back payments would be taxed by reference to the year in which they ought to have been paid, had the claimant been permitted to claim them as if they were married or in civil partnership. However, this is not currently clear. It might be argued that because there was no entitlement to the benefit before implementation of the remedial order, the payment should be taxed in the year it is claimed or received, irrespective of it having been notionally calculated by reference to an earlier period of time.

The position for universal credit for lump sums of WPA is also not entirely clear. Payments of WPA are usually treated as unearned income for universal credit in the assessment period they are received. DWP could of course choose to legislate for a different treatment of the lump sum; for example, it could be allocated to the relevant assessment period it accrued in (resulting in potential universal credit overpayments in the assessment period concerned).

If it follows the usual rules, then this would mean that a claimant's income is probably going to be more than their maximum universal credit in that assessment period and so it would just reduce the universal credit payment in that one month. In theory, this means they could be far better off than if they had received the payments at the correct time. This is because if it had been paid at the correct time, it would have been deducted at a pound-for-pound rate from the claimant's universal credit entitlement.

LITRG is urging HMRC and DWP to work through the tax and benefit issues together and to ensure the treatment of lump sums under the remedial order is fully

understood before the legislation is finalised. DWP must also ensure that claimants of back payments are advised what they need to do in terms of tax, tax credits and benefits following a claim. It would be unacceptable for people to receive a large amount and then have it unexpectedly create difficult tax, tax credits and benefit issues. The draft remedial order is to be considered by the Joint Committee on Human Rights, to which LITRG has submitted comments.