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The Law Commission and The Scottish Law Commission

(LAW COM. No. 105)
(SCOT. LAW COM. No. 62)

JUDICIAL PENSIONS BILL

REPORT ON THE CONSOLIDATION OF CERTAIN ENACTMENTS RELATING TO PENSIONS AND OTHER BENEFITS PAYABLE IN RESPECT OF SERVICE IN JUDICIAL OFFICE

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Lord High Chancellor and the Lord Advocate
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THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION

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To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain, and

the Right Honourable the Lord Mackay of Clashfern, Q.C., Her Majesty's Advocate.

The Judicial Pensions Bill which is the subject of this Report seeks to consolidate certain enactments relating to pensions and other benefits payable in respect of service in judicial office. In order to produce a satisfactory consolidation we have made a number of recommendations which are set out in the Appendix to this Report.

The first two recommendations only affect judges of the Court of Session and are made by the Scottish Law Commission. The recommendations numbered 3 to 7 concern judicial officers exercising jurisdiction throughout Great Britain and are made by both Commissions. The remainder relate to judicial offices in England and Wales and are made by the Law Commission.

The second of the two recommendations made by the Scottish Law Commission alone is not reflected in the Bill as introduced because it is considered that it is a matter for Parliament to decide.

Some of the other recommendations are minor corrections and improvements which could be made under the Consolidation of Enactments (Procedure) Act 1949.

The Commissions have consulted the Lord Chancellor's Department and the Scottish Courts Administration.

MICHAEL KERR, *Chairman of the Law Commission.*

J. O. M. HUNTER, *Chairman of the Scottish Law Commission.*

28 *October* 1980

APPENDIX

ARRANGEMENT

RECOMMENDATIONS

1. Pensions for judges of the Court of Session are afforded by the Judges' Pensions (Scotland) Act 1808. In substance the pensions are the same as for other holders of high judicial office, but there are formal and verbal differences. Originally pensions for other holders of high judicial office were in much the same terms as those in the 1808 Act, but they were modernised in Schedule 4 to the Administration of Justice Act 1973.

Under the 1808 Act the pension is to be granted under the Royal sign manual, and if granted on grounds of ill-health that fact must be recited in the grant. In practice no formal grant is made, and the provision is unnecessary.

The pension is payable "at such and the same times, and in such and the same manner as the salaries of the judges of the said Court of Session, Justiciary, and Exchequer are now paid and payable". This obscure provision means that the pension is payable quarterly in arrear. In practice payment is made monthly, and the provision is unnecessary.

The pension is payable on resignation of office whereas pensions for other holders of high judicial office are payable on "retirement". In the context the difference is no more than verbal. "Retirement" is the more general expression and is better suited to the case where a judge vacates office on attaining the age limit in section 2(1) of the Judicial Pensions Act 1959; in 1808 there was no age limit.

A pension on the grounds of ill-health for other holders of high judicial office is under paragraph 1(1) of Schedule 4 to the Administration of Justice Act 1973 payable "if at the time of his retirement he is disabled by permanent infirmity from the performance of the duties of his office". In the 1808 Act there is nothing corresponding to the words "at the time of his retirement". Their substance is however implicit in the 1808 Act if only because the fact of ill-health must at present be recited in the grant of the pension.

We recommend that the requirements of the 1808 Act concerning grant by Royal sign manual, and the time of payment of pension, should not be re-enacted. We also recommend that references to retirement should be substituted for references to resignation and that the provision for pension on retirement on grounds of ill-health should be the same as that for other holders of high judicial office. Effect is given to these recommendations in clause 2 of the Bill.

2. The pensions for judges of the Court of Session discussed in our recommendation above are discretionary. On the other hand all other holders of high judicial office have, in accordance with paragraph 1(1) of Schedule 4 to the Administration of Justice Act 1973, an unqualified entitlement to their pensions. In this respect the pension rights of judges of the Court of Session are anomalous.

We recommend that the pension of a judge of the Court of Session should be one to which he is by law entitled, as in the case of other holders of high judicial office.

Effect is not yet given to this recommendation in the Bill because we consider that its importance calls for a decision by Parliament which could be taken in the passage of this Consolidation Bill. Omission of clause 2(4) of the Bill would implement the recommendation.

3. Section 18 of the Superannuation Act 1965 affords certain benefits in case of injury or disease sustained in the discharge of duty. It must be read with section 19 under which the recipient may have to make refunds in certain circumstances, and sections 80, 81(1), 94, 96 and 99 which interpret and supplement section 18. These 7 sections form part of a pensions code which until 1972 applied to the civil service and have their counterparts in the principal civil service pension scheme which in 1972 superseded the 1965 Act for the civil service.

Section 18 (but not the other 6 sections) is applied in the case of the court officers in paragraph 1 of Schedule 1 to the Bill by paragraph 26(1) of Schedule 2 to the Superannuation (Amendment) Act 1965, and in the case of the Judge Advocate General by section 34(4)(*a*) of the Courts-Martial (Appeals) Act 1951. (It should be explained that those enactments mention section 41 of the Superannuation Act 1949 which is replaced and re-enacted in section 18 of the Superannuation Act 1965.)

One would expect to find that in these two cases these provisions about injury and disease applied in the same way as they applied (before 1972) to civil servants. And in particular one would expect to find that the interpretation of section 18 in sections 94 and 99 of the 1965 Act applied. In the case of the court officers mentioned above sections 94 and 99 were expressly excluded (though by general terms) by sub-paragraph (3) of the paragraph 26 of Schedule 2 to the Superannuation (Amendment) Act 1965 mentioned above. This gives an absurd result and must be a mistake. (It should be explained that paragraph 26(3) refers to provisions of the Superannuation Act 1949 re-enacted in the 1965 Act.)

Apart from this mistake it is reasonably clear that all the 7 sections about injury and disease apply both to the court officers mentioned above and to the Judge Advocate General.

We recommend that paragraph 26(1) of Schedule 2 to the Superannuation (Amendment) Act 1965 and section 34(4)(*a*) of the Courts-Martial (Appeals) Act 1951 should now be construed as applying not only section 18 of the 1965 Act but also the rest of that Act as it applies in relation to section 18. Effect is given to the recommendation in clause 9(4)(*a*) of the Bill, and in Parts III and IV of Schedule 1 (paragraphs 15(6)(7), 17, 18, 21 and 22).

4. Pensions for whole-time presidents or chairmen of industrial tribunals are afforded by paragraph 11 of Schedule 9 to the Employment Protection (Consolidation) Act 1978. In sub-paragraph (2)(*a*) " service " ought to be " relevant service " which is defined in sub-paragraph (4), and may include prior service in offices other than those pensionable under the section. As it stands sub-paragraph (2)(*a*) is imprecise for " service " could mean " relevant service " or some other category of service.

We recommend that " relevant service " should be substituted for " service " accordingly. Effect is given to the recommendation in clause 12(2)(*a*) of the Bill.

5. The Administration of Justice (Pensions) Act 1950 affords lump sum benefits and widows' and children's pensions in respect of service in judicial office. Contributions must be made by a retiring officer in return for a widow's or children's pension. Section 9 deals with a person serving again after retirement.

If he was unmarried when he first retired he may have made no contribution to a widow's or children's pension; if he wishes to provide for a widow's or children's pension on his subsequent retirement he must, under section 9(1)(*a*), make a contribution on resumption of service. The amount of the contribution is one-half of the lump sum received on first retirement. This figure of one-half does not take account of the increase in widows' and children's pensions made by section 10 of the Administration of Justice Act 1973 and the related changes both in the the amount and method of payment of contributions. The right figure for the case of re-employment may now be more or less than the one-half in section 9 and cannot be simply formulated. It cannot however exceed three-quarters of the lump sum; three-quarters of the lump sum is the most payable in the ordinary case where a married man retires from judicial office without any break in service.

We recommend that the Minister for the Civil Service should be empowered to determine the right sum subject to its not exceeding three-quarters. Effect is given to this recommendation in subsections (1)(*a*) and (3) of clause 25 of the Bill.

6. Section 9 of the Administration of Justice (Pensions) Act 1950, which is described in paragraph 5 above, applies to all the judicial offices within that Act except the Judge Advocate General and a president or chairman of industrial tribunals. It is conceivable that the holder of either office might resume his service after retirement.

We recommend that section 9 should apply to these two offices. Effect is given to this recommendation in clause 25 of the Bill.

7. Service as President of the Transport Tribunal counts for pension for a Supreme Court officer in paragraph 1 of Schedule 1 to the Bill, and vice versa. Moreover the rate of pension of the President of the Transport Tribunal is the same as that of one of these court officers. And for both the President and these Supreme Court officers some allowance is made for service in any other judicial office by the Superannuation (Judicial Offices) Rules 1968. There are however, minor differences and discrepancies.

First, paragraph 8(3) of Schedule 10 to the Transport Act 1962 provides that service in any judicial office to which the Administration of Justice (Pensions) Act 1950 applies counts for pension for the President of the Transport Tribunal, and this has no counterpart for these Supreme Court offices, or indeed for any other judicial office. The provision so made for the President is rather more favourable than that made by the Rules of 1968 mentioned above for all judicial offices, and is accordingly unjustifiable. Paragraph 8(3) is, anyway, incomplete because it is not reflected in the provisions about pensionable service in the Administration of Justice (Pensions) Act 1950.

Secondly, certain provisions of the Superannuation Act 1965, of minor importance, apply to the Supreme Court officers mentioned above, but not to the President of the Transport Tribunal.

Thirdly, a Supreme Court officer recruited from the civil service may choose to remain within the civil service pension scheme: there is no counterpart for the President of the Transport Tribunal.

If, as we recommend below, the pension provisions are assimilated, consequential changes must be made in the way the pension benefits for service as President of the Transport Tribunal are defrayed under paragraph 8 of Schedule 10 to the Transport Act 1962 and section 21(3) and (4) and Schedule 3 paragraph 4 of the Administration of Justice (Pensions) Act 1950.

We recommend that the President of the Transport Tribunal should be treated for all pension purposes as if his office were one of the offices of the Supreme Court mentioned above. We also recommend that consequential changes should be made in the way pension benefits for service as President of the Transport Tribunal are defrayed. Effect is given to this recommendation in paragraphs 1, 2(1) and (3) and 23 of Schedule 1 to the Bill.

8. The offices of the Supreme Court in paragraph 1 of Schedule 1 to the Bill are pensionable under section 128 of the Supreme Court of Judicature (Consolidation) Act 1925. Service in any of those offices counts for pension and subsection (2) of section 128 excludes all other service.

These court officers are in some circumstances eligible for benefits under Part I of the Superannuation Act 1965 the amounts of which depend on length of service. For the purpose of these provisions service as an ordinary civil servant counts as well as service as a court officer. This is anomalous. A court officer recruited from the civil service has the option of continuing subject to the principal civil service pension scheme in which case both his prior service as a civil servant and his service as a court officer count for pension. If he does not opt he is pensionable under section 128 and his time in the civil service does not count for that purpose. Following his decision other benefits ought to be on the same basis.

In practice the change is unlikely to make any difference. A certain number of officers recruited from the civil service choose the pension arrangements in section 128, but only in rare cases have the benefits under Part I of the Superannuation Act 1965 been available in circumstances where service in the ordinary civil service can count for benefits.

The change would bring the treatment of these Supreme Court officers into line with the treatment of county court registrars and effects a modest simplification of the law.

We recommend that section 128(2) of the Supreme Court of Judicature (Consolidation) Act 1925 should apply to all benefits under the Superannuation Act 1965. Effect is given to this recommendation in paragraph 2(1) of Schedule 1 to the Bill.

9. The Supreme Court officers in Schedule 1 to the Bill and county court registrars are treated for pension purposes as serving in the civil service of the State. This is the effect of section 118 of the Supreme Court of Judicature (Consolidation) Act 1925 as amended by the Courts Act 1971 and the Superannuation Act 1972 and, for county court registrars, of section 21(5) of the County Courts Act 1934.

Since the passing of the Superannuation Act 1972 this gives a wrong result. All these officers are now pensionable both under the Superannuation Act 1965 (with the modifications made by section 128 of the Judicature Act of 1925 and section 21 of the County Courts Act 1934) and also under the principal civil service pension scheme. The principal civil service pension scheme ought not to apply.

There is one exception. At present an officer recruited from the civil service may choose to continue under the civil service pension scheme (instead of being pensionable under the Superannuation Act 1965 as modified) and then of course it is right for that scheme to apply.

If this is put right it will make for ready understanding of the nature of the choice if the option is reversed so that the officer stays outside the civil service pension scheme unless he opts for it.

We recommend that section 118 of the Judicature Act of 1925 and section 21(5) of the County Courts Act 1934 should not apply to the Supreme Court officers mentioned above, or county court registrars, except

(*a*) so as to apply, as at present, the Superannuation Act 1965, and

(*b*) as respects officers recruited from the civil service who choose to remain within the principal civil service pension scheme,

and for officers given that choice we recommend that the form of option be reversed. Effect is given to these recommendations in paragraph 3 of Schedule 1 to the Bill.

10. Section 3 of the 1965 Act affords a lump sum payment on retirement after attaining the age of 60, or retirement on the ground of ill-health. This is anomalous because section 4 of the 1965 Act, which gives a lump sum on death in service, does not apply, and because the retiring age for the personal pension is 65 and not 60. In the legislation in which these anomalies first arose there is another unexpected result; in transitional cases a retiring officer could obtain a lump sum in return for surrendering part of his pension, and this was in addition to the lump sum under what is now section 3 of the 1965 Act.

In practice the responsible Department has never given a lump sum under section 3 of the 1965 Act, or its antecedent, since the anomaly arose on the passing of the Supreme Court Officers (Retirement, Pensions, etc.) Act 1921. And since 1950 lump sums have been available on retirement (or death) under the Administration of Justice (Pensions) Act 1950.

Lump sums are also available to a retiring officer under sections 8 and 9(2) of the 1965 Act which deal with the unlikely cases of retirement on abolition of office, or discharge for inefficiency. If a case did occur the departmental practice would be the same as under section 3.

A case could arise where a retiring officer was not entitled to a lump sum under the 1950 Act but was in terms entitled to a lump sum under section 3, 8 or 9(2) of the 1965 Act. This has never occurred and cannot be said to be covered by the departmental practice.

We recommend that no lump sum allowance should be granted under section 3, 8 or 9(2) of the 1965 Act to a retiring officer eligible for a lump sum under section 2 (1) of the Administration of Justice (Pensions) Act 1950. Effect is given to this recommendation in paragraphs 5, 6, 7 and 8 of Schedule 1 to the Bill.

11. A pension for service as one of the court officers in paragraph 1 of Schedule 1 to the Bill is, under section 12 of the Superannuation Act 1965, abated if the officer is re-employed in the public service. Section 98(6) of the 1965 Act extends section 12 so as to apply equally to re-employment in certain public bodies listed in Schedule 8 to the Act. The list is much the same as that in Schedule 1 to the Superannuation Act 1972. The latter list has been kept up to date whereas Schedule 8 to the 1965 Act, no doubt because it is of very limited application, has not been kept up to date.

No purpose is served by having two separate lists serving much the same purpose. Moreover if section 12 is made to refer to the list in Schedule 1 to the 1972 Act a considerable simplification is effected in the Bill.

Section 98(6) of the 1965 Act also expands the reference to a government department in section 93 of that Act. And the same considerations apply as in the case of section 12 mentioned above.

We recommend that in section 12 and section 93 a reference to Schedule 1 to the Superannuation Act 1972 be substituted for the reference to Schedule 8 to the Superannuation Act 1965. Effect is given to this recommendation in paragraphs 9(3) and 20(3) of Schedule 1 to the Bill.

12. Under section 18 of the Superannuation Act 1965 an allowance may be granted to a person who is injured or contracts a disease in the discharge of duty. Section 18(3) puts a limit on that allowance when taken with that person's ordinary pension (if any) and the annuity value of any lump sum under the 1965 Act. If part of the lump sum has been used to provide a widow's or children's pension that will be reflected in working out the limit.

Section 18 is applied in the case of the court officers in paragraph 1 of Schedule 1 to the Bill by paragraph 26(1) of Schedule 2 to the Superannuation (Amendment) Act 1965, and in the case of the Judge Advocate General by section 34(4)(*a*) of the Courts-Martial (Appeals) Act 1951.

Section 18(3) does not fit either case for two reasons. First, if the judicial officer does get a lump sum it will almost certainly be under the Administration of Justice (Pensions) Act 1950, and not under the Superannuation Act 1965. Secondly, if the officer does get a lump sum under the 1950 Act and part is used to provide a widow's or children's pension, that should be reflected in working out the limit in section 18(3).

In the case of the court officers in paragraph 1 of Schedule 1 to the Bill paragraph 26(2) of Schedule 2 to the Superannuation (Amendment) Act 1965 modifies section 18(3) so as to make it fit in the way described above. There is however no counterpart to paragraph 26(2) in section 34 of the Courts-Martial (Appeals) Act 1951.

In paragraph 26(2) of Schedule 2 to the Superannuation (Amendment) Act 1965 the reference to section 8 of the 1950 Act should now include a reference to the amending section 10 of the Administration of Justice Act 1973, and the corrections which should be made in section 34 of the 1951 Act should follow suit.

There is one further minor defect in section 18(3). The lump sums of which it takes account do not include lump sums payable, in unusual circumstances, under section 2, 8(2) or 9 of the Superannuation Act 1965.

We recommend that section 34(4)(*a*) of the Courts-Martial (Appeals) Act 1951 should be amended so as to make the same adjustments as those in paragraph 26(2) of Schedule 2 to the Superannuation (Amendment) Act 1965. And the further minor modification by reference to the Administration of Justice Act 1973 and lump sums under the 1965 Act should be made in both cases. Effect is given to these recommendations in paragraphs 15 and 16 of Schedule 1 to the Bill.

13. For the purpose of effecting economy in national expenditure temporary abatements of salary have on occasion been made by the Minister for the Civil Service and the Lord Chancellor. Under section 81(1) of the Superannuation Act 1965 such an abatement made by the Minister for the Civil Service is to be disregarded for pension purposes; this applies to all the court officers in paragraph 1 of Schedule 1 to the Bill. Section 1(2) of the Superannuation Act 1950 does the same for an abatement of salaries made by the Lord Chancellor; this applies only to Supreme Court officers in paragraph 1 of Schedule 1 to the Bill, and not to county court officers. There seems no reason why the two categories of officers should be treated differently or why these provisions should depend on which Minister is responsible for the abatement of salary.

If section 81(1) applied to a direction by any Minister section 1(2) of the Superannuation Act 1950 would become unnecessary.

We recommend that section 81(1) of the 1965 Act should apply to any abatement made for the purpose of effecting economy in national expenditure, regardless of the Minister by whom the direction is given, and that section 1(2) of the Superannuation Act 1950 should not be re-enacted. Effect is given to the recommendation in paragraph 18 of Schedule 1 to the Bill, and by the repeals in Schedule 4 to the Bill.

14. The office of registrar of the district registry of the High Court at Liverpool or Manchester is pensionable under section 4(2) and Schedule 1 of the County Courts Act 1924. But that office is now invariably held by a county court registrar, and his salary as an officer of the High Court is, under paragraph 4 of Part II of Schedule 1 to the County Courts Act 1934, deemed for pension purposes to be part of his salary as an officer of the county court. Accordingly the provision made by the 1924 Act is unnecessary.

We recommend that section 4(2) and Schedule 1 of the 1924 Act should not be re-enacted, and should be repealed except for persons who have already retired. Effect is given to this recommendation by the repeals in Schedule 4 to the Bill subject to the saving for officers now retired in paragraph 10(1) of Schedule 2 to the Bill.

15. Section 10 of the Administration of Justice (Pensions) Act 1950 and sections 40 and 41 of the Superannuation Act 1965 deal with the pension rights of the court officers within paragraph 1 of Schedule 1 to the Bill who transfer to employment outside the civil service which is approved for the purposes of those sections.

In practice those sections have never been, and never will be, used for these court officers. Provision is made elsewhere for pension rights on transfer from one judicial office to another, and that includes these court offices.

We recommend that section 10 of the Administration of Justice (Pensions) Act 1950 and sections 40 and 41 of the Superannuation Act 1965 should not be re-enacted, Effect is given to this recommendation by the repeals in Schedule 4 to the Bill.

16. Sections 11 and 79 of the Superannuation Act 1965 apply to the court officers in Schedule 1 to the Bill. Section 11 authorises the reduction of a pension or lump sum under the Act in case of his "defaults or demerit". Section 79 states that no person has an absolute right to any such pension or lump sum. All the provisions under which these benefits may be granted are however permissive and do not create any right. Section 79 also saves the power to dismiss without compensation.

Both these sections seem unnecessary and inappropriate, and there is nothing comparable for the other officers with whom the Bill deals.

We recommend that sections 11 and 79 of the Superannuation Act 1965 should not be re-enacted. Effect is given to this recommendation by the repeals in Schedule 4 to the Bill.

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