



Legal update — July 2017

Employment and pensions Supreme Court rules same sex survivors' pensions benefits must not be restricted

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The Supreme Court has decided that UK law unlawfully discriminates against survivors of same sex couples as it permits pension schemes to restrict their benefits to service accrued post December 2005.

Background

The UK was required to transpose the Equal Treatment Framework Directive (which established a general framework against discrimination on a number of grounds, including sexual orientation), by 2 December 2003. Whilst the UK did comply with this requirement, UK law did not introduce the right for same sex couples to enter into civil partnerships until 5 December 2005. The relevant UK legislation, the Equality Act, permits pension schemes to restrict the benefits payable to survivors of same sex couples to service accrued from this date.

Mr Walker joined the Innospec Pension Scheme on 2 January 1980 and was a member until his retirement in 2003. He and his partner entered into a civil partnership on 23 January 2006 and subsequently married. The Innospec Scheme made use of the exemption under the Equality Act and restricted same sex survivors' pension benefits to post 5 December 2005 service only.

Mr Walker first raised a claim in the Employment Tribunal that the exemption was lawful in November 2011. The Employment Tribunal agreed that it was unlawful as it amounted to direct and indirect discrimination on the grounds of sexual orientation which could not be justified. Innospec appealed and the ET's decision was rejected by the Employment Appeal Tribunal. Mr Walker also lost his subsequent appeal to the Court of Appeal; the judgment relied on the EU principles of "no retroactivity" and "future effects" which meant the Framework Directive should not have retrospective effect.

Supreme Court decision

In the final twist of this long running case, the Supreme Court has now overturned the Court of Appeal decision

and ruled that the exemption is unlawful as it is discriminatory on the grounds of sexual orientation and cannot be reconciled with the "plain effect" of the Framework Directive. The judgment held that as non-discrimination on the grounds of sexual orientation is now a principle of EU law, it follows that any contemporary denial to Mr Walker's husband of a spouse's pension is incompatible with the Directive.



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Commentary

This is a great result for Mr Walker and removes what many perceive to be an unfair barrier to equality. His husband is now entitled to a full spouse's pension of circa £45,000 per year rather than £1,000 per year, based on all Mr Walker's service in the scheme, in the event that Mr Walker dies before him. The Department for Work and Pensions, which opposed Mr Walker's case alongside his employer, estimates that the costs involved in requiring all pension schemes to equalise entitlements retrospectively would be £100 million for private sector schemes and a further £20 million for public sector schemes.

Pension schemes will need to review their rules to ensure they are in line with this judgment and calculate same sex survivors' benefits based on all service rather than only post December 2005 service. In many cases, this is unlikely to have a material funding implication for schemes. However, trustees should be prepared for claims from members whose benefits have been restricted in line with the exemption in the Equality Act,

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many of whom could stand to benefit significantly from this ruling.

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