

UK: PENSIONS UPDATE

SUPREME COURT HANDS DOWN JUDGMENT IN SAME SEX SURVIVOR BENEFITS CASE

In this special edition of the UK: Pensions Update we take a look at the Supreme Court's decision in the case of *Walker v Innospec*¹, which was handed down yesterday.

In a landmark decision, the Supreme Court has unanimously allowed the member's appeal; declaring that: (i) UK legislation providing that it is not unlawful for there to be discrimination because of sexual orientation in respect of access to benefits relating to service prior to 5 December 2005 is incompatible with EU law and must be disapplied; and (ii) the member's husband is entitled to a spouse's pension on death, provided they remain married.

BACKGROUND

The Equal Treatment Directive (2000/78/EC) (the "Framework Directive") prohibits differences of treatment because of sexual orientation in occupational pension schemes.

UK legislation provides that same sex partners (both civil partners and same sex spouses) must be provided with survivor benefits in the same way as opposite sex spouses for benefits which relate to service completed on or after 5 December 2005 (and for contracted-out benefits from 6 April 1988). This 2005 restriction is contained in paragraph 18 of Schedule 9 to the Equality Act 2010.

Mr Walker had worked for Innospec from 1980 to 2003, when he retired. He entered into a civil partnership with his partner in 2006 (and they subsequently married). In 2006, Mr Walker asked Innospec to clarify the amount of survivor's pension payable on his death. As all of Mr Walker's pensionable service pre-dated 5 December 2005, he was told that his civil partner would only receive a very small pension based on his contracted-out rights.

Mr Walker brought a complaint to the Employment Tribunal, who upheld his claim on the basis that the 2005 exception contravened the Framework Directive. Innospec then appealed to the Employment Appeals Tribunal and the appeal was upheld.

Mr Walker appealed to the Court of Appeal and his appeal was dismissed on the basis that the principle of "no retroactivity" means that conduct which was lawful when it occurred cannot retroactively become unlawful. Mr Walker had retired before the Framework Directive came into force and the entirety of Mr Walker's service was completed before 5 December 2005. As a result, his situation was "permanently fixed" before the change in law was introduced.

Mr Walker appealed to the Supreme Court.

SUPREME COURT'S DECISION

The Supreme Court has unanimously allowed Mr Walker's appeal and made a declaration that: (i) paragraph 18 of Schedule 9 to the Equality Act 2010 is incompatible with EU law and must be disapplied; and (ii) Mr Walker's husband is entitled to a spouse's pension on death, provided they remain married, calculated on the basis of all the years of Mr Walker's service with Innospec.

Key to reaching this decision was the following:

- Although EU law does not require the recognition of same sex partnerships, the European Court of Justice (CJEU) has held in previous cases that if a status equivalent to marriage is available under national law, it is directly discriminatory contrary to the Framework Directive for an employer to treat a same sex partner

who is in such a partnership less favourably than an opposite sex spouse.

- The general rule is that legislative changes apply prospectively (unless a contrary intention can be found). This comes from a need to ensure 'legal certainty' and to protect the legitimate expectations of those who have relied on the law as it previously stood.
- It is therefore important to determine the point at which a legal situation has become "permanently fixed". However, this is not easy to identify when dealing with pension rights, which may have accumulated over many years. The Court of Appeal had wrongly concluded that entitlement to a survivor's pension is permanently fixed as it is earned.
- Two recent decisions of the CJEU concerning the equal treatment of same sex partners to survivor's pensions made clear that, unless there is evidence that there would be unacceptable economic or social consequences of giving effect to Mr Walker's entitlement to a survivor's pension for his husband, there is no reason that he should be subjected to unequal treatment. The point of unequal treatment occurs at the time the pension falls to be paid.

WHAT DOES THIS MEAN FOR PENSION SCHEMES AND EMPLOYERS?

It is clear from the Supreme Court's judgment that occupational pension schemes should no longer treat same sex spouses differently from opposite sex spouses.

The judgment and its conclusions were delivered specifically in the context of same sex marriages, although some of the comments made could be interpreted to equally apply in the case of civil partnerships. Schemes (and employers) which currently restrict the provision of survivor benefits for civil partners to post December 2005 service should consider whether this restriction continues to validly apply in light of the Supreme Court's judgment.

It will also be interesting to see what impact this has on the treatment of survivor benefits in public sector schemes. In 2014, the Government carried out a review of the differences in survivor benefits provided by schemes in order to consider whether to change the law to eliminate or reduce the difference in treatment. The Government proposed no immediate change at that time, noting that to eliminate the differences in treatment across public sector schemes would cost around £2.9 billion.

ⁱ *Walker v Innospec Limited and others* [2017] UKSC 47.

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