

SUMMARY

2017/46 Supreme Court upholds right to equal survivors' pensions for same-sex partners (UK)

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Background

The EU Framework Directive (2000/78/EC) established a framework against discrimination, including discrimination on the basis of sexual orientation.

Civil partnerships became possible in the UK from 5 December 2005, the date the Civil Partnership Act 2004 came into force.

As it was previously lawful to discriminate against same-sex couples, paragraph 18 of schedule 9 to the Equality Act contains an exemption for pension benefits which accrued before that

date or are payable in respect of services before that date. Under that exemption, service before 5 December 2005 can be disregarded when calculating a survivor's pension which a civil partner or same-sex spouse will receive on the death of a scheme member.

This case involved a challenge to the application of this exemption.

Facts

The claimant was Mr Walker, who is gay and has lived with his male partner since 1993. They entered into a civil partnership in January 2006 and later converted their civil partnership into a marriage, after the coming into force of the Marriage (Same Sex Couples) Act 2013. Mr Walker had been employed by Innospec Ltd from 1980 until he retired in 2003. Throughout his employment, he had contributed to the company's occupational pension scheme.

In 2006, Mr Walker asked Innospec to confirm that, in the event of his death, it would pay his civil partner the spouse's pension that the scheme provided for. Innospec refused, on the basis that the whole of Mr Walker's service predated 5 December 2005. In taking this approach, Innospec was relying on an exception in paragraph 18 of Schedule 9 to the Equality Act to the general anti-discrimination rule that applies to pension schemes. Under this exception, it is lawful to discriminate against an employee who is in a civil partnership or same-sex marriage by preventing or restricting access to a benefit the right to which accrued before 5 December 2005, or which is payable in respect of periods of service before that date. Because Mr Walker's service with Innospec was all before that date, the company's position was that this exception applied and a substantially lower survivor's pension would be payable to Mr Walker's husband on the former's death.

Mr Walker brought a claim for sexual orientation discrimination. The financial stakes for him were high. Under Innospec's approach, his husband would be entitled on his death to only a statutory minimum pension of around £1,000 a year. If he had been married to a woman, she would have stood to receive an annual spouse's pension of over £45,000.

Mr Walker's claim was initially upheld by the Employment Tribunal, which found that Innospec's approach was discriminatory. However, this was overturned on Innospec's appeal to the Employment Appeal Tribunal. Mr Walker then appealed to the Court of Appeal, which held that Mr Walker's case must be assessed on the basis of the EU law in force at the time of his employment.

The Court of Appeal applied its interpretation of two EU principles in coming to this decision: the principle of 'no retroactivity', and the 'future effects' principle. The principle of no retroactivity, it held, meant that conduct that was lawful when it occurred could not

retroactively become unlawful. The future effects principle, it held, was that amending legislation applies to the future effects of a situation which arose under the law as it stood before amendment. Both of these principles are subject to a contrary intention being found in the law, and are aimed at protecting the legitimate expectation of those who relied on the previous law as it stood and at providing legal certainty.

The Court of Appeal therefore concluded that the exemption in Schedule 9 to the Equality Act was not inconsistent with the Framework Directive as it would not have retroactive effect but would apply only to the future effects of the situation. It held that a survivor's pension was permanently fixed at the time the service it was based on accrued, which is to say in Mr Walker's case before 5 December 2005.

Mr Walker made a final appeal to the Supreme Court.

Judgment

The Supreme Court unanimously allowed the appeal and made a declaration that the exception in paragraph 18 of Schedule 9 to the Equality Act is incompatible with EU law and must be disapplied.

They held that the survivor's pension was not fixed at the time of the service to which it related, but rather should be assessed at the time at which it becomes payable, i.e. on the death of the relevant scheme member. To deny a full survivor's pension at that time would in this case amount to direct sexual orientation discrimination.

The five judges were split in how they arrived at this result. The reasoning of the three majority judges was as follows:

In applying the 'no retroactivity' principle, the Court of Appeal had been wrongly influenced by a string of judgments of the ECJ dealing with pensions equality as between men and women (starting with *Barber – v – Guardian Royal Exchange Assurance Group* [1990] IRLR 240). While the ECJ had limited the retrospective effect of its specific judgments in those cases, the Supreme Court said this was not relevant to the temporal application of EU legislation generally, such as the Framework Directive. The Supreme Court stated that it was "vital to keep the two concepts distinct". Limitations on the temporal application of the judgments in question had been applied in special circumstances, and based on parties' legitimate expectations.

The point of unequal treatment occurs at the time that the pension falls to be paid, and the

period during which Mr Walker acquired that entitlement was immaterial. The financing of Innospec's pension scheme should have taken into account a possible change in Mr Walker's marital status, and he could not have been denied entitlement to a spouse's pension if he married a woman after he retired. His marriage to his husband was legal, so his entitlement to a spouse's pension was well-founded. At the point of payment, i.e. when Mr Walker dies, a refusal to pay an equal survivor's pension to his husband based on his gender would constitute discrimination.

There were two ECJ judgments which put the validity of Mr Walker's claim beyond doubt – Maruko [2008] IRLR 450 and Römer (Case C-147/08). The ECJ in these cases specifically decided that it was contrary to the Framework Directive for same-sex civil partners not to have the same right to survivor's benefit under an occupational pension scheme as surviving spouses in a similar position. It was clear from these judgments that, unless evidence established 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 was no reason he should be subjected to unequal treatment.

They also considered Parris – v – Trinity College Dublin and others (Case C-443/15), another ECJ case in which a man sought to ensure his male partner would be entitled to a survivor's pension. Dr Parris who worked in Dublin had entered into a civil partnership in the UK on 21 April 2009, his 63rd birthday. He took early retirement the following year and started drawing his pension. His civil partnership was not recognised under Irish law until January 2011. The pension scheme provided that a member's spouse or civil partner had a right to a survivor's pension but only if the marriage or civil partnership was entered into before the member reached the age of 60. The court held that there was no discrimination in this case because the condition applied equally to both same-sex and opposite-sex unions. EU law does not require Ireland to provide for marriage or civil partnership for same-sex couples, albeit that there must be no discrimination once such provision is in place. Furthermore, Ireland was not required to give retrospective effect to its Civil Partnership Act, nor implement transitional provisions for those who were already 60 when the Act came into force. The facts of Parris differ from those of this case because Mr Walker's partner would have had a right to a survivor's pension if he had been female, unlike Dr Parris's partner.

The two minority judges agreed the appeal should be allowed on a more limited basis, essentially the second point outlined above. They considered that the question of who qualified as Mr Walker's 'spouse' would fall to be answered at the time the pension is due to be paid, when it would be unlawful under the Framework Directive to discriminate between different-sex and same-sex marriages.

Commentary

The impact of this decision is that Mr Walker's husband – provided they remain married – will be entitled on Mr Walker's death to a full survivor's pension of £45,000 per annum instead of around £1,000 per annum. This result has unsurprisingly been hailed as a landmark victory for LGBT rights, not least by the human rights and civil liberties organisation Liberty which supported and acted for Mr Walker in his legal proceedings. Clearly the Supreme Court's judgment will pave the way for claims by other couples in a similar position to Mr Walker and his husband.

The restrictions on backdating in Schedule 9 to the Equality Act were originally enacted in 2005, the year after the UK adopted civil partnerships, by amending the Sexual Orientation Regulations that were then in force. Only three years later, the ECJ's ruling in Maruko cast serious doubt as to whether the UK exception was consistent with the requirements of EU law, but it has taken many more years for this finally to be confirmed in Mr Walker's case. This judgment provides some long-awaited certainty in this regard.

Trustees of occupational pension schemes that restrict the survivor pensions payable to same-sex civil partners and spouses in line with the exemption will now need to take steps to amend their schemes to provide pensions to same-sex civil partners and spouses with equal survivors' benefits. It has been estimated that the potential financial repercussions for such schemes could be around £100 million for private sector schemes and much more in the public sector.

The Supreme Court's judgment clearly highlights the current supremacy of EU law in this respect, as a provision of domestic statute was held to be inconsistent with the UK's obligations contained in the underlying European directive. Consequently, there is an intriguing question around how the UK Government will decide to proceed after Brexit. If and when the UK ultimately leaves the EU – depending on the agreed terms of departure – it would theoretically be possible for the UK to legislate in a way that falls short of the requirements of the Framework Directive in relation to same-sex survivors' pensions. On this, it is worth noting that Mr Walker also brought an alternative argument that paragraph 18 of Schedule 9 of the Equality Act is incompatible with Article 14 of the European Convention on Human Rights, prohibition of discrimination. However, the Supreme Court did not find it necessary to deal with this argument given that he had succeeded in his appeal on other grounds, so this would potentially be an alternative route to the same outcome.

Comment from other jurisdiction

The Netherlands (Peter Vas Nunes, BarentsKrans): It is hard to disagree with this judgment. The central element in its reasoning seems to be that “the point of unequal treatment occurs

at the time that the pension falls to be paid”. Not having read the full judgment, I do not know whether this statement applies only to survivors’ benefits, which were at issue in this case, or to all types of pension. I can imagine that there could be situations where it would be hard on the pension provider not to take prior contributions into account. Suppose, for example, that a defined contribution pension scheme (without employee contributions) was only available to healthy employees (i.e. it excluded disabled employees) and that the law allowed this until a certain date. Would a disabled employee be able to claim full retirement benefits upon reaching normal retirement age despite not having contributed in the period before said date?

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