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Pensions

Walker v Innospec Limited – Supreme Court rules same sex survivors' pensions cannot be restricted to members' post-2005 service

Briefing

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Introduction

In a landmark ruling handed down on *July 12, 2017*, the Supreme Court (SC) has allowed an appeal by Mr Walker against his employer, Innospec Limited, ruling that survivor benefits for same sex partners cannot be restricted to those calculated only on the basis of pensionable service after *December 5, 2005*, (the date when the Civil Partnership Act 2004 came into force). The SC held that in the event of Mr Walker's death, his surviving husband would be entitled to a pension based on the entirety of the member's service with the employer, not merely that service which occurred after same-sex unions were recognised under UK law.

This means that occupational pension schemes must now provide survivors of same sex marriages and civil partnerships with the same level of benefits as those awarded to survivors of opposite sex marriages.

Background

In November 2012, an employment tribunal (ET) decision cast doubt on the Government's implementation of the Equal Treatment Framework Directive (the Directive) through the Equality Act 2010 (EqA 2010).

Mr Walker, who retired in 2003, claimed that Innospec had discriminated against him as the employer's scheme provided a spouse's pension to a member's civil partner, but only in relation to service after December 5, 2005.

The employer relied on the exemption in paragraph 18 of Schedule 9 to the EqA 2010 (the Exemption), under which civil partners must be treated in the same way as spouses on the death of a scheme member, but only in respect of pensionable service completed after December 5, 2005. The ET ruled that the employer had directly discriminated against Mr Walker in refusing to provide a spouse's pension for service accrued before that date, which was in contravention of the Directive. Further, the Exemption should be interpreted so as to be compatible with the Directive, and it was therefore unlawful for pension schemes to provide anything other than a full survivor's pension for civil partners.

However, this decision was overturned on appeal, with the Employment Appeal Tribunal (EAT) deciding that the Exemption was compatible with the Directive. The EAT considered that it could not be asked to "legislate rather than interpret" so as to conclude that it was incompatible. To do so would be "diametrically opposed to the thrust of the legislation in this particular respect and to the apparent intention of Parliament".

Mr Walker's appeal was then dismissed in the Court of Appeal (CA) together with that of Mr O'Brien QC, broadly on the basis that there was no retrospective entitlement to pension rights arising as a result in changes to EU law. The CA concluded that Mr Walker's entitlement to a future pension was established (or "permanently fixed") as he earned it. It followed that as the conduct was not unlawful when it occurred, it could not be made retrospectively so in future. Mr O'Brien was appealing the EAT's decision that the calculation of his pension should take into account only that part of his service which occurred after the transposition into domestic law of the Part Time Workers Directive on April 7, 2000. The O'Brien appeal was also unsuccessful in the CA.

However, the SC held that

- The partial exemption to the requirement to equalise survivor benefits set out in the EqA 2010 is incompatible with EU law.
- Provided they remain married at the time of Mr Walker's death, Mr Walker's husband would be entitled to a survivor's pension calculated on the basis of the entire pensionable service, not merely that accrued post-December 5, 2005.

The SC disagreed with the CA judgment and held that the right to an equal survivor's pension was not "permanently fixed" as the pensionable service it would be based on accrued over time. Instead, it should be assessed at the point that it becomes payable. It therefore followed that, provided Mr Walker and his husband remained married, and his husband does not predecease him, a full spouse's pension should be paid, calculated on the basis of the entirety of Mr Walker's service with Innospec.

At the point in time when the pension became payable, "denial of a pension would amount to discrimination on the ground of sexual orientation". The SC ruled that the CA had been wrong to conclude that only service after the Directive had been implemented should be taken into account for pension calculation purposes, confirming that Mr Walker had an "entitlement to a pension calculated on the basis of his years of service before the Directive was transposed".

In *O'Brien v Ministry of Justice*, the SC unanimously decided to refer the question of whether the Part-Time Workers Directive requires periods of service accrued before the deadline for transposing that directive to be taken into account when calculating the pension of a part-time judge. The difference between the two periods of service is over 22 years. The SC referred the *O'Brien* case to the ECJ.

Comment

In practice, many schemes have granted civil partners the same rights to receive a full spouse's pension as married opposite-sex partners. However, the decision will have an immediate impact on schemes that have not fully equalised scheme survivor benefits for same-sex partners (as opposed to contracted-out benefits, where the civil partners' and same sex spouses' entitlement to post-April 6, 1988 accrual cannot be restricted).

Where schemes have relied on the Exemption and have not equalised scheme benefits, immediate action should be taken to revise both the scheme rules and communications to members to reflect the SC ruling. From a practical point of view, this may not make a significant difference to the funding position of a scheme, as the actuary is likely to have assumed that a proportion of the members are "married" for the purposes of the valuation. The decision will have an appreciable impact at individual level though, as a same sex survivor in receipt of a restricted spouse's pension may now be entitled to a larger benefit based on the deceased partner's entire service record and schemes may wish to revisit death benefits previously paid to same-sex survivors which were based on post-2005 service only.

The decision may also be significant for public-sector pension schemes. A report from the DWP published in 2014 concluded that equalisation between the sexes, as well as that based on sexual orientation, could cost them around £2.9 billion.

However, it is difficult in some respects to reconcile the SC decision in Walker with its decision in *O'Brien* and the *Barber* decision of 1990. The "no retroactivity" principle has until now applied to EU legislation and the SC in *Walker* acknowledged the difficulty of identifying the time at which the pension entitlement had become fixed – that is, was it at the time of the member's retirement, or at the (future) date of his death when a spouse's pension would be payable? Given the tenacity of DWP's arguments during the life of the case, it may also raise interesting questions as to whether this judgment would be revisited in a post-Brexit world.

View the judgment.

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