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Equal Pension Rights for Same-Sex Couples

A landmark Supreme Court ruling extends same-sex survivors' pension benefits to pre 2005 accrual.

The unanimous judgment will benefit thousands of couples and may impose unexpected additional liabilities on defined benefit pension funds.

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Background

Since 5 December 2005, same-sex couples have been able to formalise their relationship as a civil partnership. This right continues to apply, although existing civil partners can now choose to instead convert their relationship into marriage.

The Marriages (Same Sex Couples) Act 2013 sought to place marriages for same-sex couples on an equal footing with those for opposite-sex couples. Generally, this aim was achieved although some differences still do remain. Until last week one such area concerned the statutory provision of survivors' benefits in occupational pension schemes.

While any lump sum rights had to be provided on the same basis as for opposite-sex spouses, the statutory pension rights for same-sex spouses mirrored the entitlement of surviving civil partners and thus only had to be provided for benefits accrued during pensionable service from 5 December 2005.

The Facts of the Case

Mr Walker started work for Innospec Ltd on 2 January 1980 and was a member of the defined benefit pension scheme until he took early retirement on 31 March 2003. He had lived with his male partner since 1993; they entered into a civil partnership on 23 January 2006 and subsequently married.

Shortly after the Civil Partnership Act 2004 came into force on 5 December 2005 Mr Walker asked Innospec to confirm they would, in the event of his death, pay a spouse's pension to his civil partner. They refused because his service pre-dated 5 December 2005. 2003 Regulations and subsequently the Equality Act 2010 provided a statutory exception to the non-discrimination rule implied into occupational pension schemes. Under this exception it is lawful to prevent or restrict access to benefits to a same-sex spouse where the right to the benefit accrued before 5 December 2005.

In Mr Walker's case the value of his "spouse's pension" was about £45,700 per annum. Mr Walker's spouse, as things stood, was only entitled to a pension of about £1,000 per annum (the statutory guaranteed minimum).

Mr Walker brought a discrimination claim in the Employment Tribunal in November 2011 which he won. Innospec appealed and the Employment Appeal Tribunal (EAT) reversed the decision. Mr Walker appealed and the Court of Appeal upheld the decision of the EAT. He then took his case to the Supreme Court.

European Union Non-Discrimination Law

EU law does not impose any requirement on member states to recognise same-sex partnerships. Under the EU's 2000 Framework Directive the prohibition of discrimination in the field of employment and occupation was extended to unequal treatment on the grounds of sexual orientation. The European Court of Justice in 2008 subsequently held, that where member states recognise same-sex partnerships, it is directly discriminatory contrary to the Framework Directive for an employer to treat a same-sex partner less favourably than an opposite-sex spouse.

The general rule, applicable to most legal systems, is that legislative changes apply prospectively and, unless a contrary intention appears, are presumed not to apply retrospectively. EU law is no different in this respect to UK law.

The Supreme Court Decision

Overturning the decision of the Court of Appeal, the Supreme Court found in Mr Walker's favour, holding the Equality Act 2010 was directly discriminatory and breaches the Framework Directive. Provided the couple remain married, and Mr Walker dies first, his husband will therefore be entitled to the same pension as a wife would be entitled to in a heterosexual marriage.

While acknowledging the no retroactivity principle, the Court drew a distinction between retroactive applications of the legislation to past situations and immediate applications to continuing situations. Whilst accepting the principles presented a challenge when you are dealing with an entitlement to an occupational pension, which has been accumulated over decades, the question was when did the right to survivor's benefits become "permanently fixed"?

The Court held the right became permanently fixed at the time the payment of the benefits to a surviving spouse would come due, in this case on the death of Mr Walker, and not at the time of accumulation of the benefits, or as the Court of Appeal had said, at the date of Mr Walker's retirement.

The Court said Mr Walker, during his working life, had paid precisely the same into the pension scheme as a heterosexual man would have paid and been paid the same salary as a heterosexual man. There was no reason for the company to anticipate that it would not become liable to pay a survivor's pension to his lawful spouse. The fact the spouse was male rather than female made no difference.

Where does this leave defined benefit pension schemes?

Many defined benefit pension schemes already do not discriminate between civil partners, same-sex spouses and opposite-sex spouses. For these schemes nothing has changed. However, where a scheme does contain provisions which place limits on civil partner's (or same-sex spouse's) benefits that do not apply to opposite-sex spouses; they need to immediately stop that practice.

Actions for Trustees

Check the Rules

Trustees should review the Rules of their pension scheme to ensure civil partners and same-sex spouses are treated the same as opposite-sex spouses on the death of the member. Definitions such as “marriage” “husband”, “wife”, “spouse”, “widow”, and “widower” may need amending. Legal advice may be necessary.

Member Communication

An all-member communication should be considered to let members know about the change (if any). Where appropriate, trustees should consider letting members know what proof would be needed to prove financial dependency on death.

The wording of member booklets should also be checked to ensure the correct position is being communicated to members.

Correcting Past Cases

There may also be a number of defined benefit schemes which now face backdated claims from same-sex spouses and civil partners. Trustees, working with their pensions administrators, should revisit any past cases where discrimination may have taken place with a view to considering whether any adjustment needs to be made.

Funding Impact

Trustees of pension schemes which relied on the Equality Act exemption should seek actuarial advice to understand the impact on scheme funding, which in most cases will be small.

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