

# Are we all equal?



## ✓ Sunniva Kolostyak explores whether different relationships are receiving the same treatment when it comes to receiving survivor's pensions benefits

There are differences in how survivor's benefits are treated in both public and private sector pension schemes, largely due to legislation playing catch-up with changing attitudes and legal relationships over the past 10-15 years.

DLA Piper partner, Matthew Swynnerton, who also heads the company's pensions practice, explains that a number of schemes have taken legal advice over the years.

"Over that period of time, there have been new categories and new forms of legal relationships formed, such as same-sex marriages and civil partnerships," he says, highlighting the Equality Act 2010.

However, he adds, the Equality Act provides an exemption, which states that it is not unlawful discrimination relating to sexual orientation to prevent or restrict the survivor from accessing the benefits before 5 December 2005, the date when the Civil Partnership Act 2014, came into effect. Swynnerton says: "Because the legislation enabled schemes to restrict benefits, many scheme rules reflected that."

The shift only came after the Supreme Court's landmark judgement in the *Walker v Innospec* case in July 2017, where it was ruled that same-sex couples that are married or in a civil-partnership should have the same pension benefits as heterosexual couples in the event of a scheme member's death, as an EU directive stated that civil partners and same-sex spouses require equal treatment.

The case terminated pension schemes' ability to restrict benefits

for same-sex partners to before the implementation of the Civil Partnership Act, and the government instructed public service pension schemes to amend their processes to enable the provision of equal benefits for civil partners and same-sex spouses in 2018.

Despite being incompatible with the EU directive, changes to legislation to remove the exemption from the Equality Act 2010 are still pending, but should be disapplied, according to Sackers partner Georgina Jones.

"The judgment places an onus on trustees to provide a full survivor's scheme pension for same-sex spouses and civil partners. If scheme rules do not already provide this (many schemes do), an amendment will be required," she says.

Swynnerton comments that the equality process, which should have been over by now, has seen a lack of movement from the industry. Only in early July this year did Pensions Minister Guy Opperman make a written statement to parliament stating that the government has agreed to implement changes that will provide greater pensions equality for same-sex couples following the *Walker* judgement.

Another Supreme Court ruling found that an unmarried woman was eligible to receive a survivor's pension from her deceased partner's pension. Denise Brewster lived with her opposite-sex partner for 10 years, up to December 2009. On Christmas Eve that year, the couple became engaged, however, two days later, her partner died. The ruling found it unlawful discrimination to require unmarried members to complete

a nomination form, according to Article 14 of the European Convention on Human Rights (ECHR).

The court stated that the procedural requirements for unmarried cohabitants were that they were "designed to ensure that the existence of a cohabiting relationship, equivalent to marriage or civil partnership was established in an objective manner and also that the wishes of the scheme member had been identified [through the execution of a valid nomination form]", Jones says.

"The decision is only direct application to public sector schemes as the ECHR only applies to the interpretation of UK legislation and the acts of public bodies. However, it is a useful prompt for trustees to check whether their scheme's rules contain any similar requirements, and to consider whether these are appropriate and necessary in light of the decision."

The next couple that trustees need to consider when looking at scheme regulations is co-habiting couples, but, Swynnerton notes, this is not a legally recognised couple yet, so co-habiting couples don't often have enforceable rights under a pension scheme. But members are able to nominate dependants.

"You do have a situation where a member dies after living with a long-term spouse, but have never formally married or entered civil partnership. It is normally possible for trustees to, at their discretion, pay benefits to that person, but that would ordinarily be a lump sum death benefit, not a spouse's pension."

Opening up regulation for different relationships also makes it harder for trustees to assess the nature of relationships, as people co-habit in a number of different ways.

Whether a more open regulation is the future for all schemes is unclear, but for the time being, schemes widening the definition of 'spouse' remains unusual.

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