

Supreme court decision on survivors' benefits

➤ **Matthew Swynnerton looks at the Supreme Court's recent decision about benefits payable to civil partners and same sex spouses**

The Equality Act 2010 contains an exemption which provides that it is not unlawful discrimination relating to sexual orientation to prevent or restrict a person who is not married to a person of the opposite sex from accessing a benefit that is payable in respect of periods of service before 5 December 2005. Some pension scheme rules mirror this exemption and limit pensions payable to surviving civil partners and same sex spouses to the member's period of service on and after 5 December 2005 (although contracted-out benefits have to be provided based on service on and after 6 April 1988).

In July the Supreme Court issued a judgment in the case of *Walker v Innospec* concluding that this exemption is incompatible with a European Directive that established a general framework for equal treatment in employment and occupation, and must be disapplied. This decision has implications for pension schemes that calculate benefits in line with the exemption.

Background to the case

All of the member's service in the relevant scheme was prior to 5 December 2005. The Employment Tribunal upheld the member's claim and concluded that the restriction of benefits was unlawful discrimination, but this decision was overturned by the Employment Appeal Tribunal. The Court of Appeal rejected the member's subsequent appeal. It concluded that the member's entitlement to benefit was earned incrementally during his period of service and must

be judged by reference to the EU law in force at the time of his service, and at that time the different treatment in relation to survivors' benefits was lawful. The Court of Appeal thought that it would go against the principle of EU law of 'no retroactivity' if conduct which was lawful when it occurred was retroactively to become unlawful. This meant that the requirement for equal treatment only applied to service after the directive came into force.

The Supreme Court's decision

The Supreme Court allowed the member's appeal against the Court of Appeal's decision. Its reasoning included that the Court of Appeal had been influenced by European case law that exceptionally limited the application of a judgment relating to equal pay for men and women to service on and after 17 May 1990, but those cases were about the application of a judgment whereas the current case is about the application of a directive. The Supreme Court thought that the relevant time was the point at which the pension falls to be paid, not the time of the service. It also stated that two previous decisions of the Court of Justice of the European Union (CJEU) about benefits for same sex partners made it clear that, unless evidence establishes that there would be unacceptable economic or social consequences of giving effect to the member's entitlement to a survivor's pension for his husband, at the time the pension would fall due, there is no reason that he should be subjected to unequal treatment as to the payment of that pension.

Whilst the Supreme Court unanimously allowed the member's appeal, two of the five judges preferred to leave the question of the relevance of the cases about equal pay to the application of the directive to be determined by the CJEU in a case that the Supreme Court has referred to it about the service to be taken into account when calculating pensions for part-time workers.

It is also worth noting that the judgment did not comment on the restriction of contracted-out rights to post-5 April 1988 service and that legislation remains in force.

Implications for schemes

It is possible that the CJEU may comment more generally on the way that directives apply to the calculation of pension benefits in the case referred to it about part-time workers. However, given that the Supreme Court was clear in its overall conclusion that the exemption in the Equality Act in relation to survivors' benefits should be disapplied, schemes which currently rely on the exemption to restrict survivors' benefits payable to civil partners and same sex spouses should act now to amend their rules for future cases and consider reviewing past cases where, in reliance on the exemption, pensions have been refused or restricted.



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