

Without prejudice

On the face of it, the Equality Act 2010 allows schemes to limit civil partners' pensions to benefits accrued since 5 December 2005. The lawfulness of this exemption has, however, been challenged by Liberty, the human rights organisation. It is supporting John Walker in a claim against his former employer, Innospec Limited, of unlawful sexual orientation discrimination. He has been successful at the Employment Tribunal, but the decision seems likely to be appealed.

The final outcome may result in all schemes having to give fully retrospective spouses' pensions to civil partners and, in the future, same sex married couples.

Mr Walker's claim

Mr Walker retired from Innospec in 2003 on an annual pension of about £85,000. He entered into a civil partnership in 2006. The scheme informed Mr Walker that, on his death, there would only be a contracted out pension payable to his civil partner of about £500 a year. In stark contrast, if Mr Walker was married to a woman at the date of his death then the spouse's pension would be £41,000 a year. Mr Walker claimed unlawful sexual orientation discrimination.

At first glance, Mr Walker's claim would seem doomed. The Equality Act 2010 contains an exemption (in Paragraph 18(1) of Schedule 9) allowing civil partners to be denied the equivalent of a spouse's pension in respect of accrual

Equality Act 2010 exemption

"A person does not contravene this Part of this Act, so far as relating to sexual orientation, by doing anything which prevents or restricts a person who is not married from having access to a benefit, facility or service ... the right to which accrued before 5 December 2005 ... or ... which is payable in respect of periods of service before that date."

Nick White and Daniel Gerring, Travers Smith, consider the consequences of the Walker case for retrospective equality in pensions payments



White civil partners...

before 5 December 2005 (Box). All of Mr Walker's pensionable service was before that date.

Mr Walker's challenge was based on the 2008 European Court decision in a German

case, *Maruko v Versorgungsanstalt der deutschen Bühnen*. Germany has a "life partnership" system that is similar to the UK's civil partnership regime except that life partners are also entitled to fully equal pension rights. Mr Maruko's life partner was a costume designer for a state theatre company. When he died in 2005, Mr Maruko was denied the pension to which a spouse would have been entitled. He claimed unlawful sexual orientation discrimination and the European Court agreed.

The Directive

Although *Maruko* was a German case, the UK government recognised its potential impact and made submissions. It argued that an introductory recital to the 2000 Equal Treatment Directive, Recital 22, allowed national legislation to restrict benefits (see Quote).

The European Court rejected this. It said that recitals are not part of the operative provisions of a Directive and Recital 22 was merely noting that "civil status" and the benefits flowing from this are for individual EU member states to decide. But it added that, in deciding those benefits, member states must comply with EU non-discrimination principles. Translating this into clearer English, it

was saying that states are free to decide:

- what civil status they allow same sex partners to attain and
- what benefits attach to particular civil statuses
- but that if they allow same sex couples to attain a status comparable to heterosexual marriage then they must also give them
- equality as regards the benefits that attach to that status.

In *Maruko*, the German national court had indicated that the German system of "life partnerships" was comparable to marriage, since both entitled partners to the same property rights. The position as regards UK civil partnerships is more or less the same, with the exception of the pensions exemption at issue in the *Walker* case. The tribunal in *Walker* therefore unsurprisingly found that civil partnership is comparable to marriage and so discrimination against civil partners is contrary to the Directive.

Direct effect?

The tribunal then needed to consider what the effect of the breach of the Directive was.

In *Maruko*, the employer was an "emanation of the state". Under European law, such bodies are bound directly by EU directives, which can be enforced directly against them. The consequence for the German state theatre company was that it was found liable to provide Mr Maruko with a full pension.

Employers who are not emanations of the state are not directly bound by Directives. So, while it appeared from the *Maruko* decision that the UK was probably in breach of its obligation to implement

This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

Equal Treatment Directive 2000 Recital 22

Court in 1990, says that national legislation should be interpreted so as to be compatible with EU directives.

This can be done even if the legislation's language is not ambiguous

and can, if necessary, involve departing substantially from the language used. The tribunal also noted, following an earlier House of Lords case (*Ghaidan v Godin-Mendoza* (2004)), that any words implied into legislation must be consistent with the scheme of the legislation, unless it is clearly intended not to conform with the Directive.

Applying these principles, the tribunal decided that the fundamental feature of the Equality Act is the prohibition of discrimination, there was no clear statutory language indicating that it was not intended to conform with the Directive and so it would not go against the grain to interpret the Equality Act as reflecting the requirements of the Directive.

While noting that it was not necessary to identify particular words to imply into the Act, the tribunal said that the words "or in a civil partnership" could be spliced between the words "who is not married" and "from having access to a benefit, facility or service" (Box) to give the exemption a meaning compatible with European law.

This effectively disapplies the Equality Act exemption and means, if the decision is upheld, that Mr Walker is entitled to a fully retrospective pension.



Gerring ...unequal pensions

In a nutshell

- the *Walker v Innospec* case centres on the issue of retrospective equality of pension for civil partners
- Mr Walker has been successful at the Employment Tribunal, but an appeal seems likely
- the final outcome may result in all schemes having to give fully retrospective spouses' pensions to civil partners and, in the future, same sex married couples.

the Directive and could be required to put that right, private sector employers such as Innospec thought that they need not take any action until the government resolved the matter.

Innospec argued that, whatever the Directive required the government to do, it (Innospec) was nevertheless entitled to rely on the clear exemption under UK law.

The tribunal, however, found that even though the Directive was not directly applicable, the Equality Act exemption could and should be interpreted to reflect the Directive's requirements.

The tribunal, having found discrimination, relied on a Court of Appeal decision (*HMRC v IDT Card Services Ireland Limited* (2006)), which considered the *Marleasing* principle. This principle, established by the European

Retrospective effect

Any argument that the Directive should not apply retrospectively was firmly dismissed by the European Court in *Maruko*. The tribunal in *Walker* took the same approach.

It was argued in both cases that a temporal limitation should apply, such as that imposed by the European Court in *Barber* (1990) in relation to sex discrimination. In *Barber*, the court had said that schemes only had to equalise benefits accrued since 17 May 1990, the date of its judgment, because the financial impact of retrospective equalisation would be too great. This line of argument was rejected in *Maruko*: the court ruled that there was no evidence of any such financial impact. In fact, no evidence was adduced but it seems unlikely that any persuasive evidence could have been presented. In cases of sexual orientation discrimination, as compared to sex discrimination, the numbers are much smaller.

The potential impact on UK schemes

Many defined benefit schemes (the government estimates two thirds) did not take advantage of the Equality Act exemption and gave civil partners rights to full spouses' pensions, on the basis that the actuarial cost of providing full equality was not great. But plenty did. Mr Walker's case shows how great the cost in respect of an individual could be. Employment Tribunal decisions are not binding, even in other tribunal cases, but this one seems likely to be appealed. It will be interesting to see how the Employment Appeal Tribunal, and perhaps higher courts, will deal with the conflict between European and UK laws. In any event, there is pressure on the government to amend UK law to require fully retrospective equality.

Finally, it is worth noting that, in its Marriage (Same Sex Couples) Bill, the government currently intends to offer the same, potentially ineffective, exemption for same sex spouses' pensions.

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