

WALKER V INNOSPEC – SAME-SEX PARTNERS WIN RIGHT TO EQUAL SURVIVORS' PENSION BENEFITS

BACKGROUND

John Walker started working for Innospec in 1980 and became a member of Innospec's pension scheme from the outset. He continued to accrue benefits under the scheme until his retirement in 2003. On 5 December 2005, Mr Walker applied to enter into a civil partnership. He later married his partner following the legalisation of same-sex marriages in 2013.

Following enquiries raised by Mr Walker, Innospec confirmed that, in the event of Mr Walker's death, the spouse's pension payable to his same-sex partner would be limited by reference to pensionable service Mr Walker had built up in the scheme after 5 December 2005. Innospec's position was based on an exception in the Equality Act 2010 which made the restriction of same-sex survivors' pensions in this manner lawful.

If Mr Walker was married to a woman, she would be entitled to a spouse's pension of approximately £45,700 per annum. Mr Walker's husband will be entitled to a pension relating to his contracted-out benefits amounting to approximately £1,000 per annum.

Mr Walker made a successful claim in the Employment Tribunal against Innospec in 2012 claiming discrimination contrary to EU law. The Employment Tribunal's decision was reversed by the Employment Appeal Tribunal in 2014. The Court of Appeal upheld the Employment Appeal Tribunal's decision in 2015 on the basis that, very broadly, EU law does not have retroactive effect. Our eBulletin on the Court of Appeal's decision can be found [here](#).

THE SUPREME COURT'S DECISION

The Supreme Court held that the exception in the Equality Act 2010 which made it lawful to restrict same-sex survivors' pension benefits by reference to pensionable service built up after 5 December 2005 was incompatible with EU law and should be disapplied. Provided he did not predecease Mr Walker and that they remained married at the time of Mr Walker's death, Mr Walker's husband was entitled to a spouse's pension calculated on the basis of all the years of Mr Walker's pensionable service with Innospec.

Contrary to the position adopted by the Court of Appeal, the Supreme Court held that whether or not discrimination occurs should be judged at the point when the survivors' pension becomes payable. An equal survivors' pension should be granted unless there would be unacceptable social or economic consequences of providing such a benefit at the point it is payable.

The comments made by two judges, Lord Carnwath and Lord Hughes, are of particular interest. They held that Mr Walker's appeal should be allowed on the basis that he had earned a right to a pension for his spouse. That right, and the possibility of a change in his marital status had always been part of his pension terms even before 2005 and should have been taken into account in the financing of the Innospec scheme at all times. The question of who qualified as Mr Walker's spouse fell to be answered at a date when it was unlawful under EU law to discriminate as between heterosexual and same-sex surviving partners. This did not amount to the creation of retrospective rights.

COMMENT

Schemes that already provide the same benefits for all periods of service in respect of all surviving partners will not be affected by this decision.

However, many schemes that limited the survivors' pension payable to same-sex partners in reliance of the exception under the Equality Act 2010 will need to take immediate action to equalise survivors' pension benefits. This will include a need to revisit any same-sex survivor pensions paid on an unequal basis after 5 December 2005.

O'BRIEN V MINISTRY OF JUSTICE

The Supreme Court's decision in *O'Brien v Ministry of Justice*, issued on the same date as the decision in *Walker* and by a bench comprised of the same judges that heard the *Walker* case, has resulted in a reference being made to the Court of Justice of the European Union (the CJEU) on the general principles of EU law governing the non-retroactivity of legislation. The CJEU's decision may shed further light on the retroactivity of EU law and limit the inferences that can be drawn from *Walker*.

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