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## “NO RETROACTIVITY” OF EU LAW: WALKER V INNOSPEC AND O'BRIEN V MINISTRY OF JUSTICE

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The Court of Appeal has dismissed two appeals, which were heard jointly, against decisions of the Employment Appeal Tribunal concerning discrimination against a part-time worker and a civil partner in relation to pension provision: *O'Brien v Ministry of Justice* and *Walker v Innospec*.

A significant point in the proceedings was the Court's application of the principle that new EU law will not have retroactive effect. The Court found that conduct relating to the provision of unequal pension benefits which was lawful when it occurred will not become unlawful under a later change in EU law even if benefits only become payable after the change in EU law.

### **WALKER V INNOSPEC: CIVIL PARTNERS**

Mr Walker accrued benefits under the Innospec pension scheme until he left Innospec's service and retired in 2003. He entered a civil partnership in 2006. He was informed that, in the event of his death, his civil partner would not be entitled to a survivor's pension based on his pensionable service up to 2003, save for a pension of £500 a year based on his contracted-out rights. If Mr Walker had a wife, by comparison, the survivor's pension payable to her if he died would be around £41,000 a year.

Mr Walker's complaint to the Employment Tribunal was that restricting the benefits payable to his surviving civil partner on his death in this way amounted to unlawful discrimination against him on the grounds of his sexual orientation in breach of an EU directive (the Equal Treatment Directive) prohibiting such discrimination in employment law in the EU (which had been implemented under UK law on 1 December 2003 (before the deadline for doing so of 2 December 2003)).

He argued that the exception in the Equality Act 2010 (the EA 2010) which provides that, in relation to non-contracted out benefits under occupational pension schemes, civil partners can lawfully be excluded from survivor benefits attributable to the deceased member's service before 5 December 2005 contravened the Equal Treatment Directive. Civil partnerships were introduced in the UK from 5 December 2005.

The Employment Tribunal agreed with him. The Employment Appeal Tribunal did not.

### **O'BRIEN V MINISTRY OF JUSTICE: PART-TIME WORKERS**

Mr O'Brien had worked as a part-time judge until his retirement in March 2005. The key issue was whether he was entitled to accrue pension benefits under the Judicial Pensions Scheme in relation to his part-time service before 7 April 2000 when the UK was required to implement an EU directive preventing less favourable treatment of part-time workers (the Part-Time Workers Directive).

The Employment Tribunal thought he was. The Employment Appeal Tribunal did not.

### **KEY POINTS FROM THE COURT OF APPEAL'S DECISION**

The Court dismissed the appeals and held as follows:

#### ◆ **No retroactivity principle**

Under the “no retroactivity” principle, EU legislation does not have retroactive effect, unless it is clear the legislator intended otherwise. Applying this principle, the Equal Treatment Directive and the Part-Time Workers Directive do not have retroactive effect.

#### ◆ **Future effects principle**

Under the “future effects” principle, a new EU law that is not intended to have retroactive effect will only apply to the effects of a situation created under the old law which were not “definitively established” when the EU law changed.

In the context of the calculation of pension benefits, the Court concluded that pension rights attributable to a particular period of service are acquired definitively during that period of service, and “definitively fixed” at the end of that period, notwithstanding that the pension might only fall to be paid at a later date.

The Court stressed that the principle of legal certainty under EU law required pension rights to be determined by reference to the EU rules that applied at the time of the period of service on the basis of which the rights were acquired.

◆ **Application of principles to Mr Walker**

The failure to provide for civil partner benefits to accrue in respect of Mr Walker, which was lawful before the Equal Treatment Directive had to be implemented under UK law, could not become retroactively unlawful.

Mr Walker's entitlement to a pension, including his right to have a survivor's pension paid after his death, was definitively established as he earned it and had to be judged by reference to the law in force at the time of his service, notwithstanding that any civil partner survivor's pension would only become payable after the implementation of the Equal Treatment Directive and the introduction of civil partnerships.

◆ **Application of principles to Mr O'Brien**

At the time of Mr O'Brien's service before 7 April 2000 (by when the Part-Time Workers Directive had to be implemented under UK law) as a part-time worker he acquired no pension rights, and could not do so retroactively.

◆ **Compatibility of the EA 2010 with EU law**

The Court also found the exclusion for pre-2005 service in the EA 2010 is not incompatible with the Equal Treatment Directive, and that, even if it were incompatible, the Court would not be permitted to interpret the EA 2010 as if it were compatible because doing so would "make a new law which Parliament has plainly rejected".

**COMMENTARY**

Those monitoring equality in relation to same sex spouse/civil partner survivor benefits will note that the validity of the exclusion for pre-2005 service in the EA 2010 has been upheld. This will be academic for the many schemes that already provide the same benefits for all service for surviving same sex spouses and civil partners as for opposite sex spouse survivors.

More generally, the decision offers some comfort that limitations and rules for pension benefits which are lawful at the time they are earned will not be retroactively made unlawful by new EU legislation, unless that is clearly what the legislators intend. From a legal perspective at least, those responsible for administering and funding UK pension schemes may welcome this certainty.

The Court's discussion of retroactivity may also be of wider interest to those concerned about the extent to which EU law might retrospectively affect other aspects of the UK pensions regime.

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