



12 July 2017

PRESS SUMMARY

Walker (Appellant) v Innospec Limited and others (Respondents) [2017] UKSC 47
On appeal from [2015] EWCA Civ 1000

JUSTICES: Lady Hale (Deputy President), Lord Kerr, Lord Reed, Lord Carnwath, Lord Hughes

BACKGROUND TO THE APPEAL

John Walker, the appellant in these proceedings worked for the respondent, Innospec Ltd, from 1980 until his retirement in 2003. Throughout that time he made regular contributions to the firm's occupational pension scheme. Mr Walker is gay and has lived with his male partner since 1993. They entered into a civil partnership on 23 January 2006 and are now married.

In 2006 Mr Walker asked Innospec to confirm that, in the event of his death, they would pay the spouse's pension, which the scheme provides for, to his civil partner. Innospec refused, because his service predated 5 December 2005, the date that civil partnerships were introduced in the UK, and any discriminatory treatment is therefore permitted under paragraph 18 of Schedule 9 to the Equality Act 2010. This provides that it is lawful to discriminate against an employee who is in a civil partnership or same-sex marriage by preventing or restricting them 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. If Mr Walker was married to a woman (or indeed if he married a woman in the future) she would be entitled on his death to a "spouse's pension" of about £45,700 per annum. As things stand at present, Mr Walker's husband will be entitled to a pension of about £1,000 per annum (the statutory guaranteed minimum).

Mr Walker's claim for discrimination was upheld by the Employment Tribunal, but Innospec's appeal to the Employment Appeals Tribunal was allowed, and Mr Walker's appeal to the Court of Appeal was dismissed. He now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows Mr Walker's appeal and makes a declaration that (i) paragraph 18 of Schedule 9 to the Equality Act 2010 is incompatible with EU law and must be disapplied and (ii) Mr Walker's husband is entitled on his death to a spouse's pension, provided they remain married. Lord Kerr (with whom Lady Hale and Lord Reed agree) gives the lead judgment. Lord Carnwath and Lord Hughes give a judgment concurring in part.

REASONS FOR THE JUDGMENT

EU Directive 2000/78/EC (the Framework Directive) requires member states to prohibit discrimination in the field of employment and occupation on various grounds including sexual orientation. The deadline for transposing the Directive into domestic law was 2 December 2003 and the UK did this within the deadline through legislation now incorporated into Part 5 of the Equality Act 2010 [17]. Parliament also, however, provided for the exception now contained in paragraph 18 of Schedule 9 to the 2010 Act restricting benefits payable in respect of periods of service before 5

December 2005. The essential question in this appeal is whether paragraph 18 of Schedule 9 is incompatible with the Framework Directive [20-21].

Although EU law does not impose any requirement on member states to recognise same-sex partnerships, the European Court of Justice (CJEU) has held that if a status equivalent to marriage is available under national law, it is directly discriminatory contrary to the Framework Directive for an employer to treat a same-sex partner who is in such a partnership less favourably than an opposite-sex spouse. In the UK, Parliament has chosen to recognise same-sex partnerships, first through the introduction of civil partnerships and subsequently through the recognition of same-sex marriage itself [17-19].

The general rule under EU law, as in most modern legal systems, is that legislative changes apply prospectively. The CJEU has developed two principles to establish the temporal application of EU legislation - the “no retroactivity” principle and the “future effects” principle [22-23]. These principles draw a distinction between the retroactive application of legislation to past situations (which is prohibited unless expressly provided for) and its immediate application to continuing situations (which is generally permitted). The relevant question is whether the legal situation has become “permanently fixed” [25]. The application of these principles presents a challenge when one is dealing with entitlement to an occupational retirement pension, the right to which may accumulate over decades and it may not be easy to identify the point at which it becomes “permanently fixed” [26].

The Court of Appeal, in dismissing Mr Walker’s appeal, wrongly concluded that entitlement to a survivor’s pension is “permanently fixed” at the date of retirement [43]. It was influenced in this view by a line of the CJEU’s case law exceptionally limiting the temporal application of one of its judgments relating to equal pay for men and women (the *Barber* line of case law). In the opinion of the majority of the Court, these cases are not relevant to the application of the Framework Directive in a case such as this. How the CJEU exceptionally applies a temporal limitation to one of its rulings has no inevitable bearing on the temporal application of legislation as a matter of principle [46].

In any event, two recent decisions of the Grand Chamber of the CJEU concerning the equal treatment rights of same-sex partners to survivor’s pensions put success for Mr Walker’s claim beyond doubt (Case C-267/06 *Maruko v Versorgungsanstalt der Deutschen Bühnen* and Case C-147/08 *Römer v Freie und Hansestadt Hamburg*) [46]. From these cases, it is clear that, unless evidence establishes that there would be unacceptable economic or social consequences of giving effect to Mr Walker’s entitlement to a survivor’s pension for his husband, at the time that this pension would fall due, there is no reason that he should be subjected to unequal treatment as to the payment of that pension [55]. Mr Walker’s husband, provided he does not predecease him, and that they remain married at the time of Mr Walker’s death, is therefore entitled under the Framework Directive to a spouse’s pension calculated on the basis of all the years of Mr Walker’s service with Innospec. On that account, paragraph 18 of Schedule 9, in so far as it authorises a restriction of payment of benefits based on periods of service before 5 December 2005, is incompatible with the Framework Directive and must be disapplied [77].

Lord Carnwath and Lord Hughes agree with the majority that Mr Walker’s appeal should be allowed, but on the more limited basis that the question of who qualified as his spouse fell to be determined after the Directive had come into force. They prefer to leave the broader question of whether the *Barber* line of case law is of any relevance to the application of the Framework Directive to be determined by the CJEU in *O’Brien v Ministry of Justice* [2017] UKSC 46, in which the Court has decided to refer to the CJEU a question relating to the pension entitlement of part-time workers [77-78].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>