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**Briefing** Pension rights of same sex partners: time for legislation

The much-anticipated decision of the Court of Appeal in *Walker v Innospec* concerns the legal validity of a legislative exception in the Equality Act 2010 to the requirement for equal treatment as between civil partners and same sex married couples and opposite sex married couples. In its judgment, the Court of Appeal confirmed the validity of the exception.

Summary

The much-anticipated decision of the Court of Appeal in *Walker v Innospec*<sup>1</sup> was handed down today. The case concerns the legal validity of a legislative exception in the Equality Act 2010 to the requirement for equal treatment as between civil partners and same sex married couples, on the one hand, and opposite sex married couples on the other. The exception is that equal treatment is not required in respect of pension rights relating to service before 5 December 2005.

In its judgment, the Court of Appeal confirmed the validity of the exception. The incomplete discrimination protection for pension rights (and other benefits related to service) of same sex couples therefore remains under UK legislation.

Both the Employment Appeal Tribunal and the Court of Appeal noted that the UK legislative exception is stated clearly. In the opinions of the Tribunal and of the Court, legislative intervention would be required in order to amend the position. This is a matter of legislative policy; judicial interpretation alone is insufficient.

A number of UK pension schemes have already fully equalised survivors' benefits for same sex and opposite sex couples in respect of all service. However, for those schemes that have provided only the legislative minimum by way of equalisation and retained a difference in treatment between the two groups for service before 5 December 2005, today's decision confirms the legality of the legislative exception meaning that this practice is not contrary to the Equality Act 2010. Nevertheless, there remains a risk that the legislation may be amended in the future in light of continuing Government review of this area.

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UK Government Review 2014

The UK Government had reviewed the equalisation of survivor benefits in 2014 (as part of the measures legalising same sex marriage). The review was in response to criticism of the fact that anti-discrimination protection for same sex married couples was aligned with that provided to civil partners, rather than aligned with the position of opposite sex married couples (i.e. that the exception for spouse's benefits relating to service before 5 December 2005 continues to apply).

The Government concluded in March 2015 that, while it believed that there should be equality of treatment between married same sex couples and civil partners on the one hand, and married opposite sex couples on the other, it would need to consider further the complex issues that arise from pension equalisation. This recent decision of the Court of Appeal may provide a further reason for legislative intervention in this area.

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## Legislative background

UK legislation has, since 1 December 2003, prohibited discrimination on grounds of sexual orientation (but not on grounds of married status). Legislation also introduced civil partnerships with effect from 5 December 2005 and (in England and Wales) same sex marriage from 13 March 2014. But insofar as survivors' benefits under pension schemes are concerned, the Equality Act 2010 includes an exception from the general prohibition on discrimination on the grounds of sexual orientation; the relevant legislation requires that registered civil partners and married same sex couples must be treated in the same way as opposite sex spouses in respect of death benefits only in relation to benefits that relate to service post-5 December 2005 (save as to contracted out benefits which must be equalised for service after 6 April 1988).

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## Facts

Mr Walker worked at Innospec Ltd for around 23 years, retiring in 2003. He receives an annual pension in the region of £85,000. The terms of the Innospec pension scheme rules would entitle an opposite sex spouse surviving Mr Walker to a spouse's pension of two-thirds of his pension.

Mr Walker entered into a civil partnership with his male partner on 23 January 2006 at one of the first opportunities available under UK law, and has since married his male partner. The pension scheme does not provide for a right to death benefits for the survivor of a same sex married couple in respect of service before 5 December 2005. In effect the scheme and the employer rely on the exception in the Equality Act 2010<sup>2</sup>. As a result Mr Walker's spouse's pension entitlement, should he outlive Mr Walker, is to a pension of only around £500 per year (presumably this is in relation to post-1988 GMP rights).

Mr Walker challenged the pension scheme rules and the UK legislation that seemingly does not prohibit the differential treatment between same sex and opposite sex couples. While he was successful in the Employment Tribunal, the Employment Appeal Tribunal upheld the company's appeal (see our [European Pensions Bulletin 24 March 2014](#)). Mr Walker appealed to the Court of Appeal.

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## Decision

In answering the questions before it, the Court of Appeal placed weight on the guiding principles of legal certainty and "no retroactivity" of legislation, i.e. that conduct which was lawful when it occurred cannot retroactively become unlawful.

The key question before the Court of Appeal was how to interpret the exception from sexual orientation discrimination for survivors' benefits in UK legislation.

The Court of Appeal held that the exception in the Equality Act 2010 is clear, and shows an intention on the part of the legislature to limit the scope of sexual orientation discrimination protection to benefits for service after 5 December 2005. The Court did not consider it possible to interpret the clear words of the provision otherwise, as to do so would stray into the realm of legislating.

The Court also considered whether the exception to the prohibition on sexual orientation discrimination in UK legislation should be disapplied for being in breach of a fundamental principle of EU law. However, the Court of Appeal followed jurisprudence of the European Court of Justice in finding that the right of equal treatment on the ground of sexual orientation did not become a fundamental principle of EU law until the implementation date of the underlying EU Directive (the Equal Treatment Framework<sup>3</sup> Directive) had expired (which occurred on 3 December 2003).

The principle of equal treatment between married same sex couples and opposite sex couples with a similar status was then required in the UK following the introduction of civil partnerships from 5 December 2005. The Court of Appeal held that the UK approach of limiting the impact of the prohibition on discrimination by reason of sexual orientation to service after 5 December 2005 was consistent with underlying decisions of the European Court of Justice on retrospective effect<sup>4</sup>, and is not incompatible with the Framework Directive. In the opinion of the Court of Appeal, to bring benefits in respect of service pre-5 December 2005 into the scope of anti-sexual orientation discrimination

legislation would give retroactive effect to the equal treatment legislation.

The Court of Appeal considered that it had sufficient clarity in relation to the points of law in question in the case, and so declined to make a reference to the European Court of Justice.

<sup>1</sup>*Walker v Innospec & Ors* [2015] EWCA Civ 1000

<sup>2</sup> Paragraph 18 of Schedule 9, Equality Act 2010

<sup>3</sup> 2000/78/EC

<sup>4</sup> *Ten Oever* (Case C-109/91); *Coloroll* (Case C-200/91)

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