

Beware the pensions undertow.

It's hard to keep your head above water these days, with all the moves afoot to change the law. Kite-flying politicians playing Jenga with pensions, wondering what would happen if they pull out this rule or tweak that one, are a constant worry. And if that wasn't enough, we have to cope with interventions from the courts as well.

Take 'retrospectivity', the principle fundamental to EU (and English) law which says that legislative changes do not apply retrospectively. In other words, an action which is lawful cannot later on be rendered unlawful.

The current plan to cut the Money Purchase Annual Allowance to £4000 in the next Finance Bill, which won't be an Act before late October, arguably breaches this principle, because the government insists it will be retrospective to 6 April 2017.

A recent Supreme Court case looked like another breach. Known as *Walker v Innospec*, it concerned spouse's benefits under a defined benefit pension scheme. Like many schemes, Innospec provides death benefits if members are married when they die. After civil partnership legislation was introduced in December 2005, civil partners were also covered, but crucially, only in respect of benefits accrued after that date.

Mr Walker took early retirement in 2003. He formed a civil partnership in 2006. Innospec told him at the time (and confirmed after he married his partner) that the only benefit payable on his death would be about £1,000, in connection with post-88 contracted-out service. Mr Walker commenced legal action on grounds of sexual orientation discrimination, asserting that the legislation did not comply with the EU Framework Directive. Had he married a woman, the spouse's pension would have been over £45,000.

At first he won his case, but then the Employment Appeal Tribunal and the Court of Appeal strongly backed Innospec's argument that they had acted in line with the law at the time, and their position should not be undone by subsequent changes in the law.

Mr Walker nevertheless persevered, and finally won. The Supreme Court noted that if Mr Walker had married a woman after he left pensionable service, and was still married to her when he died, the Innospec scheme rules would have entitled her to a spouse's pension - notwithstanding the fact that they were not married during the time that he was paying contributions to his pension fund.. Entitlement to a pension death benefit arises at the point it becomes payable, i.e. when the member dies. This is where the question of unequal treatment occurs.

It is against the law to discriminate on grounds of sexual orientation. In permitting this, paragraph 18 of Schedule 9 to the Equality Act 2010 fails to correctly implement the EU Directive. It will have to be amended, and in the meantime trustees should be reviewing their scheme rules. Additional funding required might be little or none, since the scheme actuary will have formed a view of the percentage of members who are likely to be married (heterosexually or otherwise).

While at first this looks like retrospectivity, in fact that rule only applies to situations which have ended. Taking away such benefits would be unlawful, but the entitlement to a spouse's pension is ongoing up to the point of the member's death.

It's a warning, though, that there could be hidden risks in pensions. On the surface, all might be clear, but there could be an undertow to catch you out.

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