PO-25756

# Ombudsman's Determination

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| Applicant | Mr Y |
| Scheme | Buck Consultants UK Pension Scheme |
| Respondents | The Trustees of the Buck Consultants UK Pension Scheme (the **Trustees**) |

## Outcome

1. I do not uphold Mr Y's complaint and no further action is required by the Trustees.

2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr Y has complained that the Trustees have declined to award him a pension on the death of his civil partner.

## Background information, including submissions from the parties

### Background

4. Mr Y's partner, Mr D, was a member of the Buck Consultants UK Pension Scheme. Mr D died in August 2017. Both he and Mr Y had retired in 1995. They became civil partners in January 2006, having cohabited since 1995.

5. The Trustees have declined to pay a spouse's pension because Mr Y was not married to Mr D at the date Mr D retired.

6. The Trustees have explained that the requirement to be married at the date of retirement was included in the Scheme's first definitive deed, dated 18 June 1987. They provided Mr Y with a copy of the 1987 rule. The Trustees said that the requirement was subsequently removed in respect of members leaving service on or after 1 April 1999; although this change was not incorporated into the Scheme rules until August 2014. The Scheme is currently governed by a trust deed and rules dated 21 August 2014.

7. Rule 5.2(b) provides:

> "If the Pensioner is survived by a Qualifying Spouse, then the Qualifying Spouse shall be entitled to a pension for life, starting on the day of the Pensioner's death …"

8. "Qualifying Spouse" is defined as:

> "in relation to any deceased Member, that Member's surviving legal spouse or Civil Partner,
>
> Except that
>
> (i) …
>
> (ii) where the spouse or Civil Partner at the date of death of a Member who left Pensionable Service before 1 April 1999 is not the person to whom such a Member was married or in a civil partnership with at the earlier date of ceasing Pensionable Service or retiring, such spouse or Civil Partner shall not be a Qualifying Spouse …"

9. Mr Y and his TPAS adviser asked the Trustees to consider *Walker v Innospec* [2017] UKSC 47. The Trustees confirmed that they had considered *Walker v Innospec*. They referred Mr Y to *David L Parris v Trinity College Dublin and others* ECJ case C-443/15. Summaries of the two judgments are provided in the appendix.

10. The Trustees said the employer, Buck Consultants Limited (**Buck**), had the discretion to agree to Mr Y receiving a benefit. They said they had made a formal request to Buck to consider this and had been told that it did not wish to exercise its discretion to pay Mr Y a benefit. Mr Y has not raised a formal complaint against his employer in this respect, however clearly it is a discretion rather than a mandatory requirement.

**Mr Y's position**

11. Mr Y submits:-

- The Trustees have refused to recognise 40 years of shared life, including 22 years of shared cohabitation. He and Mr D were in a legal union from 2006 to 2017. This is longer than some marriages last.
- The Trustees have insisted that a benefit is only payable to a survivor if the couple were legally married at the time of retirement.
- In 1995, it was impossible for a same-sex couple to marry until 2005. He does not understand how the Scheme rules could be amended from 1999 when civil partnerships did not become legal until 2005.
- His civil partnership was finalised in January 2006 but has not been accepted by the Trustees.

- They have not accepted that the *Walker v Innospec* case applies.
- His partner helped him with household expenses, such as insurance, heating and electricity, and council tax. His partner was also able to drive and had a car; whereas he is unable to drive due to macular eye disease. He is now reliant on public transport and taxis to get to hospital appointments, etc.
- The Trustees reclaimed Mr D's September 2017 pension payment, which had been paid in error. This is characteristic of an indifferent attitude.
- He is aware that another pension scheme administered by Buck does pay pensions to civil partners. His own pension scheme, the NHS Pension Scheme, would also pay a pension to a civil partner.

**The Trustees' position**

12. The Trustees submit:-

- They have no power to pay Mr Y a benefit under the Scheme rules.
- A spouse's pension would only be payable to a surviving spouse to whom Mr D was married, or in a civil partnership, at the date he retired.

## Adjudicator's Opinion

13. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees. The Adjudicator's findings are summarised below:-

- The situation appeared to be that the Scheme contained a requirement that a "Qualifying Spouse" be married to the member at the time of retirement. Mr Y had, quite rightly, pointed out that this was not possible for him and Mr D at the time of his retirement. In fact, it did not become possible until some time after Mr D's retirement. The Scheme rules had been amended since Mr D's retirement, but still contained this requirement for members who retired before 1 April 1999. The question remained whether this requirement amounted to discrimination.
- Dr Parris had been in a similar position to Mr Y; inasmuch as he was unable to marry before the age of 60 (the requirement in the relevant scheme) because the law in Ireland did not recognise civil partnerships. The Court of Justice of the European Union (**CJEU**) had decided that the rule was not discriminatory because it applied equally to same-sex and opposite sex couples.
- European Union (**EU**) law did not require Ireland to make provision for marriage or civil partnerships for same-sex couples. It was required to ensure that any measures which it did introduce complied with the EU's non-discrimination provisions once they had been enacted. However, there was no

requirement for the measures to be retrospective. It was left to member states to decide whether or not to make provision for same-sex marriage or civil partnerships and whether to make any provisions retrospective.

- The Trustees had to pay benefits in accordance with the Scheme rules unless there was an overriding provision in legislation or caselaw. It appeared that there was no overriding provision in legislation under which the Scheme rule could be found to be discriminatory. The UK government had not made the Marriage (Same Sex Couples) Act 2013 retrospective. In addition, the available caselaw suggested that the Scheme rules were not discriminatory because they applied the requirement for marriage/civil partnership at retirement equally to same-sex and opposite sex couples.

- The Adjudicator noted a reference by Mr Y to another scheme administered by Buck. She acknowledged that she had not seen the rules which applied to the other scheme, but suggested that they perhaps did not contain the same requirement for marriage at retirement; not all schemes did. The Adjudicator expressed the view that, in and of itself, this did not help with Mr Y's case.

14. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr Y for completeness.

## Ombudsman's decision

15. The Trustees can only pay Mr Y a pension if the Scheme rules allow the payment; unless there is an overriding legal requirement for them to do so. Under the Scheme rules, in order to be entitled to a pension, Mr Y has to meet the definition of Qualifying Spouse. Because Mr D retired before 1 April 1999, in order for Mr Y to be a Qualifying Spouse, they had to be married at the date Mr D retired.

16. I fully accept that the law, as it stood in 1995, did not allow Mr D and Mr Y to marry at the relevant time. The earliest date on which they could have become civil partners was 5 December 2005; the date the Civil Partnership Act 2004 came into force. In fact, Mr D and Mr Y became civil partners very shortly after this date.

17. Mr Y has cited the *Walker* case. This is understandable since, ostensibly, it would appear to support his case. However, in Mr Walker's case, the spouse's pension would have been payable to a wife regardless of when the marriage took place. The refusal to pay a pension to Mr Walker's husband was based on the dates of Mr Walker's service. In other words, the scheme was refusing to pay the pension because it had accrued prior to 5 December 2005. However, it would not have refused to pay a pension to a wife on those grounds even if the marriage had taken place after retirement.

18. The question for the Supreme Court was whether paragraph 18 of Schedule 9 to the Equality Act 2010 was incompatible with EU Directive 200/78. In other words, was the exception to the general non-discrimination rule implied into occupational pension schemes incompatible with the prohibition on discrimination contained in Directive 2000/78. The exception allowed schemes to restrict access to benefits where the right to the benefit arose before 5 December 2005 or had accrued by reference to service before this date.

19. Having considered arguments relating to retroactivity and future effect, the Supreme Court found that paragraph 18 was incompatible with Directive 2000/78 and should be disapplied. The Court found that the date on which it was necessary to determine whether discrimination arose was the date of payment of the pension. At the date on which the pension would be paid, Mr Walker and his husband would have been treated less favourably than a comparable heterosexual couple.

20. In *Parris*, the scheme rules provided that a spouse's pension would be paid if the couple had been married before the member reached age 60. Dr Parris found himself in much the same position as Mr Y; he could not marry or enter into a civil partnership before he reached age 60 because the law in Ireland did not allow him to. He could not, therefore, comply with the scheme's requirement and secure a survivor's pension for his spouse.

21. The CJEU found that the scheme rule in question did not give rise to discrimination, either directly or indirectly, on the grounds of sexual orientation. Surviving civil partners were treated the same as surviving spouses. The fact that Dr Parris was unable to satisfy the qualifying condition was a consequence of the state of the law as it existed in Ireland at the time of his 60th birthday. There was no requirement for Ireland to provide for marriage or civil partnerships for same-sex couples from any given date. However, if and when it did so provide, the prohibition on discrimination contained in Directive 2000/78 would then apply going forward.

22. Mr Y is not entitled to a Qualifying Spouse's pension because he and Mr D were not married or in a civil partnership at the time of Mr D's retirement. This requirement applies equally to heterosexual couples. The fact that Mr D and Mr Y could not comply is a consequence of the law in the UK in 1995. The law changed with the introduction of the Civil Partnership Act 2004, but this legislation was not retroactive. The judgment in Parris indicates that the CJEU would find this justifiable and not unlawful.

23. Applying the approach of the Supreme Court in *Walker*, as at the date the pension would have been paid, the decision not to pay Mr Y cannot be said to amount to discrimination; he has been treated no less favourably than a comparable spouse.

24. Mr Y has asked how it is that the Scheme rules could have been amended from 1999 when civil partnerships did not come into being until 2005. The Scheme rules were retrospectively amended in 2014 to remove the requirement for marriage or civil

partnership at retirement. However, this does not help Mr Y because there was no requirement for the Trustees to backdate the amendment to any given date.

25. I realise that Mr Y will find it extremely disappointing, but I do not find that there are grounds for me to uphold his complaint.

**Anthony Arter**

Pensions Ombudsman
5 February 2019

## Appendix

### *David L Parris v Trinity College Dublin and others* ECJ case C-443/15

26. Dr Parris was a lecturer at Trinity College Dublin and a member of its defined benefit pension scheme. He had lived with his same-sex partner for over 30 years and entered into a civil partnership in the UK in 2009. Dr Parris' civil partnership was not recognised in Ireland until 2011; when civil partnerships became lawful in Ireland. Dr Parris was aged 64 in 2011.

27. The rules of the pension scheme in question provided that a survivor's pension would be paid to spouses or civil partners except where the marriage or civil partnership had been entered into after the member had reached the age of 60. Dr Parris argued that it had not been possible for him to comply with this requirement because civil partnerships were not recognised in Ireland until after his 60th birthday. He brought proceedings before the Equality Tribunal (Ireland) arguing that he had been directly or indirectly discriminated against on the grounds of either sexual orientation or age. The Equality Tribunal dismissed Dr Parris' case and he appealed to the Labour Court (Ireland). The Labour Court referred the case to the CJEU.

28. The Labour Court referred three questions to the CJEU:-

    - Did the requirement, that a member and his civil partner have entered into a civil partnership before the member's 60th birthday in circumstances where they were not permitted by national law to do so, constitute discrimination contrary to Article 2 of Directive 2000/78?

    - If not, did the above requirement constitute discrimination on the grounds of age when the requirement was not used in actuarial calculations and the member and his partner had not been permitted by national law to enter a civil partnership before the member's 60th birthday?

    - If not, would it constitute discrimination if the limitations on entitlement arose from the combined effect of the age and sexual orientation of the member?

29. In answering the first question, the CJEU first considered whether an occupational pension scheme rule such as the one in question fell within the scope of Directive 2000/78. The CJEU decided that the survivor's benefit at issue derived from the employment relationship between Dr Parris and his employer. As such, it should be categorised as pay within the meaning of Article 157 Treaty on the Functioning of the EU (**TFEU**). The national rule at issue, therefore, fell within the scope of Directive 2000/78.

30. The CJEU then moved on to consider whether the application of the rule produced discrimination on the grounds of sexual orientation and was, therefore, prohibited by Directive 2000/78. It noted that, since the Civil Partnership Act had been enacted in 2010, the pension scheme rule had provided a survivor's pension for both surviving spouses and surviving civil partners. In addition, receipt of the pension was subject to

the condition that the marriage or civil partnership be entered into before the member's 60th birthday for both spouses and civil partners. The CJEU found that it followed that surviving civil partners were not treated less favourably than surviving spouses. The rule did not give rise to direct discrimination.

31. The CJEU then considered whether the rule gave rise to indirect discrimination. It noted that, at the date on which the Civil Partnership Act entered into force, Dr Parris was 64 years old. He did not, therefore, satisfy the rule for his civil partner to be entitled to a survivor's pension. Dr Parris had argued that indirect discrimination arose because it was impossible for same-sex couples to satisfy the condition at issue.

32. The CJEU noted that the fact that Dr Parris was unable to satisfy the condition was, firstly, a consequence of the state of the law existing in Ireland at the time of his 60th birthday. In particular, it was a consequence of the absence of a law recognising civil partnerships between same-sex couples. Secondly, it was a consequence of the absence of any transitional provisions for homosexual members born before 1951.

33. The CJEU referred to recital 22 of Directive 2000/78 which expressly stated that the directive was without prejudice to national laws on marital status and the benefits dependent thereon. It had held that marital status and the benefits flowing therefrom were matters which fell within the competence of the Member States and EU law did not detract from that competence. The CJEU did, however, find that Member States must comply with the provisions relating to non-discrimination in the exercise of their competence.

34. Member States were, therefore, free to provide for or not provide for marriage or civil partnership for same-sex couples. If they did so provide, they may determine the date from which such provision is to have effect. Consequently, EU law did not require Ireland to provide for civil partnerships for same-sex couples prior to 2011. Nor was it required to give retrospective effect to the Civil Partnership Act. Nor was there any requirement for transitional measures for same-sex couples where the member had already reached age 60 in 2011.

35. The CJEU concluded that the rule at issue did not produce indirect discrimination on the grounds of sexual orientation.

36. With regard to the second question, the CJEU first considered whether the rule in question created discrimination on the grounds of age. It said the rule treated members who married or entered into a civil partnership after age 60 less favourably than those who did so before age 60. It followed that the rule established a difference in treatment based directly on the criterion of age.

37. However, Article 6(2) of Directive 2000/78 allowed Member States to provide for occupational pension schemes to fix ages for admission or entitlement to benefits, including fixing different ages for different groups of employees. The use of age criteria in actuarial calculations did not constitute discrimination on the grounds of age, provided that it did not result in discrimination on the grounds of sex.

38. Article 6(2) applied only to occupational pension schemes which covered the risks of old age and invalidity and not all aspects of those risks; only those expressly referred to therein.

39. The survivor's pension at issue was a form of old age pension. By making entitlement to receive the survivor's pension subject to the condition that the member marry or enter into a civil partnership before age 60, the rule merely laid down an age limit for entitlement; that is, it fixed an age for access to the benefit. In those circumstances, it was covered by Article 6(2) and did not constitute discrimination on the grounds of age.

40. The fact that Dr Parris was not able to enter into a civil partnership before age 60 did not affect that conclusion. The impossibility was a consequence of the fact that, on his 60th birthday, the law did not provide for civil partnership for same-sex couples.

41. With regard to the third question, the CJEU acknowledged that discrimination could be based on several of the grounds set out in Article 1 of Directive 2000/78. However, there was no new category of discrimination resulting from a combination of more than one of those grounds where discrimination on the basis of those grounds taken in isolation had not been established.

***Walker v Innospec* [2017] UKSC 47**

42. Mr Walker began working for Innospec Ltd in January 1980. He was required to become a member of the company's contributory pension scheme and continued to pay into the scheme throughout his employment with Innospec. His employment continued until he accepted early retirement in March 2003. Under the terms on which Mr Walker could take early retirement, he was able to maximise his pension to the level that it would have reached if he had retired at normal pension age. The concessions made by his employer which allowed him to do so were not made in exchange for any waiver by him of his future pension rights.

43. Mr Walker had lived with his male partner since 1993. They applied for a civil partnership in December 2005 and their civil partnership was registered in January 2006. Shortly afterwards, Mr Walker asked Innospec to confirm that, in the event of his death, it would pay the spouse's pension to his civil partner. It refused because Mr Walker's service predated 5 December 2005; the date the Civil Partnership Act came into force. If Mr Walker had been married to a woman or if he married a woman in the future, she would be entitled on his death to the pension provided by the scheme to a surviving spouse.

44. The basis of the refusal was paragraph 18 of Schedule 9 to the Equality Act 2010. Briefly, this provided an exception to the general non-discrimination rule implied into occupational pension schemes. Under this exception, it was lawful to prevent or restrict access to a benefit, facility or service to a person: (a) where the right to that benefit, etc. accrued before 5 December 2005; or (b) which was payable in respect of periods of service before that date.

45. Mr Walker brought a case of discrimination on the grounds of sexual orientation in the Employment Tribunal and succeeded. Innospex appealed. Although Innospec's arguments on direct and indirect discrimination failed, the Employment Appeal Tribunal allowed the appeal. It held that Directive 2000/78 did not have retrospective effect to render unlawful inequalities based on sexual orientation which arose before the last date for its transposition. Paragraph 18 was not, therefore, incompatible with the Directive. The Employment Appeal Tribunal also held that, if paragraph 18 was incompatible with the Directive, it was not open to it to interpret the provision in a way which rendered it compatible. The purpose of paragraph 18 was to create an exception. To nullify the exception would run contrary to the grain of the legislation. It held that paragraph 18 could not be disapplied.

46. Mr Walker appealed unsuccessfully to the Court of Appeal. The Court of Appeal referred to two principles of EU law: the "no retroactivity" principle; and the "future effects" principle. The former meant that EU legislation did not have retroactive effect unless: it is clear from its terms or general scheme that the legislator intended it to; the purpose to be achieved requires it to; and the legitimate expectations of those concerned are duly respected. The Court of Appeal found that to require a pension to be paid to Mr Walker's husband would give retrospective effect to Directive 2000/78. The second principle meant that amending legislation applies immediately to the future effects of a situation which arose under the law as it stood before the amendment, unless there was a specific provision to the contrary.

47. The Supreme Court was asked to consider three principle issues:-

    - Whether the differential treatment provided for by paragraph 18 was compatible with Directive 2000/78.

    - If the differential treatment was not compatible with Directive 2000/78, did Mr Walker's claim fail because paragraph 18 must be given effect?

    - Should a declaration of incompatibility under section 4 of the Human Rights Act 1998 be made?

48. The Court identified the key question as being whether the effect of Directive 2000/78 was to prohibit discrimination on the grounds of sexual orientation with regard to the payment of pensions in respect of periods of service before 5 December 2005.

49. With regard to retroactivity, the Court noted that, as a general rule, in most modern legal systems legislative changes applied prospectively and EU law was no different. It noted also that, from settled caselaw, new rules applied immediately to the future effect of a situation which arose under the old rules. This had developed to avoid retrospective effect and ensure the immediate prospective application of legislation to ongoing legal relationships. It was necessary because it was not always easy to identify the point at which a right accrued.

50. The Court recognised that applying the above principles presented a challenge in the context of entitlement to benefits under an occupational pension scheme. The right to

a pension might accrue over many years. During that time, actuarial assumptions were made based on existing legal conditions; notwithstanding the fact that the pension would be paid in the future. Such assumptions would be upset when a new equal treatment provision was introduced. It was not easy to identify the point at which entitlement became fixed; that is, whether it was at the date of retirement or the date of payment.

51. The Supreme Court reviewed the cases considered by Court of Appeal:

*Defrenne v Sabena* (Case 43/75) [1976] ECR 455; [1981] 1 All ER 122

It was held that Article 119 had direct effect and could be relied on from the date by which it required member states to implement the principle of equal pay (1 January 1962). In recognition of the far-reaching economic consequences, the effect of the judgment was time limited so that it could not be relied upon to support claims for pay periods before the judgment date. This was a pragmatic decision in response to unusual circumstances and not a general rule relating to the retrospective application of legislation.

*Bilka-Kaufhaus GmbH v Weber von Hartz* (Case C-170/84) [1986] ECR 1607; [1986] 2 CMLR 701

Benefits under an occupational pension scheme amounted to pay within the meaning of Article 119 being “consideration received by the worker from the employer in respect of his employment”. The issue of whether there was entitlement to benefits deriving from service prior to Article 119 did not arise.

*Barber v Guardian Royal Exchange Assurance Group (*Case C-262/88) [1990] ECR I-1889; [1991] 1 QB 344

This involved a different question; namely, whether benefits under contracted-out schemes fell within pay for the purposes of Article 119. It was held that they did. The Court considered submissions on restricting the effect of its judgment and made it clear that, to do so, was only possible as an exceptional measure. This case did not constitute an example of a general principle of non-retroactivity for EU legislation.

*Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* (Case C- 109/91) [1993] ECR I-4879; [1995] ICR 7

The question arose as to whether, in light of the *Barber* judgment, equal treatment should apply to all pension payments made after 17 May 1990, including any which had fallen due already, irrespective of the date of the periods of accrual. Although a literal reading of the *Barber* judgment would have applied equal treatment to all pension payments after 17 May 1990, the Court accepted a more restrictive definition.

*Maruko v Versorgungsanstalt der Deutschen Bühnen* [2008] ECR I-1757; [2008] All ER (EC) 977

This case concerned payment of a pension to a registered life partner. The pension arose from the member's service between 1959 and 2003. The CJEU agreed that it could, exceptionally, restrict the effects of a judgment, taking into account any serious difficulties which its judgment might create. It found that there was nothing to suggest that the financial balance of the scheme in question would be retroactively disturbed if the effects of its judgment were not restricted in time.

The CJEU ruled that: "The combined provisions of articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse".

The Supreme Court found: "The effect of this, as regards Mr Walker and his husband, is unmistakable. If he survives Mr Walker, his husband is entitled to a spouse's pension on the same basis as would a wife".

*Römer v Freie und Hansestadt Hamburg* (Case C-147/08) [2011] ECR I-3591, [2013] 2 CMLR 11

This case concerned a pensioner who had been in a registered life partnership and applied for the same supplementary pension which was paid to married pensioners. His pension rights arose from contributions paid from 1950 to 1990. The CJEU held that he was entitled to equal treatment if life partnerships were comparable to marriage.

The CJEU considered whether, if Mr Römer was entitled to pension payments, their amount should be calculated only by reference to the contributions that were made after the *Barber* judgment. The question was approached on the basis that any limitation of the period of service to be considered would require a restriction on the otherwise natural application of the principle that contemporaneous discrimination was forbidden unless exceptional circumstances would justify such a restriction. None of the parties had requested a restriction. The Advocate General stated: "by no means apparent from the documents in the case that the financial balance of the supplementary pension scheme managed by the defendant in the main proceedings risks being retroactively disturbed by the lack of such limitation".

In the circumstances, the CJEU held that *Barber* had no bearing on Mr Römer's entitlement. Neither the Federal Republic of Germany nor the Freie und Hansestadt Hamburg had suggested any limitation in time of the effects of the present judgment and no evidence submitted to the court indicated that they should be so limited.

The Supreme Court found that this case made it clear that, unless evidence established 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 was no reason that he should be subjected to unequal treatment as to the payment of that pension.

52. In Mr Walker's case, it was submitted that the Employment Appeal Tribunal had wrongly taken the description of pension benefits as deferred pay as equating the time at which the pension accrued with the time at which any discrimination was to be judged. The Supreme Court agreed. The point of unequal treatment occurs at the time the pension falls to be paid. Mr Walker was entitled to have for his married partner a spouse's pension at the time he contracted a legal marriage. The period during which he acquired that entitlement had nothing to do with its fulfilment. The financing of Innospec's pension scheme should have been planned to take account a possible change in Mr Walker's marital status. He could not have been denied entitlement to a spouse's pension if he had married a woman after he retired. His marriage to his current partner was as legal as a heterosexual marriage and his entitlement to a spouse's pension was equally well-founded.

53. None of the *Barber* line of cases considered the future effects principle. This is because the principle concerned the effects of legislation; whereas *Barber* and *Ten Oever* dealt with temporal limitations on judgments.

54. The salary paid to Mr Walker was the same as that paid to a heterosexual man. There was no reason for the company to anticipate that it would not become liable to pay a survivor's pension to a lawful spouse. The date at which that pension became due was the time at which denial of a pension would amount to discrimination.

55. In *Römer*, the CJEU had found that Mr Römer could not claim pension payments before 2003, but the pension due to him after that date should be calculated on the basis of all the years during which entitlement had built up. In Mr Walker's case, he could not claim entitlement before the transposition of Directive 2000/78 into UK law. However, once that had happened, his pension was to be based on all his years of service.

56. The questions referred to the CJEU in *Parris* did not concern Dr Parris' period of service. Nevertheless, it had been submitted that, since Dr Parris' entitlement was based on service completed before the coming into force of Directive 2000/78, it could not be subject to the principle of equal treatment. The Advocate General had rejected the submissions on the basis that settled caselaw provided that a new rule of law applied from the date the act introducing it came into force. It did not apply to legal situations which had arisen under the old law but it did apply to their future effects. A restriction of the temporal scope of Directive 2000/78 would have required an express stipulation to that effect and no such provision had been made. The prohibition on discrimination contained in Directive 2000/78 could not give rise to claims for payments in respect of past periods. However, recognition of the right to a future survivor's pension was unaffected because such recognition was concerned with future payments.

57. Lord Kerr said:

> "The CJEU held that Dr Parris's case did not amount to discrimination at all, citing the principle in *Maruko* that legislation treating surviving civil partners less favourably than surviving spouses will amount to direct discrimination if the two are in comparable situations under national law, but noting that the rule in issue in Dr Parris's case applied equally to opposite-sex marriages and same-sex civil partnerships. His inability to meet the qualifying criterion for the survivor's pension resulted from the lack of provision for same-sex partnerships under Irish law at the time of his 60th birthday and it was for member states to decide both whether to make such provision and, if so, whether to make it retrospective. The CJEU did not, therefore, need to address the UK government's argument that Dr Parris's claim fell outside the temporal scope of the Directive but nothing in its judgment cast doubt on AG Kokott's clearly expressed opinion that the submissions of the UK were incompatible with *Maruko* and *Römer*."

58. The Supreme Court allowed Mr Walker's appeal. It found that, insofar as it authorised a restriction on payment of benefits based on periods of service before 5 December 2005, paragraph 18 was incompatible with Directive 2000/78 and had to be disapplied. It found that Mr Walker's husband was entitled to a spouse's pension calculated on all the years of his service with Innospec, provided that they remained married at the date of his death.