
Equal survivor pensions in the private sector: A briefing for union negotiators

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1. Inequality in private sector survivor pension provision

The [government review into survivor benefits](#) estimated that 27 per cent of private sector schemes (1,334 schemes) that provide a survivor pension treat same-sex spouses and civil partners less favourably than opposite-sex spouses, relying on an exemption in the Equality Act 2010. The TUC estimates that more than 70,000 members of defined benefit pension schemes in the private sector will leave a surviving same-sex spouse or civil partner.¹ In contrast, all but one per cent of private sector defined benefit schemes provide equal survivor benefits for widowers. The failure of legal challenges to overturn this discrimination (the case of *Walker v. Innospec* summarised below) and the continued failure of the government to make a decision on changing the law mean that equalisation will have to be achieved through negotiation by unions working in the private sector.

This guide sets out the facts, the law and the arguments to persuade employers to extend voluntarily the provisions of their occupational pension schemes to provide equal survivor benefits

2. Historical background: how inequality arose

Most defined benefit occupational pension schemes provide a pension to a surviving spouse when a scheme member dies. Initially, these were 'widow's pensions', reflecting the fact that most married women were financially dependent on their employed husbands. As women entered and stayed in the workforce in larger numbers, survivor benefits were extended to widowers but not always on an equal basis. Sex discrimination law requires equal access to pensions from 1990 onwards (Section 67, Equality Act 2010). This means a woman's pre-1990 service in a scheme doesn't have to count towards the

¹ Based on assumptions the Government made in the review on the proportion of people who are likely to leave a same-sex spouse or civil partner now and in the future, the number of current, active and deferred members in defined benefit pension schemes in the private sector and a crude assumption that those leaving a same-sex survivor will be spread evenly across the quarter of schemes affected.

accrual of a survivor pension for her husband and so her husband may receive a smaller survivor pension than a widow would receive, even if he is financially dependent on her. In the public sector pension schemes, widowers' pensions were introduced slightly earlier so service in a scheme from 1988 onwards counts towards a widower's pension.

The [government review into survivor benefits](#) found that just one per cent of private sector DB schemes do not provide pensions for widowers that are equal to widows, but in almost all the public sector pension schemes, accrual for a widower's pension is limited to 1988 onwards.

With the passing of sexual orientation discrimination laws and legal recognition of same-sex relationships, surviving civil partners and same-sex spouses became entitled to a survivor pension but again there is inequality in the amounts they receive compared to opposite-sex widows and widowers. An exemption in the Equality Act 2010 (paragraph 18, schedule 9) means only service in a pension scheme from 6 December 2005 onwards (the date the Civil Partnership Act took effect) has to count towards accrual of a survivor pension for a civil partner or same-sex spouse. This means surviving same-sex partners are entitled to far less than a widow or a widower. When the Civil Partnership Act was introduced, as a result of trade union pressure, survivor benefits for civil partners were backdated to 1988 in most of the public sector schemes making them equal to widowers but not to widows. But in the private sector the legal requirement is still to just backdate accrual to 2005.

3. Legal challenge: The *Walker v Innospec* case

The decision by the courts in this case means that (unless the government decides to change the law – see section 5 below) it will be up to negotiators to achieve equality in pension provision in private sector schemes. The case is summarised here because it may provide useful information to inform negotiations with scheme providers.

On 29/30 June 2015, the Court of Appeal heard the case of *Walker v Innospec*. Mr. Walker, supported by Liberty, challenged the exemption in paragraph 18, schedule 9 of the Equality Act 2010 as being incompatible with EU equality law. His former employer's pension scheme will only pay £500 a year to his same-sex spouse if Mr. Walker predeceases him, whereas if he was married to a woman she would be entitled to a survivor pension of £41,000 a year. Mr. Walker's previous challenge was successful at Employment Tribunal but was overturned by the Employment Appeal Tribunal.

In October 2015 the Court of Appeal ruled against Mr. Walker saying that discrimination law cannot have retroactive effect. The judge expressed sympathy with Mr. Walker and his husband and he accepted that there was no evidence that equalising survivor pensions for same-sex partners would have been

unaffordable for the Innospec pension scheme or other private sector schemes. At paragraph 61 of the judgement he commented:

"... there is no evidence that the extension of the class of beneficiaries to include same-sex surviving spouses would seriously unsettle the financial basis of the Innospec scheme or of pension schemes generally. The difficulty is not of that pragmatic kind. It stems from the basic principle that the law cannot be changed retrospectively."

4. Facts and arguments for voluntary change

- Fairness and equality

The law has changed to recognise that same sex couples should be treated equally – the creation first of civil partnership, then of same sex marriage, confirm that relationships between people of the same sex are viewed as equal to those of opposite sex partners and in almost every respect they are treated as equals: access to survivor pensions is one of the few remaining areas of inequality, and a large majority of private sector employers have recognised this and voluntarily changed their rules to remove this discrimination.

As in the Walker case, this can make an enormous difference to individuals, but at very little cost to the scheme (see 'b'). An employer wishing to be seen as committed to fairness and equality should initiate a change in pension scheme rules to eliminate any remaining discrimination against same sex survivors or widowers.

- Cost

The government review estimated that it would cost £0.4 billion to remove the inequalities in survivor pensions in private sector schemes. This is a tiny amount relative to schemes' overall liabilities. The review estimated it would mean an increase of just 0.03% in pension schemes' total technical provisions – this is the amount of money that a scheme has to hold now for it to meet its future pension commitments.

The judge in the Walker case recognised that cost was not the issue in this case.

- Employers may do it if asked

This case study shows how equalisation can be achieved through negotiation:

Sue, 62, discovered that her civil partner would be entitled to a pension worth £4,000 a year less than a widow would receive. She challenged this and her scheme recently agreed to change the rules so her partner will now get an equal pension.

Sue Stelfox is a member of Prospect. She is 63 and her civil partner is 44. Five years ago, when Sue had 38 years' service in her employer's final salary scheme and was considering taking her pension, she asked for an estimate of her civil partner's entitlement to a survivor pension. She was told her partner would be

entitled to £5,488 a year. She calculated that if her partner was a widow she would be entitled to about £9,400 a year. So her partner would get about £4,000 a year less because she is in a same-sex relationship rather than being married to a man.

Sue was told that trustees might agree to pay her civil partner more as a financial co-dependent but this would be on a discretionary basis and there was no guarantee. Sue pressed her employer to change the scheme rules for surviving civil partners and same-sex spouses around the time of the review into survivor pensions in July 2014. She cited other private sector employers that provided equal survivor pensions. Her employer and the scheme's trustees agreed to change the rules and her civil partner is now entitled to a survivor pension that is equal to a widow's pension.

- Many employers already support equalisation

The TUC submission to the government review included the following examples of employers that had fully equalised survivor benefits in their pension schemes: BAE, Babcock, BP, BT, CABI, Co-operative, Highlands & Islands Airports, National Trust, National Library of Wales, National Museum of Wales, O2, Prudential, RBS, Royal Mail, Telefonica, and USS. The rail unions forwarded a notification from one of the train companies following the legalisation of same-sex marriage informing members that their pension scheme would be providing full equality for surviving same-sex spouses which stated that "The company is fully supportive of this change."

The Royal Mail Pension Plan provided the TUC with the following:

"The Civil Partnership Act 2004 (CPA) came into force on 5 December 2005 providing civil partners with rights akin to spouses in respect of pensions. Pension schemes were required to ensure that they operate from that date so that civil partners will be entitled to receive:

- contracted-out survivors' benefits relating to service on or after 6 April 1988; and
- all other survivors' benefits relating to service on or after 5 December 2005.

Schemes needed to amend their rules to confirm that the contracting-out benefits are to be paid to a civil partner. Royal Mail made the appropriate amendments to the RMPP to comply with this legislative requirement - in effect the minimum it was required to do.

The Trustee Board subsequently requested that the sponsoring employer (Royal Mail) agree to further amend the rules of the RMPP to fully equalise the service requirement for surviving civil partner pensions with that of spouses. That amendment was made in the rules in 2009 and since then surviving civil partners have been treated equally with widows/widowers with retrospective effect."

5. The government review and TUC campaign

The government agreed to an amendment (s.16) in the Marriage (Same-Sex Couples) Act 2013 which committed it to carrying out a full review of the costs of providing equal survivor pensions by 1 July 2014. The review was carried out and published on 26 June 2014 but no decision has been made (as of January 2016) on whether to change the legislation. The review concluded: "In considering its response to this review, the Government will need to consider these costs and the potential impact on pension schemes, along with the wider consequences of making retrospective changes to scheme rules. As this review demonstrates, these are complex issues and the Government will have to consider these very carefully before making a decision on whether the law should be changed."

Ministers have been questioned repeatedly about when a decision will be made on the review findings but have always replied with the same message that it is complex and the headline message has been concern about the cost to pension schemes in both private and public sectors. The TUC wrote again to press the arguments for equalisation (December 2015). The TUC campaign has attracted wide support from politicians from all parties and has featured several petitions and media coverage in a number of publications, particularly around the first anniversary of publication of the review (June 2014).

6. Conclusion

A motion having been carried at TUC Congress 2015 on this issue, the TUC will continue to campaign for the government to make a favourable decision on equalising survivor benefits. At the same time unions in the private sector are encouraged to negotiate the same with their employers, and may make use freely of the information contained in this briefing.

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