EMPLOYMENT TRIBUNALS

Claimant: **Mr D Beattie and 16 others**

Respondents: **(1) 20-20 Trustee Services Limited**
(2) Federal Mogul Limited

PRELIMINARY HEARING

Heard at: London Central Employment Tribunal (in public by CVP)

On: 10 January 2022

Before: Employment Judge Gordon Walker

Representation
Claimants: Mr A Short QC, with Ms B Venkata, of counsel
First Respondent: Mr K Bryant QC
Second Respondent: Did not attend

RESERVED JUDGMENT

1. The Employment Tribunal has jurisdiction to hear the claims.

2. Article 3 of the Equality Act (Age Exceptions for Pension Schemes) Order 2010, insofar as it authorises a restriction of pension payments related to rights accrued, or benefits payable, in respect of the claimants' periods of pensionable service prior to 1 December 2006, is incompatible with Council Directive 2000/78/EC and is disapplied.

REASONS

Introduction

3. These claims concern a defined benefit occupational pension scheme: the T&N Retirement Benefits Scheme (1989) ("the scheme").

4. The claimants are pensioner members of the scheme, save for the fifth claimant who is the widow of a former contributing member.

5. The first respondent is the trustee of the scheme and the responsible person for the purposes of section 61 of the Equality Act 2010 ("EA").

6. The second respondent is the scheme's principal employer. It has been insolvent since 2006. No remedy is claimed against the second respondent, which was joined solely to comply with section 120(5) EA. At a preliminary hearing on 7 October 2021 proceedings against the second respondent were stayed until further notice.

7. The claimants assert that, by reducing and/or capping their pension payments, the first respondent has treated them less favourably because of their age, contrary to sections 5 and 13(1) EA.

8. The first respondent says that it reduced and/or capped the claimants' pension payments in accordance with the law as it was then understood. It has (and continues to) recalculate the claimants' pension payments. It has agreed to uplift the payments and to repay the arrears.

Issue for the preliminary hearing

9. At a preliminary hearing on 7 October 2021 Employment Judge Davidson listed an open preliminary hearing to decide whether the claimants' claims were arguable in light of Article 3 of the Equality Act (Age Exceptions for Pensions Schemes) Order 2010, which states:

Occupational pension schemes: excepted rules, practices, actions and decisions

3. It is not a breach of the non-discrimination rule for the employer, or the trustees or managers of a scheme, to maintain or use in relation to the scheme,

(a) ….

(b) rules, practices, actions or decisions as they relate to rights accrued, or benefits payable, in respect of periods of pensionable service prior to 1st December 2006 that would breach the non-discrimination rule but for this paragraph.

10. The claimants accept that if Article 3 were applied, it would exclude their claims, since they relate to rights accrued before 1 December 2006. The claimants submit that Article 3 is inconsistent with EU law and that it should be disapplied in accordance, or by analogy, with the reasoning of the Supreme Court in ***Innospec Ltd and others v Walker*** [2017] ICR 1077.

11. The first respondent submits that ***Innospec*** is distinguishable, Article 3 should be applied, and the Tribunal therefore does not have jurisdiction to hear the claims.

Procedure, documents and evidence heard

12. Mr Short QC and Mr Bryant QC provided skeleton arguments and made oral submissions at the hearing.

13. The parties prepared a (main and supplementary) bundle of authorities.

14. There were two bundles of documents for the hearing. These contained little more than the pleadings and were hardly referred to.

15. No evidence was heard.

Factual background

16. There is no material dispute of fact.

17. Save for the fifth claimant, the claimants were all contributing members of the scheme before their retirement. The fifth claimant is the widow of a contributing member of the scheme. Hereinafter I shall, for ease, refer to the fifth claimant as if she was also a member of the scheme.

18. The second respondent entered administration on 1 October 2001. On 11 October 2001 the first respondent was appointed by the Pensions Regulator as an independent trustee.

19. The claimants left pensionable service and their pension benefits came into payment no later than 31 January 2005.

20. On 10 July 2006 the second respondent entered into a company voluntary arrangement.

21. If the sponsoring employer of an eligible defined benefit pension scheme becomes insolvent, the pension scheme enters into a period of assessment ("the assessment period") for entry into the Pensions Protection Fund ("PPF") for the purposes of Part 2 of the Pensions Act 2004 ("PA04").

22. The assessment date was 10 July 2006. The scheme is still in assessment.

23. The PPF was established by PA04 to protect the rights of employees in defined benefit pensions schemes in the event of the insolvency of an employer. It was intended to meet the UK's obligations under Directive 80/897/EC and Directive 2008/94/EC ("the Insolvency Directive(s)").

24. The compensation payable by the PPF is set out in schedule 7 of PA04. The level of compensation differs depending on whether a member has reached a scheme's normal pension age ("NPA") at the time the assessment period begins. Those who have not reached NPA are subject to a prescribed compensation cap. There are also limits on the annual cost of living increases allowed in the period before the member reaches NPA. No increases are allowed for service prior to 6 April 1997.

25. Pursuant to PA04 s.138, even if the PPF has not assumed responsibility for the scheme, the benefits payable from a scheme must be reduced from the start of the assessment period so that they do not exceed the compensation that would be payable by the PPF.

26. The scheme's actuary undertook a valuation of the scheme pursuant to PA04 section 143 as of 9 July 2006 (the day before the assessment period began).

27. From 10 July 2006 the first respondent reduced the claimants' pension payments in accordance with the provisions of PA04 and schedule 7.

28. In September 2011 the section 143 valuation was approved by the PPF, and it was determined that the scheme had sufficient assets to cover more than 100% of the PPF level of compensation, as it was then understood.

29. In October 2011, the first respondent entered a bulk annuity contract with Legal & General which insured scheme benefits equivalent to just over the PPF compensation level.

30. One of the claimants (Mr Hampshire) brought a legal challenge against the PPF level of compensation, arguing that the reduction of his benefit to below 50% of his accrued rights was contrary to Article 8 of the Insolvency Directive.

31. In 2019, in ***Hampshire v PPF*** (Case C-17/17); [2019] Pens L.R.1, the CJEU confirmed that Article 8 required member states to ensure that every employee of an insolvent employer received benefits corresponding to at least 50% of the value of their accrued pension entitlement.

32. The PPF's interim solution, pending legislation, was to conduct a one-off actuarial valuation of the pension benefits payable to a member from the insolvency date under the scheme, and to compare this with what the PPF would have paid the member over time. The PPF compensation would be uplifted ("the Hampshire uplift") if it was estimated to be less than 50% of what the scheme would have paid the member over time. The recalculations continued to apply the caps to, or in respect of, those who were below NPA at the assessment date.

33. The first respondent recalculated affected members' benefits to include the Hampshire uplift. The revised benefits are being paid on an ongoing basis from the first respondent's cash reserve.

34. The claimants sought judicial review of the PPF's methodology for implementation of the Hampshire uplift. In July 2021, the Court of Appeal in ***R (Hughes) v PPF*** [2021] Pens. L.R 17 held that the application of a cap in calculating PPF compensation payable to those who were not at, or over, NPA when a scheme entered an assessment period, was unlawful age discrimination.

35. The removal of the cap on compensation following the judgment of the Court of Appeal requires recalculation of benefits for affected members of the scheme ("the Hughes uplift").

36. The first respondent is in the process of calculating the Hughes uplift for affected members, including the claimants. The first respondent has agreed that arrears of pension benefits, to include the Hampshire and Hughes uplifts, should be backdated to 10 July 2006 (the start of the assessment period).

37. The arrears have not been paid. The first respondent says that its cash reserve will not be sufficient to pay those arrears, or the uplifted benefits, for more than a limited period. The first respondent is in discussions with Legal & General as to whether it will take on the additional liabilities. Alternatively, the PPF will assume responsibility for the scheme.

38. On 9 August 2021, Mr Beattie and others lodged a claim against the respondents complaining that the reduced and/or capped compensation paid to them was unlawful direct age discrimination. They compare themselves with members of the scheme who had reached NPA by the assessment date.

39. On 7 October 2021, at a case management hearing before Employment Judge Davidson, two earlier claims brought by Mr Hampshire and Mr Farrell (presented to the Tribunal on 1 November 2019) were consolidated with the Beattie claims.

40. The remedies sought by the claimants are declarations, recommendations, and compensation. Given the first respondent's agreement to pay, and to backdate, the Hampshire and Hughes uplifts, the financial remedies sought by the claimants are likely to be for injury to feelings and interest only.

The law

EU legislation

41. The Treaty on the Functioning of the European Union says, so far as is relevant:

> *Article 10:*
>
> *In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*

<u>Article 19 (ex Article 13 TEC):</u>

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

42. The most relevant provisions of Council Directive 2000/78/EC ("the Framework Directive") are:

<u>Article 1:</u>

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

<u>Article 2:</u>

Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.

…

<u>Article 6:</u>

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

…

<u>Article 18:</u>

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 2 December 2003 …

In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination…

Domestic legislation

43. The Framework Directive with regards to age was implemented domestically by the Employment Equality (Age) Regulations 2006. These regulations came into force in respect of occupational pensions on 1 December 2006. Regulation 11 contained a temporal limitation:

Pension schemes

11.—(1) It is unlawful, except in relation to rights accrued or benefits payable in respect of periods of service prior to the coming into force of these Regulations, for the trustees or managers of an occupational pension scheme to discriminate against a member or prospective member of the scheme in carrying out any of their functions in relation to it (including in particular their functions relating to the admission of members to the scheme and the treatment of members of it).

…

44. These regulations were replaced by the Equality Act 2010 from 1 October 2010. Chapter 2 relates to occupational pension schemes. The most relevant provision is:

61 Non-discrimination rule

(1)An occupational pension scheme must be taken to include a non-discrimination rule.

(2)A non-discrimination rule is a provision by virtue of which a responsible person (A)—

(a)must not discriminate against another person (B) in carrying out any of A's functions in relation to the scheme;
…
(3)The provisions of an occupational pension scheme have effect subject to the non-discrimination rule.
…
(8)It is not a breach of a non-discrimination rule for the employer or the trustees or managers of a scheme to maintain or use in relation to the scheme rules, practices, actions or decisions relating to age which are of a description specified by order by a Minister of the Crown.

45. The Equality Act 2010 was accompanied by the Equality Act (Age Exceptions for Pensions Schemes) order 2010. A temporal limitation was inserted with effect from 1 October 2010 by Equality Act (Age Exceptions for Pension Schemes) (Amendment) order 2010. Article 3 (as amended) states:

Occupational pension schemes: excepted rules, practices, actions and decisions

3. It is not a breach of the non-discrimination rule for the employer, or the trustees or managers of a scheme, to maintain or use in relation to the scheme,

(c) ….

(d) rules, practices, actions or decisions as they relate to rights accrued, or benefits payable, in respect of periods of pensionable service prior to 1st December 2006 that would breach the non-discrimination rule but for this paragraph.

46. There is a similar temporal limitation at paragraph 18 of schedule 9 of EA:

Benefits dependent on marital status, etc.

18(1) A person does not contravene this Part of this Act, so far as relating to sexual orientation, by doing anything which prevents or restricts a person … from having access to a benefit, facility or service

(a) the right to which accrued before 5 December 2005 (the day on which section 1 of the Civil Partnership Act 2004 came into force), or
(b) which is payable in respect of periods of service before that date.

47. The Equality Act 2010 (Commencement No 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010, at paragraph 7 states:

Transitional provisions

7. Part 9 of the 2010 Act (enforcement) applies where—

(a) an act carried out before 1st October 2010 is unlawful under a previous enactment, and

(b) that act continues on or after 1st October 2010 and is unlawful under the 2010 Act.

48. I was referred to the Pensions Act 2004, at sections 126-127; sections 131-133; section 138; sections 149-150; and section 154. Section 138(2) states:

Section 138 Payment of scheme benefits

…

(2) The benefits payable to or in respect of any member under the scheme rules during the assessment period must be reduced to the extent necessary to ensure that they do not exceed the compensation which would be payable to or in respect of the member in accordance with this Chapter if—

(a)the Board assumed responsibility for the scheme in accordance with this Chapter, and

(b)the assessment date referred to in Schedule 7 were the date on which the assessment period began.

…

Case law

49. I have already referred to the claimants' legal challenges against the PPF compensation:

    49.1 ***Hampshire v PPF*** (Case C-17/17); [2019] Pens L.R.1: The CJEU confirmed that Article 8 required member states to ensure that every employee of an insolvent employer received benefits corresponding to at least 50% of the value of their accrued pension entitlement; and

    49.2 ***R (Hughes) v PPF*** [2021] Pens. L.R 17: The Court of Appeal held that the application of a cap in calculating PPF compensation payable to those who were not at, or over, NPA when a scheme entered an assessment period, was unlawful age discrimination.

50. ***Innospec Ltd and others v Walker*** [2017] ICR 1077 concerned the temporal limitation at paragraph 18 of schedule 9 EA.

51. Mr Walker was a member of a contributory pension scheme. Under the terms of the scheme, a survivor's pension would be paid to a surviving spouse, even if the marriage was entered into after the member's retirement.

52. Mr Walker retired on 31 March 2003. He was gay and had lived with his male partner since 1993. They applied for a civil partnership on 5 December 2005. This was registered on 23 January 2006. They later married.

53. Shortly after the civil partnership was registered, Mr Walker asked Innospec to confirm that, in the event of his death, they would pay the spouse's pension to his civil partner. Innospec refused, relying on paragraph 18 of schedule 9 EA.

54. The conclusion of the majority of the Supreme Court (Lord Kerr giving the leading judgment) was (at paragraph 76):

> *76. I would allow Mr Walker's appeal and declare that, in so far as it authorises a restriction of payment of benefits based on periods of service before 5 December 2005, paragraph 18 of Schedule 9 to the 2010 Act is incompatible with the Framework Directive and must be disapplied. I would make a further declaration that Mr Walker's husband is entitled to a spouse's pension calculated on all the years of Mr Walker's service with Innospec, provided that at the date of Mr Walker's death, they remain married.*

55. In reaching this conclusion, the Supreme Court considered the temporal limitations on EU law. Specifically:

    55.1 The no retroactivity principle;

    55.2 The future effects principle; and

    55.3 The exception in the case of ***Barber v Guardian Royal Exchange Assurance Group*** (Case C-262/88) ("the Barber exception").

56. The first principle, applicable in most modern legal systems, is that legislative changes apply prospectively. The second principle is that new rules apply immediately to the future effects of an ongoing situation that arose under the old rules. As relevant to these two principles, Lord Kerr said as follows in ***Innospec***:

24. The policy behind the no retroactivity principle is thus similar to that described in Bennion —the need to ensure "legal certainty" and to protect the "legitimate expectations" of those who have relied on the law as it previously stood. The future effects principle is simply the other side of the same coin. It is a method developed by the CJEU to avoid any retrospective effect and to ensure the immediate prospective application of legislation to ongoing legal relationships. The principle is necessary because it is not always easy to identify the point at which a right accrues. Employment provides a paradigm example. How should a new EU provision be applied to an ongoing employment relationship that had begun before the provision came into force? In the Land Nordrhein-Westfalen case, the CJEU answered that question by holding, at para 52, that "the application of a new rule … from the date of its entry into force, to a contract of employment concluded prior to its entry into force, cannot be regarded as affecting a situation arising prior to that date". As Advocate General Jacobs explained, at para 59 of his opinion:

> *"Applying a legal provision to a fixed-term employment contract which has not finally ended by the time that provision enters into force does not involve retroactive application of the law; it entails only the immediate application of that provision to the effects in the future of situations which have arisen under the law as it stood before amendment."*

25. The CJEU draws a distinction, therefore, 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 distinction was elucidated by Advocate General Cosmas in Andersson v Svenska Staten (Case C-321/97) EU:C:1999:9; [1999] ECR I-3551 , para 57:

> *"Retroactive effect consists in the application of the rule to situations which were permanently fixed before that rule came into force. Immediate effect, which, in principle, works likewise according to the principle tempus regit actum, consists in applying the rule to situations which are continuing."*

26. The application of these principles presents a challenge when one is dealing with entitlement to an occupational retirement pension. Conventionally, the right to a pension accumulates over decades. During the time that the right is accruing, actuarial assumptions are made based on existing legal conditions, notwithstanding that the pension is payable in the future. Those assumptions are upset when, because of changes in social values, a new equal treatment provision is introduced. It is not immediately easy to identify the point at which entitlement to a pension becomes "permanently fixed"—whether for example at the date of retirement or when the pension is paid.

57. Turning to the Barber exception, and how this relates to these two principles, Lord Kerr explained that:

> *44. But it is vital to keep the two concepts distinct. "No retroactivity" and "future effects" are principles of law which apply to all EU legislation, unless a contrary intention can be found. The Barber exception is an example of a technique used by the CJEU to limit the generally retroactive application of its judgments , which it will only exercise in the most exceptional circumstances and where the impact would be truly "catastrophic". The court limits the temporal application of its judgments in cases where reliance has been placed on a different understanding of the law and legitimate expectations may be upset, but only in the most special circumstances. Therefore, how the court 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.*

58. Lord Kerr then considered two decisions of the CJEU: ***Maruko v Versorgungsanstalt der Deutschen Bühnen*** (Case C-267/06) [2008] All ER (EC) 97; and ***Römer v Freie und Hansestadt Hamburg (European Commission intervening)*** (case C-147/08) [2011] EC I-3591.

59. ***Maruko*** was a claim brought by the surviving life partner of a former member of the German Theatre Pension Institution (VddB). They had entered into a life partnership in 2001. Mr Maruko's life partner had (in all likelihood) ceased pensionable service before 2003 (when the Framework Directive was implemented). He died in 2005. The pension fund argued that to take account of service before the Framework Directive's implementation deadline would give the Directive retrospective effect. The CJEU rejected this argument. Lord Kerr concluded at paragraph 51 of ***Innospec*** that:

> *The material ruling of the court was:*
>
> > *"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 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.*

60. ***Römer*** was a claim by a pensioner for the supplementary pension payments that were given to married pensioners. Mr Römer's pensionable service ended on 31 May 1990. In 2001 he entered into a life partnership. The CJEU held that Mr Römer was entitled to equal treatment if German life partnerships were comparable to marriage. Lord Kerr explained that:

> *53. One of the supplementary questions which the court considered was 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. Advocate General Jääskinen approached this question 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: EU:C:2010:425; [2011] ECR I-3591, paras 157–158. As it happened, no party had requested one in the Römer case, and it was, moreover,

> *"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": para 159.*

54. In the circumstances, the CJEU held that the Barber case 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.

55. From this 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.

…

65. Put simply, 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 entitlements to them had been built up. Translating that to Mr Walker's case, the message is clear. He could not have claimed entitlement to the payment of the pension before the transposition of the Directive into UK law but, once that happened, the rate of his pension was to be based on all the years of his service, even those which preceded the date of the transposition.

61. Lord Kerr concluded that the Court of Appeal had misunderstood and/or been puzzled by the ***Maruko*** and ***Römer*** cases because it had wrongly equated the time at which the pension right accrues, with the time at which the discrimination in the provision of the resulting benefits is to be judged. He said as follows on this issue:

56. Mr Chamberlain submitted that the appeal tribunal [2014] ICR 645 wrongly took Advocate General Van Gerven's description of pension benefits in the Ten Oever case [1995] ICR 74 as "deferred pay" as equating the time at which a pension right accrues with the time at which any discrimination in the provision of resulting benefits is to be judged. I agree that the appeal tribunal was wrong to do so. The point of unequal treatment occurs at the time that the pension falls to be paid. If Mr Walker married a woman long after his retirement, she would be entitled 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. Whether benefits referable to those contributions are to be regarded as "deferred pay" is neither here nor there, so far as entitlement to pension is concerned. 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 whatever to do with its fulfilment.

57. As Advocate General Jääskinen said in the Römer case, at para 160:

> *"In the hypothetical case that Mr Römer had been able to enter into a marriage in October 2001, instead of a life partnership, the Freie und Hansestadt Hamburg would have had to increase the supplementary pension paid to him … The financing of the retirement scheme concerned must have been planned taking into account the possibility of changes in the marital status of pensioners."*

…

60. The approach of the Court of Appeal led it to the same conclusion as the appeal tribunal, in equating the time at which a right to a pension accrues with the time at which discrimination in the provision of benefits is to be judged. The implication of this approach

was considered by Professor Wintemute in an article, "Does EU law permit unequal survivor's pensions for same-sex couples?" (2014) 43 ILJ 506, 510, commenting on the appeal tribunal judgment, when he said:

"The implication of the EAT's analogy was that, from 1980 to 2003, Mr Walker had been paid the lower 'gay wage' (one with no expectation that a survivor's pension would ever be paid to the employee's surviving partner despite the employee's equal contributions to the pension scheme), rather than the higher 'heterosexual wage' (one with an expectation that a survivor's pension might be paid to the employee's surviving spouse based on the employee's contributions to the pension scheme)."

61. This illustrates the essential flaw in the approach of the Employment Appeal Tribunal and the Court of Appeal. The salary paid to Mr Walker throughout his working life was precisely the same as that which would have been 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 his lawful spouse. The date when that pension will come due, provided Mr Walker and his partner remain married and his partner does not predecease Mr Walker, is the time at which denial of a pension would amount to discrimination on the ground of sexual orientation.

62. Tying all of this together, Lord Kerr concluded at paragraph 72 that:

I would therefore hold that Mr Walker's husband, provided he does not predecease him, and that they remain married at the time of Mr Walker's death, is 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 to the 2010 Act is incompatible with the Framework Directive . In particular, paragraph 18(1)(b) which authorises a restriction of payment of benefits based on periods of service before 5 December 2005 cannot be reconciled with what I consider to be the plain effect of the Directive.

63. Mr Bryant referred me to the High Court case of ***Carter and another v Chief Constable of Essex Police*** [2020] ICR 1156. Mr Carter was married to his first wife before he retired from the police force. She predeceased him. He remarried. The police regulations in force at the time of Mr Carter's retirement precluded his second wife from any entitlement to a widow's pension (in the event that she outlived him), because she was not married to Mr Carter before his retirement. This restriction was removed after Mr Carter's retirement. Mr and Mrs Carter argued that the exclusionary rule was (amongst other things) unlawful age discrimination. The respondents argued that Mrs Carter's claim for a widow's pension crystalised and/or was extinguished before age discrimination became unlawful in 2006. The claimants relied on ***Innospec*** (and other case law) and submitted that the discrimination should be judged on the date when the pension would otherwise be payable. Pepperall J preferred the respondents' submissions, saying as follows:

43. In Brewster [2017] ICR 434 , Langford [2020] 1 WLR 537 and Innospec Ltd [2017] ICR 1077 , the die was not cast until the claimants' partners died. Until that point a surviving partner's pension would have been payable in accordance with the rules of the respective pension schemes if:

43.1 Mr McMullan and Ms Brewster had simply signed the required declaration;

43.2 Mrs Langford had divorced her estranged husband; and

43.3 Rather less probably, Mr Walker had left his partner and remarried a woman.

Accordingly, even if one tweaked the facts of those cases such that the men who were members of the occupational pension schemes had retired before 2 October 2000 but died after that date, I consider that there would have been no retrospectivity issue and section 3 of the 1998 Act would have required the court to read the relevant regulations in accordance with the Convention.

44. By contrast, in this case, the effect of the exclusionary rule extinguished any right to a widow's pension decades ago:

44.1 Given that Mr Carter was married to Jean throughout his police service, the effect of regulation C5 was that a widow's pension could only be paid to her. This position crystallised in 1977 when Mr Carter retired and there could be no question of any widow's pension in this case at any point following his first wife's death in 1979.

44.2 June Carter has been adversely affected by the exclusionary rule since her marriage in 1981.

…

47. For these reasons, I conclude that Mrs Carter is not entitled to rely on the Human Rights Act 1998 in seeking declaratory relief against the chief constable. This is a claim seeking to challenge the effect of legislation that extinguished the right to a widow's pension many years before the passage of the 1998 Act in which there was no post-2000 service.

48. I reach the same conclusion under EU law. Borrowing from the observation of Advocate General Cosmas, this claim seeks to give retrospective effect to the Framework Directive and 2006 Regulations in order to challenge a situation that was permanently fixed long before such provisions came into force.

Submissions

64. Mr Short submitted that the principle of future effects means that, once in force, the prohibition upon age discrimination applied prospectively to the ongoing legal relationship between the parties, even where that relationship arose from pensionable service prior to 1 December 2006. The Supreme Court considered exactly this point in ***Innospec*** and the reasoning applies equally and obviously to the current limitation in Article 3 of the Equality Act (Age Exceptions for Pensions Schemes) Order 2010.

65. Mr Byrant submitted that ***Innospec*** could be distinguished, because:

65.1 ***Innospec*** was concerned with a different statutory exclusion and a different protected characteristic. Therefore the Supreme Court's judgment is not binding;

65.2 A key factor relied upon by the Supreme Court in ***Innospec*** concerned the funding of the scheme (paragraphs 56-58 and 61 of ***Innospec***). In ***Innospec*** the scheme could, and should, always have been funded

on the basis that Mr Walker might marry a woman after retirement, in which case she would have been entitled to a full widow's pension if he predeceased her. But it is not the case that the first respondent could, and should, have ensured that greater funding was available in the scheme;

65.3 The foundation of the Supreme Court's judgment in ***Innospec*** was that, although Mr Walker had ceased pensionable service before the cut-off date in paragraph 18 of schedule 9 of the EA, entitlement to the benefit in question had not crystalised at that point. The civil partnership and subsequent marriage took place after 5 December 2005, so the entitlement had not arisen by that date. In contrast, in the present case, before the cut-off date: (1) accrual had ceased; (2) the benefit had started to be paid; and (3) the requirement to reduce the benefit had been imposed. The claimants' entitlement was set in stone before 1 December 2006; and

65.4 Linked to his third submission, Mr Bryant submitted that ***Innospec*** concerned paragraph 18(1)(b) of schedule 9 of the EA only (see headnote, paragraphs 72 and 76 of ***Innospec***). Paragraph 18(1)(a) was not, and could not, have been in issue, as Mr Walker's right to a survivor's pension could not have accrued until after he had someone who was in a position to survive him for the purposes of the scheme rules. This was in contrast to the case of ***Carter***. The claimants' position is even clearer and more straightforward that in ***Carter***. Their rights to benefits under the scheme rules accrued when they ceased pensionable service, or when they started to receive pension payments on retirement. However, it is not the rules of the scheme that are said to be discriminatory, but rather the overriding statutory provisions of PA04. The accrued right in issue is the right to receive benefits set in accordance with the PA04 during the PPF assessment period. That right accrued when the assessment period began on 10 July 2006, and therefore before the 1 December 2006 cut-off date.

66. Mr Short countered each of Mr Bryant's arguments, in the following way:

66.1 It is immaterial that ***Innospec*** concerned a different statutory exclusion and a different protected characteristic. The reasoning in ***Innospec*** applies in exactly the same way;

66.2 Although the funding of the scheme was referred to in the minority judgment, and in parts of the majority judgment, this was not the basis for the majority decision in ***Innospec***. In any event, this does not distinguish the case, as the scheme should have been funded to pay the full pension entitlements, and not just the PPF capped compensation;

66.3 The Supreme Court does not state that their decision was based on rights having been accrued after 2005. The decision was based on the future effects principle and the fact that there was a continuing relationship. This was not because the entitlement to the benefit arose after the cut-off point. That is clear from the facts of ***Maruko*** and ***Römer***. In any event, as there is still a theoretical possibility that the assessment period will end without the PPF taking responsibility (for example if a scheme rescue occurs: PA04 s.149(2)(a)), the situation is not set in stone in the current case either; and

66.4 In response to Mr Bryant's fourth submission, Mr Short contended that:

66.4.1 Accrual refers to the time at which benefits are earned. You do not accrue an additional right just because a condition precedent (for example marriage (and death) in the case of a survivor's pension) is met;

66.4.2 The PPF cap is not a right, it is a restriction to a right: PA04 section 38(2);

66.4.3 ***Innospec*** concerned the entirety of paragraph 18 of schedule 9 EA (see paragraphs 72 and 76 of ***Innospec***). There was no valid material difference between limb (a) and limb (b); and

66.4.4 The situation was permanently fixed in ***Carter*** as there was no ongoing legal relationship with Mr Carter's second wife from

the date of their marriage, as she could never qualify for the widow's pension under the rules.

Conclusion

67. I prefer the submissions of Mr Short.

68. Mr Bryant is correct that, before 1 December 2006 (the date of the domestic implementation of the Framework Directive as regards age in relation to pensions):

    68.1 The claimants had left pensionable service;

    68.2 The claimants' pension benefits had come into payment;

    68.3 The assessment period had commenced; and

    68.4 The requirement to reduce the claimants' benefits had been imposed.

69. However, these factors did not permanently fix the situation before 1 December 2006.

70. I find that there was an ongoing legal relationship between the claimants and the first respondent after 1 December 2006. I have reached this conclusion because:

    70.1 The first respondent continued to make pension payments to the claimants on an ongoing basis. These were also recalculated and uplifted;

    70.2 The situation was not fixed by the fact that the claimants had left pensionable service and their pension benefits had come into payment before 1 December 2006. In ***Maruko*** and ***Römer*** the members had ceased pensionable service before the Framework Directive came into force, and their pension benefits had already come into payment. In ***Römer*** (as in the present case) the claim was for an uplift to such payments; and

    70.3 The commencement of the assessment period, and the consequential requirement to reduce the level of benefits, did not permanently fix the situation either. I reject Mr Bryant's submission that the accrued right in issue in this case is the right to receive benefits set in accordance with the PA04 during a PPF assessment period. PA04 section 138(2)

makes it clear that the claimants did not accrue an additional or standalone right on assessment. Rather, this was a restriction to the benefits that were payable in accordance with the scheme rules.

71. As there was an ongoing relationship between the parties, the principle of future effects applies. As the Supreme Court explained in ***Innospec*** (see paragraphs 24-26 of ***Innospec***), in such circumstances, the new rules will apply immediately to the future effects of the situation that arose under the old rules.

72. The point of unequal treatment occurs at the time that the pension falls to be paid, not the date when it accrues. What therefore matters, is that, when paid, the pension is non-discriminatory in accordance with the law applicable at the time of payment (see paragraphs 56 and 61 of ***Innospec***).

73. I find that the present case is analogous to ***Innospec***. I do not accept Mr Bryant's submissions that the case is distinguishable. I have addressed those submissions in turn below.

74. First, it is not material that ***Innospec*** concerned a different statutory exclusion or protected characteristic. Both cases concern compliance with the Framework Directive.

75. Second, whilst there are references to the funding of the scheme in the Supreme Court's majority judgment in ***Innospec***, this was not the ratio of the decision. The funding of the scheme would only have been relevant to the temporal limitation of the law if there would have been catastrophic economic consequences of its implementation, such that the ***Barber*** exception could be applied. That was not the case.

76. Third, in ***Innospec***, there was a continuing relationship between Mr Walker's spouse and Innospec at the time when the Framework Directive was implemented, because the scheme rules permitted Mr Walker's spouse to receive a survivor's pension (if they predeceased him), even if the marriage was entered into after his retirement. The position therefore did not become permanently fixed upon Mr Walker's retirement. As Lord Kerr explained at paragraph 61 of ***Innospec***, there was no reason for Innospec to anticipate

that it would not become liable to pay a survivor's pension to Mr Walker's lawful spouse.

77. However, contrary to Mr Bryant's third submission, it was not material that that Mr Walker's civil partnership and subsequent marriage took place after 5 December 2005 (which would have necessarily been the case under domestic law). In ***Maruko*** and ***Römer*** the life partnerships were entered into in 2001 (as permitted under German law), which predated the Framework Directive. There was a continuing relationship between Mr Maruko and VddB as he was the life partner of the VddB member at the time of the implementation of the Framework Directive.

78. Further on the third submission, for the reasons I have already given, I reject Mr Bryant's submission that the claimants' entitlement had been set in stone before 1 December 2006. To the contrary, I have found that there was an ongoing legal relationship.

79. There are a number of separate points to make on Mr Bryant's final submission, which I address in turn below.

80. I read the Supreme Court's judgment in ***Innospec***, and in particular paragraphs 72 and 76, as covering the entirety of the paragraph 18(1) exception at schedule 9 EA. The Supreme Court therein states that paragraph 18 of schedule 9 is incompatible with the Framework Directive. In most cases there will not be any difference between 18(1)(a) and 18(1)(b), as the right to a pension benefit generally accrues by reference to periods of service.

81. Mr Bryant relied upon the ICR headnote in support of his submission that the exception relied on by Innospec and challenged by Mr Walker was paragraph 18(1)(b). I do not find this submission persuasive, because:

    81.1 The headnote does not form part of the judgment;

    81.2 In any event, at page 1079G of the ICR report, where the parties' statement of agreed facts and issues is recorded, there is reference to paragraph 18 in its entirety; and

81.3 At paragraph 14 of the judgment, Lord Kerr records the first issue identified by Mr Walker. Again, paragraph 18 is referred to in its entirety.

82. I do not accept that Mr Walker accrued a right to a survivor's pension only when he had someone who was in the position to survive him for the purposes of the scheme rules. I accept Mr Short's submission that Mr Walker accrued the right during pensionable service, but that the condition precedent for that right was met at a later date. I reached this conclusion because:

82.1 This is the common understanding of how pension rights are accrued. This point is demonstrated by the way that the term "accrued" is used in the ***Innospec*** judgment (and the other cases I was referred to during the course of the hearing, and to which I have made reference to in "the law" section above);

82.2 At paragraph 56 of the ***Innospec*** judgment, Lord Kerr draws a distinction between the period when Mr Walker "acquired" the entitlement (to a spouse's pension for his married partner), and its "fulfilment". This distinction is consistent with Mr Short's submission that the right was accrued during pensionable service, but the fulfilment of the entitlement took place when the condition precedents for its fulfilment were met; and

82.3 The error that the Court of Appeal made in ***Innospec*** was to interpret the case of ***Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrif*** (Case C-109/91) [1995] ICR 74, as establishing a general principle of EU law, to the effect that the entitlement to a survivor's pension is "permanently fixed" as it is earned (paragraph 43 of ***Innospec***). The Supreme Court corrected this error. However, they did not disagree with the premise that the entitlement is earned during the period of pensionable service.

83. I have already explained that I reject Mr Bryant's submission that the PPF cap constitutes a separate right. It is a restriction on the benefits payable under the scheme rules (PA04 section 138).

84. Unlike Mr Walker's spouse in ***Innospec***, in ***Carter*** the situation was permanently fixed between the second Mrs Carter and the respondent before the new law came into force. This was because the exclusionary rule in the police regulations in force at the time of Mr Carter's retirement precluded Mr Carter's wife from recovering a survivor's pension, unless they were married before his retirement. As Mr Carter was not married to his second wife at the time of his retirement (having been married to his first wife at that time), the situation between the respondent and Mr Carter's second wife was permanently fixed.

85. For these reasons, I conclude that Article 3 of the Equality Act (Age Exceptions for Pension Schemes) Order 2010, insofar as it authorises a restriction of pension payments related to rights accrued, or benefits payable, in respect of the claimants' periods of pensionable service prior to 1 December 2006, is incompatible with the Framework Directive and is disapplied.

86. The Employment Tribunal therefore has jurisdiction to hear the claims.

87. The case has been listed for a preliminary hearing on 22 March 2022.

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Employment Judge **Gordon Walker**

Date 19 January 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

20/01/2022.

FOR EMPLOYMENT TRIBUNALS