

Discrimination: Sex

Key Points

- This note is primarily focussed on the sex discrimination issues which have arisen in relation to occupational pension schemes (rather than personal pension schemes), because this is where most of the sex discriminatory practices have been identified.
 - The Equality Act 2010 (the "Act") applies to both employers participating in occupational pension schemes and the trustees of such schemes. The Equality Act 2010 also inserts an overriding non-discrimination rule into occupational pension schemes if they do not already contain such a provision.
 - Under the Act, persons (including trustees of pension schemes) are prevented from directly or indirectly discriminating, victimising or harassing someone because of their sex.
 - The key cases of Barber v Guardian Royal Exchange and Coloroll Pension Trustees Limited v Russell established that pension schemes had to equalise pension benefits between men and women, with effect from 17 May 1990 (i.e. the date of Barber decision), and outlined how they should equalise them.
 - Specifically, men and women were required from this date to build up benefits by reference to the same normal retirement age ("NRA"). Before this, women typically had an NRA of 60 and men an NRA of 65. This difference in NRA meant that, in broad terms, men were required to work for longer than women in order to build up an equivalent pension.
- Many pension schemes have a gap between the 17 May 1990 (when they were legally required to equalise benefits for both sexes) and the date that a legally valid equalisation of the pension benefits was actually effected. This is known as a 'Barber window'. The main reason many schemes have a 'Barber window' is because there was a lack of clarity for a number of years as to how pension schemes were required to validly equalise.
 - Equalisation of Guaranteed Minimum Pensions ("GMPs") was not addressed in the Barber case and remains a difficult area.
 - Much of the case law and legislation referred to in this note involves European directives and rulings by the European courts. The requirement to equalise pension benefits between the sexes it is not expected to materially change following the UK's withdrawal from the European Union.

Main Sources

- The EC Equal Treatment Framework Directive 2000/78
- Equality Act 2010
- DWP consultation paper (January 2012) and interim response (April 2013) on GMP equalisation

Case Law

- Barber v Guardian Royal Exchange [1990] 2 All ER 660
- Coloroll Pension Trustees Limited v Russell [1994] EUECJ C-200/91

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- Preston & Others v Wolverhampton Healthcare NHS Trust & Others [2001] UKHL 5

General Principle

It is unlawful for an employer to discriminate against employees because of their gender. The current legislation prohibiting discrimination on grounds of sex is set out in the Act, which implements the EC Equal Treatment Directive into UK law.

The Act prohibits four forms of sex discrimination: direct sex discrimination; indirect sex discrimination; harassment and victimisation.

The Act also inserts an overriding non-discrimination rule into occupational pension schemes where they do not already contain such provision.

Application to pensions

Until 1990, pension schemes in the UK often mirrored the state pension age by having different retirement ages for men and women. Typically, men would have an NRA of 65 whilst women usually had an NRA of 60.

This changed following a series of key European Court of Justice ("ECJ") judgments that established that pension schemes had to provide equal benefits for men and women from the date of the first of these landmark equalisation cases (Barber).

Case Law

Article 157 of the EU Treaty states that: "each member state shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied."

The case of Barber established that pension entitlements were pay for the purposes of equal pay legislation. As a result, it was held to be unlawful for there to be an age condition distinguishing between men and women.

Occupational pension schemes were therefore required to equalise pension benefits for men and women. The Barber case did not, however, specify how pension schemes should apply equalisation. A subsequent case, Coloroll held that:

- For pension benefits accrued before 17 May 1990, there is no obligation on pension schemes to either retrospectively:
 - reduce benefits for employees receiving favourable treatment; or
 - enhance benefits for employees receiving detrimental treatment.
- For pension benefits accrued in the Barber window between 17 May 1990 and the date of any legally effective equalisation measure (e.g. a deed of amendment to the scheme rules), the pension scheme must provide all members with the most advantageous terms. This usually means that men received the earlier NRA of 60 applicable to female members.
- EU law permits reductions in benefits previously enjoyed by employees in order to bring about equal treatment. As a result, once a legally effective equalisation measure has been introduced (i.e. the date on which the Barber window closed) a pension scheme could provide benefits to all members that

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were 'levelled down'. This typically saw the higher NRA of 65 applying to all members.

For many pension schemes, this means that members have at least three tranches of benefits:

- Benefits accrued before 17 May 1990 – with the pension scheme's original NRA for men and women;
- Benefits accrued between 17 May 1990 and the date of legally effective equalisation measures (the Barber window) – the pension scheme's most advantageous NRA will apply to all benefits accrued in this period for both sexes;
- Benefits accrued after the date of legally effective equalisation measures – pension schemes are able to apply a higher NRA for both sexes – typically the NRA originally applicable to male members.

Problem areas for pension schemes

Until pension schemes validly equalised benefits, members' benefits were 'levelled up' to the most advantageous terms. As many pension schemes followed the state pension age, women often had an NRA of 60 and men an NRA of 65. Under such a scheme, men would be treated as having an NRA of 60 from 17 May 1990 (i.e. the date of the Barber decision) until the date benefits were validly equalised in the pension scheme (the closure of the Barber window).

Some pension schemes failed to equalise benefits properly or at all, resulting in costly 'levelled up' benefit provision.

Barber and subsequent case law decisions have not addressed whether pension schemes should equalise GMPs. GMP equalisation continues to be a difficult area for the pensions industry and the Government is currently looking at proposals for how best to equalise GMPs. [Worth mentioning the Lloyds test case?]

Sex discrimination and part-time workers

The case law outlined above did not address the issue of part-time workers' pensions. Decisions by some pension scheme providers to prevent those working in a part-time capacity from being able to participate and contribute towards a pension scheme affect a higher proportion of women than men (as, on average, proportionately more women work part-time hours than men).

The Preston case established that, regardless of gender, a worker is entitled to access their employer's pension scheme.

Discrimination: Marital and Civil Partnership status

Key Points

- The Equality Act 2010 (the "Act") applies to both employers participating in occupational pension schemes and the trustees of such schemes.
- The Act also inserts an overriding non-discrimination rule into occupational pension schemes if they do not already contain such a provision.
- Under the Act, persons (including trustees of pension schemes) are prevented from directly or indirectly discriminating or victimising someone because the individual is married or a civil partner. Harassment protection does not apply in relation to marital or civil partnership status.

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- Same-sex partners have a right to any dependents' pensions provided by pension schemes once they enter into a civil partnership or marry.
- An exemption allows pension schemes to restrict this right to benefits that accrued from 5 December 2005 (i.e. when legislation permitting civil partnerships came into force).
- The exemption was the subject of a government review published in June 2014. The government is yet to make a final decision on any legislative changes to the exemption.
- victimising another person because they have made or intend to make a claim in relation to marriage or civil partnership discrimination.

It is important to note that harassment does not apply in relation to marital or civil partnership status. Furthermore, only people who are actually married or in civil partnerships are protected.

The Act consolidated and developed various pieces of discrimination legislation that had previously been contained in different strands of primary and secondary legislation.

Main sources

- Council Directive 2000/78/EC (the Equal Treatment Framework)
- The Equality Act 2010
- The Marriage (Same Sex) Couples Act 2013
- The Civil Partnership Act 2004
- The EHRC Employment Statutory Code of Practice

General Principle

Under the Act, a person is prohibited from:

- directly discriminating against another because the individual is married or a civil partner;
- indirectly discriminating against another by applying a 'provision, criterion or practice' that disadvantages those who are married or civil partners; or

Civil partnerships, same-sex marriage and the law

The Civil Partnership Act 2004 came into force on 5 December 2005. From this date, same-sex couples could enter into a civil partnership.

The Marriage (Same Sex Couples) Act 2013 came into force on 13 March 2014. It allows the marriage of same-sex couples and the conversion of a civil partnership to a marriage.

The Act and pension schemes

The Act applies to both employers participating in occupational pension schemes and the trustees of such schemes. The Act also applies to third party providers of services and would therefore apply to pension scheme administrators and the providers of contract based personal pension schemes (e.g. GPPs).

The Act inserts an overriding non-discrimination rule into occupational pension schemes if they do not already contain such provision. This extends previous provisions by including marriage or civil partnership status into the overriding non-discrimination rule.

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Statutory exceptions

There are a number of exceptions to the non-discrimination rule under the Act. For example an employer may have a defence to a discrimination claim if, having regard to the nature or context of the work, not being married or a civil partner is an occupational requirement. Another statutory exception is where the discriminatory act was taken for the purposes of safeguarding national security.

Under the Marriage (Same Sex Couples) Act 2013 the government was required to review the differences between treatment of spouse's rights for same-sex and opposite-sex couples. The government's report was published in June 2014 and recommended no immediate change. The government has yet to make a final decision.

Cases challenging the exemption on survivors' pension rights for same-sex partners

In the context of pension provision, the Act requires same-sex partners to have a right to any dependants' pensions provided by a pension scheme once they enter into a civil partnership or marriage but there is an exemption in the Act which permits a scheme to restrict this right to benefits that accrued from 5 December 2005 (i.e. when legislation permitting civil partnerships came into force).

Legal challenges to the exemption are ongoing but have so far been unsuccessful. The joined cases of O'Brien v Ministry of Justice and Walker v Innospec were heard by the Supreme Court in March 2017, with the claimants arguing that the exemption is discriminatory and same-sex partners should be entitled to survivor's benefits based on a member's rights for all periods of service (as opposite-sex partners are). The judgement is yet to be handed down. The recent ECJ case of Parris v Trinity College Dublin challenges the thinking of the Court of Appeal in the Innospec cases, where the exemption was upheld, although the facts in Parris differ slightly and the ECJ did not consider the key issue of retroactivity of the Equal Treatment Directive.

Some pension schemes continue to rely on the exemption, while others have amended their rules to ensure same-sex partners receive the same benefits as opposite-sex partners for all periods of service. Prudent Trustee boards are seeking an actuarial assessment of the cost of such a change to prepare for any possible changes in the law.

Objective justification

Where a particular practice in relation to a pension scheme does not fall within one of the statutory exceptions, it may still be lawful if it can be objectively justified. This means that a practice will not be discriminatory if it can be demonstrated that the provision is "a proportionate means" of "achieving a legitimate aim".

As with most of the other characteristics protected by the Act, objective justification can only apply to indirect discrimination.

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