

LEGAL

Pensions in court: A legal update

Although it has been a steady year for pension cases seen in the European courts, the ones that have made the headlines have been significant

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The European courts play a key part in clarifying pensions-related matters for all the member states and the cases in the courts in 2016 have primarily been associated with pensions discrimination.

Squire Patton Boggs pensions partner Matthew Giles notes: “Both the Court of Justice of the European Union (ECJ) and the European Court of Human Rights (ECHR) have heard cases exploring the extent to which workers have been treated unfairly based upon age, sexual orientation and other ‘protected characteristics’.” Below we take a look at some of the most influential cases from the year.

Cases from the past year

Dansk Industri (ECJ, April 2016, Denmark)

This concerned a Danish law that grants a severance allowance (a multiple of monthly salary) to long-service employees when they are dismissed, but states that no severance allowance will be payable to individuals who joined their employers’ pension plan before age 50 and who are entitled to draw an early retirement pension at the time of dismissal, explains Giles.

“The ECJ found that this legislative provision was discriminatory on the grounds of age and incompatible with EU anti-discrimination law. It was held that the Danish court was required to interpret national law in line with the wording and purpose of EU law and should disapply any inconsistent provision of national law where such interpretation was not possible.”

Aldeguer Tomas v Spain (ECHR, June 2016, Spain)

This concerned an individual who had been denied a survivor’s pension following the death of his same-sex partner, Giles says.

“Although the couple had been in a long-term, de-facto marital relationship, they were unmarried at the time of death because Spanish law permitting same-sex marriages was not yet in force. Mr Tomas argued that it was discriminatory on the grounds of sexual orientation, for the Madrid High Court not to have followed the same approach in relation to the same-sex marriage law as had been taken in relation to previous opposite-sex marriage law of applying it retrospectively and providing for ‘stable cohabiting couples’. The ECHR rejected the claim on the basis the respective positions were fundamentally different and it was up to states to decide how to implement new legislation.”

Parris v Trinity College Dublin (ECJ, November 2016, Ireland)

This considered a rule in an occupational pension plan, which stated that no survivor’s pension would be available where a member had married or entered into a civil partnership after reaching age 60, Giles explains.

“Whilst death-bed marriage restrictions are common, it was argued that this provision was discriminatory to Dr Parris and his same-sex partner on the grounds of age and sexual orientation because the Irish law recognising civil partnerships had not been introduced until Dr Parris was already over 60. The ECJ found against the claimant on the basis that EU law did not require Ireland to provide for marriage or civil partnership for same-sex couples and neither did it require any such laws to be retrospective or to have transitional arrangements when first introduced.”

Upcoming cases

As we enter 2017, Sackers associate director Georgina Beechinor looks at some influential cases that are to be heard in the European Courts over the next 12 months.

Hampshire v Board of the Pension Protection Fund (UK) **MP v Secretary of State for Work and Pensions (UK)**

Mr Hampshire and 15 other former employees of T&N challenged the PPF's valuation of the T&N scheme, which began being assessed for PPF compensation in 2006, Beechinor says.

"They argued that a provision of the Insolvency Directive means that EU member states must ensure that every employee of an insolvent employer receives at least half of their accrued DB pension benefits. Mr Hampshire calculated that he would be entitled to a pension after adjustment of a lump sum of £19,819 per annum from the PPF. As he would have been entitled to a pension of approximately £76,302 per annum from the scheme, he argued that he was suffering a reduction of about 67 per cent from his contractual entitlement. The UK's Court of Appeal is now asking the Court of Justice of the European Union whether PPF compensation levels are unlawful and whether the Insolvency Directive can be invoked directly and override the compensation provisions in the Pensions Act 2004."

The case concerns the UK's implementation of the Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security, which deals with state benefits, including old age and retirement pensions, Beechinor explains.

"MB, a male-to-female transsexual sought to claim her state pension from age 60 (the state pension age for women at the time). Her claim was rejected as she had not obtained a full gender recognition certificate. MB had not wished to obtain the certificate, as to do so would have invalidated her marriage, which existed before same-sex marriage was permitted in the UK. The Supreme Court has asked the CJEU whether the relevant directive "precludes the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a state retirement pension".

Notable cases from the past

Each new year brings new pensions conflicts and rulings, which can have a huge impact across the continent. Here are some of the significant cases that are still having ramifications today.

Barber v Guardian Royal Exchange Assurance Group (ECJ, May 1990, UK) **PPG Holdings BV (PPG) (CJEU, July 2013, Netherlands)**

The impact of this significant decision, now over 25 years old, still resonates within the pensions industry, says Taylor Wessing employment, pensions and mobility group lawyer Angela Sharma.

"Mr Barber was a member of an occupational pension scheme that had unequal normal retirement ages for men and women (65 and 60 respectively) – not uncommon at the time. He brought a sex discrimination claim on the grounds that this was contrary to the requirements of the European Directive dealing with equal pay, but this case hinged on finding that pensions constituted 'pay' for the purposes of Article 119 (now 141) of that Directive – which was in fact the conclusion that the ECJ reached in its decision. The application of the decision was restricted to periods on and from 17 May 1990.

"That still left unanswered questions, most of which were dealt with in the subsequent case of Coloroll. The fallout, however, is still being felt now. Many schemes failed to equalise properly at the time, a fact that has often been discovered many years later, with new examples being discovered at the time."

Value Added Tax is harmonised and payable in accordance with EU law. "Unfortunately, unlike most employers, pension schemes are not VAT registered (as they are not businesses) and so cannot reclaim VAT, but it has been common practice for employers that are VAT registered to claim VAT in relation to scheme expenses invoiced and paid by them. There is an exemption under Directive 2006/112/EC from having to pay VAT on expenses in relation to the management of 'special investment funds' but one of the prominent cases contending that pension schemes fell within this definition, and so are exempt, failed," explains Sharma.

"However, there have been other decisions in this area, most notably looking at whether, where an employer pays expenses on behalf of a pension scheme, it can offset all the VAT paid against VAT charged to the business. This was the nature of the PPG Holdings BV case, which involved a Dutch group of companies that paid expenses for the pension scheme. The Court held that all of the VAT paid on those expenses could be offset because the provision of the pension scheme was for the employer's employees, so therefore the pension scheme was a direct and immediate link between that provision and the taxable business of the group, and it was part of the group's business.