

Pension rights for same-sex couples

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Exclusion of same-sex partners from pension schemes – a difficult issue

Because:

- Complexities of time and money.
- Employment, social security, or financial service?
- Direct or indirect sexual orientation discrimination?
- A topic of national family law?

Exclusion of same-sex partners from pension schemes – an easy issue

Because:

- Substantial sum for partners concerned.
- Fairness: when premium is paid in, pension should be paid out.
- Evidence: in the rules the exclusion is evident.
- Abundant case law that discrimination between same-sex and different-sex couples is a form of sexual orientation discrimination.
- Two ECJ judgments (*Maruko & Römer*).

International human rights bodies

- *Karner v Austria* (ECtHR 24.7.2003)
- *Kozak v Poland* (ECtHR 2.3.2010)
- *PB and JS v Austria* (ECtHR 22.7.2010)
- *Manenc v France* (ECtHR 21.9.2010 inadm.)

- *Young v Australia* (UN HRC 6.8.2003)
- *X v Colombia* (UN HRC 30.3.2007)

International staff tribunals

- *EJP v FAO*
(ILO Administrative Tribunal 2007, Judgment 2590)
- *Adrian v SG of the UN*
(UN Adm. Trib. 2004, Judgment 1183)
- *AHRC-J v ILO*
(ILO Adm. Trib. 2006, Judgment 2549)
- *EH v FAO*
(ILO Adm. Trib. 2009, Judgment 2860)

Court of Justice of the EU

- *Grant* (1998, C-249/96)
- *D and Sweden v Council*
(2001, C-122/99P & C-125/99P)
- *Mangold* (2005, C-144/04)
- *Maruko* (2008, C-267/06)
- *Römer* (2011, C-147/08)

Young v Australia (UN HRC 6.8.2003) para 10.4

- in previous communications the Committee found that differences in ... benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry ...
- In the instant case, it is clear that the author, as a same sex partner, did not have the possibility of entering into marriage. Neither was he recognized as a cohabiting partner of Mr. C, for the purpose of receiving pension benefits, because of his sex or sexual orientation.
- The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective.

Kozak v Poland (ECtHR 2.3.2010) para 92

- Sexual orientation is a concept covered by Article 14.
- Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced ... to justify the measure complained of.
- Where a difference of treatment is based on ... sexual orientation, the margin of appreciation ... is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought, but it must also be shown that it was necessary in the circumstances.
- Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention ...

PB and JS v Austria (ECtHR 22.7.2010)

29. ... since 2001 ... a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples ... Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of “family” ...
30. In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of “family life” ...

Maruko (1.4.2008, C-267/06)

- 46 ... the one criterion which may prove decisive is whether the retirement pension is paid to the worker by reason of the employment relationship between him and his former employer ...
- 47 Admittedly, that criterion cannot be regarded as exclusive, inasmuch as pensions paid under statutory social security schemes may reflect, wholly or in part, pay in respect of work ...
- 48 However, considerations of social policy, of State organisation, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme cannot prevail if the pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to the last salary ...

Maruko (1.4.2008, C-267/06)

58 As regards the significance of Recital 22 of the preamble to Directive 2000/78, that recital states that the Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

59 Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination ...

Maruko (1.4.2008, C-267/06)

72 If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78.

Römer (ECJ 10.5.2011, C-147/08)

- 42 ... as is apparent from the judgment in *Maruko* ... it is required not that the situations be identical, but only that they be comparable ... In that judgment ... the Court ... on the basis of the analysis of German law carried out by the court which made the reference ... made it clear that registered life partnership is to be treated as equivalent to marriage as regards the widow's or widower's pension.
- 43 ... the comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses and registered life partners ... which are relevant taking account of the purpose and the conditions for granting the benefit at issue ..., and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage.

Römer (ECJ 10.5.2011, C-147/08)

60 ... for the principle of non-discrimination on the ground of sexual orientation to apply in a case such as that at issue in the main proceedings, that case must fall within the scope of EU law ...

61 However, neither Art. 13 EC nor Directive 2000/78 enables a situation such as that at issue ... to be brought within the scope of EU law in respect of the period prior to the time-limit for transposing that directive ...

Römer (ECJ 10.5.2011, C-147/08)

Question 6: ... [judgment] subject to qualification – in accordance with the grounds of the ... judgment in Case C-262/88 *Barber* ... – that in the calculation of [supplementary] pension entitlement the principle of equal treatment is to be applied only in respect of that proportion of pension entitlement earned by the pensioner for the period from 17 May 1990?

66 As regards Question 6, it is sufficient to state that the dispute in the main proceedings relates to entitlement to a supplementary retirement pension paid from 1 November 2001, on which the limitation of the effects in time of the judgment in ...*Barber* ... to the period after 17 May 1990 cannot have any bearing, notwithstanding the fact that the contributions underpinning the entitlement had been paid before the date of that judgment. Furthermore, neither ... Germany nor ... Hamburg suggested any limitation in time of the effects of the present judgment and no evidence submitted to the Court indicates that they should be so limited.

Römer (10.5.2011, C-147/08)

Concl. AG Jääskinen (not yet available in English)

104. Au cas où il ne serait pas acquis que les partenaires ... sont dans des situations comparables ... les dispositions ... devraient être interprétées ... si ... réglementation ... est susceptible d'engendrer une discrimination indirecte
107. ... Certes, la disposition en cause ... exclut l'ensemble des prestataires non mariés ..., mais, de fait, les personnes homosexuelles sont plus fortement lésées que ... les personnes hétérosexuelles vivant en concubinage, car ces dernières ne sont pas définitivement évincées de la possibilité d'obtenir un tel avantage, dès lors que l'accès au mariage leur est offert ...
109. ... le lien de causalité entre l'inégalité de traitement en cause et la protection du mariage et de la famille, qui en soi pourrait être un «objectif légitime», est douteux à mon avis.
110. ... J'estime que pour promouvoir l'institution du mariage, il y a d'autres moyens que de nuire ... aux intérêts financiers des couples homosexuels ...

Manenc v France (ECtHR 21.9.2010 inadm.)

- La Cour observe ... que l'obligation de solidarité financière prévue par le code civil ... ne concerne que les époux. La Cour en déduit que le requérant n'était pas, à la suite du décès de la personne à laquelle il était lié par un PACS, dans une situation analogue ou comparable à celle d'un conjoint survivant.
- Par ailleurs ... rien ne permet d'établir que cette différence de situation reposait de manière déterminante sur l'orientation sexuelle du requérant
- ... toute personne placée dans une situation identique à la sienne aurait eu un traitement identique ... quel que soit le sexe du partenaire.
- La Cour note à cet égard que la plupart des partenaires liés par un PACS sont de sexe différent ...

EH v FAO (ILO Adm. Trib. 7.5.2009, Judgment 2860) para. 19

...Just as in a marriage, a [French] PACS establishes a legal relationship of mutual dependence. Further, and at the very least, in the absence of a contrary provision in the [FAO] Staff Regulations and Rules, the principle of non-discrimination requires that for the purposes of dependency benefits the term “spouse” be interpreted as applicable to a relationship of mutual dependence under the relevant national law.

Some literature with further references

- Waaldijk & Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*, The Hague: Asser 2006.
- Tobler & Waaldijk, Case Note *Maruko* in: *46 Common Market Law Review* 2009, 723-746.
- Waaldijk, 'Same-Sex Partnership, International Protection', in: *Max Planck Encyclopedia of Public International Law* (2009; 2011 update forthcoming).

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