

Pensions and Employment: Pensions Bulletin

10 February 2017 / Issue 3

Legal and regulatory developments in pensions

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[Details of our work in the pensions and employment field](#)

For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or [Bridget Murphy](#)

Watch List

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out (or has recently run out), with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/action
1.	Severance payments and tapered annual allowance pitfall	From 6 th April, 2016	<p>Pensions Bulletin 16/06</p> <p>2.1 Since 6th April, 2016, the £40,000 annual allowance for high income individuals is reduced by way of a taper to a minimum of £10,000 for those with income of £210,000 or more.</p> <p>2.2 For the taper to apply, the individual must have UK taxable income in 2016/17 of:</p> <ul style="list-style-type: none"> ◆ £110,000 “threshold” income, and ◆ £150,000 “adjusted” income. <p>2.3 Any taxable element of a termination package counts towards both threshold and adjusted income. A taxable termination payment could therefore catapult an individual over the £150,000 limit, resulting in a tax charge for the</p>

No.	Topic	Deadline	Further information/action
			<p>member on pension provision already made.</p> <p>2.4 There may be scope for timing taxable termination payments to straddle tax years but care would be needed in view of anti-avoidance provisions. Termination procedures should be reviewed to build in a process to identify and manage this point.</p>
2.	Members who intend to apply for Fixed Protection 2016 (“FP 2016”) must have stopped accruing benefits (note that fixed protection may be lost on joining a registered life cover arrangement)	6th April, 2016	Pensions Bulletin 15/16
3.	Abolition of DB contracting-out: Rule amendments needed	6 th April, 2016	<p>If your scheme was contracted-out on 6th April, 2016 and currently has active members accruing benefits (and who continued to accrue benefits after 5th April, 2016 in the scheme), then your scheme will, more likely than not, require a rule amendment effective from 6th April, 2016 to prevent the inadvertent addition of an additional underpin to the</p> <p>Note: Statutory power to amend, retrospective to 6th April, 2016,</p>

No.	Topic	Deadline	Further information/action
			<p>expires on 5th April, 2017</p> <p>accrued GMPs of those active members. See further Pensions Bulletin 16/03.</p>
4.	Put in place register of persons with significant control (“PSC”) for trustee company where trustee is a corporate	6 th April, 2016	Pensions Bulletin 16/03
5.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5 th July, 2016 at the latest	Trustees must notify “service providers” if the scheme is being used as a “qualifying scheme” for auto-enrolment purposes and some or all of the benefits are money purchase. Pensions Bulletin 16/04 .
6.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer’s staging date	<p>For example employers with a 2013 staging date must complete cyclical re-enrolment process between December 2015 and June 2016.</p> <p>Publication available to clients on request from usual pensions contact.</p>
7.	First Chair’s annual governance statement	Within 7 months of end of scheme year (for scheme years ending on or after 6 th July, 2015)	<p>For example, schemes with a 31st December year end must submit statement by 31st July, 2016.</p> <p>Client note dated June, 2015 available from Dawn Holmes.</p>

No.	Topic	Deadline	Further information/action
8.	“Brexit”	Referendum held on 23 rd June, 2016	<p>8.1 Supreme Court ruled¹ on 24th January, 2017 (8/3) that Article 50 notice triggering 2 year exit period requires an Act of Parliament to authorise the Government to serve that notice.</p> <p>8.2 Consider potential impact on pension schemes. Client publications available on Slaughter and May website.</p>
9.	DC Code of Practice 13 on governance and administration takes effect	28 th July, 2016	Schemes offering money purchase benefits (including money purchase AVCs, insofar as the legislation applies) must familiarise themselves with the revised Code .
10.	GMP equalisation		
10.1	Lloyds Trade Union announces intention to bring GMP equalisation class action	August 2016	We will continue to monitor developments in this litigation, said to be worth £300 million which has implications for all schemes with GMPs accrued in the period 17th May, 1990 to 5th April, 1997.
10.2	DWP publishes consultation proposing methodology for equalising GMPs	28th November, 2016	Pensions Bulletin 16/19
11.	Civil partner/same sex spouse		

¹ This was predicted in our client seminar on 23rd November, 2016 (albeit 11/0, not 8/3)

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No.	Topic	Deadline	Further information/action
	pensions: retroactivity pre-5th December, 2005		
11.1	CJEU decision in <i>Parris v. Trinity College, Dublin</i>	Decided on 24 th November, 2016	A ‘death bed marriage’ scheme rule did not indirectly discriminate on sexual orientation grounds. Pensions Bulletin 16/18
11.2	Provisional date for Supreme Court to hear appeal in <i>Walker v. Innospec</i>	March, 2017	To establish whether survivor benefits for civil partners will be retroactive to a date before the Civil Partnership Act 2004 came into force.
12.	Derivatives: New requirements to exchange variation margin	1 st March, 2017	Pensions Bulletin 17/01
13.	PPF Levy		
13.1	Measurement Time for submission of scheme data for 2017/18 PPF levy changed	31 st March, 2017	Pensions Bulletin 16/14
13.2	Submission deadline for most certificates and scheme return	31 st March, 2017, midnight	Pensions Bulletin 17/01
14.	Gender pay gap information - Regulations expected to be in force on 6 th April, 2017		Assess impact of pension provision on requirement to publish information designed to highlight any gender pay gaps. See item I below and Employment Bulletin 17/03 .

No.	Topic	Deadline	Further information/action
		4 th April, 2018	Deadline for reporting above information.
15.	HMRC’s existing practice on VAT and pension schemes ends (please see our item on this in Pensions Bulletin 16/13)	31 st December, 2017	Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover.
16.	Data protection: New Regulation	25 th May, 2018	Pensions Bulletin 16/05 Employment Bulletin 16/15
17.	Further EMIR exemption extension for pension scheme arrangements	16th August, 2018	Pensions Bulletin 17/01
18.	IORP II expected transposition deadline	12 th January, 2019	Pensions Bulletin 16/11

New Law

I. Gender pay gap and pensions

1. The final draft of the [Equality Act 2010 \(Gender Pay Gap Information\) Regulations 2017](#) (“the regulations”) is currently before Parliament for approval and is due to come into force on 6th April, 2017.

2. The regulations require employers to publish annually information designed to highlight any gender pay gaps in relation to bonuses and ordinary pay.
3. The regulations define “ordinary pay” as:
 - 3.1 basic pay;
 - 3.2 allowances;
 - 3.3 pay for piecework;
 - 3.4 pay for leave; and
 - 3.5 shift premium pay.
4. The definition expressly carves out, amongst other things, “remuneration provided otherwise than in money”.
5. The Government [response](#) (dated December, 2016) to its 2nd consultation on the regulations refers to calls from respondents for greater clarity on the treatment of employer pension scheme contributions.
6. The Government response simply states that:

“the draft regulations will continue to specify that pay is to be calculated before any deductions made at source, including (a) any cash deductions that are compulsory for the employer (e.g. PAYE, national insurance or pension contributions/schemes) and (b) any cash deductions that are compulsory for the

employee (e.g. ... attachment of earnings).“

Comment (1): It would appear that the term “ordinary pay” is not broad enough to include pension scheme employer contributions.

Comment (2): However, where cash is being paid to an individual in lieu of an employer pension scheme contribution (for example, where the member would lose their lifetime allowance protection if they were to accrue benefits) it could be argued that the amount paid may fall within the definition of “allowances”, which takes the form of a non-exhaustive list.

Comment (3): If that were to be the case, the cash payment would fall within the definition of “ordinary pay” (see above).

Comment (4): Employers making such a cash payment should note that if the payment is classed as an allowance then it would need to be included in the calculations for establishing the mean and median rates of pay for male and female employees, as required under the regulations.

7. [Draft guidance](#) on the regulations, was published jointly by ACAS and the Government Equalities Office, on 28th January, 2017.

8. As regards employee contributions, the draft guidance states that the employee’s pay and bonuses must be calculated before any pension deductions.
9. However, the section in the draft guidance covering salary sacrifice states that the figure used should be the employee’s gross pay after any reduction for salary sacrifice.
10. We are seeking clarification from the Government Equalities Office on this inconsistency.
11. As regards employer contributions, the draft guidance states: *“Employer pension contributions go directly to the pension fund, so these have nothing to do with the gender pay gap calculations”*.

Comment: The final form of the guidance may be of interest to those seeking to establish how the Government intends the gender pay gap legislation to operate in practice, but the guidance will not have the force of law.

Cases

II. Anti-franking and incorrect benefit quotes

The Ombudsman has ruled, on 5th January, 2017, that a scheme which had provided 2 incorrect benefit quotations, followed by a correct quote some years later, was not bound to honour the wrongly calculated quotes.

A. Facts

1. Dr S became a deferred member of the British Cement Association Pension Scheme on 30th April, 1984.
2. He received 3 benefit quotations over a number of years.
3. The first 2 quotations, provided in 1984 and 1996, were incorrect. The last quote, provided on his retirement in 2014, showed a lower amount.
4. The scheme administrator explained that the wrong quotes should have reflected the fact that Dr S was not entitled to the protection of anti-franking legislation since he had left contracted-out employment before 1st January, 1985.
5. Also, the scheme rules did not provide for anti-franking to be applied to members in that position.

Comment (1): Anti-franking legislation was introduced to prevent a member's benefits above his GMP being reduced to meet the cost incurred in revaluing the GMP.

Comment (2): That legislation, first set out in the Social Security Pensions Act 1975, was introduced by reference to members leaving salary-related contracted-out

employment on or after 1st January, 1985.

6. Dr S complained to the Ombudsman. His arguments included assertions that:
 - 6.1 the higher quotes constituted a contract;
 - 6.2 the possibility of an augmentation having been made could not be excluded; and
 - 6.3 the absence of scheme records regarding the earlier calculations meant the original quotes should stand.

B. Decision

1. The ruling notes that the Adjudicator rejected the argument that a contract had been formed. None of the elements required for a contract were present.
2. In offering Dr S a buy-out, amongst other options, when he first left employment the Trustees were not augmenting Dr S's benefits. Nor was there any evidence that the employer had requested a benefit augmentation. Augmentations are not silently awarded and members are typically aware of them when they have been.

3. The requirement under the scheme rules for the Trustees "*to keep or cause to be kept a complete record of all matters essential for the working of the Scheme*" did not mean that every piece of correspondence or calculation needed to be kept.
4. Only information required to run the scheme would need to be retained, such as a record of members' entitlements and the scheme Trust Deed and Rules.

Comment: The Pensions Regulator's [guidance on record-keeping](#), issued in June, 2010, states that it relates to records required to calculate benefits, rather than the calculations themselves.

5. The Ombudsman decided that providing Dr S with the incorrect benefit quotations caused distress and inconvenience and the Trustees should pay him £500 compensation.

[Dr S - PO-10463](#)

Comment: The scheme asked Dr S for evidence of any plans or commitments made by him based on the incorrect benefit quotes. Dr S had not provided any evidence of that nature. Had he done so, the possibility of putting forward a change of position

argument might have been available to him.²

III. Age discrimination: transitional pension provisions not objectively justified

1. An employment tribunal has **ruled**, on 16th January 2017, that transitional provisions linked to the reform of judicial pension arrangements could not be objectively justified.
2. The transitional provisions were designed to protect those closest to retirement from the adverse effects of the reforms.
3. The claimants argued that the transitional provisions amounted to direct age discrimination, indirect sex and race discrimination and breach of the right to equal pay.
4. The Tribunal rejected the Government's argument that focusing transitional provisions on members closest to retirement was a legitimate aim.
5. Those members were the least adversely affected by the move to the new, less generous, pension scheme.
6. The Tribunal's conclusion on objective justification regarding direct age discrimination applied equally to the

indirect discrimination and equal pay claims.

McCloud v Lord Chancellor

IV. Court of Appeal rules on link between injury and benefit

1. The Court of Appeal has agreed, on 16th January, 2017, with the High Court's interpretation of NHS legislation regarding the link between an injury sustained at work and entitlement to permanent injury benefit.
2. In doing so, the High Court was correct to set aside the Pensions Ombudsman's decision and direct the NHS Business Services Authority to consider the matter once more.

A. Facts

1. Mrs Young worked as a community nurse. While working, Mrs Young sustained an injury to her neck and her back. She already had a degenerative spinal condition, although that was only diagnosed after the injury.
2. The NHS Authority refused Mrs Young's application for permanent injury benefit. Their position was that her earning ability had not been

permanently reduced "by reason of the injury", as required under the relevant legislation³.

3. Mrs Young complained to the Ombudsman. The Ombudsman ordered the NHS Authority to reconsider its decision, but the Authority did not change its view.
4. A second complaint to the Ombudsman was not upheld, however, and the case came before the High Court.
5. The High Court ruled, on 8th July, 2015, that the injury did not have to be the sole cause of reduced earning ability, it could be a contributory cause.

B. Decision

1. The Court of Appeal agreed with the High Court.
2. The injury did not have to be **the** cause of the permanent loss of earning ability. It could be a cause of lost earning ability.
3. The Authority and its medical advisers needed to ask themselves the correct question.

² Derby v Scottish Equitable Plc (decision of the Court of Appeal on 16th March, 2001)

³ National Health Service (Injury Benefits) Regulations 1995

Young v NHS Business Services Authority

Comment: This case is a reminder of the importance of understanding, with absolute clarity, exactly how a scheme's requirements are to be applied in practice on receipt of an application for ill health benefits.

Points in practice

V. Data protection - ICO guidance in 2017

1. The Information Commissioner's Office ("ICO") has [announced](#), on 17th January, 2017, the [publication](#) of an update setting out how the ICO intends to help organisations to prepare for the EU's General Data Protection Regulation ("GDPR") during 2017.
2. ICO guidance is planned for early 2017 on:
 - 2.1 contracts and liability, and
 - 2.2 consent.

3. The ICO regards its [Overview of the GDPR](#) as the central pillar to its guidance.
4. The Overview is to be a living document, to which content will be added as more guidance is produced by the ICO and the Article 29 Working Party.

Comment: Please see our [client briefing](#) on processing under the GDPR and why UK organisations should prepare for the GDPR despite Brexit. For all our data protection publications please click [here](#).

VI. Pensions tax on overseas pensions guidance: erratum

Item II (Pensions tax on overseas pensions - guidance) of Pensions Bulletin 17/2, erroneously referred in paragraph 1. to 2016. The new chapter 3 of the draft guidance was published on 3rd January, 2017 and comments were sought until 1st February, 2017

If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact [Jonathan Fenn](#) or your usual Slaughter and May adviser.

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