

Pensions and Employment: Pensions Bulletin

28 April 2017 / Issue 8

Legal and regulatory developments in pensions

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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> <p>8.3 Article 50 notice given on 29th March, 2017.</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

No.	Topic	Deadline	Further information/action
	Government response published	13 th March, 2017	
11.	Civil partner/same sex spouse 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	Supreme Court hearing dates in appeal in <i>Walker v. Innospec</i>	8 th and 9 th 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. Judgment awaited.
12.	EMIR - Derivatives: New requirements to exchange variation margin	1 st March, 2017	If investment manager uses over-the-counter derivatives, check investment manager has arranged for trustee to comply. Pensions Bulletin 17/01 Pensions Bulletin 17/05 Trustees entering into OTC derivatives must perform an independent legal review of the enforceability of their netting and collateral arrangements. Briefing note; FCA statement on timing
13.	New 25% tax charge on certain	9th March, 2017	Transfers to QROPS in execution of requests made before 9th March, 2017 are

No.	Topic	Deadline	Further information/action
	transfers to QROPS		not subject to the new tax charge. QROPS managers must give HMRC undertaking by 13 th April, 2017 to preserve QROPS status. Pensions Bulletin 17/05
14.	PPF Levy		
14.1	Measurement Time for submission of scheme data for 2017/18 PPF levy changed	31 st March, 2017	Pensions Bulletin 16/14
14.2	Submission deadline for most certificates and scheme return	31 st March, 2017, midnight	Pensions Bulletin 17/01
15.	Pensions Advice Allowance introduction date	6 th April, 2017	Pensions Bulletin 17/04
		3 rd January, 2018	New financial advice definition. Pensions Bulletin 17/06
16.	Gender pay gap information - Regulations expected to be in force on 6 th April, 2017	4 th April, 2018	Assess impact of pension provision on requirement to publish information designed to highlight any gender pay gaps. See Pensions Bulletin 17/03 and Employment Bulletin 17/03 . Deadline for reporting above information.
17.	HMRC’s existing practice on VAT and pension schemes ends (please see our	31 st December, 2017	Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover.

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

No.	Topic	Deadline	Further information/action
	item on this in Pensions Bulletin 16/13)		
18.	Data protection: New Regulation	25 th May, 2018	Pensions Bulletin 16/05 Employment Bulletin 16/15 As data controllers, trustees will need to ensure that compliance with the EU General Data Protection Regulation is achieved by this date.
19.	Further EMIR exemption extension for pension scheme arrangements	16 th August, 2018	Pensions Bulletin 17/01
20.	IORP II expected transposition deadline	12 th January, 2019	Pensions Bulletin 16/11
21.	Brexit	By 29 th March, 2019, unless extended	UK leaves EU from effective date of withdrawal agreement or, failing that, 2 years after giving Article 50 notice unless European Council and UK unanimously decide to extend period.

New Law

I. PPF levy rules for 2017/18 finalised

1. The PPF [announced](#) on 30th March, 2017 that the levy rules for 2017/18 have been finalised, featuring:

- 1.1 minor clarifications made to the 15th December, 2016 draft (please see [Pensions Bulletin 17/01](#)), and
- 1.2 the addition of the levy rule for schemes without a substantive sponsor (please see [Pensions Bulletin 17/05](#)).
2. The PPF's [Policy Statement](#) on the new levy rule for schemes without a substantive sponsor was also published on 30th March, 2017. The Policy Statement includes worked examples of the new methodology. The PPF plans to consult further on the new levy rule for 2018/19, however.
3. The Policy Statement describes schemes without a substantive sponsor as those where:
 - 3.1 “the scheme has separated from its previous substantive employer or the employer has suffered an insolvency event”;
 - 3.2 the scheme is running on and seeking to pay scheme benefits purely from scheme assets “and perhaps any additional, finite sources of funding such as cash held in escrow”;

- 3.3 is fully funded on a Section 179 (Pensions Act 2004) basis; and
- 3.4 has entered into an ongoing governance arrangement.
4. The levy Determination for 2017/18 defines an ongoing governance arrangement an agreement or other document setting out the terms on which the scheme is permitted to operate without a substantive sponsor.

Note: The arrangement must have been entered into between 1st January, 2017 and 31st March, 2018, or the Pensions Regulator must have agreed during that period that the arrangement will be entered into at a future date.

II. Early exit charges and member-borne commission - consultation

1. The DWP has published a [consultation](#), dated 5th April, 2017, seeking views on draft regulations² covering early exit charges and member-borne commission charges.
2. The consultation closes on 31st May, 2017.

Comment: The Pension Schemes Act 2017 contains a provision allowing regulations to be made in relation to early exit charges and

² The draft Occupational Pension Schemes (Charges and Governance) (Amendment) Regulations 2017

member-borne commission charges (please see [Pensions Bulletin 16/17](#)).

A. Early exit charges

1. The draft regulations would introduce restrictions on early exit charges for members of occupational pension schemes who are eligible to access the pension freedoms which were introduced in April, 2015.
2. The legislation would apply where a charge is imposed on a member taking, converting or transferring benefits between normal minimum pension age (age 55) and normal pension age.
3. An early exit charge cap equal to 1% of the value of the member's benefits would apply to members who joined the scheme before 1st October, 2017.
4. For members who could be subject to multiple charges, the 1% cap would apply to the combined level of those charges.
5. A ban on such charges would apply to members joining the scheme on or after 1st October, 2017.
6. Service providers would be required to confirm to the trustees that they

comply, or have ceased to comply, with the legislation.

Comment: The Government response, of 15th November, 2016, to its consultation on early exit charges acknowledged that only around 3% of occupational pension scheme members faced early exit charges (please see [Pensions Bulletin 16/18](#)). Such charges are far more common in relation to personal pension schemes.

B. Member-borne commission

1. Member-borne commission has been banned since 6th April, 2016 in relation to new contracts set up by occupational pension schemes whose benefits include money purchase benefits and which are 'qualifying schemes' for auto-enrolment purposes.
2. The draft regulations would extend the ban in relation to contracts entered into before 6th April 2016 but not where the payment was made before 1st October, 2017.
3. Service providers would be required to confirm to the trustees that they have complied with the prohibition on member-borne commission within

timescales set out in the draft regulations.

III. Standardising disclosure of charges and transaction costs - consultation

1. The Investment Association has launched a [consultation](#),³ proposing the standardisation of the disclosure of charges and transaction costs.
2. The consultation, which closes on 19th May, 2017, sets out a draft [industry code](#) on the subject.
3. The draft code aims to promote the accountability of asset managers and facilitate clients' understanding of the charges and costs incurred by their investments.

Comment (1): Legislation⁴ requires the Chair's statement to set out details of charges and transaction costs and explain the trustees' assessment of the extent to which those represent good value for members.

Comment (2): The main variable in pot growth is the performance of the investments. It may be that higher transaction costs are worth paying if the investments perform better than those featuring lower transaction costs.

³ Enhanced disclosure of charges and transaction costs - 27th March, 2017

⁴ Occupational Pension Schemes (Charges and Governance) Regulations 2015

4. The Investment Association intends the final version of the code to comply with the outcome of the FCA consultation CP16/30 in relation to DC pension schemes.

Comment: Consultation CP16/30 closed on 4th January, 2017. To read more about the FCA consultation please see [Pensions Bulletin 16/15](#).

IV. Auto-enrolment guidance updated

1. The DWP has [updated](#), on 28th March, 2017, its auto-enrolment guidance on certifying money purchase pension schemes.
2. The update is intended to reflect changes made to the timing of future increases in the minimum level of contributions under the Employers' Duties (Implementation) (Amendment) Regulations 2016 (SI 2016/719).
3. Those regulations extend the transitional periods during which minimum contribution levels for jobholders who are auto-enrolled in an occupational or personal DC qualifying scheme are being phased in.
4. The extension aligns the transitional periods with the start of the tax year so that:
 - 4.1 the first transitional period begins on the employer's staging date and ends on 5th April, 2018 -

total contributions must equal at least 2% of a jobholder's qualifying earnings, of which the employer must contribute at least 1%;

- 4.2 the second transitional period starts on 6th April 2018 and ends on 5th April, 2019 - total contributions must equal at least 5% of a jobholder's qualifying earnings, of which the employer must contribute at least 2%; and
- 4.3 from 6th April, 2019 onwards, total contributions must equal at least 8% of a jobholder's qualifying earnings, of which the employer must contribute at least 3%.

Tax

V. Finance (No.2) Bill amendments

1. The Finance (No. 2) Bill 2016/17 received Royal Assent on 27th April, 2017.
2. Amendments were made to the Bill shortly before Royal Assent, due to the forthcoming general election.
3. The Bill was significantly shortened to enable its passage through the legislative process before Parliament is dissolved on 3rd May.
4. A number of pensions related provisions have been removed. It is expected that

the provisions will then be included in a post-election Finance Bill.

5. The provisions which have been removed relate to:
 - 5.1 pensions advice (exemption from income tax relating to pensions advice with a value of up to £500); and
 - 5.2 the reduction in the money purchase annual allowance to £4,000 (from £10,000).
6. There are also some technical amendments to the pensions provisions that have been retained.

Comment: For more on the Finance (No.2) Bill, which was published on 20th March, 2017, please see [Pensions Bulletin 17/07](#).

Cases

VI. High Court rules on whether RPI altered or its compilation materially changed

1. The High Court (Warren J) has ruled, on 31st March, 2017, on whether the retail prices index ("RPI") has been altered, or its compilation materially changed, under 2 sections of a scheme
2. The court also ruled that a person retiring under the DB section of the scheme **after** the date of an alteration to RPI is entitled to increases in accordance with RPI as it stands from time to time

(subject to any future adoption of a different basis following a later alteration to RPI).

A. Facts

1. The case examined the pension increase wording in the career average revalued earnings (“CARE”) section and the DB section of the Thales UK Pension Scheme.
2. The CARE section provisions governing the benefit calculation and pension increases refer to the retail prices index. However, the Principal Employer and Trustees must “*determine the nearest alternative index*” if RPI’s “*compilation is materially changed*”.
3. Under the DB section, increases to pensions in payment are set at the lower of 5% compound and increases in RPI. However, if the RPI is revised to a new base or is “*otherwise altered ... all subsequent variations in that pension will be on a basis determined by the Trustees having regard to the alteration made to the [RPI]*”.

B. Decision

CARE section

1. Routine changes to improve RPI and keep it fit for purpose are not material changes in RPI’s compilation.

2. However, the forthcoming change to RPI whereby the House Prices Index is to be replaced, for the purposes of RPI, with a new index was a material change to the compilation of RPI.
3. In determining “*the nearest alternative index*” the employer must act within a reasonable time. Not doing so could result in disappointed beneficiaries claiming that the employer has breached its duties of trust and confidence towards current and past employees.
4. An alternative index cannot be adopted simply because it is perceived as “better”. The judge found it hard to see how CPI could successfully compete against RPI as adjusted in relation to house prices.

DB section

1. The phrase “otherwise altered” did not require the alteration to be material. It would require compelling circumstances for the Trustees to depart from RPI as altered by a routine change, however.
2. In the judge’s view, RPI as varied by the new house prices index was the only basis for increases “*which the Trustees could properly determine*”.
3. The Trustees are “*subject to fiduciary obligations when making the determination; it would require*

exceptional circumstance for them to adopt an alternative index, such as CPI, in order to reduce the costs to the Company if ... they would be acting to the detriment of the beneficiaries”.

4. The judge concluded that the DB section rule applied only to pensions in payment when the change to RPI was made. A person retiring **after** the date of an alteration to RPI was not affected by that alteration. Such a person would be entitled to increases in accordance with RPI as it stands from time to time (subject to any future adoption of a different basis following a later alteration to RPI).

Thales UK Limited v Thales Pension Trustees Limited & Others

Comment (1): The judge was asked to construe the wording in each of the increase rules, so the decision closely tracks that wording. The wider application of this decision is therefore likely to be limited.

Comment (2): Although the ruling is confined to the meaning of the increase rules, the judge expressed the view that the new version of RPI was the only index which could properly be chosen for the DB section.

Comment (3): If the Trustees were to apply an index other than the new

version of RPI, that would result in different indices being used for DB section members retiring before the date on which RPI is altered and those retiring after the alteration to RPI.

VII. Pension increases applied to minimise interference with scheme integrity

The Court of Appeal (LJs Lewison, Gloster and Henderson) has ruled, on 29th March, 2017, on how an amendment to pension increases should operate in relation to benefits accrued before the date of the amendment.

A. Facts

1. The court was asked to examine the impact of a rule amendment (“**the new rule**”) made on 20th June, 1991.
2. The new rule provided for pensions in payment to be increased by 5% or in line with increases made to the retail prices index, whichever was lower (“**5% LPI**”). The new rule did not differentiate between pension accrued before and pension accrued after that date.
3. The trustees thought that the payment of future pensions would be regulated by the new rule irrespective of the date of service at which the pension accrued and the scheme was administered on that basis for many years.

4. Prior to the amendment (“**the old rule**”), pensions were increased by 3% compound.
5. The amendment power contained a prohibition on any changes that would “*operate so as to affect in any way prejudicially (a) any pension already being paid ... or (b) any rights or interests which shall have accrued to each prospective beneficiary in respect of pension benefits secured under the Scheme up to the date on which such alteration or addition takes effect*”.
6. The Court of Appeal focused on how the new rule should apply to benefits accrued before 20th June, 1991 (“**the pre-June 1991 element**”).

B. Decision

1. The High Court had decided that a member’s entitlement by reference to the pre-June 1991 element was a blend of the old rule and the new rule. This meant an increase should be made each year equal to the greater of (a) 3% and (b) 5% LPI.
2. The employer appealed, arguing that the High Court decision would give pensioners more than if the old rule had remained in force.
3. The Court of Appeal allowed the appeal.

4. The Court of Appeal decided that the employer’s suggested approach should be adopted because it “does the least interference to the integrity of the modified scheme” (following *Foster Wheeler Ltd v Hanley*).
5. Under that approach the pre-June 1991 element of pension payable in any given year would be the higher of 2 calculations:
 - 6.1 the value of the member’s pre-June 1991 element, starting from the date of retirement, increased by 3% compound up to and including the year in which the increase is to take effect; and
 - 6.2 the same calculation but by reference to 5% LPI compound instead, subject to a floor of 0% to avoid the effects of any negative retail prices increase.

FDR Limited v Dutton

VIII. No wage increase in 2nd year of front-loaded 2-year pay deal

The Pensions Ombudsman has ruled, on 21st February, 2017, that no increase was made to salaries in the 2nd year of a 2-year, front loaded, wage agreement.

A. Facts

1. A wage agreement had been entered into for the 24-month period starting on 1st January, 2012, which provided for increases of 4.75%. The payment was front loaded and was paid in December, 2012
2. The pension increase rule stated that an increase on benefits accrued before 6th April, 1997 (“**pre-97 benefits**”) “shall only be made in a calendar year in which salaries are increased”.
3. The Trustee sought legal advice which confirmed that there was no salary increase in 2013 so pre-97 benefits should not be increased in that year.
4. A complaint was brought before the Ombudsman, arguing that pre-97 benefits should also have been increased in 2013 because the wage increase covered 2012 and 2013.
5. The complainants accepted that the salary increase had not been designed so as to prevent a pension increase in 2013 for pre-97 benefits, but they argued that the arrangement was subsequently exploited when the opportunity arose.

B. Decision

1. Given the legal advice provided to the Trustee, its decision not to increase pre-97 benefits in 2013 was not unreasonable. The Ombudsman was therefore unable to reach a finding of maladministration.
2. The Ombudsman considered his role was to decide whether the Trustee had followed the correct process when considering the matter.
3. The Ombudsman took the view that it was not his role to consider whether a salary increase had taken place in 2013. He concluded, however, that wage slip evidence presented to him did not indicate that such an increase had taken place in that year.

Mr D, Mr R and Mr J - PO-9208/9259 & 9293

IX. Exoneration clause cannot protect against breaches of investment duties

The High Court (Mr Miles QC) has confirmed, on 18th January, 2017, that Section 33 of the Pensions Act 1995 prevented an exoneration clause being brought into play where the former trustees of 2 pension liberation schemes acted in breach of their duties under Section 36 of that Act.

A. Facts

1. Dalriada Trustees Limited was appointed in 2013 by the Pensions

Regulator to be trustee of 2 pension schemes on the basis that the schemes had previously engaged in pensions liberation.

2. There are separate actions in respect of a number of payments made by the schemes, alleging that the payments were not proper payments or investments of funds.

B. Decision

1. The former, individual, trustees accepted that Section 33 of the Pensions Act 1995 prevented them from relying on the exoneration clause contained in the trust deed and rules of both schemes.
2. This was because they had failed to obtain written advice from an appropriately qualified or regulated person before making an investment, as required under Section 36 of that Act.
3. The court confirmed that Section 33 also prevented reliance on the exoneration clause in respect of the equitable duty of skill and care requiring trustees to act as an ordinary prudent man of business would when exercising investment powers. In this case there was no realistic defence to the claim based on a breach of that duty.

Comment (1): Section 33 of the Pensions Act 1995 states that liability for breach of an obligation under any rule of law to take care or exercise skill in the performance of any investment functions exercisable by a trustee cannot be excluded or restricted.

Comment (2): Indemnities conferred out of the trust assets or given by employers as regards liability for such a breach are similarly invalidated by Section 33.

Dalriada Trustees Limited v Mcauley

X. Distress and inconvenience compensation cap questioned

In a decision dated 20th March, 2017, the High court (His Honour Judge Barker QC) expressed the view that an upper limit for distress and inconvenience of £1,000 was “out of touch with the value of money” and it urged the Ombudsman to rebase the upper limit at £1,600.

A. Facts

1. The complainant had sought to transfer his Scottish Widows personal pension into the Teachers Pension Scheme.
2. Several delays on the part of Capita Employee Benefits Limited, trading as Teachers Pensions (“TP”), occurred during the transfer process.

3. During the period of delays the Government Actuaries Department advised that work on cash equivalent transfer values should be suspended while discount rates guidance was being revised (“the embargo”). The change in actuarial factors arising from that revision affected the complainant’s service credit.
4. A complaint was made to the Pensions Ombudsman, arguing that the complainant’s service credit had been reduced by 2 years and 175 days as a result of the delays.
5. The Ombudsman awarded £750 for non-financial injustice suffered because he considered the complainant to be partly responsible for the delays. The complainant pursued the matter in the High Court.

B. Decision

1. The High Court upheld the complaint.
2. The fatal error of law by the Ombudsman was to find that the complainant’s failure to act immediately or promptly during the transfer process entirely negated TP’s delays.
3. TP persistently mishandled the transfer over a 5-year period and it was highly probable that but for TP’s

delay the complainant would have obtained the full service credit.

4. TP’s “lack of candour” when explaining the reasons for the delays to the complainant was an aggravating factor.
5. The High Court also considered that the Department for Education’s approach to the 2nd stage of the internal dispute resolution procedure, which indicated that it had not checked the accuracy of TP’s representations, was also an aggravating factor.
6. The High Court reluctantly remitted back to the Ombudsman:
 - 6.1 the complaint that, but for TP’s delays, the service credit would not have been affected by the embargo - to be reconsidered as an allegation of negligence causing financial loss;
 - 6.2 the appropriate compensation for distress and inconvenience; and
 - 6.3 the complaint that the Department for Education’s behaviour amounted to maladministration causing stress.

7. The High Court considered that if TP's conduct was "very exceptional" the limit for distress and inconvenience compensation could exceed £1,000. The court considered that the current limit of £1,000 was "out of touch with the value of money" and it urged the Ombudsman to rebase the upper limit at £1,600.

Baugniet v (1) Capita Employee Benefits Limited (2) The Department for Education

XI. Employer's inaccurate statement about accrued pension rights treatment post TUPE transfer

The Deputy Pensions Ombudsman has, on 3rd February, 2017, upheld a claim against a transferor employer which failed to correct its statement on how accrued pension rights would be treated following a TUPE transfer. The transferor was directed to place the complainant in the position he would have been in had the inaccurate statement not been given.

A. Facts

1. Mr E was a member of the Your Tomorrow Pension Scheme established by his employer, Lloyds Banking Group ("LBG").
2. His employment and scheme membership began on 6th January, 2014, but he had originally intended to join on 1st January, 2014. He was asked to delay the start of his

employment because another new employee was starting on 6th January.

3. Mr E was TUPE transferred on 1st April, 2014 to TSB.
4. Prior to the start of his employment Mr E was told in writing, on 4th November, 2013, that his pension benefit relating to previous pensionable service with LBG would be preserved following the TUPE transfer.
5. It was subsequently decided, at a meeting held on 11th December, 2013, that members with less than 3 months' service would only be given a refund of their contributions.
6. However, it does not appear that that decision was communicated more widely and the contents of the statement of 4th November, 2013 were not corrected.
7. Mr E was given a refund of contributions because he had completed less than 3 months' service.

B. Decision

1. The Deputy Ombudsman directed that Mr E be given the opportunity (subject to his repaying the refunded contributions) to transfer the pension rights that he had earned from 6th

January, 2014 to 31st March, 2014 to the TSB pension scheme.

2. Although the inaccurate statement did not necessarily induce Mr E to join LBG, it induced him to agree to a delayed start date. Had he known that his pension would not be preserved as a consequence of delaying his start date, he would not have agreed to the delay.

Comment: A misrepresentation becomes actionable if the party to whom it is made is induced to enter into the contract. The Deputy Ombudsman concluded that that did not appear to be the case in this instance. However, the ruling acknowledges the reliance placed on LBG's statement resulting in Mr E's agreement to delay his start date and the pensions impact of that delay.

[Mr E - PO-8518](#)

Points in practice

XII. Regulator publishes DB investment guidance

1. The Pensions Regulator published [DB investment guidance](#) on 30th March, 2017.
2. The guidance states that good investment governance is likely to involve the full trustee board taking the highest level strategic decisions, delegating where appropriate.

3. Trustees are urged to consider carefully what advice and other input they need in order to govern the scheme's investments effectively. Obtaining the minimum level of advice necessary for legal compliance may not meet this aim.
4. The guidance lists the likely aspects of a good investment strategy, such as risk-taking that is understood and balanced.
5. When implementing the investment strategy trustees should consider:
 - 5.1 operational risks;
 - 5.2 the security of scheme assets;
 - 5.3 asset transitions; and
 - 5.4 liquidity and collateral management.
6. The Regulator urges trustees to consider appropriate protections to mitigate operational and security risks in their legal contracts with third parties.
7. The guidance suggests that trustees should draw up a one or two page overview of key investment monitoring statistics to highlight potential risks and issues.

XIII. Solicitor and firm fined by the Court for refusing to give documents to Pensions Regulator

1. The Pensions Regulator issued a [press release](#) on 5th April, 2017 announcing that a solicitor and Ashley Wilson Solicitors LLP (the law firm of which the solicitor is managing partner), have been fined for refusing to give documents to the Regulator as part of a wider pension scam investigation.
2. The solicitor and the law firm were ordered to pay, respectively, £4,000 and £2,700 in fines, plus costs.
3. The press release states that this involves the first criminal convictions secured by the Regulator.
4. Neglecting or refusing to produce documents, or to provide any other information, required under section 72 of the Pensions Act 2004 without reasonable excuse is an offence under section 77 of that Act.
5. The solicitor and his firm failed to provide documents to the Regulator despite the Regulator's pursuit for almost nine months. The documents were ultimately obtained by the Regulator on entering the law firm with a search warrant.
6. The District Judge commented upon the lack of corporate governance at the law firm and said there were insufficient

“checks and balances” operated between the partners.

XIV. OTC derivatives clearing exemption

1. The European Commission has published, on 31st March, 2017, in the Official Journal of the EU the extension of the clearing exemption for pension funds investing in over-the-counter derivatives.
2. The extension lasts until 16th August, 2018.
3. For the text of Delegated Regulation (EU) 2017/610, which entered into force on 1st April, 2017, please click [here](#).

XV. Infrastructure investments by pensions funds

1. We will be hosting a panel session to debate infrastructure investing on 9th May, 2017 at 5.30pm. We are hosting this alongside our European “Best Friend” firms: BonelliErede, Bredin Prat, De Brauw Blackstone Westbroek, Hengeler Mueller and Uría Menéndez. Please click [here](#) to see our invitation for more details and how to book a place.
2. If you would like to read our briefing note on infrastructure investments by pensions funds, please click [here](#).

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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