

Pensions and Employment: Pensions Bulletin

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Legal and regulatory developments in pensions

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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>1.1 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>1.2 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>1.3 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>1.4 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 and ongoing requirement	Pensions Bulletin 16/03
5.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5 th July, 2016 at the latest and ongoing requirement	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 2014 staging date must complete cyclical re-enrolment process between December 2016 and June 2017.</p> <p>Publication available to clients on request from usual pensions contact.</p>
7.	Chair’s annual governance statement	Within 7 months of end of scheme year	<p>For example, schemes with a 31st March year end must submit statement by 31st October, 2017.</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	Part 8 action brought by female staff, trustee and Lloyds Trade Union	15 th May, 2017	We will continue to monitor developments in this litigation, which has implications for all schemes with GMPs accrued in the period 17 th May, 1990 to 5 th April, 1997.
10.2	DWP publishes consultation proposing methodology for equalising GMPs	28 th November, 2016	Pensions Bulletin 16/19
	Government response published	13 th March, 2017	Pensions Bulletin 17/7

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

No.	Topic	Deadline	Further information/action
11.	Civil partner/same sex spouse pensions: retroactivity pre-5 th 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 transfers to QROPS	9 th March, 2017	Transfers to QROPS in execution of requests made before 9 th March, 2017 are not subject to the new tax charge. QROPS managers must give HMRC undertaking by 13 th

No.	Topic	Deadline	Further information/action
			April, 2017 to preserve QROPS status. Pensions Bulletin 17/05
14.	Pensions Advice Allowance introduction date	6 th April, 2017 3 rd January, 2018	Pensions Bulletin 17/04 New financial advice definition. Pensions Bulletin 17/06
15.	Gender pay gap information regulations in force	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.
16.	Pension Schemes Bill 2017 receives Royal Assent	27 th April, 2017	Existing master trusts have notification duty for triggering events on or after 20 th October 2016 Pensions Bulletin 17/09
17.	Money laundering, terrorist financing and transfer of funds regulations to come into force	26 th June, 2017	See item I below Pensions Bulletin 17/10
18.	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.

No.	Topic	Deadline	Further information/action
19.	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.
20.	Further EMIR exemption extension for pension scheme arrangements Additional 3 year clearing extension proposed	16th August, 2018	Pensions Bulletin 17/01 Pensions Bulletin 17/10
21.	IORP II transposition deadline	12 th January, 2019	Pensions Bulletin 16/11
22.	Brexit	By 29th 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. Money Laundering etc regulations made

1. The final [Money Laundering, Terrorist Financing and Transfer of Funds \(Information on the Payer\) Regulations 2017](#) have been made.

2. We wrote to HM Treasury about provisions contained in the draft regulations requiring trustees of most private sector occupational pension schemes (and trustees of other “taxable relevant trusts”) to provide HMRC with extensive beneficial ownership information (please see [Pensions Bulletin 17/10](#)).
3. To provide context for the impact of those requirements, in 2015 there were 19.2 million members of private sector occupational pension schemes.²
4. The final version of the regulations does not address the issues that have been raised by us. We have therefore contacted HM Treasury again.
5. In addition, the compliance date for the first occasion on which trustees must provide HMRC with beneficial ownership information has been brought forward.
6. That deadline is now 31st January, 2018 (under the draft regulations the deadline was 5th April, 2018).
7. Trustees will also be expected to tell HMRC about any changes to the information provided of which the trustees are aware. The deadline for that is on or before the 31st January after the tax year in which the change occurred.

8. If the trustees are not aware of any changes, they are expected to confirm that to HMRC on or before the 31st January after the tax year in question.
9. The change/no change notifications described above existed in the draft regulations but the deadline in the draft was expressed as before the end of the tax year in question, so the final regulations extend that deadline.

Comment (1): Further representations will need to be made to HM Treasury to explain once more that these obligations should not apply to occupational pension schemes.

Comment (2): Such schemes are recognised as low-risk under other aspects of the money laundering legislation and in the HMRC Guidance relating to trust or company service providers (“TCSPs”).

Comment (3): We understand from HM Treasury that guidance on how trustees should comply with the legislation will be published “in the coming weeks”.

10. HMRC updated its guidance entitled ‘Money laundering supervision for trusts or company service providers’ on 26th June, 2017.

² Office for National Statistics - Occupational Pension Schemes Survey - 2015

11. The updated guidance retains the wording of the previous version which categorised occupational pension schemes as ‘low-risk trusts’. This means that TCSPs offering professional trustee services to such schemes are still exempt from the requirement to register with HMRC.

Cases

II. BA pension increase ruling

The High Court has ruled, on 19th May, 2017 (Morgan J), that the trustees of the Airways Pension Scheme (“the scheme”) validly exercised their unilateral power to:

- ◆ amend the scheme in 2011, to grant themselves a unilateral power to give discretionary increases, and
- ◆ award a discretionary pension increase in 2013.

BA has obtained leave to appeal, however, as well as an injunction preventing payment of the increases until the appeal is decided.

A. Facts

1. The scheme originally related to employment in the public sector. Increases are therefore provided in accordance with Pension Increase Review Orders.

2. In 2010, the basis for increases set out in those Orders was changed from RPI to CPI.
3. The trustees used their unilateral power to amend the scheme in 2011, to grant themselves unilateral power to provide discretionary increases
4. The amendment power was restricted in a number of ways. One such restriction was that amendments could not have the effect of changing the purposes of the scheme.
5. The scheme trust deed and rules contained a clause setting out the main object of the scheme. The main object was to provide benefits in accordance with the rules “*and no benevolent or compassionate payments can be made therefrom*”.
6. In 2013 the trustees decided to grant a 0.2% discretionary increase above CPI. The 0.2% increase amounted to 50% of the gap between RPI and CPI for 2013.
7. BA challenged the trustees’ actions on a number of fronts. The over-arching submission by BA was that all the member-nominated trustees (“MNTs”) had pre-determined the decision that was ultimately taken to secure increases above CPI.
8. BA therefore argued that the MNTs did not give any active or genuine

consideration to the exercise of the discretionary power and had effectively fettered their own discretion.

9. BA also argued that the trustees failed to take account of all relevant considerations and they took into account irrelevant considerations.

B. Decision

1. It was necessary for the court to consider:
 - 1.1 the scope of the powers concerned;
 - 1.2 the purposes for which the powers were conferred, to address the argument that the exercise of each power was an abuse of the power; and
 - 1.3 the decision-making processes.
2. The trustees validly exercised their unilateral power to amend the scheme in 2011, to grant themselves a unilateral power to give discretionary increases.
3. The amendment was not beyond the scope of the amendment power nor an abuse of that power.
4. The trustees had not pre-determined the decision to award the discretionary increase.

5. The decision to award the discretionary increase was not beyond the scope of the power conferred by the amended rule, nor an abuse of that power.
6. The trustees actively and genuinely engaged with the decision-making process and had regard to all relevant (and no irrelevant) considerations.
7. The discretionary increase was not a benevolent or compassionate payment, nor did it change the purposes of the scheme.
8. The prohibition on making benevolent payments under the scheme:

“was not intended to prevent the trustees conferring on themselves, and then exercising, a power to make discretionary payments which would be available to all of the pensioners irrespective of their personal circumstances”.

Comment: The judgment contains a useful summary of previous cases which have ruled on how trustees should approach decision-making under a

discretionary power (set out in paragraphs 482 to 492 of the judgment).

British Airways PLC v Airways Pension Scheme Trustee Limited

C. Permission to appeal granted

1. On 25th May, 2017, BA was given leave to appeal the High Court’s decision that discretionary pension increases awarded by the trustees were valid.
2. BA was also granted an injunction preventing payment of the increases until the appeal is decided.

British Airways Plc v Maunder

III. GMP equalisation claim launched

1. A Part 8 claim was launched, on 15th May, 2017, by Lloyds Bank female employees, Lloyds Banking Group Pensions Trustees Limited and the Lloyds Trade Union concerning GMP equalisation.
2. Part 8 claims are used in a variety of circumstances “where there is unlikely to be a substantial dispute of fact”.³ In the pensions context, such claims are typically brought where a party is asking the court to make a declaration on how

the scheme trust deed and rules should be construed or on the scope of the trustees’ powers.

Comment (1): Lloyds Trade Union announced its intention to bring a class action on this point in its [newsletter](#) dated August, 2016.

Comment (2): The DWP published its response to its consultation on GMP equalisation on 13th March, 2017 (please see [Pensions Bulletin 17/7](#)).

Comment (3): A great deal of the response amounts to a holding position, leaving much to be decided following future discussions with an industry working group.

IV. High Court ability to appoint trustee confirmed

The High Court (Walden-Smith J) has appointed Dalriada Trustees Limited (“**Dalriada**”) to act as trustee of 8 occupational pension schemes, known as the Encartes Schemes (“**the schemes**”), without prejudice to Dalriada’s appointment already made by the Pensions Regulator.

A. Facts

1. Bluefin Trustees Limited was the trustee of the schemes until Dalriada

³ Chancery Guide - HM Courts & Tribunals Service (February, 2016)

was appointed by the Pensions Regulator on 10th January, 2017. The appointment was made due to “a number of concerns” about the schemes.

2. Dalriada wanted the court to exercise its inherent jurisdiction to appoint Dalriada as trustee of the schemes, without prejudice to its appointment which had already been made by the Regulator.
3. This was because it had become apparent that there could be assets which are not in fact held under the schemes. If that were to be the case, the appointment made by the Regulator would not operate in respect of those assets because the Regulator’s statutory power to appoint does not extend to assets falling outside of a scheme.

B. Decision

1. The court made the appointment sought.
2. The court had inherent jurisdiction to do so (*Pi Consulting (Trustee Services) Ltd v Pensions Regulator*).
3. There was no suggestion of wrongdoing at this stage and Dalriada did not need to establish this in order to bring their application.

4. The circumstances justified invoking the court’s supervisory jurisdiction. Dalriada must be able to deal with the assets in full, whether they fall within or outside of the schemes.
5. It was also clearly in the interests of the beneficiaries (*Pensions Regulator v Dalriada Trustees Limited*) that there be a single trustee with a clear and unambiguous appointment over all the assets.

Dalriada Trustees Limited v Bluefin Trustees Limited and The Pensions Regulator

V. CJEU Insolvency Directive ruling

The CJEU has ruled that Article 8 of the Insolvency Directive (2008/94/EC) does not require the exclusion of unpaid member contributions from the scope of the employer’s insolvency proceedings.

A. Facts

1. This case was referred to the CJEU by a German court.
2. Insolvency proceedings were initiated against Mr Webb-Samann’s employer in October, 2013.
3. Mr Webb-Samann brought proceedings in respect of his member contributions which had not been paid across to an occupational

pension scheme in respect of the period starting January, 2013.

4. In line with German law, the claim was satisfied in respect of the 3 months immediately prior to the employer’s insolvency, leaving in dispute contributions for the period of January to June, 2013.
5. The referring court asked the CJEU to consider whether Article 8 of the Insolvency Directive required that the scope of the employer’s insolvency proceedings should exclude member contributions not paid across by the employer.

B. Decision

1. Article 3 of the Insolvency Directive requires payment of outstanding claims, including certain contributions in the form of salary claims. Member States may restrict the scope of Article 3’s application, for example by limiting the period for which outstanding claims are to be met.
2. Article 8 of the Insolvency Directive seeks to protect the interest of employees in securing payment of their pension claims. Member States do not have power to limit the level of that protection. Article 8 seeks to guarantee the protection of the long-term interest of employees, since

such interests extend over the retirement period.

3. It follows that Article 8 applies to outstanding pension contributions in so far as those are not compensated under Article 3. Articles 3 and 8 can apply together to the same situation.
4. Article 8 requires Member States to ensure a minimum degree of protection of at least half of the old-age benefits arising out of the accrued pension rights for which the member has paid contributions (*Robins and Hogan* cited).
5. Not paying across the contributions for the period in dispute would result in Mr Webb-Samann's monthly pension being EUR 5-7 lower than would otherwise be the case.
6. Article 8 does not require a level of protection exceeding that already granted in this case.

C-454/15 - Webb-Samann

Points in practice

VI. Hoover RAA approved

1. The Pensions Regulator has [announced](#), on 2nd June, 2017, its approval of a proposal for a regulated apportionment arrangement in respect of the Hoover (1987) Pension Scheme ("HPS").

2. The RAA will involve:
 - 2.1 a payment of £60 million from Hoover Limited to HPS;
 - 2.2 the transfer of ordinary shares in the employer to HPS, amounting to a 33% stake;
 - 2.3 payment of the trustee's expenses in relation to the RAA; and
 - 2.4 Candy Group's (which acquired Hoover Limited in 1995) agreement to write off debt owed to it by the employer.
3. There are approximately 7,500 members in HPS, two-thirds of whom are pensioners, the remaining third being deferred members.
4. As at March, 2016, the buy-out deficit was £500 million and the PPF deficit was £300 million.
5. This follows an earlier failed attempt by the employer to obtain approval for an RAA proposal in 2015.
6. The employer had also approached the PPF about possibly entering into a company voluntary arrangement "shortly afterwards".
7. Following this, the trustee and employer could not reach agreement on deficit repair contributions so the Regulator

appointed a 'skilled person' to report on the level of contributions the employer could afford.

8. This was the first time that the Regulator had appointed a 'skilled person'.

Comment: Section 71 of the Pensions Act 2004 provides for the Regulator to nominate or approve the skilled person appointed.
9. The employer and trustees agreed to the appointment, meaning that a hearing before the Determinations Panel was not necessary in this instance.
10. The skilled person report concluded that HPS could not be funded properly without support from Candy Group. Candy Group was not legally obliged to provide that support and declined to do so.
11. The employer's business continued to deteriorate and it approached the Regulator with a further RAA proposal in 'early 2017'.
12. The Regulator's [regulatory intervention report](#) sets out the various RAA tests to be met and how those were satisfied in this case.

VII. Regulator's Tranche 12 analysis published

1. The Pensions Regulator [announced](#), on 13th June, 2017, the publication of its [Tranche 12 analysis](#).

2. The analysis sets out the expected funding positions of DB schemes with valuation dates between September, 2016 and September, 2017.
3. The Regulator concludes that the majority of DB schemes are affordable and that “many should do more to tackle increased deficits and reduce risk to pensioners”.
4. Points to note include the following:
 - 4.1 better than expected asset returns have not, generally, been sufficient to offset the increase in liabilities resulting from changed market conditions;
 - 4.2 50% of the schemes are either in surplus or have an adequate employer covenant, and have adequate investment and funding strategies;
 - 4.3 a further 37% of the schemes have strong employer covenants but the contributions are low relative to affordability and/or investment risk is high in those schemes ;
 - 4.4 of the FTSE350 companies who paid deficit repair contributions and dividends in each of the previous 6 years, the ratio of

contributions to dividends declined from around 10% to around 7% ; and

- 4.5 the percentage of FTSE350 companies that paid no deficit repair contributions but paid dividends increased from 11% (in 2011) to 15%.

Comment: . The Pensions Regulator stated, in its [Annual Defined Benefit Funding Statement 2017](#) published on 15th May, 2017, that it will consider opening an investigation if its expectations (outlined in the Statement) are not met in the event of an employer’s distribution to shareholders exceeding deficit reduction pension contributions - please see [Pensions Bulletin 17/10](#).

VIII. EIOPA 2nd stress test launched

1. EIOPA⁴ [announced](#), on 18th May, 2017, the launch of its 2nd EU-wide occupational pensions stress test.
2. The announcement states that this stress test takes account of the impact of the macro-financial developments since the first stress test of 2015.
3. The exercise is designed to assess the resilience of the European occupational

pensions sector to an adverse market scenario.

4. The stress test is also designed to analyse how Institutions for Occupational Retirement Provision (“IORPs”) transfer shocks, resulting from the impact of the adverse market scenario, to the real economy and financial markets.
5. The stress scenario combines a drop in risk-free interest rates with a fall in the price of assets held by IORPs.
6. The test covers DB, DC and hybrid schemes, and includes all European Economic Area countries with material IORPs sectors, exceeding EUR 500 million in assets.
7. The deadline for participating IORPs to complete the exercise is 13th July, 2017.
8. The stress test results are expected to be published by the end of 2017.

Comment (1): In its [Corporate Plan](#) for 2015-2018 (dated March, 2015), the Pensions Regulator expressed its intention to work with EIOPA on the development of the stress test.

Comment (2): It is understood that the Regulator will be contacting schemes in

⁴ European Insurance and Occupational Pensions Authority

the coming weeks to encourage their participation in the stress test.

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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