

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>expired 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 17th May, 1990 to 5th April, 1997.
		Trial window	Between 1 st June, 2018 and 31 st October, 2018
10.2	DWP publishes consultation proposing methodology	28th November, 2016	Pensions Bulletin 16/19

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

No.	Topic	Deadline	Further information/action
	for equalising GMPs	13 th March, 2017	Pensions Bulletin 17/7
	Government response published		
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 12 th July, 2017	To establish whether survivor benefits for civil partners will be retroactive to a date before the Civil Partnership Act 2004 came into force. Judgements issued (Pensions Bulletin 17/12)
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

² Much of the Act is not in force yet, such as the prohibition on operating a master trust scheme unless authorised and,

No.	Topic	Deadline	Further information/action
13.	New 25% tax charge on certain transfers to QROPS	9th March, 2017	Transfers to QROPS in execution of requests made before 9th March, 2017 are 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.	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 Act 2017 receives Royal Assent ²	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 (Information on the Payer) Regulations	26th June, 2017	Pensions Bulletin 17/11

consequently, provisions on the authorisation criteria and ongoing supervision.

No.	Topic	Deadline	Further information/action
	2017 came into force		
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. Possible further extension may be granted by HMRC to the existing practice.
19.	Data protection: New Regulation: EU General Data Protection Regulation comes into force	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	16 th August, 2018	Pensions Bulletin 17/01 Pensions Bulletin 17/10
21.	IORP II ³ transposition deadline	12 th January, 2019	Pensions Bulletin 16/11

No.	Topic	Deadline	Further information/action
22.	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: (a) European Council and UK unanimously decide to extend period, or (b) UK withdraws, if able to do so, its Article 50 notice before 29 th March, 2019.

New law

I. Early exit charges and ban on member-borne commission

1. The [Occupational Pension Schemes \(Charges and Governance\) \(Amendment\) Regulations 2017 \(SI 2017/774\)](#) were made on 19th July, 2017 and come into force on 1st October, 2017.
2. The regulations cover early exit charges and member-borne commission.
3. Guidance on early exit charges has also been produced by the DWP.
 - A. **Early exit charges**
 1. Early exit charges for occupational pension scheme

members who have reached age 55 will be banned if the member joins on or after 1st October, 2017.

2. A 1% cap on such charges will apply where the member joined before that date.
3. Service providers must confirm in writing to the trustees that they are complying with the early exit charge restrictions within 1 month, beginning on 1st October, 2017.
4. The DWP [issued](#) early exit charge guidance for trustees and service providers, on 21st July, 2017.
5. The guidance concerns occupational pension scheme members who joined the scheme before 1st October, 2017 and to whom the 1% cap on early exit charges therefore applies.
6. The guidance confirms that market value adjustments (“MVA”) are not classed as early exit charges.

³ Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision

7. Where:

- 7.1 an MVA is made, or
- 7.2 a member has a ‘guarantee or a “reasonable expectation” of a terminal bonus being paid’,

the MVA or bonus should be applied before calculating the value of the member’s pot upon which the 1% cap will be imposed.

Comment (1): The Government response (dated 15 November, 2016) to its consultation on early exit charges acknowledged that only around 3% of occupational pension scheme members faced early exit charges. Such charges are far more common in relation to personal pension schemes.

Comment (2): Trustees of schemes with affected members may wish to follow this up with the service provider if they have not received confirmation of compliance with the early exit charge restrictions by the beginning of November, 2017.

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. From 1st April, 2018, service providers will be required to comply with the ban on member-borne commission for contracts entered into before 6th April, 2016 where the payment was made on or after 1st October, 2017.
3. Service providers must confirm in writing to the trustees that they are complying with the member-borne commission ban. They will be required to do this within 1 month, beginning on 1st April, 2018.

II. Auto-enrolment consultation - DB alternative quality requirement; seafarers; offshore workers

1. The DWP has [published](#), on 19th July, 2017, a call for evidence entitled ‘Auto-enrolment: defined benefits alternative

quality requirement and provisions for seafarers and offshore workers’.

2. Legislation⁴ requires a review of the DB alternative quality requirement in 2017 and at least every 3 years thereafter.
3. Responses are sought until 30th August, 2017.
4. The Government is seeking to establish whether the auto-enrolment DB and hybrid scheme alternative quality requirements, including transitional provisions that apply to formerly contracted-out schemes, work as intended.
5. In addition to several specific questions about how the legislation is operating in practice, the Government wants to know more generally about any burden on schemes and employers arising from the alternative quality tests, and how the tests might be simplified further.
6. The call for evidence also covers legislation⁵ regarding the auto-enrolment of seafarers and offshore workers who ordinarily work within the UK.
7. Seafarers are people working in any capacity on board a ship or hovercraft. Offshore workers are people working on oil or gas extraction and related activities in the UK territorial sea, UK

⁴ Pensions Act 2008, Section 23A

⁵ Pensions Act 2008, Sections 96 and 97

continental shelf, or a cross-boundary field.

III. State Pension Age (SPA) review

1. The Government has published, on 19th July, 2017, its [final State Pension Age review report](#).
2. The report concludes that State Pension Age should increase from age 67 to 68 in 2037-39. This is 7 years earlier than currently anticipated under legislation.
3. In reaching this conclusion the Government is following the recommendation of John Cridland CBE.
4. The Government plans to carry out a further review, however, before legislating along these lines “to enable consideration of the latest life expectancy projections and to allow us to evaluate the current rises in State Pension age”.
5. Uncertainty regarding life expectancy projections has led the Government to decide that it will not formalise its SPA policy beyond 2037-39 at this stage.

Comment (1): Please see [Pensions Bulletin 16/16](#) to read about the consultation issued by John Cridland CBE, dated October, 2016.

Comment (2): Occupational pension schemes which provide benefits on a basis which is designed to take account of the State’s pension provision (for example, bridging

pensions) are likely to be affected by any change in the SPA. Such schemes may need to amend to their scheme rules.

Comment (3): If the SPA among the scheme’s membership varies, this would add another layer of complexity.

Tax

IV. VAT

The working group of the Pensions Research Accountants Group has issued an alert dated 3rd July, 2017, which states that ‘it is looking increasingly likely that there will be a further extension of the transitional period beyond 31 December 2017’ during which HMRC’s existing treatment of VAT in respect of pension schemes will still be available to trustees and employers.

Comment (1): HMRC’s Brief 14 (2016), issued on 5th September, 2016, announced the current transitional period which is due to end on 31st December, 2017 (please see [Pensions Bulletin 16/13](#)).

Comment (2): That announcement also explained that HMRC found that it was taking longer than expected to reconcile the *PPG* decision with pension and financial service regulations, accounting rules and emerging case law.

Comment (3): Guidance on possible options for VAT recovery in the context of pension schemes had therefore been put on hold.

Comment (4): The *PPG* ruling decided that employers should be able to recover up to 100% of VAT incurred in relation to pension scheme expenditure.

V. Finance Bill

1. A [Ministerial Statement](#) by Mel Stride, the Financial Secretary to the Treasury, dated 13th July, 2017, covers provisions withdrawn from the Finance Act 2017:

“Where policies have been announced as applying from the start of the 2017-18 tax year or other point before the introduction of the forthcoming Finance Bill, there is no change of policy and these dates of application will be retained.”

2. The Government has [listed](#), on 14th July, 2017, the provisions that will apply before the introduction of the Finance Bill, scheduled for introduction in Autumn, 2017.
3. Included amongst those provisions are:

- 3.1 the money purchase annual allowance (which will drop from £10,000 to £4,000); and
- 3.2 the pensions advice income tax exemption for the first £500 worth of advice arranged or paid for by employers.

Comment (1): The Finance Act 2017 was significantly shortened to enable its

passage through the legislative process ahead of the dissolution of Parliament in the run up to the General Election (please see [Pensions Bulletin 17/08](#)).

Comment (2): Both of the provisions referred to above were announced as taking effect on 6th April, 2017 before their withdrawal from what then became the Finance Act 2017.

Comment (3): Given the Ministerial Statement, it appears that the forthcoming Finance Bill will introduce these provisions retroactively, with effect from 6th April, 2017.

Comment (4): The money purchase annual allowance only applies to those individuals who have flexibly accessed their money purchase pot on or after 6th April, 2015.

Comment (5): Member communications should include a warning note that the reduction in the money purchase annual allowance is expected to take retroactive effect, from 6th April, 2017.

Cases

VI. IBM Court of Appeal decision

1. The Court of Appeal has ruled, on 3rd August, 2017, that changes introduced by the employer in respect of its pension provision did not amount to breaches of:

- 1.1 the contractual duty of mutual trust and confidence implied under an employment contract; or
- 1.2 the duty of good faith formulated in the *Imperial Tobacco* case.
2. The changes involved excluding employees from DB future service accrual, ending the long-standing policy of allowing early retirement on favourable terms and making future pay rises non-pensionable.
3. The Court of Appeal overturned the High Court decision that a disappointment of members' 'reasonable expectations' was, of itself, a breach of either of the above duties.
4. An employer exercising a discretionary 'own interest' power under the scheme trust deed or rules, or deciding whether to make a pay rise non-pensionable, will be in breach of those duties if it makes the decision "irrationally" in the strict legal sense (see 6 below).
5. The ruling makes it clear that a court should be highly reluctant to overturn an employer's decision when exercising these types of discretion.
6. The court set out a 2 limb test for irrationality, described as equivalent to the *Wednesbury* public law test. Meeting one of the limbs would be sufficient.

7. Limb 1 of the test asks whether the employer failed to consider all relevant matters and excluded from its consideration all irrelevant matters.
8. When considering relevant matters, the employer should consider whether it has previously engendered an expectation amongst members. For such an expectation to arise, the representations must have been clear and certain, amounting to a commitment or assurance.
9. Limb 2 of the test is that the decision does not have a logical connection between the evidence and the ostensible reasons for the decision.
10. The court also held that it is not a breach of the contractual duty of mutual trust and confidence for an employer to state in 'firm terms' to employees that any future pay increases will be non-pensionable.
Comment: The decision is, from an employer's perspective, to be welcomed in that it removes a number elements of uncertainty in the process for changing pension plan benefits for the future.
11. As regards IBM's consultation, however, the court confirmed that failure to comply with the statutory requirements for consultations would be capable of being a breach of the mutual trust and confidence duty or the *Imperial* duty of good faith.

Comment (1): IBM did not appeal the High Court’s finding that its consultation was defective and it may therefore be the case that claims will be made against IBM on this footing.

Comment (2): The representative beneficiaries did not plead that the principal employer had breached its *Imperial* duty of good faith when conducting its consultation process. Leave to amend their pleadings, to correct this oversight, was rejected by the Court of Appeal.

IBM v Dalglish

Please click [here](#) to see our briefing note on this case.

VII. Ill-health retirement of disabled person not unfavourable - CA

The Court of Appeal (Arden LJ, Briggs LJ and Bean LJ) held, on 14th July, 2017, that a disabled employee who had reduced his hours from full-time to part-time before taking ill health retirement had not been treated "unfavourably" under Section 15 of the Equality Act 2010 when his pension benefits were based on his final part-time salary, rather than his previous full-time salary.

A. Facts

1. Mr Williams initially worked full-time but then reduced his hours by half from 2010 until his retirement on ill-

health grounds in 2013, at the age of 38. His pension benefits were enhanced so that the calculation was based on prospective service up to age 67, based on his part-time salary.

2. Mr Williams argued that had he suffered from a different disability striking him down suddenly and without a period of part-time working, such as a heart attack, his pension benefits would have been based upon his full-time salary.
3. He claimed that he had suffered unfavourable treatment in consequence of something arising from his disability (his reduced hours), contrary to Section 15 of the Equality Act 2010.

B. Decision

1. The Court of Appeal dismissed Mr Williams’ claim.
2. Treatment that conferred advantages on a disabled person, but would have conferred greater advantages had the disability arisen more suddenly, did not amount to unfavourable treatment under Section 15 of the Equality Act 2010
3. To read more about this decision, please see our [Employment /Employee Benefits Bulletin 17/13](#).

Williams v Trustees of Swansea University Pension & Assurance Scheme

VIII. LGPS investment guidance not for pensions purpose

The High Court (Sir Ross Cranston) has ruled on 22nd June, 2017 that restrictions contained in statutory guidance on Local Government Pension Scheme (“LGPS”) investments had not been produced for pensions purposes and therefore fell outside of the scope of the Secretary of State’s statutory powers.

A. Facts

1. Guidance governing the LGPS’s investment strategy was issued by the Secretary of State for Communities and Local Government in September, 2016.
2. The guidance stated that administering authorities must not “... [use] pension policies to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries...other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government” nor “pursue policies that are contrary to UK foreign policy or UK defence policy”.
3. This restriction operated even if an investment strategy would not involve significant financial risk to

the scheme and irrespective of member support.

4. The claimants brought judicial review proceedings, arguing that the Secretary of State acted unlawfully in issuing this part of the guidance because:

- 4.1 it falls outside the proper scope of his statutory powers because it was issued for non-pensions purposes (broadly, foreign affairs and defence purposes);

- 4.2 it is unlawfully lacking in certainty; and

- 4.3 it is contrary to Article 18(4) of Directive 2003/41/EC on the Activities and Supervision of Institutions for Occupational Pension Provision (the “IORP Directive”).

B. Decision

1. The court found in the claimants’ favour on the first ground but not on the second and third grounds.
2. The court could not see how the Secretary of State had acted for a pensions purpose.
3. As regards the second ground, the court concluded that “*there is no binding principle that ministerial*

guidance or policy is unlawful because it is materially unclear or ambiguous, or silent as to important circumstances.”

4. The judgment identifies 3 principles when assessing the lawfulness of ministerial guidance:

- 4.1 it must be read in a practical, common sense manner, and as a whole, and not as if one were construing legislation or analysing a judgment;

- 4.2 to be unlawful, it must in the circumstances be positively misleading or erroneous in law, not simply imprecise, lacking in specificity or requiring the exercise of judgment to apply it to a particular situation; and

- 4.3 if the guidance is statutory, the threshold will be tempered by the legal character of the guidance, the extent to which it is binding, and the consequences laid down in the event of its breach.

5. As regards the third ground, Article 18(4) of the IORP Directive prohibits Member States from subjecting the investment decisions of institutions or investment managers to any kind of prior approval or systematic

notification requirements. These purposes were unaffected by guidance on non-financial decisions.

Comment: The 3 principles to be applied when assessing the lawfulness of ministerial guidance mean that it would be difficult for a challenge on such a basis to succeed.

R (on the application of Palestine Solidarity Campaign Ltd) v Secretary of State for Communities and Local Government

Points in practice

IX. Pensions Ombudsman and PPF Ombudsman Annual Report and Accounts

1. The Pensions Ombudsman and PPF Ombudsman **published** their Annual Report and Accounts for 2016/17 on 10th July, 2017.
2. Points to note include:
 - 2.1 of the 1,333 complaints received, 70% were resolved informally;
 - 2.2 20% of cases decided were upheld, a further 13% were partly upheld;
 - 2.3 there were 17 new cases accepted for investigation by the PPF Ombudsman (out of 36 referrals);

Comment: The PPF Ombudsman investigates complaints

concerning decisions made by the PPF Board in relation to the PPF and the Financial Assistance Scheme. Of the 17 complaints investigated, 3 related to allegations of PPF maladministration, 3 concerned the Financial Assistance Scheme and 11 concerned PPF reviewable matters. Reviewable matters are listed in Schedule 9 of the Pensions Act 2004, including the PPF Board's decisions on levies.

- 2.4 pension liberation cases have reduced from 16% of the caseload in 2015/16 to 7.7% in 2016/17;
- 2.5 complaints about transfers have increased, ranking 2nd in the top 10 types of investigation;
- 2.6 failure to provide information or act on instructions ranks as the most complained about matter investigated;
- 2.7 investigations take an average of 10 months to complete; and
- 2.8 2% of complaints result in a Determination following a Preliminary Decision (the formal process used in complex disputes), down from 27% of complaints following the process in 2014/15.

X. Pan European Personal Pension proposal - HM Treasury's views

1. HM Treasury has written a [memorandum](#), dated 14th July, 2017, on the European Commission proposal (COM (2017) 343) for a Regulation on a pan-European personal pension product ("PEPP") (please see [Pensions Bulletin 17/12](#) to read about the proposal).
2. HM Treasury plans to consult informally with the FCA and the pensions industry 'to determine a final position over the next few months'. The memorandum expresses HM Treasury's views in the interim, however.
3. It has reservations that the proposal would contribute to Capital Markets Union objectives and does not agree that it can be justified.
4. Personal pension products can currently be offered in all Member States and the underlying investments can already achieve the aim of increasing funds available for long-term investment across the EU.
5. HM Treasury also considers that there is very little evidence of demand for a PEPP sufficient to warrant the expense of establishing and maintaining a regulatory framework.
6. As regards the Commission recommendation that PEPPs should be granted the same tax relief as that

granted to national personal pensions, HM Treasury states that tax is a national competency and Member States must retain the right to refuse tax reliefs to the PEPP if it is clearly incompatible with the domestic pension system.

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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