

Pensions and Employment: Pensions Bulletin

1 September 2017 / Issue 14

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>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.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6 th April, 2015, is expected to drop from £10,000 to £4,000 under forthcoming Finance Bill 2017	Retroactive effect from 6 th April, 2017	Member communications should include a warning note about this, highlighting the retroactive effect.

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.	GMP equalisation		
11.1	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.
		Trial window	Between 1 st June, 2018 and 31 st October, 2018
11.2	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
12.	Civil partner/same sex spouse pensions: retroactivity pre-5 th December, 2005		
12.1	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
12.2	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.

No.	Topic	Deadline	Further information/action
		12 th July, 2017	Judgments issued (Pensions Bulletin 17/12) If necessary, affected schemes should correct the position for pensions already in payment, update the trust deed and rules and update member booklets and other member communications as necessary.
13.	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
14.	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 April, 2017 to preserve QROPS status. Pensions Bulletin 17/05
15.	Pensions Advice Allowance introduction date	6 th April, 2017 3 rd January, 2018	Pensions Bulletin 17/04 New financial advice definition.

No.	Topic	Deadline	Further information/action
			Pensions Bulletin 17/06
16.	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.
17.	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
18.	Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 came into force	26 th June, 2017	Pensions Bulletin 17/11
19.	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 (Pensions Bulletin 17/13).
20.	Data protection: New Regulation: EU General Data Protection 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

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
			comes into force Regulation is achieved by this date.
21.	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
22.	IORP II ³ transposition deadline	12 th January, 2019	Pensions Bulletin 16/11
23.	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.

Forthcoming events

Our next Pensions Update Seminar will take place on Wednesday, 29th November, 2017, between 9.30am and 1.00pm.

We will be covering a broad range of topics, including:

consequently, provisions on the authorisation criteria and ongoing supervision.

- an update on recent tax developments,
- what schemes must do to prepare for the General Data Protection Regulation,
- the impact of the *Walker* decision on same sex spouses/civil partners, and
- recent case law (including the *IBM* ruling) on exercising employer and trustee discretions relating to pensions.

Please save the date.

More details of the Seminar and how to book will follow with our next Update.

New law

I. Data Protection Bill - Statement of intent

1. The Department for Digital, Culture, Media & Sport published, on 7th August, 2017, a [Statement of Intent](#) concerning the Government's plans to introduce a Data Protection Bill.
2. The Bill will implement the EU General Data Protection Regulation ("GDPR"), amongst other measures (such as giving individuals the right to be forgotten).

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

Comment (1): EU Regulations have direct effect in Member States. These Regulations usually contain provisions called derogations, which allow Member States to introduce, via national legislation, exceptions to certain requirements contained in the Regulation.

Comment (2): The GDPR comes into force on 25th May, 2018.

3. The Statement includes a list of ‘notable derogations’ from the GDPR that it intends to make use of. For example, the Government intends to require that there must be legitimate grounds for processing personal data by automated means. This would be an exemption from the GDPR requirement that individuals have the right not to be the subject of automated decision-making (such as e-recruiting).
4. There will also be a new criminal offence of intentionally or recklessly re-identifying individuals from anonymised or pseudonymised data. The new offence will carry a maximum penalty of an unlimited fine. Those who knowingly handle or process such data will also be guilty of an offence.
5. A [letter](#) from Digital Minister Matt Hancock to stakeholders (dated 7th August, 2017) has also been published. The letter promises that “we will where possible reproduce the

exemptions and safeguards currently in the Data Protection Act.”

Tax

II. Pension Schemes Newsletter 89

1. HMRC published, on 27th July, 2017, [Pension Schemes Newsletter 89](#).
2. The newsletter clarifies the circumstances in which an annual return of individual information should be completed by pension scheme administrators.
3. The lifetime allowance look up service will no longer be launched in Summer, 2017, as mentioned in [Pension Schemes Newsletter 88](#). HMRC promises to update readers on when the service will be available.
4. A Pensions Online Digital Service is to be launched, which ‘will hold everything in relation to scheme administration in one place’. It will be rolled out in 2 phases. From April, 2018, HMRC will move administrator and scheme registration onto the new service. The second phase begins in April, 2019 and will affect administrators and pension schemes registered with HMRC before April, 2018.

Cases

III. Court of Appeal rules on pensionable pay cap

The Court of Appeal (Gloster LJ) ruled, on 28th July, 2017, that the introduction of a pensionable pay cap was allowed under the scheme rules and did not breach Section 91 of the Pensions Act 1995, nor the employer’s implied duty of trust and confidence.

A. Facts

1. Mr Bradbury has been employed by the BBC since 1997.
2. He was initially a member of a DB section of the BBC Pension Scheme.
3. The BBC sent out a communication to all employees in 2010 because of concerns about the increasing pension scheme deficit. This was done following consultations with the trustee, scheme members and the unions.
4. The BBC’s communication offered 3 options:
 - 4.1 remain in the employee’s current section of the scheme but with a 1% cap on pensionable future pay increases;

4.2 join the new career average section; or

4.3 join the new DC scheme.

5. Mr Bradbury joined the career average section of the scheme in 2011 for future service. He also accepted a 2% pay rise, whilst reserving his right to claim damages.
6. Following 2 Pensions Ombudsman rulings and 2 High Court decisions on whether the BBC was able to impose the cap, Mr Bradbury appealed to the Court of Appeal.

B. Decision

1. The Court of Appeal dismissed the appeal.
2. The definition of 'Basic Salary' in the scheme rules referred to "[T]he amount determined by the BBC as being an Employee's basic salary or wages payable under the terms of his or her Continuing or Fixed Term Contract ...".
3. That definition allowed the BBC to decide whether, or how much of, a pay rise counted as Basic Salary, and was therefore pensionable. Capping pensionable pay did not reduce an employee's existing pension entitlement as at the date of an increase in salary.

4. Mr Bradbury had no contractual right to any pay rise. Nor was there any basis for the argument that active members had some sort of right to a link between pay and pensions.

5. The court also rejected Mr Bradbury's argument that the cap breached Section 91 of the Pensions Act 1995 which, amongst other things, prohibits the surrender of pension rights. Section 91 does not apply where a person may acquire a future right to a pension as a result of a future increase in Basic Salary. Nor does it apply to a change to the content of Mr Bradbury's employment contract.

6. As the cap did not breach the scheme rules nor Section 91, the court did not need to consider Mr Bradbury's argument that the cap could not take effect as a *South West Trains v Wightman* type of agreement, effected outside of the scheme.

7. Mr Bradbury's argument that the BBC had breached its implied contractual duty of trust and confidence was also rejected.

8. Faced with a multi-billion pound deficit, the trustees, unions and BBC all agreed that something had to be done. Increasing employer contributions from 3.5% of the licence fee to around 10% would have

been unaffordable, however, and would have damaged its services to licence fee payers.

9. The ruling noted that the cap did not single out a class of employees for less favourable treatment because all employees were given the same choice.

10. The court also rejected the allegation that the BBC had imposed the cap for the collateral purpose of achieving a more agile workforce. The cap was introduced primarily in response to the pension scheme deficit.

Comment: This decision is consistent with the Court of Appeal decision in *IBM v Dalgleish*. For more detail on the *IBM* decision, please see [Pensions Bulletin 17/13](#) and our [briefing note](#) on that case.

[Bradbury v British Broadcasting Corporation](#)

IV. Gender recognition certificates and State pension

The Upper Tribunal (Administrative Appeals Chamber) has ruled, on 19th July, 2017, that the claimants, who did not have gender recognition certificates prior to reaching female State Pension Age ('SPA'), were not entitled to backdated State pension.

A. Facts

1. Both claimants:

- 1.1 had undergone male-to-female gender reassignment surgery in the 1980s, prior to reaching female SPA;
 - 1.2 had reached female SPA after the Gender Recognition Act 2004 came into force;
 - 1.3 but obtained gender recognition certificates after each of them had reached female SPA.
2. The claimants sought State pension for the period between the date each of them reached female SPA and the date from which they in fact started to receive State pension.
 3. One claimant's acquired gender had been recognised by HMRC since 1982 and was recorded in her passport.

B. Decision

1. The Upper Tribunal allowed the Secretary of State's appeal from the First-tier Tribunal rulings which had found in the claimants' favour.
2. The claimants could have applied for their gender recognition certificates ahead of reaching female SPA but did not. In contrast to the situations examined by the courts in *Richards* and *Timbrell*, there was nothing to suggest that either of the claimants

might have had any difficulty in obtaining a certificate.

3. The fact that the Gender Recognition Act 2004 meant that a person's acquired gender was only recognised on a prospective basis, once the certificate was issued, and not from birth, did not mean that the principle of equal treatment (with women who had been female from birth) under Directive 79/7/EEC had been breached.

Secretary of State for Work and Pensions v HY

Points in practice

V. Professional Trustee - revised description; monetary penalties policy

1. The Pensions Regulator has issued a [press release](#), on 10th August, 2017, announcing the publication of its monetary penalties policy and its revised description of who it considers to be a professional trustee.
2. The Regulator also published its [response to consultation](#) on these issues on 10th August 2017.
3. To read about the consultation, please see [Pensions Bulletin 17/7](#).

A. Professional trustee description

1. A professional trustee is a person (whether or not incorporated) acting in the course of the business of being a trustee. Various illustrative examples are set out in the [description policy document](#).
2. An individual representing or promoting himself as having expertise in trustee matters generally to the trustees or employers of one or more schemes in relation to which he does not meet either of the descriptions in paragraph 3.1(a) below, will normally be considered to be a professional trustee.
3. The Regulator would not normally consider a remunerated trustee to be a professional trustee if:
 - 3.1 he is or has been:
 - (a) a member of the pension scheme or a related pension scheme (ie, a scheme with a sponsoring employer in the same corporate group); or

- (b) employed by, or a director of, a participating employer in the pension scheme (or an employer in the same corporate group); and
- 3.2 he does not act, or offer to act, as a trustee in relation to any unrelated scheme.
- 4. Neither independence, nor remuneration, nor long tenure alone will determine whether a trustee is professional.
 - 5. Trustee boards are expected to assess and evidence on a regular basis the value their remunerated trustees bring to the board, however.
 - 6. The Regulator will normally apply higher penalties for those falling within the professional trustee description.
 - 7. But where the individual is not a professional trustee, the Regulator may take account of his remuneration or expertise when deciding whether to impose a discretionary monetary penalty and the penalty amount.

- 8. Where a trustee is a professional trustee in respect of one scheme, the Regulator will consider him to be a professional trustee of all schemes of which he is a trustee.
- 9. Professional trustees are expected to notify the sponsoring employer and other trustees of their schemes of their professional trustee status as soon as reasonably practicable.
- 10. The scheme return guidance is to be updated to reflect the professional trustee description, but whether or not a trustee identifies himself as professional will not, of itself, determine his status.

B. Monetary penalties policy

- 1. The monetary penalties policy does not cover penalties issued for non-compliance with auto-enrolment duties.
- 2. The policy supports the statement in the professional trustee description that the Regulator will usually impose higher penalties on professional trustees.

- 3. For example, professional trustees would be expected to pay twice the penalty payable by non-professionals where there has been a scheme return breach.

Comment: Trustees of registrable schemes in receipt of a scheme return notice must provide the Pensions Regulator with a scheme return by the date specified in the notice (Section 64 of the Pensions Act 2004). Failure to do so could result in a penalty of up to £5,000 in the case of an individual or £50,000 in any other case.

- 4. Similarly, where a chair's statement has not been prepared and the scheme has a professional trustee, the penalty will generally be set at the maximum level of £2,000.

Comment (1): Trustees of occupational money purchase schemes must prepare a Chair's annual governance statement within 7 months of the end of each scheme year. To comply with the legislation, the statement must contain particular pieces of information and be signed by the Chair of trustees. Failure to comply will

result in a mandatory penalty of between £500 and £2,000⁴.

Comment (2): The Pensions Regulator imposed 3 penalties of £2,000 upon Pitmans Trustees Limited on 4th July, 2016, in respect of each of 3 schemes for which it acted as professional trustee. The Section 89 report stated that the maximum fine had been imposed because the schemes had a professional trustee (please see [Pensions Bulletin 16/12](#)).

5. The policy sets out 3 penalty bands. Band 1 is the least severe and band 3 is the most severe. The nature and impact (or potential impact) of a breach determines the band applicable. The policy lists examples of factors that may be taken into account when assessing the band level.
6. However, the Regulator points out that it retains discretion to depart from the band range where it considers it appropriate to do so.
7. The policy also contains a list of factors that may be taken into

account in the calculation of a penalty, such as willingness to engage and cooperate and whether the scheme has a professional trustee.

Comment (1): The Regulator is under pressure to address any shortcomings in its performance as perceived by the Work and Pensions Select Committee. In its report on defined benefit schemes, dated 21st December, 2016 (please see [Pensions Bulletin 17/01](#)) the Select Committee envisaged “a nimbler TPR intervening earlier” and noted that the Regulator was reluctant to use some of its substantial powers.

Comment (2): In its response (dated 20th February, 2017) to that report, the Regulator stated that it was taking steps to ensure that it moves to enforcement quicker and was focusing on becoming nimbler (please see [Pensions Bulletin 17/06](#)).

Action point: Review your Pensions Act compliance procedures including processes for diarising and meeting deadlines. A pensions legislation compliance checklist is available to clients from your usual contact.

⁴ Occupational Pension Schemes (Charges and Governance) Regulations 2015, regulation 28(4)(b).

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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