

Pensions and Employment: Pensions Bulletin

24 November 2017 / Issue 19

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](#)

Forthcoming events

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

Please click [here](#) to see the invitation and for information on how to book.

We will be covering a broad range of topics, including what schemes must do to prepare for the General Data Protection Regulation.

For example, should the employer be a controller in common with the trustee of certain pension plan membership data? Will you need to appoint a Data Protection Officer? Will individuals named on expression of wishes forms need to be informed of that fact under Article 14 of the GDPR?

A checklist on what trustees need to do to comply with the General Data Protection Regulation is available to clients from your usual Slaughter and May contact.

Other topics covered include:

- an update on recent pensions-related tax developments,
- 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.

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</p>

No.	Topic	Deadline	Further information/action
			<p>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 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)	6 th April, 2016	Pensions Bulletin 15/16
3.	Put in place register of	6 th April, 2016 and	Pensions Bulletin 16/03

No.	Topic	Deadline	Further information/action
	persons with significant control (“PSC”) for trustee company where trustee is a corporate	ongoing requirement	
4.	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 .
5.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer’s staging date	For example employers with a 1st July, 2015 staging date must complete cyclical re-enrolment process between 1st April, 2018 and 30th September, 2018. Publication available to clients on request from usual pensions contact.
6.	Chair’s annual governance statement	Within 7 months of end of scheme year	For example, schemes with a 31 st March year end must submit statement by 31 st October, 2017. Client note dated June, 2015 available from Dawn Holmes .
7.	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 .
8.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase	Retroactive effect from 6 th April, 2017	Member communications should include a warning note about this, highlighting the retroactive effect.

No.	Topic	Deadline	Further information/action
	pot on or after 6 th April, 2015, has dropped from £10,000 to £4,000 under Finance (No.2) Act 2017		
9.	GMP equalisation		
9.1	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
9.2	DWP publishes consultation proposing methodology for equalising GMPs Government response published	28th November, 2016 13 th March, 2017	Pensions Bulletin 16/19 Pensions Bulletin 17/7
10.	Civil partner/same sex spouse pensions: retroactivity pre-5th December, 2005		
10.1	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

No.	Topic	Deadline	Further information/action
10.2	Supreme Court ruling in <i>Walker v. Innospec</i>	12 th July, 2017	Survivor benefits for civil partners and same sex spouses must be based on all service, including before the Civil Partnership Act 2004 came into force. 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.
11.	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
12.	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
13.	Pensions Advice Allowance	6 th April, 2017	Pensions Bulletin 17/04

No.	Topic	Deadline	Further information/action
	introduction date	3 rd January, 2018	New financial advice definition. Pensions Bulletin 17/06
14.	Gender pay gap information regulations in force	6 th April, 2017	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 .
		4 th April, 2018	Deadline for reporting above information.
15.	Pension Schemes Act 2017 receives Royal Assent ¹	27 th April, 2017	Existing master trusts have notification duty for triggering events on or after 20 th October 2016 Pensions Bulletin 17/09
16.	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 Further guidance awaited from HMRC.
	Deadline for registering with HMRC for its Trusts Registration Service	31 st January after tax year in which tax paid, starting 31 st January, 2018	Pensions Bulletin 17/16 and item III below .
17.	HMRC's existing practice on VAT and pension schemes to		Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover. Pensions Bulletin 17/18

¹ 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
			continue indefinitely
18.	DC bulk transfers without member consent: anticipated introduction of easements	6 th April, 2018	Pensions Bulletin 17/18
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. A compliance checklist for trustees is available to clients from their usual Slaughter and May contact.
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 ² transposition deadline	12 th January, 2019	Pensions Bulletin 16/11
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:

consequently, provisions on the authorisation criteria and ongoing supervision.

No.	Topic	Deadline	Further information/action
			(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. Select Committee and PPF correspondence re Monarch RAA

1. The Work and Pensions Select Committee has [published](#), on 6th November, 2017, correspondence between Frank Field MP (Chair of the Select Committee) and Alan Rubenstein (Chief Executive of the PPF) regarding the 2014 Regulated Apportionment Arrangement (“RAA”) in respect of the Monarch Airlines pension scheme.
2. The webpage contains a link to a letter from Frank Field MP to Alan Rubenstein, dated 31st October, 2017. The letter focuses on a ‘news article’ about the Monarch RAA which quotes the PPF’s head of restructuring and insolvency, Malcolm Weir, and asks a number of questions about the deal.

² Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision

Comment: It seems surprising that commentary in the press has triggered detailed questioning by a Select Committee regarding a particular deal which took place 3 years ago.

3. The webpage also quotes Frank Field MP, who is pushing for the Pensions Regulator to be given the power to impose punitive fines:

“Had the Mantegazzas had the threat of punitive fines such as we have recommended hanging over them, this deal would have been concluded much more satisfactorily.”

Comment (1): The Work and Pensions Select Committee report on DB schemes (dated 21st December, 2016 - please see [Pensions Bulletin 17/01](#)) recommended the introduction of punitive fines to contribution notices and financial support directions, so that the fine trebles the original demand.

Comment (2): The Government’s [Green Paper](#), published on 20th February, 2017, expressed reservations about allowing the Regulator to add such punitive fines, however.

³ entitled ‘Safeguarded-flexible pension benefits: simplified valuation and introduction of personalised risk warnings’

II. Safeguarded-flexible benefits - DWP guidance

1. The DWP has published, on 13th November, 2017, [guidance](#)³ on safeguarded-flexible pension benefits.
2. The non-statutory guidance focuses on the requirement, set out in regulations⁴ (“**the regulations**”), for personalised risk warnings to be issued when a trigger event, such as a request to transfer-out, occurs in respect of a member with safeguarded-flexible benefits. That requirement will come into force on 6th April, 2018.

Comment (1): To read about the Government’s response to its consultation on safeguarded-flexible benefits please see [Pensions Bulletin 17/12](#).

Comment (2): The regulations define a “safeguarded-flexible benefit” as a benefit, other than a money purchase or cash balance benefit, calculated by reference to an amount available for its provision. The consultation paper considered that a safeguarded-flexible benefit would offer some sort of guarantee regarding the pension income that it will, or may, provide.

Comment (3): Our response to the consultation made the point that the only guarantees most occupational DC schemes come across are in insurance policies where the scheme only promises what the policy provides.

Comment (4): In that situation the benefits are money purchase benefits, not safeguarded-flexible benefits.

Tax

III. Finance (No.2) Act 2017

1. Finance Bill 2017-18 received Royal Assent on 16th November, 2017 and is now the [Finance \(No.2\) Act 2017](#).
2. The Act contains provisions, with retroactive effect from 6th April, 2017, which:
 - 2.1 exempt from income tax the first £500 of pensions advice arranged or paid for by employers, if certain conditions are met; and
 - 2.2 reduce the money purchase annual allowance from £10,000 to £4,000.

⁴ Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) (Amendment) Regulations 2017

IV. Finance (No.2) Bill

The Government has announced, via a written [statement](#) (HCWS233) made by Mel Stride (Financial Secretary to the Treasury) on 7th November, 2017, that Finance (No.2) Bill will be published on 1st December, 2017.

Cases

V. High Court rules £2,750 for distress

The High Court (Norris J) has ruled, on 16th October, 2017, that a claimant who repeatedly received incorrect information regarding requirements to qualify for an unreduced early retirement pension should be awarded £2,750 for the distress and inconvenience experienced, instead of the £500 awarded by the Deputy Pensions Ombudsman.

A. Facts

1. Mrs Smith was a member of the NHS pension scheme. She enjoyed ‘special class status’ under the scheme for a number of years
2. Members with special class status were able to retire early at age 55 with an unreduced pension if they met certain requirements set out in the legislation governing the scheme.
3. Mrs Smith combined her role in the NHS as a healthcare support worker with a coordinator role for the

Sheffield Children’s NHS Foundation Trust (‘SCFT’). She was then seconded to the SCFT in 2008, carrying out duties that would not qualify her for special class status on retirement.

4. Despite making enquiries over the years, Mrs Smith was not told that she must, amongst other things, have spent the last 5 years of her pensionable employment in a clinical role in order to have special class status at retirement.
5. In 2014, Mrs Smith retired at age 55 but then discovered that her pension was reduced for early retirement. She brought a claim arguing that she would have delayed her retirement had she realised that her pension would be reduced on early retirement.
6. The Deputy Pensions Ombudsman found that Mrs Smith had not suffered financial loss and decided that she should be awarded £500 for distress and inconvenience.

B. Decision

1. The High Court decided that the Deputy Pensions Ombudsman’s conclusion that no financial loss had been suffered did not lack any evidential foundation, nor was it perverse or irrational.

2. However, the £500 compensation for distress and inconvenience was a starting point and in this case that amount was too low.
3. The number of instances of maladministration was material to the likely level of distress.
4. Inaccurate information provided over the 6 years leading up to Mrs Smith’s retirement amounted to several instances of maladministration.
5. The number of opportunities there were to correct the misinformation given, the relative ease with which the true position could be ascertained, and the period through which the maladministration persisted meant that the award should be above £1,600.

Comment: The High Court urged the Pensions Ombudsman to rebase the upper limit for distress and inconvenience awards from £1,000 to £1,600 in the *Bagniet* decision. To read more about that decision, please see [Pensions Bulletin 17/08](#).

6. The court concluded that the award for Mrs Smith’s distress and inconvenience should be £2,750.

Smith v Sheffield Teaching Hospitals NHS Foundation Trust

VI. Meaning of a trust

1. The Upper Tribunal (Tax and Chancery Chamber) decided, on 5th October, 2017, to strike out a sponsor's challenge to the Pensions Regulator's decision to appoint an independent trustee to 2 schemes suspected of being pension liberation arrangements.
2. The court rejected the sponsor's argument that the arrangements were not trusts and that the Regulator could not, therefore, exercise its statutory power to appoint a trustee.

A. Facts

1. RP Medplant Ltd ("**the Sponsor**") was a company with an address in Cyprus. It set up 2 pension schemes (the "**Schemes**") by written instrument with Imperial Trustee Services Ltd (in respect of the Capita Oak Pension Scheme) and Thames Trustees Ltd (in respect of the Westminster Pension Scheme).
2. Both Schemes received transfers from other pension arrangements.
3. Orders to wind up Imperial Trustee Services Ltd and Thames Trustees Ltd were made in 2015. The Official Receiver asked the Pensions Regulator to appoint a new trustee to the Schemes.

4. The Regulator appointed Dalriada as an independent trustee of the Schemes, using its power under Section 7(3)(b) of the Pensions Act 1995.
5. The Sponsor referred the Regulator's determination to appoint Dalriada to the Upper Tribunal, arguing that the statutory power to appoint a trustee was not available in this instance because the Sponsor asserted that the Schemes were not set up under trust.

B. Decision

1. The Upper Tribunal struck out the Sponsor's referral. There was no reasonable prospect of evidence being produced which could demonstrate that the Schemes were not in fact trust arrangements.
2. The scheme documentation clearly indicated that the Schemes were run as trusts. The Schemes were not contractual arrangements. The assets were held as assets of each Scheme.
3. Under a contractual arrangement the assets would belong to the scheme administrator. In such an arrangement, the broad range of powers, including the power to invest, given to the administrator under the Scheme documentation would not be necessary.

4. The decision also cites extensively from trust law text books the requirements for an express trust.
5. Applying those principles to the case in hand, the court noted that even if the Sponsor had not appreciated that the arrangements gave rise to trusts, its intentions were not relevant.
6. Noting that express reference to terms such as 'trust' or 'trustee' had been avoided in relation to the Schemes, the court pointed out that "*labels do not matter. Whether a trust is created depends on the substance and effect of the words used.*"
7. The court also noted that Section 252 of the Pensions Act 2004 prohibits trustees of occupational pension schemes administered in the UK from receiving a funding payment if the scheme is not established under irrevocable trusts.
8. The Schemes had received transferred-in funds from other pension arrangements and would therefore be in breach of Section 252 were they not set up under trust. However, the court decided that it did not need to reach a conclusion about the effect of a breach of Section 252.

RP Medplant Ltd v The Pensions Regulator

Points in practice

VII. Pensions Regulator penalties

1. The Pensions Regulator has [published](#), on 13th November, 2017, its quarterly list showing penalties imposed in connection with:
 - 1.1 auto-enrolment escalating penalty notices - for example, such an unpaid notice resulted in £52,500 being owed by Cromwell Care Home Ltd,
 - 1.2 failure to submit a scheme return - leading to fines of hundreds of pounds, and
 - 1.3 failure to prepare a chair's statement - resulting in several fines ranging between £500 and £2,000.
2. The list includes the name of the scheme and the fine amount. Professional

trustees of the scheme in question are also listed.

3. The webpage implies that the information is comprehensive because it is presented by reference to:
 - 3.1 1st July - 30th September, 2017, and
 - 3.2 information 'previously published'.
4. The penalties list has been published alongside the Regulator's [Compliance and enforcement Quarterly bulletin: July-September 2017](#).
5. The bulletin emphasises the tougher stance being taken by the Regulator in connection with the late submission of scheme funding valuations and recovery plans.

Action point: This emphasises the need to timetable carefully and maintain momentum on statutory funding valuations under Part 3 of the Pensions Act 2004.

6. Also outlined are the number of occasions on which the Regulator has used specific powers during:
 - 6.1 July 2017 - September 2017, and
 - 6.2 April 2014 - September 2017.
7. In non-auto-enrolment situations, the most heavily used powers (over both periods) were:
 - 7.1 power to appoint trustees,
 - 7.2 information gathering powers, and
 - 7.3 scheme return enforcement.
8. Powers used in connection with the enforcement of auto-enrolment far outnumber the use of other powers exercised by the Regulator.

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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