

# Pensions and Employment: Pensions Bulletin

2 February 2018 / Issue 02

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 <sup>th</sup> April, 2016	<p><a href="#">Pensions Bulletin 16/06</a></p> <p>1.1 Since 6<sup>th</sup> 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"> <li>◆ £110,000 “threshold” income, and</li> <li>◆ £150,000 “adjusted” income.</li> </ul> <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</p>

No.	Topic	Deadline	Further information/action
			<p>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 <sup>th</sup> April, 2016	<a href="#">Pensions Bulletin 15/16</a>
3.	Put in place register of persons with significant control (“PSC”) for trustee company where trustee is a corporate	6 <sup>th</sup> April, 2016 and ongoing requirement	<a href="#">Pensions Bulletin 16/03</a>

No.	Topic	Deadline	Further information/action
4.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5 <sup>th</sup> 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. <a href="#">Pensions Bulletin 16/04</a> .
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 <sup>st</sup> March year end must submit statement by 31 <sup>st</sup> October, 2017. Client note dated June, 2015 available from <a href="#">Dawn Holmes</a> .
7.	DC Code of Practice 13 on governance and administration takes effect	28 <sup>th</sup> July, 2016	Schemes offering money purchase benefits (including money purchase AVCs, insofar as the legislation applies) must familiarise themselves with the revised <a href="#">Code</a> .
8.	Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6 <sup>th</sup> April, 2015, has dropped	Retroactive effect from 6 <sup>th</sup> April, 2017	Member communications should include a warning note about this, highlighting the retroactive effect.

No.	Topic	Deadline	Further information/action
	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 <sup>th</sup> May, 2017	We will continue to monitor developments in this litigation, which has implications for all schemes with GMPs accrued in the period 17 <sup>th</sup> May, 1990 to 5 <sup>th</sup> April, 1997.
		Trial window	Between 1 <sup>st</sup> June, 2018 and 31 <sup>st</sup> October, 2018
9.2	DWP publishes consultation proposing methodology for equalising GMPs	28 <sup>th</sup> November, 2016	<a href="#">Pensions Bulletin 16/19</a>
	Government response published	13 <sup>th</sup> March, 2017	<a href="#">Pensions Bulletin 17/7</a>
10.	Civil partner/same sex spouse pensions: retroactivity pre-5 <sup>th</sup> December, 2005		
10.1	CJEU decision in <i>Parris v. Trinity College, Dublin</i>	Decided on 24 <sup>th</sup> November, 2016	A 'death bed marriage' scheme rule did not indirectly discriminate on sexual orientation grounds. <a href="#">Pensions Bulletin 16/18</a>

<sup>1</sup> 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
10.2	Supreme Court ruling in <i>Walker v. Innospec</i>	12 <sup>th</sup> 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 ( <a href="#">Pensions Bulletin 17/12</a> ) 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 <sup>st</sup> March, 2017	If investment manager uses over-the-counter derivatives, check investment manager has arranged for trustee to comply. <a href="#">Pensions Bulletin 17/01</a> <a href="#">Pensions Bulletin 17/05</a> Trustees entering into OTC derivatives must perform an independent legal review of the enforceability of their netting and collateral arrangements. <a href="#">Briefing note</a> ; <a href="#">FCA statement on timing</a>
12.	New 25% tax charge on certain transfers to QROPS	9 <sup>th</sup> March, 2017	Transfers to QROPS in execution of requests made before 9 <sup>th</sup> March, 2017 are not subject to the new tax charge. QROPS managers must give HMRC undertaking by 13 <sup>th</sup> April, 2017 to preserve QROPS status.

consequently, provisions on the authorisation criteria and ongoing supervision.

No.	Topic	Deadline	Further information/action
			<a href="#">Pensions Bulletin 17/05</a>
13.	Pensions Advice Allowance introduction date	6 <sup>th</sup> April, 2017  3 <sup>rd</sup> January, 2018	<a href="#">Pensions Bulletin 17/04</a>  New financial advice definition. <a href="#">Pensions Bulletin 17/06</a>
14.	Gender pay gap information regulations in force	6 <sup>th</sup> April, 2017  4 <sup>th</sup> April, 2018	Assess impact of pension provision on requirement to publish information designed to highlight any gender pay gaps. See <a href="#">Pensions Bulletin 17/03</a> and <a href="#">Employment Bulletin 17/03</a> .  Deadline for reporting above information.
15.	Pension Schemes Act 2017 receives Royal Assent <sup>1</sup>	27 <sup>th</sup> April, 2017	Existing master trusts have notification duty for triggering events on or after 20 <sup>th</sup> October 2016 <a href="#">Pensions Bulletin 17/09</a>
16.	Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 came into force	26 <sup>th</sup> June, 2017	<a href="#">Pensions Bulletin 17/11</a> Further guidance awaited from HMRC.
	Deadline for registering with HMRC for its Trusts Registration Service	31 <sup>st</sup> January after tax year in which tax paid, starting 31 <sup>st</sup> January, 2018 but no penalty if	<a href="#">Pensions Bulletin 17/16</a> <a href="#">Pensions Bulletin 17/18</a> <a href="#">Pensions Bulletin 17/20</a>

No.	Topic	Deadline	Further information/action
		done by 5 <sup>th</sup> March, 2018	
17.	HMRC's existing practice on VAT and pension schemes to continue indefinitely		Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover. <a href="#">Pensions Bulletin 17/18</a>
18.	DC bulk transfers without member consent: anticipated introduction of easements	6 <sup>th</sup> April, 2018	<a href="#">Pensions Bulletin 17/18</a>
19.	Bulk transfers of contracted-out rights without consent: anticipated introduction of easements	6 <sup>th</sup> April, 2018	<a href="#">Pensions Bulletin 18/01</a>
20.	Auto-enrolment total minimum DC contributions will increase to 5% (of which minimum employer contribution of 2%)	6 <sup>th</sup> April, 2018 to 5 <sup>th</sup> April, 2019	
21.	Auto-enrolment total minimum DC contributions will increase to	6 <sup>th</sup> April, 2019 onwards	

No.	Topic	Deadline	Further information/action
			8% (of which minimum employer contribution of 3%)
22.	Deadline for service providers to send trustees written confirmation of compliance with ban on member-borne commission for pre-6 <sup>th</sup> April, 2016 contracts where payment made on or after 1 <sup>st</sup> October, 2017. Applies where scheme used as "qualifying scheme" for auto-enrolment purposes and some or all of benefits are money purchase.	1 <sup>st</sup> May, 2018	If confirmation not received then trustees should chase. Note: This may well be an empty category for many schemes.
23.	Data protection: New Regulation: EU General Data Protection Regulation comes into force	25 <sup>th</sup> May, 2018	<a href="#">Pensions Bulletin 16/05</a> <a href="#">Employment Bulletin 16/15</a> 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

No.	Topic	Deadline	Further information/action
			clients from their usual Slaughter and May contact.
24.	Further EMIR exemption extension for pension scheme arrangements Additional 3 year clearing extension proposed	16 <sup>th</sup> August, 2018	<a href="#">Pensions Bulletin 17/01</a>  <a href="#">Pensions Bulletin 17/10</a>
25.	IORP II <sup>2</sup> transposition deadline	12 <sup>th</sup> January, 2019	<a href="#">Pensions Bulletin 16/11</a>
26.	Brexit	By 29 <sup>th</sup> 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 <sup>th</sup> March, 2019.

## New law

### I. 29<sup>th</sup> March, 2018 deadline - new PPF contingent asset forms for 2018/19

1. Schemes have until 29<sup>th</sup> March, 2018 to use the new PPF contingent asset standard agreement forms for

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

agreements entered into on or after 18<sup>th</sup> January, 2018.

2. The PPF's deadline of 5pm on 29<sup>th</sup> March, 2018 applies to the submission of hard copy documents, including a certified copy of the contingent asset agreement. Not meeting that submission deadline means that the contingent asset in question will not be taken into account when the PPF carries out its 2018/19 levy calculation.
3. Please click [here](#) to see the new standard forms and guidance.
4. If you require assistance with this, please get in touch with your usual Slaughter and May contact.
5. Agreements executed before 18<sup>th</sup> January, 2018 and re-certifications will not need to be re-executed on the new forms in order to be submitted for 2018/19.
6. For the 2019/20 levy year the PPF anticipates that Type A and B Contingent Assets with a fixed cap will be required to be re-executed on the new standard forms by the deadline for that levy year (expected to be at the end of March, 2019).

**Comment:** To read about the PPF Levy Determination and Policy Statement for 2018/19 please see [Pensions Bulletin 18/01](#).

7. On a separate point, where a Type A contingent asset results in a levy saving of at least £100,000, a guarantor strength report prepared by a professional adviser will need to be obtained by trustees prior to the certification of that contingent asset. That report would need to be provided to the PPF by 5pm on 29<sup>th</sup> March, 2018.

## II. DB White Paper expected in Spring, 2018

Guy Opperman, Parliamentary Under Secretary of State for Pensions, has [announced](#), on 11<sup>th</sup> January, 2018 during a House of Commons debate, that:

*“The White Paper will be delivered at some stage this spring. Spring is an elastic term in the House of Commons ... but it will certainly be delivered before the summer period.”*

**Comment:** The Green Paper on DB private pension schemes published in 2017 focused, in particular, on the affordability of DB schemes by suggesting options for “stressed” schemes and their employers, such as cutting or renegotiating benefits. The Paper also contemplated increasing the Pensions

Regulator's powers. To read more about the Green Paper please see [Pensions Bulletin 17/05](#).

## III. Master trusts - new reportable event

1. Amending Regulations<sup>3</sup> will add, from 6<sup>th</sup> April, 2018, a new reportable event requiring the scheme administrator to inform HMRC within 30 days of a scheme becoming, or ceasing to be, a master trust scheme (within the meaning of Section 1 of the Pension Schemes Act 2017).
2. The new reportable event is intended to provide HMRC with the information that it will need in order to exercise its future power<sup>4</sup> to refuse to register, or to de-register, master trust schemes which are not authorised under the Pension Schemes Act 2017 (please see [Pensions Bulletin 17/20](#)).
3. The Regulations also contain consequential amendments, with effect from 6<sup>th</sup> April, 2017, designed to ensure that information provided to members by the scheme administrator reflects the reduction in the money purchase annual allowance from £10,000 to £4,000.

**Comment:** The money purchase annual allowance applies to individuals who

<sup>3</sup> [The Registered Pension Schemes and Overseas Pension Schemes \(Miscellaneous Amendments\) Regulations 2018 \(SI 2018/5\)](#)

<sup>4</sup> currently set out in the Finance (No.2) Bill 2017-19

have flexibly accessed their money purchase pot on or after 6<sup>th</sup> April, 2015. The Finance (No.2) Act 2017 reduced the money purchase annual allowance from £10,000 to £4,000 with retroactive effect, from 6<sup>th</sup> April, 2017.

## Cases

### IV. High Court rules on use of RPI

1. Schemes with an RPI indexation rule which also contemplates the possibility of using an alternative index in certain circumstances may be interested in the latest High Court ruling on this kind of provision.
2. Pension increase rulings are based on the exact wording of the scheme rules in question, however.

#### A. Facts

1. BT sought a High Court ruling about the use of RPI when calculating increases to pensions in payment for members of Section C of the BT Pension Scheme. The Trustee sought clarity on all relevant issues so as to enable it to administer the pension increase entitlements of those members with certainty.
2. The court considered the pension increase provisions set out in the 2016 scheme rules and in the 1993 scheme rules.

3. Both provisions required pension increases to be based on the increase in RPI, capped at 5%. However, in certain circumstances, the provisions anticipated the employer, in consultation with the trustees, choosing a different index.
4. Under the 2016 scheme rules, the situation in which a different index might be chosen was where RPI *“ceases to be published or becomes inappropriate”*.
5. Under the 1993 scheme rules, the situation in which a different index might be chosen was where RPI *“ceases to be published or is so amended as to invalidate it in the view of the Principal Company as a continuous basis for purposes of calculating increases”*.

#### B. Decision

The High Court (Zacaroli J) decided that neither situation, as expressed under the 2016 and the 1993 scheme rules, applied.

#### C. 2016 scheme rule

1. The question of whether RPI had become inappropriate was one of objective fact. ‘Inappropriate’ meant something more than ‘less appropriate’. It was not enough that it would be better to use another index.

2. Appropriateness related to the purpose for which the rule existed. That purpose was that pension payments should reflect increases in the cost of living of pensioners.
3. If RPI were universally regarded as inappropriate for all other uses, it might nevertheless remain appropriate for pension increases.
4. The court was not bound to agree with a respectable body of opinion, but if such a body considered RPI to be appropriate for some purposes then that was a factor to be weighed in the balance.
5. RPI could become inappropriate without there being any direct or indirect change to that index, for example if there was *“a wholesale loss of confidence in it as an accurate measure of inflation and its widespread discontinuance”*. RPI was compiled using a flawed method for aggregating data, but that had been the case for many decades.
6. The court also confirmed that an examination of whether RPI had become inappropriate could take into account matters occurring before the adoption of the 2016 scheme rules.
7. The RPI measure of indexation had not become inappropriate.

#### D. 1993 scheme rule

1. The 1993 scheme rule was concerned with a direct change in some way to RPI, to its compilation or to its calculation which caused it to no longer be valid when making a comparison between the current and the prior year.
2. The judge considered that a rational decision maker in the position of BT could not decide that such a comparison would be invalidated as a result of an amendment made to the RPI formula concerning clothing.

**Comment (1):** We understand that the decision is being appealed.

**Comment (2):** The Government's Green Paper on private sector DB schemes published in 2017 sought views on whether a statutory override should be introduced to allow schemes to move to a different index for pension increases and revaluation.

**Comment (3):** The Paper also contemplated allowing schemes to suspend indexation in some circumstances.

**Comment (4):** To read more about the Green Paper please see [Pensions Bulletin 17/05](#). A White Paper is expected in Spring, 2018 (please see item I above).

*British Telecommunications PLC v (1) BT Pension Scheme Trustees Limited (2) Bruce-*

*Watt (representative beneficiary )- 19<sup>th</sup> January, 2018*

#### V. Failure to provide information to Regulator - conviction under 3 charges

1. The Pensions Regulator has broad information gathering powers under the Pensions Act 2004. One of those powers is the ability to issue a notice under Section 72 for the provision of information.
2. Recipients of a formal Section 72 notice should note that if they are unable to put forward a reasonable excuse for neglecting or refusing to provide the information demanded then they run the risk of a criminal conviction and an unlimited fine.
3. A successful prosecution has been brought concerning Dominic Chappell's failure to comply with 3 demands for information made by the Pensions Regulator.

##### A. Facts

1. The Regulator was using its information gathering powers under Section 72 of the Pensions Act 2004 as part of its investigation into the sale of BHS and its subsequent insolvency.
2. Dominic Chappell was the majority shareholder in Retail Acquisitions Limited, which purchased BHS in 2015.

3. There were 3 charges brought against Mr Chappell regarding 3 Section 72 notices issued to him.
4. The third notice required information to be provided regarding Mr. Chappell's assertion that the Regulator had leaked to the press details of a warning notice it had served on him.

##### B. Decision

1. Mr Chappell was found guilty under all 3 charges.
2. Sentencing has yet to take place.

**Comment:** This is the fifth criminal conviction arising from this kind of breach, the first having taken place in April, 2017.

3. The Pensions Regulator's [press release](#) about the conviction points out that its anti-avoidance (often referred to as 'moral hazard') action against Mr Chappell in respect of the BHS pension schemes is continuing.

*The Pensions Regulator v Dominic Chappell - 11<sup>th</sup> January, 2018 (Brighton Magistrates' Court)*

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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