

Pensions Bulletin

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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](#)

New law

I. Guidance on bulk DC transfers without consent

1. Trustees considering a bulk DC transfer without consent will need to familiarise themselves with DWP [guidance](#).¹
2. The guidance follows the regulations and Government response to consultation on such exercises (please see Pensions Bulletin 18/05).
3. The guidance includes:
 - 3.1 an explanation of when trustees should seek advice on the proposed transfer from an independent person who they reasonably believe to be qualified to advise;
 - 3.2 what that advice should cover and how the trustees should assess the receiving scheme; and
 - 3.3 a list of what the Government expects transfer agreements to contain.

4. The guidance emphasises that trustees may decide to seek advice from an independent person in order to comply with their fiduciary duties, even where the situation is one in which the legislation would not require them to seek that advice.
5. The guidance anticipates that trustees could be satisfied about the adviser's independence even where the adviser has received payments, in the year before the advice was given, from: the receiving scheme employer, a service provider for that scheme, a group undertaking of that employer or service provider, or from the receiving scheme directly.
6. In that event, the trustees would be expected to make a written record of:
 - 6.1 their decision,
 - 6.2 the factors taken into account (some of which are listed in the guidance),
 - 6.3 the weight attributed to each factor, and

- 6.4 their reasons for deciding that they consider the adviser to be independent.
7. The Government expects the transfer agreement to include the above information as well as:
 - 7.1 confirmation on a number of points - for example, *'confirmation that data protection rules have been met (e.g. the legal basis used for the transfer of personal data from the transferring scheme to the receiving scheme)'*; and
 - 7.2 certain pieces of information - for example, information about members with tax protections and members with earmarking or pension sharing orders on divorce.
8. The Government also expects the transferring trustees to warrant to the receiving trustees that the information provided is accurate and complete.

¹ Bulk transfers without consent: money purchase benefits without guarantees - 30th April, 2018

Comment (1): Trustees and their advisers involved in a bulk DC transfer without consent will need to bear in mind the Government's expectations when drafting the transfer agreement.

Comment (2): Full compliance with data protection legislation may well be difficult to establish with absolute certainty in a bulk transfer situation.

II. Money laundering - TRS registration no longer required for schemes registered online with HMRC

1. HMRC has confirmed that trustees of pension schemes which are already registered online (under 'Pension Schemes Online' or under 'Manage and Register Pension Schemes') are no longer required to register on the Trusts Registration Service when complying with their duties under the money laundering legislation.²
2. HMRC has produced revised guidance on the interaction between its Trusts Registration Service and the obligations of trustees under the money laundering legislation. Reference to the change of policy is also made in [Pension schemes newsletter 98 - May 2018](#).

3. The guidance states:

'The TRS legislation provides HMRC with the discretion to determine the format by which trustees must submit the information about the trust.

... HMRC will not issue a civil penalty for failure to comply with TRS legislation should a scheme instead be registered on PSO/MRPS and we do not deem this to constitute a criminal offence under the TRS legislation.

... If a pension scheme registered on PSO/MRPS has submitted information on the TRS then going forwards it does not need to do anything further in relation to the TRS. The scheme administrators can update the details about their trust on PSO/MRPS.'

4. The guidance also contains a list of information intended to relate to trustees' duty to keep certain records, as required under regulation 44 of the money laundering regulations.

Comment: The list attempts to replicate the record-keeping requirements contained in the regulations but does not quite match the legislation. Trustees should therefore follow what the

regulations require when establishing which records to keep.

Cases

III. Retroactive change to amendment power; equitable right of recoupment not subject to limitation period

A. Overview

1. Trustees and employers may be interested in a High Court decision that a 1993 change to the power of amendment had retroactive effect to 1990. This meant that a 1991 decision to introduce 5% Limited Price Indexation ('LPI') from 1992 was effective, even though the scheme's amendment formalities at the time of the 1991 decision had not been met.
2. The ruling also concludes that a remedy known as the equitable right of recoupment is not subject to a limitation period.

B. Facts

1. The employer and trustees of a DB scheme took the decision in 1991 that pensions in payment should be

² [Money Laundering, Terrorist Financing and Transfer of Funds \(Information on the Payer\) Regulations 2017 \(SI 2017/692\)](#).

indexed by 5% LPI from April 1992.
That decision was put into operation.

2. The 1991 decision did not follow the amendment formalities of the Trust Deed and Rules at that time, which required amendments to be made by the employer and trustees by deed or 'by any writing effected under hand'.
3. In 1993, however, the power of amendment was altered as part of a Trust Deed and Rules rewrite which was expressed to take retroactive effect from 1990. The new amendment power allowed changes to be made by the trustees, with the employer's consent, by deed or 'by resolution (in writing)'.
4. The court was asked to establish whether the introduction of 5% LPI increases in 1992 was valid and, if not, whether those payments could be recovered by the trustees.

C. Decision

1. The High Court decided that the alteration to the power of amendment in 1993 had retroactive effect to 1990.
2. The introduction of 5% LPI indexation in 1992 was valid. The minutes of the 1991 trustee meeting at which 5% LPI was discussed was a 'resolution (in writing)' and the employer had

consented to indexation at that level.

3. This did not involve '*impermissibly re-writing history*'. The amendment could have been made under the scheme rules in operation in 1991 but there was a failure to observe the formalities which the amendment power of those rules required.
4. The valid introduction of 5% LPI meant that there were no overpayments to be recovered by the trustees, but the judge decided to comment on the recovery of overpayments in case his conclusion on the validity of the change was wrong.
5. The employer argued that the trustees would be under a duty to recoup any overpaid increases from future pension payments to the pensioners concerned. The court noted that such a duty was subject to Section 91 of the Pensions Act 1995.
6. Where the amount of a set-off is in dispute, Section 91(6) prohibits the exercise of the set-off unless the order of a 'competent court' makes it enforceable. A Pensions Ombudsman determination would not constitute such an order but a County Court order to enforce the determination would satisfy Section 91(6).

7. The judge also considered that the exercise of the equitable right of recoupment was not subject to a 6-year limitation period under Section 5 of the Limitation Act 1980. Equitable recoupment involved an adjustment of accounts in the future, not a claim for payment back of monies paid in the past.

Comment: This decision may be contrasted with the *Webber* litigation, in which the High Court decided that a 6 year limitation period applied (please see [Pensions Bulletin 16/16](#)). In *Webber* the scheme administrator initially sought repayment of the overpaid amount by cheque and subsequently offset the overpayment against Mr Webber's lump sum.

8. In the absence of a limitation period the doctrine known as laches may apply, under which delay can bar a claim to equitable relief. Laches usually requires the person from whom the payment is sought to have relied on what they have received to their detriment.
9. The trustees and individual members should determine whether laches applies in each instance as there may be circumstances in which seeking to recover overpayments would be inequitable.

10. The court rejected the argument that the doctrine known as estoppel by convention would have applied if 5% LPI had not been validly introduced. The argument put to the court was that the trustees and employer had acted in such a way as to suggest that they both assumed that 5% LPI applied since 1992 and it would therefore be unfair for one party to resile from that agreed assumption.

Burgess v BIC UK Ltd - 17th April, 2018
(Arnold J)

IV. Advocate General Opinion on PPF compensation and the Insolvency Directive

A. Overview

1. The Advocate General has agreed with the Court of Appeal's preliminary ruling that the 50% minimum level of protection under Article 8 of the Insolvency Directive (2008/94/EC) applied to each individual employee. If the EU Court of Justice reaches the same view this will have implications for the level of compensation offered by the PPF.
2. The Opinion also concludes that Article 8 could be relied on directly by an individual against a body such as the PPF.

B. Facts

1. Mr Hampshire was 58 years old when his employer (T&N) became insolvent. Normal pension age under the scheme was 62 and his pension was reduced by 67%. Mr Hampshire argued that Article 8, as interpreted in the cases of *Robins* and *Hogan*, meant that each employee should be guaranteed at least half of their benefits under the occupational pension scheme.
2. Article 8 says:
'Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary occupational or inter-occupational pension schemes outside the national statutory social security schemes.'
3. In a preliminary ruling, the Court of Appeal asked the EU Court of Justice to decide whether Article 8 requires Member States to ensure that each employee receives at least 50% of the value of accrued rights when the

employer becomes insolvent. The Court of Appeal's preliminary view was that it does.

4. The Court of Appeal also wanted the EU Court of Justice to consider whether Article 8 was directly effective.
5. To read about the Court of Appeal ruling and about *Robins* and *Hogan*, please see [Pensions Bulletin 16/11](#).
6. Obstacles to reaching a 50% level of provision for every individual under the PPF compensation rules were identified as:
 - 6.1 the cap on compensation for individuals under normal pension age when the employer becomes insolvent; and
 - 6.2 restricted indexation provision.

C. Opinion

1. The Advocate General agreed with the Court of Appeal's preliminary ruling that the 50% minimum level of protection under Article 8 applied to each individual employee. It was not merely an average level of protection for all employees.
2. The Advocate General also concluded that Article 8 could be relied on

directly by an individual against a body such as the PPF. Article 8 is sufficiently precise and unconditional and can be relied upon by individuals not only against a Member State but also against other organisations or bodies which are subject to the authority or control of the State, or which possess special powers. The PPF is such a body.

Comment: If the EU Court of Justice rules that PPF compensation has not complied with Article 8, and the enforcement of such a ruling is that the UK must take steps, changes would need to be made to the Pensions Act 2004.

Hampshire v The Board of the Pension Protection Fund - 26th April, 2018 - Advocate General Kokott

Points in practice

V. Auto-enrolment breach results in curtailed bus operator licence

1. Employers may wish to note the wider regulatory impact on one particular employer's business as a consequence of its non-compliance with auto-enrolment legislation.

2. The Traffic Commissioner has announced that a bus company which failed to auto-enrol its staff has had its transport licence cut from 40 to 31 vehicles indefinitely and a formal warning has been recorded on the licence.
3. The press release quotes the Traffic Commissioner for the North West of England as saying that the fact that a bus operator was the first company to be prosecuted for non-compliance with auto-enrolment duties "*casts a shadow on the industry*".
4. The press release also refers to a number of undertakings having been agreed relating to the appointment of a new transport manager, financial standing and the payment of fines.

Comment: To read about the fines imposed on Stotts Tours (Oldham) Ltd please see [Pensions Bulletin 18/04](#).

5. The Traffic Commissioner's action follows a public inquiry which was held on the matter.

Bus operator's licence curtailed after prosecution for failing to auto-enrol staff in company pension scheme - 1st May, 2018

VI. Impact of Brexit on cross-border schemes

1. UK cross-border schemes may be interested in a European Commission [Notice to Stakeholders](#) about the legal repercussions of Brexit on such schemes.

Comment: The onerous funding and other obligations under the original IORP Directive (2003/41/EC) have meant that the number of cross-border schemes in the UK is understood to be small.

2. The Notice (issued on 27th April, 2018) explains that, subject to any transitional Brexit arrangement, the latest IORP Directive (EU) 2016/2341 ("IORP II")³ will cease to apply to the UK after Brexit.
3. As a consequence, UK cross border schemes would be treated as 3rd country undertakings. Those schemes would therefore need to contact the authorities in the relevant host Member State(s) before Brexit to find out how, if at all, they may continue to operate cross-border.
4. The EC notes that the contractual arrangements of such schemes may also be affected. It anticipates that schemes in that position will need to cooperate with national supervisors and with EIOPA

³ IORP II will need to be transposed by Member States before 13th January, 2019

to ‘identify and mitigate compliance risks’.

- Where the cross-border scheme is registered or authorised in the EU, the notice points out that UK employers will still be able to contribute and be subject to IORP II in relation to members or beneficiaries whose relationship with the scheme’s sponsoring employer is governed by EU social and labour law.

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. | 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 |
| 2. | 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 . |
| 3. | Cyclical re-enrolment | Within 6 month window by reference to | For example employers with a 1st July, 2015 staging date must complete cyclical re-enrolment process between |

| No. | Topic | Deadline | Further information/action |
|-----|---|---|--|
| | | third anniversary of employer’s staging date | 1st April, 2018 and 30th September, 2018. Publication available to clients on request from usual pensions contact. |
| 4. | Money purchase annual allowance, which applies to individuals who have flexibly accessed their money purchase pot on or after 6 th April, 2015, has dropped from £10,000 to £4,000 under Finance (No.2) Act 2017 | Retroactive effect from 6 th April, 2017 | Member communications should include a warning note about this, highlighting the retroactive effect. |
| 5. | GMP equalisation | | |
| 5.1 | 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 |
| 5.2 | Government response to consultation on GMP equalisation published | 13 th March, 2017 | Pensions Bulletin 17/7 |
| 6. | 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. Pensions Bulletin 17/18 |

| No. | Topic | Deadline | Further information/action |
|-----|--|--|--|
| 7. | DC bulk transfers without member consent: introduction of easements | 6 th April, 2018 | Pensions Bulletin 17/18 Pensions Bulletin 18/05 See Item I above |
| 8. | Bulk transfers of contracted-out rights without consent: introduction of easements | 6 th April, 2018 | Pensions Bulletin 18/01 Pensions Bulletin 18/05 |
| 9. | Deferred debt arrangements become available | 6 th April, 2018 | Pensions Bulletin 18/05 |
| 10. | Disclosure of costs, charges and investments - new requirements | Mostly in force 6 th April, 2018 | Pensions Bulletin 18/05 |
| 11. | Auto-enrolment total minimum DC contributions increase to 5% (of which minimum employer contribution of 2%) | 6 th April, 2018 to 5 th April, 2019 | |
| 12. | Auto-enrolment total minimum DC contributions will increase to 8% (of which minimum employer contribution of 3%) | 6 th April, 2019 onwards | |

| No. | Topic | Deadline | Further information/action |
|-----|---|----------------------------|---|
| 13. | Deadline for service providers to send trustees written confirmation of compliance with ban on member-borne commission for pre-6 th April, 2016 contracts where payment made on or after 1 st October, 2017. Applies where scheme used as “qualifying scheme” for auto-enrolment purposes and some or all of benefits are money purchase. | 1 st May, 2018 | If confirmation not received then trustees should chase. Note: This may well be an empty category for many schemes. |
| 14. | 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 |

| No. | Topic | Deadline | Further information/action |
|-----|---|--------------------------------------|--|
| | comes into force | | Regulation is achieved by this date. A compliance checklist for trustees is available to clients from their usual Slaughter and May contact. |
| 15. | Further EMIR exemption extension for pension scheme arrangements Additional 3 year clearing extension proposed | 16th August, 2018 | Pensions Bulletin 17/01 Pensions Bulletin 17/10 |
| 16. | IORP II ⁴ transposition deadline | 12 th January, 2019 | Pensions Bulletin 16/11 |
| 17. | Brexit | By 29th March, 2019, unless extended | UK leaves EU from effective date of withdrawal agreement or, failing that, 2 years after giving Article 50 notice unless: (a) European Council and UK unanimously decide to extend period, or (b) UK withdraws, if able to do so, its Article 50 notice before 29th March, 2019. |

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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