

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](#)

Cases

I. BA trustees to appeal to Supreme Court

1. The trustees of the Airways Pension Scheme have [announced](#) that they will seek court permission to use the scheme's assets to fund an appeal to the Supreme Court.
2. The Court of Appeal ruling is of wider interest because it serves as a reminder that trustees must use their powers for a proper purpose.
3. The Court of Appeal decided that the trustees had acted for an improper purpose when they used their unilateral power to amend the scheme in order to grant themselves unilateral power to provide discretionary increases. The Court of Appeal gave the trustees permission to appeal, however.
4. To read about the Court of Appeal decision, please see [Pensions Bulletin 18/12](#).
5. The trustees anticipate that the hearing before the Supreme Court will take place in the second half of 2019.

II. High Court grants rectification of 2002 rules rewrite error

1. The High Court has decided to order the rectification of errors made during a

rules rewrite carried out in 2002. The decision was reached without a trial, saving time and expense.

2. The errors concerned the level of revaluation applicable to members who had transferred into the scheme the previous year, as part of a scheme merger exercise.

A. Facts

1. In 2001 two pension schemes were merged into the Unipart Group Pension Scheme ('the Scheme'). Benefits for members of the transferred-in schemes were to remain the same post-merger. This meant that they were entitled to statutory revaluation.
2. In contrast, other members of the Scheme were entitled to underpinned revaluation (broadly, the higher of statutory revaluation and the rate of increase to pensions in payment under the Scheme).
3. A rules rewrite of the Scheme took place in 2002. The rewrite was intended to be a tidying-up exercise. Errors in the drafting, however, meant that the revised rules provided for the transferred-in members to have underpinned revaluation.

B. Decision

1. The court was satisfied that the errors should be rectified. The 4-part test for rectification, set out in *Daventry*, had been met.
2. Rectification was granted despite the fact that the errors took place in 2002 and were 'possibly' discovered in 2007, by the scheme actuaries: '*the evidence here is compelling and I can see no reason why delay should have any effect upon the outcome*'.

Comment (1): The court in *Sovereign Trustees Ltd v Lewis* summarised the *Daventry* 4-part rectification test, and commented on points arising from that test in the pensions context - please see [\(Pensions Bulletin 16/16\)](#).

Comment (2): There have been a number of instances in recent years in which the High Court has granted rectification without a trial. Examples of this include: *Sovereign Trustees Ltd v Lewis* ([Pensions Bulletin 16/16](#)), *Saga* ([Pensions Bulletin 16/12](#)), and *Girls Day School Trust* ([Pensions Bulletin 16/08](#)).

Unipart Group Ltd v UGC Pension Trustees Ltd and (27th March, 2018)
(Chief Master Marsh)

Points in practice

III. Pensions Regulator launches new approach

1. The Pensions Regulator has [announced](#) a shift in its approach to scheme supervision from October, 2018. The new approach involves differing levels of intervention, depending on the risk identified. Details of the new approach are set out in [“Making workplace pensions work: TPR Future - our new approach”](#).
2. The Regulator plans to introduce dedicated **one-to-one** supervision of the “biggest” DC (excluding master trusts), DB and public sector schemes. These schemes (and, in some cases, the sponsoring employers) are to expect “ongoing contact” with the Regulator.
3. Schemes are to be selected for the one-to-one approach based on a range of criteria, including size, risk and previous interactions with the Regulator. The Regulator anticipates that this will operate in relation to 25 schemes initially, increasing to 60 schemes over the next year.
4. In addition, there will be a “**higher volume supervisory approach**” for a broader group (between 20% and 40%) of DB schemes. This will:

- be piloted with 50 schemes, to assess compliance with messages in the Regulator’s 2018 Funding Statement, particularly in relation to the payment of dividends by sponsoring employers;
 - initially involve proactive contact from the Regulator; and
 - be followed by “more intense” regulatory activity if any concerns are not addressed.
5. The Regulator expects all DB schemes to experience an increased likelihood of intervention concerning their annual valuations and the reduction of deficits.

IV. PPF levy for 2019/20 - consultation launched

The PPF has launched its [consultation](#) for the 2019/20 draft Levy Determination, which closes on 25th October, 2018. The PPF intends to publish the final Determination in December, 2018. To see the documents supporting the consultation (the draft Determination, Appendices and Guidance), please click [here](#).

A. Commercial consolidation vehicles

1. In recognition of the new, and developing, market in DB consolidation vehicles, there will be adjusted Levy Rules for such arrangements.

2. The PPF acknowledges that the present uncertainty over the shape and structure of DB consolidators means that the levy will need to develop for those vehicles over time. In the meantime, it has attempted to define commercial consolidators via an ‘entry rule’.

Comment: The draft commercial consolidator definition does not offer much in the way of certainty. It includes subjective elements, providing that such schemes have a purpose ‘*in the opinion of the Board*’ to effect consolidation of schemes’ liabilities and/or to enable a return to be payable otherwise than to members, and to which ‘*in the opinion of the Board*’ it is appropriate to apply the consolidator Levy Rules.

3. The PPF is proposing that the levy rules for consolidators should be based on an adjusted version of the methodology used for schemes without a substantive sponsor. The PPF’s rationale for this is that, while both types of arrangement share the risk posed by investment failure, there are differences in their risk profiles too, such as the potential scale and profit withdrawal of consolidators.

B. Re-certification of contingent assets

1. The levy consultation sets out the circumstances in which schemes will need to re-execute contingent assets using the new standard form.
2. Existing Type A and Type B contingent assets with a **fixed cap element** must be re-executed on the new (January 2018) standard form by 29th March, 2019, in order to be recognised for the 2019/2020 levy year.

Comment: Some schemes with Type A guarantees have additional non-PPF compliant guarantees that are dependent on the Type A guarantees. These will need to be checked to see whether they also need to be amended.
3. Where the scheme is not making any changes other than re-execution on the new standard form, the PPF will allow certain easements. For example, a new legal opinion will be required but that opinion can be a 'refresh' of an existing one so long as all the required confirmations remain covered. If additional changes are to be made, however, the PPF will expect to see supporting documents as if the contingent asset were new.
4. Type C(i) contingent assets entered into before 18th January, 2018 will not need to be on the new standard form, but those entered into on or

after that date should be on the new form.

5. Existing Type C(ii) contingent assets will not need to be re-executed on the new form.
6. Hard copy contingent asset documentation must be with the PPF by 5.00pm on **Friday 29th March, 2019**, with online certification by midnight on **Sunday 31st March, 2019**.
7. Scheme returns will need to be submitted on Exchange by midnight on **Sunday 31st March, 2019**.

V. Ombudsman revises guidance on non-financial injustice

1. Trustees and employers dealing with complaints made against them to the Pensions Ombudsman should note that the Ombudsman's guidance on its awards for non-financial injustice has been revised, with **immediate effect** from 13th September, 2018.
2. The Ombudsman has decided to introduce fixed awards for distress and inconvenience, split into 5 categories:
 - nominal: no award - this may involve a recommendation that the respondent offers the applicant a formal apology, however;

- significant: £500 - this is the Ombudsman's starting point;
 - serious: £1,000;
 - severe: £2,000; and
 - exceptional: more than £2,000 - the guidance refers to decisions where awards above £2,000 have been made.
3. The guidance sets out circumstances which the Ombudsman would expect to see in relation to each category, including a list of example aggravating factors which could push the award from the severe category into the exceptional category.

Comment: Some of the circumstances and factors are not entirely clear. For example, one factor in the severe category is that the 'respondent failed to understand the applicant's distress and/or inconvenience'. Similarly, the aggravating factors include a situation where the respondent is 'wilful or reckless'. The concept of 'wilful' behaviour is unsatisfactory of itself, without a link to some further level of intent to cause a particular type of damage.

4. The revised guidance goes on to note, however, that:

“we will not look to ‘rob Peter to pay Paul’. For example, where the award comes out of limited scheme resources and the scheme is underfunded, in wind-up, or is in the process of being transferred to the Pension Protection Fund.”

Comment: The typical £500 level of award for non-financial injustice has meant that schemes may have viewed this aspect of an adverse Ombudsman’s ruling to be of nominal importance. The impact could be significant, however, for schemes facing a dispute involving several members, particularly where the ‘severe’ or ‘exceptional’ category applies.

VI. Dispute resolution signposting - joint letter

1. Trustees should note that the Pensions Regulator does not intend to penalise them for telling members about the transfer of the disputes arm of The Pensions Advisory Service (‘TPAS’) to The Pensions Ombudsman. Any exposure to penalties would have arisen from the fact that a notification to members along those lines would not reflect current statutory¹ requirements.
2. A [joint letter](#) by Guy Opperman MP (Minister for Pensions) and the Pensions Regulator’s Chief Executive, Lesley

¹ regulations governing disclosure (SI 2013/2734) and internal dispute resolution procedures (SI 2008/649)

Titcomb, seeks to clarify how schemes should signpost members to the Ombudsman and TPAS, following the transfer of the latter’s dispute resolution function into the former in March, 2018.

3. The joint letter notes that the squeeze on parliamentary time caused by Brexit has meant that the legislation has not been updated yet to reflect the above change, but promises that the legislation will be brought up to speed ‘*at the latest by April 2020*’.
4. The joint letter therefore acknowledges that schemes may wish to update their signposting now, without having to wait for legislative change. It goes on to state that:

“TPR is satisfied that there would be no purpose served in considering whether to apply penalties in respect of non-compliance with existing legislation where signposting has been updated to clearly reflect the current position”.

5. The joint letter clarifies that the Ombudsman now operates an Early Resolution Service ‘to provide a quick, informal and streamlined process’, without the need for the complainant to

first use the scheme internal dispute resolution procedure.

6. The Ombudsman’s Adjudication Service still requires use of the scheme internal dispute resolution procedure first.
7. Requests for information and advice are still being dealt with by TPAS’s non-disputes arm, although that function is to transfer to the new Single Financial Guidance Body ‘*shortly*’.

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

No.	Topic	Deadline	Further information/action
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 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.
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 commenced 5th July, 2018

No.	Topic	Deadline	Further information/action
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
7.	DC bulk transfers without member consent: introduction of easements	6 th April, 2018	Pensions Bulletin 17/18 Pensions Bulletin 18/05 Pensions Bulletin 18/08
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	6 th April, 2018 to 5 th April, 2019	

No.	Topic	Deadline	Further information/action
			contribution of 2%)
12.	CJEU decides PPF compensation must equal at least 50% of each recipient’s benefit (<i>Hampshire - Case C-17/17</i>)	6 th September, 2018	Pensions Bulletin 18/13
13.	Data protection: New Regulation: EU General Data Protection Regulation in force	25 th May, 2018	Pensions Bulletin 16/05 Employment Bulletin 16/15 As data controllers, trustees need to ensure that compliance with the EU General Data Protection Regulation is achieved. A compliance checklist for trustees is available to clients from their usual Slaughter and May contact.
14.	Existing EMIR exemption extension for pension scheme arrangements ends EU Parliament confirms further extension of pensions exemption, with further extensions possible	16th August, 2018 12th June, 2018	Pensions Bulletin 17/01 Pensions Bulletin 18/12 Pensions Bulletin 18/10
15.	Master trusts new authorisation and supervision regime starts	1 st October, 2018	Pensions Bulletin 18/12 Pensions Bulletin 18/13 (note: SI later re-issued as SI 2018/1030)

No.	Topic	Deadline	Further information/action
16.	IORP II 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.
18.	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
19.	Trustees must ensure Statement of Investment Principles meets new requirements on ESG and stewardship	Most requirements to be met by 1 st October, 2019	Pensions Bulletin 18/13

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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