

Pensions Bulletin

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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. 5th Money Laundering Directive

1. At the moment, schemes registered with HMRC's online pension service do not have to register with the Trust Registration Service ('TRS'). The TRS was introduced as part of the UK's arrangements for meeting the requirements of the EU's 4th Money Laundering Directive ('MLD').
2. There is now a 5th MLD that will have to be transposed into UK law by 10th January, 2020, and the Treasury has issued a [consultation](#) on this. There is no action for trustees to take at this stage as the Government is currently deciding whether the existing pensions easement will fulfil the registration requirements of the 5th MLD (a further consultation, by HMRC, is expected later this year).

Cases

II. High Court rules on Ombudsman jurisdiction

Schemes now have greater certainty when scoping out the implications of a possible or actual complaint to the Ombudsman. The High Court has decided that the Pensions Ombudsman can only rule on issues put to him by the complainant.

A. Facts

1. The complainant ('S') was a coroner who started to receive benefits under the Local Government Pension Scheme ('LGPS') in 2014. This was several years after his 75th birthday (he reached age 75 in April 2005). Pension contributions were paid for almost a year after S's 75th birthday and he was paid for coronial work during that period.
2. The scheme administrator noted that bringing S's pension into payment after his 75th birthday breached the LGPS regulations. It proposed that S be deemed to have retired in April 2006, however (almost 1 year after he reached age 75). The administrator accepted that arrears were due but argued that interest was only payable for the 2006/07 year and not for the subsequent years. S complained to the Ombudsman.
3. The Ombudsman was not asked when the pension ought to have come into payment but he decided to rule on this anyway, concluding that it should have been paid from S's 75th birthday.

4. The recalculation flowing from this meant that interest was payable by reference to a longer period, but S's benefits were reduced and S would have owed the scheme just over £40,000. S therefore appealed to the High Court.

B. Decision

1. The High Court noted earlier case law which found that the Ombudsman's jurisdiction was '*limited to the investigation of the complaint actually made to him*'. The Ombudsman did not, therefore, have jurisdiction to determine the start date for S's pension.
2. The court also noted that an Ombudsman decision about costs could only be challenged if found to be perverse, concluding that that was not the case here.

Comment: This decision contrasts with a 2011 High Court ruling (*Grievson*) that the Ombudsman should have considered whether estoppel applied, despite the fact that the complainant had not raised that argument. The decision in *Grievson* could be distinguished in at least 2 ways,

however: (i) in *Grievson* the court was dealing with a different kind of complainant (the coroner in the present case submitted 28 pages of ‘*extensive*’ and ‘*technical*’ material); and (ii) the court’s approach in *Grievson* paved the way for consideration of an argument (estoppel) that could be of assistance to the complainant.

Sheffield v Kier Group PLC and Ors

III. Validating pre-1997 pension increases was “impermissible rewriting of history”

A. Overview

Where a previous attempt to amend rules has been found to be invalid, courts have sometimes been asked to look at whether the amendment in question could be validated retrospectively. The Court of Appeal has recently examined when such retrospective validation might be available.

B. Facts

1. A 1991 decision to provide increases did not comply with the formalities set out in the Trust Deed and Rules at that time. Nevertheless, the scheme had been administered on the basis that the increases were effective. The error came to light 20 years later and the employer sought a declaration that the pension increases were invalid.

2. A Trust Deed and Rules rewrite executed in 1993 (but expressed to take effect in 1990) altered the power of amendment to allow for changes to be made by written resolution. The High Court decided that this change validated the 1991 decision to provide the pension increases in question.
3. The employer appealed against this aspect of the High Court’s ruling, but not against the other aspects of the decision, which dealt with the recovery of overpayments (to read about the High Court ruling please see [Pensions Bulletin 18/08](#)).

C. Decision

1. The Court of Appeal disagreed with the High Court. There had been no common intention between the employer and trustees that the later Trust Deed would validate previously invalid amendments, so the 1991 amendment was ineffective. To hold otherwise “*went a step too far and involved the re-writing of history to an impermissible extent*”.
2. In some circumstances a trustee’s decision to do something may justify imputing to them an intention to exercise a power, even if they were unaware of the existence of that power. That was not the case here, however, because (i) the power in question must be in existence at the

time that the decision is made, and (ii) a decision to exercise a power can be imputed only where it is not possible to infer an intention **not to** exercise the power.

D. Trustee resolution formalities

The Court commented (but did not rule) on the status of the minutes recording the 1991 decision. In the Court’s view, those minutes were not a “trustee resolution” but rather a resolution on future policy, leaving the implementation of that policy to later. To be effective a written resolution should have (i) been set out in a written document (ii) been signed by all 3 trustees, and (iii) included a formal reference to the employer’s consent.

Comment: The High Court’s decision was at odds with concerns expressed in *Briggs v Gleeds* ([Pensions Bulletin 14/07](#)) about the failure to comply with amendment formalities. As this decision illustrates, the distinction between what amounts to the “*impermissible rewriting of history*” and enabling “*effect to be given to what, as a matter of historical record, was in fact decided as done*” is a fine one.

BIC UK Ltd v Burgess

Points in practice

IV. Regulator's blog on funding regime changes

The Pensions Regulator has published a [blog](#) on how it plans to introduce the funding regime changes outlined in the Government's 2018 White Paper.

A. *Not another Minimum Funding Requirement ('MFR')*

The Regulator is keen to communicate that it does not intend to pursue a 'one size fits all' MFR 2.0 framework: *'there will be scope for schemes to choose a more bespoke approach subject to further evidence being provided and greater regulatory scrutiny.'*

Comment: There has been some concern that the Government's intention to clarify 'prudent' technical provisions (expressed in the 2018 White Paper) might lead to an encroachment upon trustees' ability to decide what should be 'prudent' - they currently do this by taking actuarial advice on how the scheme funding regime applies to their scheme, subject to the overview of the courts and case law on the concept of prudence.

B. *Timing*

The Regulator plans to issue 2 consultations, one in Summer 2019 (depending on the legislative timetable), with a second consultation in 2020 *'once*

we have more clarity on the intended primary and secondary legislative package'.

C. *Areas for consultation*

The intention is to consult on:

- a suitable **long term objective** -
 - **closed schemes:** the blog expressly anticipates the possibility of a transfer to a Superfund, as well as other options such as buy-out or low risk run-off
 - Comment:** If a transfer to a Superfund is to be considered, a number of hoops would need to be jumped through to achieve that outcome.
 - **open schemes:** the Regulator says that it does not want the funding regime to *'unduly increase the cost of future accruals and lead to unnecessary scheme closures'*
 - Comment:** Schemes undergoing a valuation since the March 2018 White Paper should have borne in mind that the 'comply or explain' revised regime will place greater emphasis on taking a long term view. The Summer 2019 consultation being planned is likely to provide further detail for

schemes still negotiating their valuations around that time or subsequently. In the interim, the 2019 Annual Funding Statement also provides a gloss on the Regulator's expectations (please see [Pensions Bulletin 19/03](#)).

- setting **clearer parameters** (such as discount rates) around journey plans and technical provisions, based on the scheme's circumstances (eg, by reference to scheme maturity or covenant strength)
- guidelines on **acceptable recovery plan lengths** for different covenant strengths - the Regulator plans to consult on whether, all other things being equal, stronger employers should be required to fund deficits over a shorter period
- Comment:** The Regulator's 2019 Funding Statement indicated that a median recovery plan length is 7 years so it considers schemes with a strong covenant should generally have significantly shorter plan lengths (please see [Pensions Bulletin 19/03](#)).
- how **contingent support** may be used (eg, to support long recovery plans, especially where shorter plans would be unaffordable)

- how trustees could demonstrate that risk in their **investment strategy** is supported (eg, through a stress test)

Protecting DB savers: our expectations are clear- 9th May, 2019 - by David Fairs (Executive Director of Regulatory Policy, Analysis and Advice)

V. DWP review of TPR urges clearer Codes

1. The DWP has published a [review](#) of the Pensions Regulator, urging it to assess whether its Codes of Practice ‘are the correct minimum standards of compliance they expect of all schemes ... clarifying to schemes what things the regulator asks of them are requirements and what are merely guidelines.’
2. The review states that all the recommendations have been accepted by the Regulator, the DWP, and Cabinet Office and approved by the Minister for Pensions and Financial Inclusion.

Comment: Codes of Practice often set out expectations not reflected in legislation. Despite this, Codes are taken into account by courts, meaning that employers and trustees must operate their schemes with that in mind. There is certainly scope for the Codes to present a clearer distinction between firm expectations and suggestions for best practice.

3. The DWP also recommends giving the Regulator power to ‘create rules

governing the details of what information they require from schemes’ because legislation on ‘data requirements ... cannot change at the same pace as the digital world’.

Comment: The DWP appears to hint that the Regulator may be given further rule-making powers in the future, noting that such a step would bring it more into line with the FCA, save Parliamentary time, and ‘potentially resolve public confusion over the extent of [its] powers’. If so, there may well be concerns about the degree of oversight involved, despite the DWP’s promise that any such rule-making ability would be given ‘with correct ministerial oversight and industry input’.

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.	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.
4.	GMP equalisation		
4.1	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.
		Judgment published	26 th October, 2018 Pensions Bulletin 18/15 Pensions Bulletin 18/17
4.2	Government response to consultation on GMP equalisation published	13 th March, 2017	Pensions Bulletin 17/7

No.	Topic	Deadline	Further information/action
5.	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
6.	DC bulk transfers without member consent: introduction of easements	6th April, 2018	Pensions Bulletin 17/18 Pensions Bulletin 18/05 Pensions Bulletin 18/08
7.	Bulk transfers of contracted-out rights without consent: introduction of easements	6th April, 2018	Pensions Bulletin 18/01 Pensions Bulletin 18/05
8.	Deferred debt arrangements became available	6th April, 2018	Pensions Bulletin 18/05
9.	Disclosure of costs, charges and investments - new requirements Chair's statement and website must publish costs and charges information	Mostly in force 6th April, 2018 Within 7 months of scheme year end falling on or after 6th April, 2018	Pensions Bulletin 18/05
10.	Auto-enrolment total minimum DC contributions increase to 5% (of which minimum employer contribution of 2%)	6th April, 2018 to 5th April, 2019	

No.	Topic	Deadline	Further information/action
11.	Data protection: New Regulation: EU General Data Protection Regulation in force	25th 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.
12.	Existing EMIR exemption extension for pension scheme arrangements ended 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
13.	CJEU decides PPF compensation must equal at least 50% of each recipient's benefit (<i>Hampshire - Case C-17/17</i>)	6th September, 2018	Pensions Bulletin 18/13
14.	Master trusts new authorisation and supervision regime introduced	1st October, 2018	Pensions Bulletin 18/12 Pensions Bulletin 18/13 (note: SI later re-issued as SI 2018/1030)
15.	IORP II transposition deadline	12th January, 2019	Pensions Bulletin 16/11

No.	Topic	Deadline	Further information/action
16.	Auto-enrolment total minimum DC contributions will increase to 8% (of which minimum employer contribution of 3%)	6th April, 2019 onwards	
17.	Trustees must ensure Statement of Investment Principles meets new requirements on ESG and stewardship	Most requirements to be met by 1st October, 2019	Pensions Bulletin 18/13
18.	Pensions Regulator consultation on draft DB Funding Code of Practice expected	Spring 2020	

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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