SLAUGHTER AND MAY

Pensions and Employment: Pensions Bulletin

26th May, 2016 / Issue 7

Legal and regulatory developments in pensions

In this issue

The Watch List

New Law

Pensions Bill announced ...more

Bank of England and Financial Services Act 2016 ...more

Tax

HMRC newsletter 78 ...more

Cases

Removal of guarantee for future service: Ombudsman's determination ...more

Informing beneficiary of two-year deadline for death benefits: Ombudsman's determination in relation to Lettman ...more

Equalisation formalities: Scottish case ...more

Points in Practice

Revised Code of Practice on DC governance and administration ...more

Pensions Regulator's Annual Funding Statement ...more

To access our Employment/Employee Benefits Bulletin visit the Slaughter and May website.

Contents include:

- The Immigration Act 2016
- The Trade Union Act 2016
- The Enterprise Act 2016
- Employees working abroad must satisfy Lawson v Serco test to bring Equality Act claims in Great Britain
- Discrimination arising from disability claim requires only a loose connection between conduct and the disability
- Court of Appeal finds that mutuality of obligation is relevant to employee status under the Equality Act 2010
- Business and human rights
- Review by Baroness McGregor-Smith on the Issues Faced by Businesses in Developing Black and Minority Ethnic Talent: Call for Evidence

Back issues can be accessed on the Slaughter and May website. To search them by keyword, click on the search button to the left.

Find out more about our pensions and employment practice on the Slaughter and May website.

Details of our work in the pensions and employment field are on the Slaughter and May website.

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 Rebecca Hardy.

Unsubscribe

Back to contents

In this issue:

I. 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.	Reduction in annual allowance for high income individuals **Note**: Up to £80,000 annual allowance for tax year ending 5th April, 2016	Applies for tax years starting on or after 6th April, 2016	Summer Budget 2015 Supplement
2.	Severance payments and tapered annual allowance pitfall	From 6th April, 2016	Pensions Bulletin 16/06
3.	Reduction in Lifetime Allowance from £1.25 million to £1 million	6th April, 2016	Pensions Bulletin 15/19
4.	Members who intend to apply for Fixed Protection 2016 ("**FP 2016**") must have stopped accruing benefits	6th April, 2016	Pensions Bulletin 15/16
5.	Abolition of DB contracting-out: practicalities	6th April, 2016	Pensions Bulletin 15/16 5.1 Employers to notify affected employees of change in contracted-out status "at the earliest opportunity" and in any event by 6th May, 2016. 5.2 Schemes to notify affected members before, or as soon as possible after, 6th April, 2016 and in any event by 6th July, 2016. 5.3 Change template contracts of employment for new joiners to remove references to contracted-out employment. 5.4 Update, where applicable, pensions section of employee handbook to cover consequences of contracting-out ending.

No.	Topic	Deadline	Further information/ action
6.	Abolition of DB contracting-out: Rule amendments needed Note: Statutory power to amend, retrospective to 6th April, 2016, expires on 5th April, 2017	6th April, 2016	If your scheme was contracted-out on 6th April, 2016 and currently has active members accruing benefits (and who continued to accrue benefits after 5th April, 2016 in the scheme), then your scheme will, more likely than not, require a rule amendment effective from 6th April, 2016 to prevent the inadvertent addition of an additional underpin to the accrued GMPs of those active members. See further Pensions Bulletin 16/03
7.	Abolition of DB contracting-out: Compliance with auto-enrolment requirements	6th April, 2016	If employer is using COSR as a "qualifying scheme" for auto-enrolment purposes, scheme will need to satisfy either: • "test scheme standard", or • alternative "cost of accruals" quality test if it is to continue as a "qualifying scheme". Pensions Bulletin 16/05
8.	Requirement to provide risk warnings when member provided with means of accessing DC benefits	6th April, 2016	Pensions Bulletin 16/04
9.	Put in place register of persons with significant control ("**PSC**") for trustee company where trustee is a corporate	6th April, 2016	Pensions Bulletin 16/03
10.	Ban on member-borne commissions in DC schemes used for auto-enrolment	6th July, 2016 at the latest	DC scheme trustees must notify "service providers" if the scheme is being used as a "qualifying scheme" for auto-enrolment purposes. Pensions Bulletin 16/04
11.	EU/US Privacy Shield for transfers of personal data to US	May, 2016	To consider if transferring personal data to US. Also review transfers of data outside the EEA for compliance with the EU data protection directive. Pensions Bulletin 16/02
12.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer's staging date	For example employers with a March 2013 staging date must complete cyclical re-enrolment process between December 2015 and June 2016. Publication available to clients on request from usual pensions contact.
13.	First Chair's annual governance statement	Within 7 months of end of scheme year (for scheme years ending on or after 6th July, 2015)	For example, schemes with a 31st December year end must submit statement by 31st July, 2016. Client note dated June, 2015 available from Lynsey Richards.
14.	Data protection: New Regulation	25th May, 2018	Pensions Bulletin 16/05
15.	"Brexit"	Referendum on 23rd June, 2016	Consider potential impact on pension schemes. Client publications available on Slaughter and May website

Back to contents

New law

II. Pensions Bill announced

A. Overview

Another Pensions Bill is on the horizon. The background briefing notes accompanying the Queen's Speech state that the Bill will cover master trusts, early exit charges and a restructuring of financial guidance bodies.

B. Master trusts

Master Trusts will have to demonstrate that schemes meet "strict new criteria" before entering the market. The Bill will create greater powers for the Pensions Regulator to authorise and supervise these schemes and take action when necessary.

Comment (1): The Government's focus on master trusts is increasing. Changes to the Compensation Sourcebook governing the Financial Services Compensation Scheme (FSCS) mean that members of master trusts are now covered in relation to non-insurance investments (**Pensions Bulletin 16/06**). The changes came into force on 29 April 2016.

Comment (2): Master trusts also featured in the Pensions Regulator report of March, 2016. The report discussed how some occupational DC schemes have approached the pensions flexibilities introduced in April, 2015. There was some concern about a number of new models designed to facilitate access to pension flexibilities. One model is based around informal arrangements between single-employer schemes and master trusts that allow members to transition their assets to the master trust. Some of these arrangements may present new risks to members and the Regulator has said that it will work closely with the DWP and the FCA to understand and address these risks.

C. Early exit charges

There will be a cap on early exit fees charged by trust-based occupational pension schemes. The aim of this cap will be to enable consumers to access pension freedoms "without unreasonable barriers".

Comment (1): The announcement of a cap on early exit fees charged by trust-based occupational pension schemes has been expected. The cap was mentioned in the Treasury's response to its consultation on transfers and early exit charges (published in February, 2016). The response paper said that the Government would consider how existing powers to limit pension charges could be used to implement a cap in trust-based schemes. Work on a cap for contract-based schemes is currently underway at the FCA. The Treasury's consultation response says that the Pensions Regulator will work alongside the FCA as it develops the design and level of the cap.

Comment (2): A point for employers to make on the legislation is that they should not be expected to incur any additional costs as a result of the cap.

D. Restructuring financial guidance

There will be a new pensions guidance body, bringing together the Pensions Advisory Service, Pension Wise and the pensions services offered by the Money Advice Service. A new money guidance body will replace the Money Advice Service and be charged with identifying gaps in the financial guidance market.

III. Bank of England and Financial Services Act 2016

1. The Bank of England and Financial Services Bill received Royal Assent on 4 May 2016.

2. The Act includes provisions (Sections 32-33) aimed at ensuring that consumers with a higher value annuity receive financial

Back to contents

advice before making the decision to sell their annuity income stream. This will be done by extending the scope of the Pension Wise service.

3. Section 32 came into force on 13th May 2016.

   Comment (1): The Act does not explain what sort of value the annuity would need to have in order for the financial advice requirement to be triggered, although Section 33(4) refers to regulations specifying criteria based on the proportion of the individual's financial resources represented by the payments under the annuity, or the value of the annuity.

   Comment (2): Pensions Bulletin 16/06 covered the three consultations (issued by HMRC, the Treasury and the FCA) regarding the secondary annuity market. The FCA consultation included proposals concerning regulated financial advice. The Treasury consultation asked whether intermediaries should be needed when providers buy back annuities below a certain value. We will continue to see further legislation, and (no doubt) further consultations on the secondary annuities market.

4. The Act also contains pensions provisions on:

   4.1 the use of appointed representatives in relation to independent advice on conversions and transfers of safeguarded pension benefits (Section 34 – this will amend the Pension Schemes Act 2015).

   Comment (1): This amendment will extend eligibility to advise on the conversion and transfer of safeguarded benefits to appointed representatives of authorised financial advisers. When an appointed representative of an authorised financial adviser gives advice, the directly authorised firm takes responsibility for the quality of the advice and compliance with FCA rules. Most financial advisers are appointed representatives with a contract to provide services on behalf of their principal, who will be an authorised financial adviser regulated by the FCA.

   Comment (2): No date has yet been set for the coming into force of this amendment.

   4.2 early exit pension charges in contract-based schemes – as announced in the Treasury's 19 January 2016 press release (Section 35 – this will amend the Financial Services and Markets Act 2000).

Tax

IV. HMRC Newsletter 78

A. Overview

1. Items of note in HMRC's Pension Schemes newsletter 78 cover:

   1.1 the tapered annual allowance, and

   1.2 individual protection 2016 and fixed protection 2016

B. Tapered annual allowance

1. HMRC have been asked to clarify when a scheme administrator must provide a member with a standard pension savings statement for 2016/2017 onwards. HMRC confirm that a statement will only be required where the member's pension input amount for that scheme exceeds the £40,000 untapered annual allowance.

2. HMRC have also been asked to clarify when scheme pays applies to members who are subject to a tapered annual allowance. For 2016/2017, an individual will be able to use scheme pays if:

2.1 their annual allowance charge for the tax year exceeds £2,000 (or, where the money purchase annual allowance applies, the member would have had an annual allowance charge exceeding £2,000 had the annual allowance applied to him), and

2.2 their pension input amount for that scheme exceeds the £40,000 untapered annual allowance.

C. Individual and Fixed protections 2016

1. Newsletter 78 contains revised pro forma application letter text for individual protection 2016 and fixed protection 2016 (set out in appendices 1 and 2). Temporary registration is available pending the Finance Bill becoming law and the introduction of HMRC's online registration.

2. The pro forma application letters now contain all the information required under paragraph 14(3) of the Schedule to the Budget Resolution with one caveat.

3. The Budget Resolution requires that an application for fixed protection 2016 includes a confirmation that the person has one or more arrangements under a registered pension scheme, or under a relieved non-UK scheme, on 6th April, 2016. The pro forma requests this confirmation as at 5th April, 2016.

Comment (1): It is unfortunate that HMRC did not correct this error despite it having been pointed out to them.

Comment (2): It may be that we can conclude that, for future cases where the member has completed the pro forma letter, this dating error is in practice not material where in fact the individual still has an arrangement on 6th April, 2016 (which will be true in practically all scenarios).

Comment (3): The changes do not solve the issue for any past applications. There may be a scenario where a member has already sent an application in and only provided the information HMRC set out in their previous defective pro forma application templates. In that scenario, the member should, to be on the safe side, update the application by providing HMRC with the additional (missing) information and ask HMRC to confirm that the number has been validly issued.

Cases

V. Removal of guarantee for future service: Ombudsman determination

A. Overview

1. A recent Pensions Ombudsman ruling has concluded that the removal of a guarantee for future service was valid.

2. The ruling also found that the more generous benefits described in the scheme booklet did not override the benefits described in the rules.

B. Facts

1. X (the complainant) joined the B&Q scheme in 1985. The guarantee was given by the employer when X's pension scheme merged into the Kingfisher Pension scheme in 1988. The guarantee was included in the receiving scheme's rules. Under the guarantee, transferring members' pensions at NRA would not be less than those which would have been payable under the transferring scheme:

"if that scheme had continued unchanged and the member had remained a contributing member of it for so long as his Service

continued and he had not opted out of FS Active Membership.".

2. Following a consultation exercise by the employer, the final salary section of the scheme closed to future accrual in 2012. X therefore became a deferred member of that section (to which the guarantee continued to apply). At the same time, X and the other members affected by the closure became members of the money purchase section, without the benefit of the guarantee.

3. The 1985 scheme booklet stated that members with at least 20 years of pensionable service were entitled to a pension of two-thirds of final salary. Under the rules, however, only active members had that right. The rules provided that deferred members' benefits were calculated as for incapacity, with a maximum accrual rate of one-sixtieths.

4. X complained that the consultation was defective and flawed and ignored members' expectations while failing to explain the consequences of the changes. She also argued that the booklet issued in 1985 should be used to calculate her benefits. X also asserted that she had a reasonable and continued expectation that her entitlement was as set out in the 1985 booklet, following IBM.

C. Decision

1. The Ombudsman decided that the 2012 deed of amendment effecting the final salary section closure did not breach Section 67 of the Pensions Act 1995. The decision refers to other cases on scheme amendments, such as *Stena* where the Court of Appeal ruled that the starting point in relation to amendment powers was that they should be given a broad interpretation.

2. The Ombudsman referred to the Pensions Regulator's investigation of the consultation process. The Regulator had found that there was no case to answer. The Ombudsman ruled that members' expectations were relevant. But the respondents were also entitled to take their own interests and the future operation of the scheme into account. The ruling concludes that the decision which they consequently took did not appear to have been irrational or perverse.

3. X had a legitimate expectation that the guarantee would not be unpredictably removed. However, once the scheme was closed to future accrual, X could not have a reasonable expectation that benefit accrual would continue, given that the receiving scheme was restructuring. There was no suggestion that the guarantee could never be amended. Also, the guarantee was taken into account when calculating X's deferred benefits for service before the final salary section was closed.

4. In line with other cases, the booklet was found not have overridden the scheme rules.

X (**PO-4280-PO-4971-and-PO-4393**) – X was the lead complainant for three complaints

Comment: Guarantees of the nature discussed in this case are increasingly rare. Employers who have given guarantees attached to members' benefits should bear in mind that the precise wording of the guarantee and the circumstances surrounding the case will be of paramount importance if they are considering whether there is any room for manoeuvre.

VI. Informing beneficiary of two-year deadline for death benefits: Ombudsman's determination in relation to Lettman

1. The Ombudsman has decided that the LGPS administering authority and the administrator at the time should have told the intended recipient of the lump sum death benefit that

HMRC set a two-year deadline for payment of the benefit.

2. The respondents were found guilty of maladministration for not informing the deceased's mother (the intended recipient) of the deadline. A further finding of maladministration was made for their failure to act within 13 working days after the mother had provided letters of administration (the two-year deadline was reached at the end of those 13 days).

3. The London Borough of Hammersmith and Fulham (the administering authority) was ordered to pay an amount equal to the unauthorised payment charge (almost £8,500) plus interest. Each respondent was also ordered to pay £250, for the distress and inconvenience caused.

Lettman - (PO-3753)

Comment (1): There is no duty to disclose HMRC's two-year payment deadline but, as evidenced in another Ombudsman ruling (*Bashford (PO2704)*), the absence of a duty on this point in legislation will not necessarily preclude a finding of maladministration being reached.

Comment (2): It would be sensible for trustees to ensure that the two-year deadline for payment of lump sum death benefits is communicated to potential beneficiaries who are being asked to provide information to be used in the trustees' decision taking. An important point to make is that the two-year deadline is a hard, non-moveable deadline.

VII. Equalisation formalities: Scottish case

A. Overview

The Inner House of the Court of Session in Scotland looked at whether the formalities set out in the scheme trust deed and rules had been met in relation to an attempt to equalise pension ages for men and women.

B. Facts

1. The main power of amendment was not relied upon as its requirements had clearly not been met.

2. The rule discussed in this case stated: "*The Trustees may with the consent of the principal employer determine in relation to any Member that his Membership shall be on such special terms as are intimated to him*".

3. There were minutes of a meeting attended by the trustees and the employer at which the employer's professional advisers reminded those present of the need to equalise benefits. The following month, the advisers wrote to the employer recommending equalisation. Soon afterwards, an announcement to staff was sent by the employer and copied to the trustees, announcing that benefits would be equalised at age 65 for men and women from January 1993.

C. Decision

1. The court ruled that the attempted equalisation did not meet the rule's requirements.

2. While there was evidence of the employer's decision on the matter, there could not be any inference that the trustees consented to the change. The trustees were copied into the announcement to members and had attended the earlier meeting with the employer, but that did not mean that the trustees had consented to the change. This was despite the trustees having administered the scheme on the basis that the change had been made.

Back to contents

3. The court also noted that there was no evidence of the announcement having been sent to members who were not members of staff.

Bett Homes Ltd v Wood

Comment: We usually see cases emphasising the need to follow the strict requirements of the amendment rule in order to effect equalisation. The most recent English case on the subject was *Safeway v Newton* (Pensions Bulletin 16/03). The judge in *Safeway* ruled that announcements to members had not, of themselves, brought about a change in NPA for women. It was only in conjunction with the actual exercise of the amending power in the consolidating amending deed executed 5 years later that the change could take effect. This was despite the fact that the trustees had run the scheme as if the announcements had equalised benefits. Taken by themselves, the announcements were not "measures" which were sufficient to comply with the EU equal treatment requirements.

Points in Practice

VIII. Revised code of practice on DC governance and administration

1. The revised draft code of practice for money purchase occupational trust-based schemes (to replace the 2013 version) was laid before Parliament on 9 May, 2016. To see the consultation and response please click here.

2. Draft codes of practice lie before Parliament for 40 days. During those 40 days, either House may resolve that the code should not be made. However, it is highly unlikely that that would happen. It is also unlikely that any further changes would be made to the draft code.

3. The Regulator consulted on the draft code of practice 13 (Governance and administration of trust based occupational defined contribution schemes) between 24 November 2015 and 29 January 2016.

4. In its response, the Regulator says that some text about relevant multi-employer schemes and non-affiliated trustees has been taken out of the draft code and will be moved to the relevant guide.

5. The most notable change stems from the Regulator's acknowledgement that a maximum three day period before the investment of contributions could be detrimental to members where current dealing patterns would need to change.

6. The new code states that the deadline of three working days only applies where a scheme operates a daily dealing cycle. Where daily dealing does not apply, the Regulator expects funds to be invested on the next available dealing date, within a maximum of five working days.

7. A few changes to the code result from changes to legislation (such as the requirement for risk warnings and the ban on member borne commission).

8. As regards respondents' requests for guidance about the line between providing information and providing advice and about the financial promotion regime, the Regulator confirms that it will be working with the FCA to produce a joint factsheet (this was previously announced in the response to the Financial Advice and Market Review).

Comment (1): The Regulator's response to many of the comments raised is that the

Back to contents

issue in question will be dealt with in the supporting guides. Much of the wording that will result from the consultation is not therefore available at this stage.

Comment (2): Codes of practice are not statements of the law and there is no penalty for failing to comply with them. It is not necessary for all the provisions of a code of practice to be followed in every circumstance. Any alternative approach to that appearing in the code of practice will still need to meet the underlying legal requirements. However, when deciding whether the legal requirements have been met, a court or tribunal must take any relevant provisions of a code of practice into account.

IX. Pensions Regulator Annual Funding Statement

1. The Pensions Regulator has published its 2016 annual funding statement, analysing how schemes are responding to market conditions.

2. The statement is aimed at schemes undertaking valuations effective in the period 22 September 2015 to 21 September 2016 but is considered relevant to all DB schemes.

3. The Regulator says that most schemes are expected to have larger deficits (the increase in deficit could be in the region of 20-35%). Mention is made of the financial market volatility at the start of 2016.

4. However, the Regulator also considers most employers to be likely to be able to maintain or increase their scheme contributions. This is because there has, in general, been an increase in employers' reported profits and an improvement in balance sheets since the last valuation date.

5. The Regulator does recognise, however, that some employers investing for growth in their business will not be able to increase their deficit reduction contributions. In that event, the Regulator expects employers to discuss this openly with their trustees.

6. The statement notes that the ratio of deficit reduction contributions to dividends has declined over the last five years. For the FTSE350, the median fell from 17% in 2010 to less than 10% in the latest round of data.

   Comment: This statistic shows that dividends have increased at a faster rate than deficit reduction contributions.

7. The prospect of larger deficits than expected means that trustees will be expected to review their recovery plan. The Regulator notes that about half of recovery plans of schemes carrying out valuations in 2016 have up to five years to run.

   Comment: The position faced by DB schemes will vary from scheme to scheme. The statement is of general interest but does not appear to provide fresh insight into the Regulator's expectations.

537085567

Back to contents

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** jonathan.fenn@slaughterandmay.com or your usual Slaughter and May adviser.

© Slaughter and May 2016

This material is for general information only and is not intended to provide legal advice.
For further information, please speak to your usual Slaughter and May contact.

OSM0008085 v01