SLAUGHTER AND MAY

Pensions and Employment: Pensions Bulletin

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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 Bridget Murphy.

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 2.1 Since 6th 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. 2.2 For the taper to apply, the individual must have UK taxable income in 2016/17 of: – £110,000 "threshold" income, and – £150,000 "adjusted" income. 2.3 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 charge for the member on pension provision already made. 2.4 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.
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	5th July, 2016 at the latest	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
11.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer's staging date	For example employers with a 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.
12.	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.
13.	"Brexit"	Referendum held on 23rd June, 2016	Consider potential impact on pension schemes. Client publications available on Slaughter and May website
14.	DC Code of Practice 13 on governance and administration takes effect	28th July, 2016	Schemes offering money purchase benefits (including money purchase AVCs, insofar as the legislation applies) must familiarise themselves with the revised Code.
15.	**Provisional date for Supreme Court to hear appeal in *Walker v. Innospec***	**November 2016**	To establish whether survivor benefits for civil partners will be retroactive to a date before the Civil Partnership Act 2004 came into force. Pensions Bulletin 16/11
16.	**HMRC's existing practice on VAT and pension schemes ends**	**31st December, 2016**	**Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover** Pensions Bulletin 16/11
17.	Data protection: New Regulation	25th May, 2018	Pensions Bulletin 16/05
18.	**IORP II expected transposition deadline**	**October/ November, 2018**	Pensions Bulletin 16/11

New Law

II. Auto-enrolment - Government views

1. The Government has published (on 22nd July, 2016) a response to a report on auto-enrolment written by the Work and Pensions Select Committee.

2. As regards master trusts, the Government envisages the introduction of protections in respect of minimum financial and governance standards, as well as extended powers for the Pensions Regulator to regulate master trusts effectively. The response says that recent Ministerial roundtables will be followed up by stakeholder events 'in the summer'.

3. Much of the Government response focuses on assisting small and micro employers to comply with their auto-enrolment duties.

4. The Committee expressed concerns in its report about the impact of Lifetime ISAs on pension saving through auto-enrolment, calling for urgent research on this issue. In its response, the Government has said that it will not commission any research on LISAs beyond the usual Impact Assessment of legislation.

5. The Government confirms that it will review certain aspects of auto-enrolment in 2017 and that it is in the early stages of scoping the review, which will be broader than the review requirements set out in legislation.

Comment (1): The Committee was concerned that Lifetime ISAs might be presented as an alternative to auto-enrolment. A Pensions Policy Institute briefing note on LISAs concluded that the impact upon retirement saving was ambiguous.

Comment (2): In line with the Pensions Regulator, the Committee had also expressed concerns that master trusts were under-regulated. The Pensions Bill (Pensions Bulletin 16/07) announced in the Queen's Speech will contain "strict new criteria" for master trusts. The Regulator will be given greater powers to authorise and supervise master trusts in the Bill.

Tax

III. Lifetime allowance protection

1. HMRC'S Pension schemes newsletter 80 was published on 28th July, 2016.

2. The newsletter includes an announcement about the online service for Fixed and Individual Protection 2016 and Individual Protection 2014.

3. Any applications made after 31st July, 2016 using the interim paper process will be returned. However, HMRC will process any interim protection applications in hand on 31st July, 2016. If such an application is successful HMRC will issue a permanent protection notification number to the member. Members with permanent protection notification numbers will not need to reapply online.

4. Pension Schemes Newsletter 78 explained that if members have applied for Individual Protection 2016 or Fixed Protection 2016 using the interim application process but fail to follow this up with an online application, providing these individuals have not lost their protection, their pension savings would continue to be protected. However, from

August, 2016 onwards, only permanent reference numbers will be recognised by HMRC. In addition, when the pension scheme administrator "look up" service becomes available, it will only validate permanent reference numbers.

5. HMRC expects the lifetime allowance look up service for pension scheme administrators (to check the protection status of their members) to be available 'later in the year'.

6. Newsletter 80 also contains a link to a new guide for members on valuing their pension for Individual Protections 2014 and 2016.

Cases

IV. Access to State Pension for transgender individual

A. Overview

The Court of Justice of the European Union (CJEU) will consider whether Directive 79/7/EEC precludes a requirement in national law that, in addition to satisfying various requirements for a change in gender to be recognised, the individual must also be unmarried to qualify for a State pension. The Supreme Court is divided on the question and has therefore referred this (on 10th August, 2016) to the CJEU.

B. Facts

MB was married on 21st September, 1974. In 1991 she began to live as a woman and in 1995 underwent sex reassignment surgery. MB did not apply for a gender recognition certificate since the coming into force of the Gender Recognition Act 2004. For religious reasons, MB and her wife are unwilling to see their marriage annulled. On 31st May, 2008 MB attained the age of 60. On 28th July, 2008, she applied for a state retirement pension, backdated to 31st May, 2008, on the footing that she was a woman. The application was rejected on 2nd September, 2008 on the ground that, in the absence of a full gender recognition certificate, she could not be treated as a woman for the purpose of determining her pensionable age.

C. Arguments raised

1. MB has argued that the Directive allows member states to impose conditions for gender recognition by reference only to physical or psychological characteristics, not marital status. As a result, MB argues that the Gender Recognition Act 2004 discriminates against her on the grounds of sex, both directly and indirectly. The indirect sex discrimination argument stems from the fact that most of the people who have reassigned their gender have done so from male to female.

2. The Government has argued that there is no reason why the conditions for the issue of a gender recognition certificate should be limited to satisfaction of the social, physical and psychological criteria of gender. Gender reassignment has significant social implications which the law may also regulate. The Government argue that conditions may therefore properly reflect criteria such as the status of marriage, which are legitimate social considerations not regulated by EU law. The European Court of Human Rights acknowledged in the *Goodwin* ruling that it was for national law to determine the conditions for recognising gender reassignment. The ruling noted that those conditions may include conditions "under which past marriages cease to be valid".

MB v Secretary of State for Work and Pensions

Comment (1): The situation discussed in this case is of limited application because the introduction of same-sex marriage in the UK meant that the Gender Recognition Act 2004 was amended in 2014 so that a full gender recognition certificate could be issued to married applicants, with the consent of the applicant's spouse.

Comment (2): The Gender Recognition Act 2004 provided for married transgender applicants to receive an interim recognition certificate, entitling the applicant to have their marriage annulled, after which a full recognition certificate would be issued. Between December, 2005 and the introduction of the Marriage (Same Sex Couples) Act 2013, the transgender individual could enter into a civil partnership with their former spouse.

V. Rectification by summary judgment

A. Overview

The High Court has granted (on 28th July, 2016) summary judgment to rectify a reference in scheme rules to 'pensionable salary'. The rectification will replace 'pensionable salary' with 'final pensionable salary'.

B. Facts

1. A deed was executed in 2003, the intention behind which was to consolidate earlier deeds and not to make significant changes.

2. The definition of 'final pensionable salary' was mistakenly replaced with 'pensionable salary'. The former term meant the average salary of the last 3 years of work, whereas the latter term used the last year of salary.

3. The scheme had been administered in accordance with the old wording, so pension calculations used final pensionable salary.

4. The representative beneficiary did not oppose the application for rectification.

C. Decision

1. The court noted the parties' intentions and behaviour at the time of the 2003 deed and subsequently.

2. The parties' failure to mention a change at the time might be evidence that there was no intention to make that change. The absence of a positive intention to not to make the change was not fatal. Not changing the way in which the scheme was administered after the 2003 deed could be evidence that there was no intention to change the wording of the rules. Evidence given by the professionals who had drafted the 2003 deed supported the view that the change was made in error and that the intention of the parties was to replicate the earlier deed.

3. The court noted that uncontested summary judgment applications should be heard in public. This was consistent with the principle of open justice.

4. The court felt satisfied that members had been told about the case. Although the defendant was not required to consult members or acquire their consent, it was good practice to inform them.

Saga Group Ltd v Paul

Comment (1): This is another example of a summary judgment allowing pension scheme rectification, following the most recent case of *Girls Day School Trust* (**Pensions Bulletin 16/08**).

Comment (2): Although it was for the court to decide whether to grant summary judgment in this case, its view was reinforced by the defendant supporting the rectification.

VI. Administrator could refuse overseas transfer where scheme not on ROPS list

A. Overview

The Pensions Ombudsman has ruled (on 24th June, 2016) that a scheme administrator could restrict transfers to overseas schemes so that the receiving scheme must be included on HMRC's ROPS list before the transfer.

B. Facts

1. A deferred NHS Pension Scheme member requested, in October, 2014, a transfer to a scheme that had appeared on HMRC's qualifying recognised overseas pension scheme (QROPS) list at the time of the request.

2. HMRC then changed its requirements on transfers to overseas schemes. By 17th June, 2015, a scheme appearing on the new recognised overseas pension scheme list (ROPS) had to provide that benefits could not be payable before age 55.

3. The NHS scheme administrator suspended overseas transfers in April 2015 pending the shift to the new ROPS system. However, later that month the administrator told the member that the funds would be transferred within 6 months of her CETV statement. In August 2015, the administrator told the member that the receiving scheme was not on the ROPS list so the transfer could not go ahead.

C. Decision

1. The Pensions Ombudsman ruled that the administrator was guilty of maladministration in telling the member, wrongly, that the transfer would go ahead. However, the administrator was within its rights to restrict overseas transfers to schemes on the ROPS list because an unauthorised payment charge was not in the member's nor the scheme's interests.

2. The Ombudsman directed £500 to be paid for distress and inconvenience suffered by the member in receiving incorrect information which stated that the transfer would go ahead.

Ms P (PO-11827)

Comment: This ruling will provide some level of comfort to scheme administrators who are keen to ensure that they make transfers which would not be classed as unauthorised payments and follow due process in achieving that aim.

VII. Discretionary ill health pension and hypothetical cost

A. Overview

The Ombudsman has ruled (on 10th June, 2016) that a deferred member of the Local Government Pension Scheme (LGPS) should not have been denied an ill health pension where the employer's reason for refusing the request was based upon a concern about the hypothetical cost involved.

B. Facts

1. Mrs R was employed by Trafford Council. In 2014, she sought ill health early retirement under the LGPS regulations, which gave the employer discretion to refuse such requests. Although Mrs R obtained a certificate from an independent registered medical practitioner (as required under the regulations) Trafford Council refused her request.

2. The Council was concerned that the cost of the pension would cause it to exceed its capital allowance for that year, in which event the cost would need to be met by the Council. Trafford Council also argued

that early retirements in general had an impact on its employer contribution rate, although the scheme actuary had not been asked to look at this. The Council also claimed that there would be a loss of public confidence if the benefit were granted in times of austerity and in view of the close scrutiny paid to significant awards made to former employees.

C. Decision

1. The Ombudsman agreed that the employer had discretion to refuse an ill health early retirement request under the regulations. He examined whether the Council had exercised that discretion in line with the implied duties of good faith and of trust and confidence to which employers are subject.

2. Citing *Bradbury v BBC* and *Prudential Staff Pensions v Prudential Assurance*, the Ombudsman restated the principles established by the High Court:

   "

   - *The implied duty is not a fiduciary duty, meaning, an employer may take its own interests into account.*

   - *The implied duty is not to be assessed by reference to the concept of reasonableness; for what seems reasonable to an employer may seem unreasonable to an employee and vice versa.*

   - *A decision by an employer might be irrational or perverse, if it overrode members' expectations or interests and thereby offended the obligation of good faith. There is no duty to take correct considerations into account and exclude from consideration matters which are irrelevant. However, the court will look at whether, overall, a decision was irrational or perverse. The manner in which an employer arrived at a decision could be material when deciding whether there has been a breach of the obligation of good faith.*

   - *An employer must not exercise its powers under a pension scheme so as seriously to damage the relationship of confidence between the employer and the employee.*

   It is clear therefore that the employer is entitled to have regard to their own interests when exercising discretion, which includes their own financial interests."

3. However, the Ombudsman noted that the presumption should be that benefits will be paid if the member meets the eligibility criteria, unless there is a cogent reason not to do so. To do otherwise would run the risk of overriding members' expectations that the scheme to which they have been contributing will provide for them when needed.

4. The Council's concern about possibly exceeding its capital allowance that year was contingent on later applications pushing it over the allowance, thus turning ill health retirement applications into a lottery where the chance of success depends on timing, rather than merit.

5. The argument that future employer contributions payable by the Council might increase could have had some merit had it been backed up by a calculation by the scheme actuary, since that would have been an actual cost. However, this argument would be available only if the actuary would normally take specific ill health retirements

into account when calculating the employer contribution rate.

6. In upholding the complaint, the Ombudsman ordered the Council to reconsider whether to agree to the ill health early retirement request by reference to the financial circumstances prevailing in April, 2015 (which was when stage 1 of the internal dispute resolution procedure took place). The Ombudsman noted that the Council could approach the scheme actuary for information about any potential effect on its contribution rate in the future, but only if the actuary normally takes specific ill health retirements into account when setting contributions.

Mrs R (PO-9309)

Comment (1): The ill health rule in this case gave the employer discretion to refuse an early pension, having first established that the criteria for ill health have been certified by a medical practitioner. The principles underlying this decision are of relevance to employers exercising their discretion in other circumstances too, however.

Comment (2): It is not surprising that the argument based on hypothetical cost was rejected by the Ombudsman. Laws on pension scheme funding require the scheme actuary to make an informed assessment of the likely future costs and performance of the scheme. An employer's anxiety about possibly exceeding its capital allowance at the end of the year was too theoretical a concern (especially without actuarial analysis to back that up).

VIII. Lifetime allowance exceeded – money purchase illustrations mis-read

A. Overview

The Deputy Ombudsman has ruled (on 5th August, 2016) that a money purchase illustration was not misleading when stating a member's fund value. The member' mistaken belief that the figure included his GMP was not the responsibility of Standard Life.

B. Facts

1. Mr E had received from Standard Life money purchase illustrations in 2011 and 2012 that set out his 'final plan value' and, separately, his GMP value, under the Standard Life Transfer Plan. The illustrations contained the warning:

> *"If you are reviewing your pension arrangements or comparing different pensions you should get more information or advice. This statement alone doesn't give you enough detail to make an informed decision."*

2. Mr E asserted that he contacted Standard Life by phone in late 2011 or early 2012 to make sure that the values provided in the yearly statements were the correct values to use in relation to the lifetime allowance. He said he was specifically advised that the values in the yearly statements were the appropriate figures to be used in a lifetime allowance calculation. There was no record by either party of the telephone conversation.

3. Mr E claimed that, based on the telephone call, he went on to make extra payments into 2 SIPPs to maximise his lifetime allowance.

4. In January, 2013 Mr E wanted to put part of his SIPPs into drawdown. In order to provide the SIPP provider with values in respect of other pensions, he asked Standard Life for information. On 18th January, 2013 Standard Life sent him a letter acknowledging a call

made to them on that date and enclosed '*values for your plan that you can send to your other provider. They will be able to use these figures to work out the percentage of your lifetime allowance this equates to.*' This letter did not refer to his GMP.

5. In November, 2013 Standard Life sent retirement forms to Mr E. On these forms, Standard Life confirmed how much of the lifetime allowance the Plan had used. From this percentage figure, Mr E realised that the amount used was greater than he had expected it to be. By making the additional payments to the SIPPs, Mr E had exceeded his lifetime allowance and therefore incurred a tax liability.

6. Mr E asserted that, irrespective of whether he could prove the contents of the conversation in 2011/12, he was entitled to assume that the final plan value included his GMP element.

7. Standard Life argued that the annual statements comply with all relevant legal and regulatory requirements and make it clear that the GMP is separate from the current value and final value. They asserted that if Mr E had asked for specific information regarding his plan, such as confirmation of his final plan value and how that would impact his lifetime allowance, he would have received a written response. They admitted that the January, 2013 letter was incorrect, but pointed out that by that point the relevant payments had already been made.

C. Decision

1. The Deputy Ombudsman was not persuaded that the 'final plan value' provided in the retirement benefit illustrations were misleading. She did not think that the information in the statements supported Mr E's assumption that the final plan value included the value of the GMP nor his conclusion that it could be used for lifetime allowance planning. None of the figures it gave claimed to be the correct basis for the lifetime allowance calculation. The statements also contained an explicit warning about using them alone to make decisions. It was not foreseeable that they would be used as Mr E used them and it was not reasonable to rely on the plan value quoted for that purpose.

2. The Deputy Ombudsman therefore concluded that Mr E misunderstood the meaning of 'final plan value' and, on the balance of probabilities, he relied on his own interpretation when investing additional monies into the SIPPs.

Mr E (PO-7774)

IX. Pension sharing order can apply to overseas pensions

A. Overview

The Court of Appeal has confirmed (on 29th July, 2016) that pension sharing orders may be made in respect of overseas pensions.

B. Facts

In earlier, financial remedy, proceedings the husband had agreed to a pension sharing order under a consent order (which was subsequently set aside). However, the husband did not disclose that the two pensions in question had been converted into an annuity in India. The judge in those proceedings wrongly thought that he would not be able to make a pension sharing order because the annuity had been issued in India. He therefore ordered the transfer of the annuity by the husband to the wife.

C. Decision

The Court of Appeal set aside the judge's order to transfer the annuity policy to the wife and remitted the pension sharing application back for consideration. If the judge had thought that

there was no legal or equitable remedy to make the order that he considered to be fair and just then that should have been the end of the matter. The presence of the annuity policy in India was not a bar to a pension sharing order being made in respect of that policy. This meant that the claim should have continued to have been progressed under the Matrimonial Causes Act 1973.

Goyal v Goyal

Points in Practice

X. Section 89 report on fines re Chair's statement failure

1. The Pensions Regulator has issued a **Section 89 report** in relation to the:
   - Precision Carbide Tools Limited Pension and Life Assurance Scheme
   - Comshare Retirement and Death Benefits Plan and
   - EBC Pension Scheme.
2. Pitmans Trustees Limited act as professional trustee for all 3 schemes. PTL wrote to the Regulator on 18th May, 2016 notifying it that they had failed to prepare a chair's statement for the Precision scheme. PTL went on to confirm that that was the case regarding the 2 other schemes as well.
3. The Occupational Pension Schemes (Charges and Governance) Regulations 2015, which came into force on 6th April, 2015, require occupational pension schemes providing money purchase benefits to prepare an annual statement, signed by the chair of the trustees, within 7 months of the end of each scheme year.
4. PTL told the Regulator that they had taken action and prepared the required statements after the breaches had occurred.
5. Fines for failing to prepare a chair's statement range from £500 to £2,000. The Regulator calculates the amount of the fine with regard to scheme size, any previous breaches of the requirement and whether there is a professional trustee in place. In this case the Regulator imposed a penalty of £2,000 for each scheme on 4th July, 2016. The fines were not contested and were paid on 11th July, 2016.
6. Explaining why the maximum fine had been imposed in this instance, the Regulator stated in its report:

   > *"We issued the maximum fine amount allowed by statute because the schemes in question have a professional trustee in place and there were no mitigating factors. In line with the Trustee Act 2000 and as set out in our defined contribution code of practice, professional trustees are expected to meet a higher standard of care and demonstrate a greater level of knowledge and understanding than trustees who are not acting in such a capacity."*

   Comment: This is the second time that the Regulator has imposed a fine for non-compliance with the requirement to prepare a chair's statement. The first reported occasion related to the Abbey Manor Group Pension Scheme. The minimum fine was imposed in that case, which did not feature a professional trustee.

XI. 21st Century trusteeship and governance - discussion paper

1. The Pensions Regulator has published a **discussion paper** on 21st Century Trusteeship and Governance (July, 2016).

2. The paper follows research conducted by the Regulator in March, 2015 and meetings held with stakeholders, industry experts and trustees.

3. The overall message is that the Regulator will continue to increase its focus on trustee education.

4. It is also proposing to issue overarching pieces of guidance to cover issues common to all schemes, with separate guidance on issues specific to particular types of scheme.

5. Key points from the paper are:

   5.1 There is a need to consider whether greater scrutiny and safeguarding is required regarding professional trustees, given the trend for professionalisation of trusteeship.

   5.2 Should Chairs be required to meet a minimum standard via qualifications, experience or belonging to a professional body?

   5.3 Should defined benefit schemes be required to appoint a Chair and report on compliance with governance standards?

   5.4 How can trustee knowledge and understanding be improved? Should trustees be required to pass all relevant modules within 6 months of being appointed? Should there be a 6-month probationary period for new trustees? Should trustees hold relevant qualifications to demonstrate competence? Would a CPD framework help?

   5.5 What would be the best way to manage the challenging area of conflicts of interest?

   5.6 It is vital that trustees engage with third parties carrying out the day-to-day management of the scheme, holding them to account and scrutinising performance to ensure a quality service and value for money are being provided.

   5.7 Trustees should critically engage with their advisers so that they make informed decisions and receive value for money.

   5.8 Further guidance on setting an investment strategy is planned by the Regulator.

   5.9 Also planned are tools to help trustees to get the most out of their advisers.

XII. Ombudsman statement on its approach in appeals

1. The Pensions Ombudsman Service (POS) has issued a **statement** (on 27th July, 2016) regarding its approach in appeals.

2. The POS says:

   "Our practice of looking to intervene will now be extended beyond participating in an appeal which raises questions affecting our legal jurisdiction or internal procedures. Our participation will be more pro-active and will be considered against the backdrop of seeking to assist the court."

3. The POS can be a party to an appeal if the court allows, and it is expected that permission will be freely given.

4. The revised approach to appeals follows the case of *Hughes v Royal London* and its wider implications. The statement says that Royal London did not wish to make representations on the transfer point but did so because it was instructed to by the court.

5. The statement says that each case will be individually considered. The POS envisages its increased participation in cases include where the decision could have a wider impact on the pensions industry (pension liberation or auto-enrolment are given as examples). It may also participate where there is a significant concern over access to justice and participation is necessary to properly present and argue the points.

6. The statement is echoed in the POS's **annual report and accounts for 2015/16**:

> *"The Ombudsman has decided that going forward he will be more robust in participating in appeals (whether or not the respondent participates) if he considers that to do so would be beneficial to the pensions industry at large."*

7. The report and accounts also state that even where the POS decides at the outset not to participate, it monitors the progress and outcome of appeals so that it can decide to change its view if new issues arise during the proceedings.

8. Not being informed of appeals from determinations in the past has also hampered the POS's participation in appeals (a situation that the report and accounts say been rectified).

9. The report and accounts say that the POS intends to participate in the Webber appeal (**Pensions Bulletin 16/03**):

> *"the Pensions Ombudsman believes that Mr Webber's latest appeal raises wider issues for his office and so intends to participate in the appeal. In particular, that the statutory time limits affecting the Pensions Ombudsman's jurisdiction are distinct from the Limitation Act 1980."*

The Webber ruling (made by the Ombudsman on 2nd February, 2016) held that the date when the 6-year limitation period for an action for recovery of pension payments stops is the date when the scheme administrator first seeks recovery, not the date when the member complains to the Ombudsman.

XIII. Stewardship toolkit

1. The Pensions and Lifetime Savings Association (PLSA) has published a **stewardship toolkit for pension funds** providing advice on the type of information pension funds could request from the companies they invest in about their workforces and corporate cultures.

2. The toolkit is designed for use as a template for funds wishing to apply a benchmark against which to assess the stewardship activities of existing and prospective consultants and investment managers. The document is also intended for use where a scheme's investments are managed in-house by FSMA-authorised staff.

3. The toolkit recommends that pension funds encourage investee companies to use their annual reports to detail their corporate

cultures and working practices in a narrative form that relates the way they manage and engage their workforce to their wider strategy and business model.

4. The toolkit suggests that the narrative should be underpinned by data, using performance metrics such as:

   - Gender diversity
   - Employment type (such as full time, part time, agency)
   - Staff turnover
   - Accidents, injuries and workplace illnesses
   - Investment in training and development
   - Pay ratios
   - Employee engagement.

5. The document also highlights ways in which to corroborate information presented by companies, and suggests questions that could be asked.

6. The PLSA describes its toolkit as building on the themes covered by a PLSA discussion paper **'Where's the Workforce in Corporate Reporting?** That discussion paper examined the extent to which the success of a company is reliant on its investment in training, developing and motivating its workers.

   Comment (1): The toolkit suggests as one source of corroboration websites and social media where current or former members of staff can express a view about the company in question. Although there is a wealth of information that can be accessed online about any particular employer, care should be taken when choosing which sources to look at. Logically, there would need to be some consideration of how reliable each source is and whether that source is, of itself, capable of corroboration.

   Comment (2): Since December, 2010 all UK-authorised Asset Managers are required under the FCA's Conduct of Business Rules to produce a statement of commitment to the Stewardship Code or explain why it is not appropriate to their business model.

XIV. PPF refreshed guidance for insolvency professionals

1. The PPF has **announced** an update to its restructuring principles and guidance for insolvency professionals. The PPF comment that regulated apportionment arrangements can be controversial and therefore the PPF feel that there should be a better understanding about the PPF's approach to those arrangements.

2. The guidance details the criteria that should be set out in any restructuring proposals made where a sponsoring employer suffers an insolvency event.

3. The documents also provide information on the roles and responsibilities of insolvency practitioners throughout the PPF assessment process.

4. The new version of the guidance requires the party seeking the restructuring to pay not only the legal fees incurred by the PPF and the trustees for documenting the deal (as required in the old version) but also the costs of "*financial advice, and any other costs incurred by the PPF as a result of the transaction, such as TUPE liabilities relating to the staff costs of the pension scheme*."

Forthcoming Events

XV. Pensions Update Seminar

Our next Pensions Update Seminar will take place on 23rd November, 2016, between 9.30am and 1.00pm. Please save the date. Invitations will be sent out separately.

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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.