

Pensions and Employment: 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](#)

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.	Severance payments and tapered annual allowance pitfall	From 6 th April, 2016	<p>Pensions Bulletin 16/06</p> <p>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.</p> <p>2.2 For the taper to apply, the individual must have UK taxable income in 2016/17 of:</p> <ul style="list-style-type: none"> ◆ £110,000 “threshold” income, and ◆ £150,000 “adjusted” income. <p>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</p>

No.	Topic	Deadline	Further information/action
			<p>member on pension provision already made.</p> <p>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.</p>
2.	Members who intend to apply for Fixed Protection 2016 (“FP 2016”) must have stopped accruing benefits (note that fixed protection may be lost on joining a registered life cover arrangement)	6 th April, 2016	Pensions Bulletin 15/16
3.	Abolition of DB contracting-out: Rule amendments needed	6 th April, 2016	<p>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</p> <p>Note: Statutory power to amend, retrospective to 6th April, 2016,</p>

No.	Topic	Deadline	Further information/action
			<p>expires on 5th April, 2017</p> <p>accrued GMPs of those active members. See further Pensions Bulletin 16/03.</p>
4.	Put in place register of persons with significant control (“PSC”) for trustee company where trustee is a corporate	6 th April, 2016	Pensions Bulletin 16/03
5.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5 th 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 .
6.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer’s staging date	<p>For example employers with a 2013 staging date must complete cyclical re-enrolment process between December 2015 and June 2016.</p> <p>Publication available to clients on request from usual pensions contact.</p>
7.	First Chair’s annual governance statement	Within 7 months of end of scheme year (for scheme years ending on or after 6 th July, 2015)	<p>For example, schemes with a 31st December year end must submit statement by 31st July, 2016.</p> <p>Client note dated June, 2015 available from Lynsey Richards.</p>
8.	“Brexit”	Referendum held on 23 rd June, 2016	Consider potential impact on pension schemes. Client publications available on Slaughter and May website .

No.	Topic	Deadline	Further information/action
9.	DC Code of Practice 13 on governance and administration takes effect	28 th July, 2016	Schemes offering money purchase benefits (including money purchase AVCs, insofar as the legislation applies) must familiarise themselves with the revised Code .
10.	GMP equalisation		
10.1	Lloyds Trade Union announces intention to bring GMP equalisation class action	August 2016	We will continue to monitor developments in this litigation, said to be worth £300 million.
10.2	DWP publishes consultation proposing methodology for equalising GMPs	28th November, 2016	We will cover this in our next Pensions Bulletin
11.	Civil partner/same sex spouse pensions: retroactivity pre-5th December, 2005		
11.1	CJEU decision in <i>Parris v. Trinity College, Dublin</i>	24 th November, 2016	Please see item VI below.
11.2	Provisional date for Supreme Court to hear appeal in <i>Walker v. Innospec</i>	March, 2017	To establish whether survivor benefits for civil partners will be retroactive to a date before the Civil Partnership Act 2004 came into force.

No.	Topic	Deadline	Further information/action
12.	Measurement Time for submission of scheme data for 2017/18 PPF levy changed	31 st March, 2017	Pensions Bulletin 16/14
13.	HMRC's existing practice on VAT and pension schemes ends (please see our item on this in Pensions Bulletin 16/13)	31 st December, 2017	Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover.
14.	Data protection: New Regulation	25 th May, 2018	Pensions Bulletin 16/05 Employment Bulletin 16/15
15.	IORP II expected transposition deadline	October/ November, 2018	Pensions Bulletin 16/11

New Law

I. Early exit charges for occupational pension schemes

- Under Secretary of State for Pensions Richard Harrington, MP has [confirmed](#), in a press release on 15th November, 2016, that the Government plans to introduce a cap on early exit charges for occupational pension schemes, effective from October, 2017.

- In its [response to consultation](#)¹, the Government says that it intends to consult publicly on the draft Regulations that will be required, in early 2017.

Comment: The Government response acknowledges that the Pensions Regulator's survey on exit charges, dated May, 2016, suggested that only around 3% of occupational pension scheme members faced early exit charges. Such charges are far more common in relation to personal pension schemes (see the item below).
- The cap will be set at 1% for existing members of occupational pension schemes and 0% for any new members.
- Where an existing member of a scheme that applied an early exit charge decided to increase their contributions after the regulations come into effect, the Government intends that the additional contributions would not be treated as new membership and would, therefore, be subject to the 1% cap.
- The Government intends to use the Pension Schemes Bill, in conjunction with existing powers in the Pensions Act 2014, to introduce the cap.
- A market value adjustment ("MVA") would not, ordinarily, be within the scope

¹ Capping early exit charges for members of occupational pension schemes - Government response - published 15th November, 2016

of the cap. The 1% cap would apply to the value of the member's pension pot after any MVA has been applied.

7. However, where a member has an **entitlement** to the value of any benefits at the point of surrender, whether that entitlement arises in the ordinary operation of the scheme or as a consequence of the way in which a terminal bonus is determined, a reduction in those benefits would be an early exit charge.

8. Conversely, a sum payable by way of terminal bonus which is paid at the **discretion** of the provider will not be treated as a charge and would therefore fall outside of the cap.

Comment: A similar carve out for market value adjustments will apply in the context of personal pension schemes, as set out in the Financial Services and Markets Act 2000 (Early Exit Pension Charges) Regulations 2016.

9. The Government does not consider scheme wind ups to be early exit charges and therefore the cap would not apply in such situations.

10. The Government acknowledges that there is some read across between the early exit charge cap and the default 0.75% cap on certain administration charges levied under schemes that are 'qualifying schemes' for auto-enrolment purposes.

11. Where both caps apply, the Government considers that the level of cap when a person leaves the scheme early to access the pension freedoms will depend on the makeup of the charge with the 0.75% cap on auto enrolment charges taking precedence.

II. FCA announces cap on early exit fees for personal and stakeholder pensions

1. The FCA has [announced](#), on 15th November, 2016, its final rules on capping early exit charges for individuals who have reached age 55 and are eligible to access the pension freedoms introduced in April, 2015.
2. The early exit charge cap will apply from 31st March, 2017 to contract-based personal pensions, including workplace personal pensions.
3. The cap will be set at 1% of the value of the pension for existing contracts.
4. For new contracts, the cap will be set at 0%.
5. The FCA rules on this are contained in [Policy statement - PS16/24: capping early exit pension charges: Feedback on CP16/15](#).

Comment (1): This announcement follows the Financial Services and Markets Act 2000 (Early Exit Pension Charges) Regulations 2016 (SI 201/1079), made on 8th November, 2016 and coming into force on 31st March, 2017 .

Comment (2): Provisions broadly mirroring the personal pension scheme early exit charge cap will be introduced in relation to occupational pension schemes, but with a planned implementation date of October, 2017 (please see above).

III. Law Commission call for evidence on pension funds and social investment

1. On 3rd November 2016, the Minister for Civil Society, Rob Wilson MP, asked the Law Commission to look at social investment by pension funds and to consider the legal or regulatory barriers to social investment.
2. A [call for evidence](#) , dated 7th November, 2016, has been issued by the Law Commission and closes on 15th December, 2016.
3. The Law Commission plans to publish its report by May 2017.
4. This project follows the Law Commission's 1st July, 2014 report, [Fiduciary Duties of Investment Intermediaries](#), which examined the situations in which pension trustees could take environmental and social factors into account. That report focused on DB pensions.
5. This latest call for evidence focuses on defined contribution pensions and asks when pension funds may be invested positively "for social good", as opposed to negative screening.

6. The call for evidence considers that the charge cap currently applicable to default arrangements in schemes classed as ‘qualifying schemes’ under auto-enrolment legislation encourages passive investment strategies. The Law Commission takes the view that such strategies, when coupled with a tendency towards ‘herding’ in investment decisions, may lead default funds to invest in a narrow range of asset classes.
7. The call for evidence notes that there is little investment in infrastructure (such as affordable housing) and asks about possible barriers to that type of investment.
8. As regards younger pension savers, the Law Commission refers to research indicating that ethical options typically available may not reflect the opinions of the millennial generation. Research has also found that younger employees are keen to invest in a pension with a social purpose.
9. The call for evidence notes, however, the FCA’s conclusion in its Feedback statement [FS 16/11](#), dated 1st October, 2016, that there was no case for regulatory change regarding the requirement for financial advisers to perform a suitability test before recommending an investment.

10. The FCA noted that social impact investing could be risky, where the investments are made in often small, unlisted companies which can have a high failure rate.
11. The FCA also noted that the expected social impact may not be achieved and there may be no financial return either.

Tax

IV. Autumn Statement of 23rd November, 2016

1. The Chancellor made his Autumn Statement today. The Autumn Statement document is available [here](#).
2. Draft legislation for Finance Bill 2017 is due to be published on 5th December, 2016 for consultation.
3. Spring Budget 2017 will be the last Spring Budget and will be followed, as usual, with a Finance Bill in Spring/Summer 2017.
4. Autumn Budget 2017 will be the first Autumn Budget and the Finance Bill will be introduced following it with the aim of reaching Royal Assent in Spring 2018, before the start of the following tax year.
5. To see the HM Treasury page of documents relating to the Autumn Statement, 2016, please click [here](#).
6. Included amongst those documents is a [consultation on reducing the money](#)

[purchase annual allowance](#) to £4,000. The consultation closes on 15th February, 2017.

7. Please click [here](#) to see our briefing on the Autumn Statement.

V. Employee benefits and the annual allowance taper - employee communications

1. This is a check point for companies that operate employee incentive schemes where income tax may be payable in relation to certain benefits. Employee communications should be checked to ensure that they pick up the potential consequences for an individual’s annual allowance taper position.
2. The starting point for each of the “adjusted” and “threshold” income tests that apply to determine whether or not the annual allowance taper applies is that they include all income that is taxable in the UK.
3. As a result, the income tests will “count in” outturns under employee incentive schemes where income tax is payable. For example:
 - 3.1 shares which vest under a long term incentive plan will result in an income tax charge. Normally nothing is payable by the employee for the shares and so the whole value of the shares when transferred to the

employee will be included in the employee's taxable income.

- 3.2 on the exercise of an option under an unapproved share option scheme, there is an income tax charge on the gain realised on exercise. The taxable amount will be included for income tax purposes. Members will usually have a relatively long period within which they can exercise the option.
- 4 In relation to long term incentive plans, vesting, which will usually be automatic if the relevant performance targets are met, may take an individual over the £150,000 adjusted income threshold at which the taper applies, or over the £110,000 threshold income threshold where a member may or may not be affected by the taper.
 - 5 Unapproved share option schemes are often made available to individuals in income brackets under £150,000, and exercising options may take an individual over the £150,000 adjusted income threshold at which the taper applies, or over the £110,000 threshold income threshold where a member may or may not be affected by the taper.
 - 6 Where these types of plans, or any other employee incentive schemes where income tax charges arise, are operated, it is worth checking that employee communications pick up the potential pensions consequences.
 - 7 Ideally these communications should include a warning, highlighting that the taxable

income counts towards both the threshold income test and the adjusted income tests when working out whether the annual allowance taper applies to the individual for the tax year in question.

Cases

VI. European court rules on surviving civil partners

1. On 24th November, 2016, the CJEU held in this case that a “death bed marriage” provision in the Trust Deed and Rules of Trinity College Dublin’s occupational DB pension scheme (the “Scheme”) did not constitute indirect discrimination based on sexual orientation.
2. In so deciding, it chose to ignore Advocate General Kokott’s opinion, published on 30th June, 2016.
3. The Scheme provided a survivor’s pension for life to a surviving spouse or civil partner only where the marriage or civil partnership was entered into before the member reached age 60.
4. The member in question had entered into a civil partnership with his long-term partner in the UK in 2009 at age 63; the civil partnership was not recognised in Ireland until 2011.

5. The member argued that it had been impossible for him to enter into a civil partnership before his 60th birthday and that the scheme rules were therefore discriminatory on grounds of sexual orientation.
6. The CJEU disagreed. EU law did not require Ireland to give retrospective effect to the legislation providing for civil partnerships.
7. The CJEU decision is in line with the UK Court of Appeal decision in *Walker v Innospec* where the Court concluded that the spouse’s pension payable to a surviving civil partner could be restricted to pensionable service on or after 5th December, 2005, the date that civil partnerships were recognised in the UK.
8. The Supreme Court is due to hear Mr. Walker’s appeal in March 2017 (postponed from 21st November, 2016 due to the imminent publication of the CJEU decision in *Parris*).
9. Please click [here](#) to read our briefing, summarising the CJEU’s decision and its potential implications.

VII. Box Clever scheme - Upper Tribunal refuses to strike out allegations not in warning notice

The Upper Tribunal (Tax and Chancery Chamber) has ruled, in a decision released on 8th November, 2016, that formal permission to advance ‘new’ arguments put forward by the Regulator and the scheme trustee was not required.

Note: Decisions reached by the Regulator’s Determinations Panel may be appealed to the Upper Tribunal. Permission may then be sought to challenge an Upper Tribunal ruling in the Court of Appeal. A further appeal could then be made to the Supreme Court if the necessary permission is obtained.

A. Facts

1. On 31st January, 2012, the Pensions Regulator published a Determination Notice issued by its Determinations Panel, dated 21st December, 2011, confirming the issue of Financial Support Directions (“FSDs”) to 5 companies, including Granada and ITV (the “Targets”), in relation to the Box Clever Pension Scheme (the “Scheme”).
2. The Scheme was established as part of a joint venture (the “JV”) between the Granada and Thorn groups relating to their TV rental businesses in 2000.
3. It provided defined benefits for former active members of the

Granada and Thorn pension funds now employed in the JV, mirroring the benefits under those schemes.

4. Past service benefits were left in the Granada and Thorn Schemes, but the Box Clever scheme was required to top up those benefits by paying for linkage to final salaries in the JV.
5. The Box Clever business was sold to a private equity buyer in 2005. Administrative receivers subsequently reorganised the group.
6. The Regulator’s Determinations Panel found that the Targets were “associated” with the scheme’s participating employers by virtue of their control of the voting power in the employers.
7. The Panel concluded it was therefore reasonable to issue the FSD having regard to the value of the benefits received by the Targets from the JV.
8. The Determinations Panel noted that the FSD jurisdiction was not fault based. There was no need for any evidence of misconduct to be found and the Panel did not find misconduct on the part of the Targets.
9. On 17th January, 2012, the Targets filed a reference to the Upper Tribunal. The trustee of the Scheme applied to be joined as an interested party. The Tribunal accepted that the trustee was a “directly affected”

person under Section 100 PA2004 and could be joined to the application.

10. Procedural directions were sought by the Targets, seeking to strike out parts of the Regulator’s pleaded case. The Targets did not succeed in the Upper Tribunal and therefore appealed to the Court of Appeal.
 11. The Targets wanted the Court of Appeal to strike out those arguments relating to whether the Targets were at fault in their dealings concerning the JV.
 12. The Targets claimed that the Regulator was seeking to change its case by adding new claims that did not form part of its warning notice or the Panel’s justification for the FSD.
- ### B. Proceedings to date
1. The Upper Tribunal refused the application to strike out on 13th December, 2013.
 2. On 24th March, 2015, the Court of Appeal held that the Upper Tribunal had discretion to allow the Pensions Regulator to rely on additional grounds not mentioned in the warning notice, but that the Upper Tribunal had not properly exercised that discretion.
 3. The Court of Appeal therefore remitted the application to the Upper Tribunal for a rehearing.

C. Decision

1. The Upper Tribunal dismissed the Targets' application. Formal permission to advance the arguments put forward by the Regulator and the scheme trustee was not required. The Targets could have no real doubt about what was being argued.
2. The warning notice represented an important protection for targets since, from the moment it was served, the targets knew the case they had to meet.
3. The Tribunal noted that the Regulator must act in a way which is frank and transparent and "*nothing could legitimately be held back. However, that does not mean that the [warning notice] represents a kind of straitjacket*".
4. The Tribunal noted the 'new' arguments put forward by the Regulator and the trustee. Those arguments were 'new' in that they were not set out in the warning notice.
5. The 'new' arguments were that:
 - the price paid was or might have been excessive,
 - the due diligence undertaken was or might have been inadequate, and

- that the borrowing was a burden the JV could not bear.
6. It was unnecessary for the Regulator and trustee to allege any fault since the FSD jurisdiction is not based on fault but on factors identified.
 7. There were 2 factors which persuaded the Upper Tribunal to allow the Regulator and trustee to advance the new arguments.
 8. First, the arguments formed part of the case from the outset and the tribunal has the power (under Section 103 of the Pensions Act 2004) to consider evidence and, inferentially, entertain arguments which were not before the Panel.
 9. Second, the new arguments were no more than a legitimate response to the Targets' case. The Upper Tribunal noted that the responses were served by the deadlines directed by the tribunal and were made reasonably promptly.

Granada UK Rental & Retail Ltd v The Pensions Regulator

VIII. Divorce - pension sharing and overseas pensions

The High Court has ruled that the ability to split a pension via a pension sharing order under Section 24B of the Matrimonial Causes

Act 1973 ("MCA") was not available in respect of an overseas pension.

A. Facts

1. 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.
2. The judge in those proceedings 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.
3. 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 to the Family Court for consideration.

B. Decision

1. The Family Court ruled that the wife's claim for a pension sharing order had failed.
2. The court examined a wide range of divorce, tax and pensions legislation. Following through various provisions under each Act, the conclusion of the court was that pension sharing under Section 24B of the MCA could only be available where the pension was a

domestic pension, not an overseas pension.

3. In view of that conclusion, the court examined whether a pension could be split on divorce by taking a different approach.
4. *Brooks v Brooks* was considered. That case allowed a settlement to be varied so that a pension could be split using the power contained in Section 24(1) (c) of the MCA.
5. The court also noted that there had been cases where a consent order had been approved to split a pension in the US, although all parties would need to be satisfied that the overseas pension provider would carry out what had been agreed.
6. As regards the likelihood of a pension sharing order being carried out in India, the court agreed with the husband's submission that the wife had not provided any evidence that such an order would be enforced in India.

Goyal v Goyal

IX. Late appeal against trustee prohibition order rejected

The Upper Tribunal has ruled, in a decision released on 7th November, 2016, that an individual who was prohibited from acting as a trustee could not appeal from the

Determinations Panel decision to the Upper Tribunal several years later.

A. Facts

1. Mr Hill had been prohibited from acting as a trustee (along with 3 other individuals) on 28th October, 2011.
2. Statutory restrictions on investment had been breached. There had also been a breach of trust because property had been acquired from vendors owned by one of the trustees, thus resulting in a conflict of interest.
3. Paragraph 2(2) of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 states that a reference to the Upper Tribunal must be received within 28 days of notice of the decision being referred.
4. Mr Hill argued that he had delayed making the reference because of stress and anxiety caused by investigations by regulatory bodies. The delay amounted to 4 years and 9 months.
5. He also argued that he had not appreciated the wider repercussions of the prohibition order for his business life, which meant that borrowing was harder to achieve.

B. Decision

1. The Upper Tribunal rejected Mr Hill's application. It was in the interests of justice not to allow the reference to be made.
2. Arguments put forward regarding the merits of the reference could perhaps be used in an application to revoke the prohibition order instead. This option could be available under Section 3(3) of the Pensions Act 1995.
3. As regards the application to refer the prohibition order, the Upper Tribunal cited the case *Martin-Artajo v Financial Conduct Authority*.
4. That case decided that a tribunal should ask itself:
 - (a) What is the purpose of the time limit?
 - (b) How long was the delay?
 - (c) Is there a good explanation for the delay?
 - (d) What will be the consequences for the parties of an extension of time? and
 - (e) What will be the consequences for the parties of a refusal to extend time?
5. The *Martin-Artajo* decision went on to state that "Time limits should be

respected unless there are good reasons not to and time limits are there for a reason: generally speaking, the parties are entitled to finality”.

6. The merits of the case should only be a factor to be weighed in the balance where the case is either
 - 6.1 obviously hopeless (in which case there is no point extending time), or
 - 6.2 so overwhelmingly strong that there is no realistic prospect of there being a defence to it (*Koksal v Financial Conduct Authority*).
7. The Upper Tribunal concluded that the answers in this case to the questions listed above meant that the delay should not be permitted.
8. The delay was very long and the reasons for the delay were insufficient.
9. If the extension were allowed then the Regulator would need to put together a case team for the matter.
10. Mr Hill could seek to revoke the prohibition order instead, however, and that would entail having to set up a case team in that event.

[Hill v Pensions Regulator](#)

X. Contractual estoppel finding overturned by High Court

The High Court has overturned a determination by the Pensions Ombudsman that the doctrine of contractual estoppel applied in a case where the member was seeking an unreduced early retirement pension.

A. Facts

1. This case concerned the Local Government Pension Scheme. The employer was the Greater Manchester Police Authority (“GMPA”).
2. Regulations (SI 2007/1166) governing the scheme allowed early retirement for deferred members from age 55 with employer consent. The regulations also stated that the employer “may determine on compassionate grounds” that the pension should be unreduced.
3. Mrs Butterworth began a six-year contract in 2008 with the GMPA.
4. Her offer letter stated: “*On conclusion of the fixed term agreement, the force will use its ‘best endeavours’ to allow you to retire early with maximum augmentation to your pensionable service in so far as the pension regulations in force at the time allow the force to do so.*”

5. Three years later, however, a compromise agreement was entered into regarding the termination of Mrs Butterworth’s employment.

6. Clause 4.2 of the compromise agreement stated:

“To the extent that it is and remains lawful for the Employer to do so and upon receipt of a written request from the Employee in accordance with the Local Government Pension Scheme (Benefits, Membership and Contribution) Regulations 2007 ... the Employer will allow the Employee to access her ... pension without reduction or abatement when she reaches 55 years of age ...”

7. On reaching age 55, Mrs Butterworth applied for an unreduced pension to her employer’s successor, the Police and Crime Commissioner for Greater Manchester (“PCCGM”). The request was refused. PCCGM decided that there were no ‘compassionate grounds’.

B. Ombudsman decision

1. The Ombudsman decided, on 21st April, 2016, (PO-6773 - [Pensions Bulletin 16/8](#)), that clause 4.2 fettered the employer’s discretion under statute. This was because it required the employer to find compassionate grounds without evidence, ahead of receipt of an

application for an unreduced pension.

2. The Ombudsman concluded that the clause was also ultra vires.
3. As a result, the Ombudsman ruled that clause 4.2 was void and unenforceable and making a promise that was outside of the employer's powers amounted to maladministration.
4. The Ombudsman decided, however, that the doctrine of contractual estoppel applied.
5. PCCGM was directed to pay Mrs Butterworth an amount equal to an unreduced pension, backdated to age 55 and continuing until she started to receive benefits directly from the scheme.
6. PCCGM was also ordered to pay £2,000 for distress and inconvenience caused by the maladministration.

C. High Court ruling

1. The Ombudsman was allowed to intervene in the High Court proceedings.
2. On 10th November, 2016, the High Court allowed the appeal from the Ombudsman's decision.

3. The High Court decided that clause 4.2 did not bind the employer in relation to any future exercise of its discretion concerning the existence of compassionate grounds. The purpose and effect of clause 4.2 was for the employer to provide its prospective consent to early retirement.
4. The parties' true intention was that the employer was agreeing prospectively to give Mrs Butterworth access to an unreduced pension at age 55 only if it lay within the lawful power of the employer to do so when the relevant time in the future arrived.
5. The employer had assessed whether there were any compassionate grounds and decided that there were none. The judge found the reasons for that decision to be unimpeachable.
6. The High Court also disagreed with the Ombudsman's conclusion that the doctrine of contractual estoppel applied because the necessary elements were missing in this case.
7. For contractual estoppel to apply, the parties must have made a binding commitment to arrange their contractual relations on the assumed basis that a certain state of affairs exists, in which case they will be

held to that bargain irrespective of whether that state of affairs actually exists.

8. There was no warranty by the employer that it was, or would be, legally empowered to facilitate guaranteed access to an unreduced pension at age 55.
9. The employer's commitment was in fact contingent on its ability to provide such access lawfully, when the relevant time arrived.
10. The judge commented that the Ombudsman determination had reached an 'illegitimate outcome' because the result of that determination was entirely different from the contractual commitment.
11. Under clause 4.2, the employer was agreeing to facilitate access to the pension fund. The Ombudsman, by contrast, required the employer to make payments equivalent to the pension payments in question but from its own funds.
12. The Ombudsman's finding of maladministration was also overturned, since it flowed entirely from the Ombudsman's erroneous interpretation of clause 4.2.
13. The Ombudsman sought to have the matter remitted back for it to consider whether Mrs Butterworth

could argue that she had a legitimate expectation to an unreduced pension.

14. The High Court refused to remit the case back to the Ombudsman. It was relevant that the question of legitimate expectation was not a live issue in the course of the Ombudsman investigation. There was no reasonable prospect of Mrs Butterworth being able to establish that she was entitled to rely on any legitimate expectation.

15. The Ombudsman had already carefully considered the complaints that were made and (in relation to contractual estoppel) added to them.

Police and Crime Commissioner for Greater Manchester v Butterworth and The Pensions Ombudsman

Comment (1): The Ombudsman is clearly acting on its recent statement (issued on 27th July, 2016) that it intends to

intervene more often when there is an appeal ([Pensions Bulletin 16/12](#)).

Comment (2): The Ombudsman intervened in the recent *Webber* ruling of 14th October, 2016 ([Pensions Bulletin 16/16](#)). The Ombudsman's intervention in that case, however, was directly relevant to Ombudsman proceedings more widely since it concerned limitation periods for recovering overpayments.

Points in Practice

XI. Scheme return guidance

The Pensions Regulator has published [additional information on completing DB and hybrid scheme returns](#), taking the form of checklists and Q&As.

Comment (1): Section 64 of the Pensions Act 2004 requires trustees and managers of occupational and personal pension schemes to provide the Pensions Regulator with certain information. This is achieved through the submission of a scheme return each year.

Comment (2): Failure to comply with this requirement could result in a maximum fine (under Section 10 of the Pensions Act 1995) of £5,000 in the case of an individual, or £50,000 for a body corporate.

Comment (3): The Regulator appears to be eager to publicise those occasions where it has decided to use its powers of sanction.

Comment (4): The Regulator recently issued fines (under penalty notices dated 7th September, 2016) to the trustees of 2 schemes identified in a press release written by the Regulator ([Pensions Bulletin 16/17](#)).

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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