

Pensions and Employment: Pensions Bulletin

Legal and regulatory developments in pensions

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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, with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/action
1.	Information to retiring DC members about the guidance guarantee	6 th April, 2015	Template information available on request
2.	Information to transferring DB members about the requirement for independent financial advice	6 th April, 2015	Pensions Bulletin 15/09
3.	Requirement to check that independent financial advice received before effecting DB transfers	6 th April, 2015	Pensions Bulletin 15/11 Action point: Check transfer-out provisions in scheme rules. They will require amendment if they give members the right to transfer without taking independent financial advice

4.	New governance requirements for occupational schemes which have money purchase benefits in them (unless limited to AVCs)	6 th April, 2015	Client note dated 24 th February, 2015 (updated 2 nd April, 2015) available from Lynsey Richards Note additional requirements for "relevant multi-employer schemes" - see Pensions Bulletin 15/08
5.	Cap on charges in default fund for auto-enrolment qualifying schemes	6 th April, 2015	Client note dated 24 th February, 2015 (updated 2 nd April, 2015 to reflect exemption from charge cap for AVCs) - Pensions Bulletin 15/06 available from Lynsey Richards Pensions Bulletin 15/09
6.	Abolition of refund of contributions for members of occupational schemes with at least 30 days' pensionable service who are just provided with money purchase benefits and who start pensionable service after 30 th September, 2015	1 st October, 2015	Action point: Check scheme rules and amend where necessary (before 1st October, 2015) to remove right to refund of contributions where member has at least 30 days' qualifying service but less than 2 years' qualifying service
7.	VAT recovery changes	31 st December, 2015	Pensions Bulletin 15/14 Await HMRC update
8.	Reduction in annual allowance for high income individuals Note: Up to £80,000 annual allowance for tax year ending 6 th April, 2016	6 th April, 2016	Summer Budget 2015 Supplement
9.	Reduction in Lifetime Allowance from £1.25 million to £1 million	6 th April, 2016	Pensions Bulletin 15/05
10.	Abolition of DB contracting-out: managing additional costs	6 th April, 2016	Pensions Bulletin 15/05 Checklist available to clients on request. Planning for this should be well developed by now.
11.	Abolition of DB contracting-out: practicalities	6 th April, 2016	Pensions Bulletin 14/08 Checklist available to clients on request. Planning for this should be well developed by now.
12.	Prohibition on Active Member Discounts in auto-enrolment qualifying schemes	6 th April, 2016	Pensions Bulletin 14/16
13.	Proposed ban on corporate directors	1 st October, 2016	Pensions Bulletin 15/07 Note: Unclear whether exemption will be available for independent corporate directors of trustee companies
14.	Automatic transfers of DC pots of £10,000 or less	Phase 1 1 st October, 2016	Pensions Bulletin 15/03
15.	Registration for Individual Protection 2014	Before 6 th April, 2017	Pensions Bulletin 14/12

Cases

II. RPI v. CPI: Buckinghamshire v Barnardo's

In an as-yet unreported decision, on 16th September, 2015, the High Court (Warren J.) held that the rules governing the Barnardo's DB Pension Scheme (the "Scheme") did not permit the trustees to switch from RPI to CPI for revaluation of deferred pension and indexation of pensions in payment for so long as RPI remained an officially-published index.

The rules provided for indexation and revaluation at the "prescribed rate", defined as the lesser of 5% and "the percentage rise in the Retail Prices Index (if any...)". "Retail Prices Index" was defined as the "general index of retail prices or any replacement adopted by the trustees without prejudicing Approval".

Barnardo's, the Scheme's principal employer, proposed that the trustees should substitute CPI for RPI for indexation and revaluation purposes. The trustees asked the court to rule on whether they had power to select an index in place of RPI and if so, what other indices might properly be adopted.

The point at issue was whether the definition of RPI in the Scheme rules meant:

- RPI or any index that replaces RPI and which is adopted by the trustees (a two-stage process); or

- RPI or any index that is adopted by trustees as a replacement for RPI (a single-stage process).

Barnardo's argued for the second option on the basis that, if an alternative index qualified as a replacement only if RPI had been discontinued, there would be little point in the further requirement of adoption by the trustees. It also argued that this construction gave the trustees flexibility to adopt whatever alternative index was best suited to the Scheme from time to time.

The representative members argued for the two-stage process and that the definition of "Index" meant RPI unless and until it was discontinued.

Warren J. agreed with the members. He held that there could be no "replacement" of RPI so long as RPI remained an officially-published index. He said "however commercially sensible it might be for CPI (or some other index) to be used in the sort of situation where, in the past, RPI was used, that is not a "replacement" of RPI in any ordinary sense of the word".

Comment (1): In 2 previous decisions on the propriety of a switch from RPI to CPI¹ the High Court rejected the members' challenges. But, as Warren J.

¹ *Danks v Qinetiq* [2012] EWHC 570 and *Arcadia Group v Arcadia Pension Trust* [2014] EWHC 2683.

emphasised when explaining why he had reached a different conclusion, each case turns on the precise wording of the trust deed and rules. Trustees faced with an employer request to switch should take legal advice before making any decisions.

Comment (2): A recent consultation by the Office for National Statistics (the "ONS") noted that, while RPI is now generally recognised as flawed, the ONS intends to continue to publish it. The RPI is used for index-linked gilts, some of which allow investors to redeem them if a "materially detrimental" change is made to the inflation measure. So the Government has a very real need to ensure the continuation of RPI, for these purposes at least.

III. Transfers-out: Trustee disclaimer: Ombudsman's determination in relation to Pollet

On 21st July, 2015, the Pensions Ombudsman held in this case that the trustee of the Optimum Internal Pension Pack Plan (the "Plan"), a DC occupational scheme of which Optimum Capital Limited (the "Trustee") was principal employer and trustee, could not require a member to sign a disclaimer excluding all liability when the member transferred to a SIPP provider.

The Trustee failed to process the member's transfer request because it claimed there were problems with the Plan's administrator and also because the member

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refused to sign a declaration in which the Trustee disclaimed all liability.

The disclaimer purported to exclude the Trustee and one of its directors from any further liability (including for breach of trust, breach of duty or maladministration) and to indemnify them against all costs and penalties in relation to the transfer. The Ombudsman held that this was an *“attempt to settle any potential possible claims against them in respect of anything that they may have done in return for doing something they have no legal right to refuse”*.

The Ombudsman noted that the member had a right to transfer both under the Plan rules and by virtue of his statutory right to a CETV. The Plan rules vested the transfer power jointly in the Trustee and the scheme administrator. The Trustee had breached its duty by failing to ensure that the transfer was processed.

The Ombudsman also held that one month from the date the SIPP provider sent the trustee the completed discharge form and transfer request would have been a reasonable timeframe to disinvest the member’s benefits and pay them over to the SIPP provider.

The Ombudsman directed the Trustee to transfer the member’s benefits to the SIPP and to make up the cost of any shortfall in the investment resulting from its failure to follow the Ombudsman’s one-month

transfer timetable. The Trustee was also directed to pay the member £500 for distress and inconvenience.

Comment (1): Like the pensions liberation decisions, this determination emphasises that, where a member has a statutory transfer right, trustees cannot deny that right.

Comment (2): But the Ombudsman’s suggested one month deadline for effecting a transfer presumes that the receiving scheme has “ticked all the boxes” for the statutory transfer right. Where the transferring scheme is in any doubt (for example where it is not clear that the transfer value will be used to acquire “transfer credits” in the receiving scheme) the Ombudsman’s suggested deadline will not apply. See [Pensions Bulletin 15/08](#) for details of the steps transferring trustees should consider taking to try to obtain a valid discharge.

Comment (3): Remember that, if the transferring trustees do not obtain a valid discharge, it is probable that the employer will have to fund the cost of reinstating the member’s benefits. In other words, the costs of compensating for delay are going to be substantially lower than the costs of not getting a good discharge.

Points in Practice

IV. PPF: Consultation on 2016/17 levy

On 21st September, 2015, the PPF published its 2016/17 PPF levy consultation and accompanying documents.

The PPF says its levy rules for 2016/17 are “*very substantially the same*” as for 2015/16, reflecting its desire to maintain stability of methodology for the 3 years of the second “triennium” (2015/16 to 2017/18).

The main changes are:

- a relaxation in the reporting requirements for re-certifying asset backed contribution arrangements (“ABCs”), and
- some changes to insolvency risk measurement.

The PPF also says it intends to re-invoice schemes that “incorrectly” classified themselves as Last Man Standing (“LMS”) schemes prior to the PPF’s “clarification” in the 2015/2016 levy determination.

Comment: It is important to distinguish here between schemes that incorrectly categorised themselves as LMS and schemes that took legal advice on the correct categorisation, prior to the PPF’s statement on the subject in its response to its consultation on the

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2015/2016 levy. For some schemes (including those on Slaughter and May's model documentation) it was not immediately clear into which of the 3 categories in the scheme return they fell. The Pensions Regulator confirmed that they fell into the LMS category but the PPF then expressed a different view in relation to the 2015/2016 levy. Leaving to one side the question of whether the new test is correct, a number of schemes subsequently amended their rules to ensure they continue to be treated as LMS schemes.

The Focus accompanying this Bulletin examines the PPF's proposals in more detail, and includes some action points for affected schemes.

Forthcoming events

V. Pensions Law Update Seminar

Our next Pensions Law Update seminar takes place on Wednesday, 18th November, 2015, between 9.30am and 1.00pm. Invitations have been 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.

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