



# Essential pensions news

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## **Briefing**

June 2017

## **Introduction**

*Essential Pensions News* covers the latest pensions developments each month.

### **General Election – hung Parliament creates uncertainty over pension policy**

Following the General Election, the Tory party has been left in a minority Government and is seeking a pact with the Democratic Unionist Party to achieve a slim Commons majority. Now that there is a hung Parliament, it seems that key decisions around the State retirement age, the State pension triple lock, social care funding and the potential increased scrutiny by the Pensions Regulator of defined benefit (DB) schemes may all take a back seat while the Government shortens its legislative programme and concentrates on Brexit issues.

One commentator's view is that the triple lock on pensions is now likely to remain until 2020 or even longer, as the Conservatives were the only party campaigning for its abolition. There are also calls for the new Government to take a sensible approach to the suggested increased regulation of DB pensions. While it is difficult to argue against the proposals to protect pensions from unscrupulous bosses, such reckless behaviour is in the very small minority. Developing law to deliver this particular Conservative manifesto promise was seen as extremely difficult.

It has been confirmed that the new Work and Pensions Secretary is David Gauke, promoted from Chief Secretary to the Treasury. In his five years at the Treasury during the coalition Government, Mr Gauke played a key role in developing the detail of the pension freedoms and was a keen supporter of automatic enrolment, so is highly experienced and knowledgeable in pensions matters. However, the lack of an outright Conservative majority means radical reform in any area will be hard to get through Parliament, but

it would be helpful to the pensions industry if the Government could clarify several outstanding pension law action points, including

- Confirming whether backdating applies on the reduction from £10,000 to £4,000 of the Money Purchase Annual Allowance if it is to apply from April 6, 2017.
- Legislating to support transfers of GMPs to schemes which have never been contracted-out.
- Issuing the promised further guidance on the application of VAT on pension fund management costs.
- Publishing a response to the DB Green Paper and reviewing current proposals for employer debt arrangements which are seen as unworkable.
- Consulting on detail for the master trust authorisation regime under the Pension Schemes Act 2017.
- Legislating to assist schemes which wish to move to CPI-based increases but which have RPI hard-wired into their rules.
- Removing barriers to DC bulk transfers without consent.

### **HMRC publishes pension schemes newsletter 87 – provision of relief at source information and new ROPS list schedule**

On June 1, 2017, HMRC published the latest issue of its regular pension schemes newsletter. Edition 87 includes the following points of interest

- Pension advice allowance – HMRC confirms its understanding that the pension advice allowance must be requested by members in writing from their scheme. HMRC states that although members can make a request by email, the decision on whether to accept this falls to the scheme administrator.
- Relief at source – notices requiring pension schemes operating relief at source to submit their annual return of individual information were issued by HMRC in January 2017. These must be returned by July 5, 2017. If a scheme fails to submit its return on time (or the information is incomplete) subsequent interim repayments will be held pending receipt of the outstanding information. If a submission then fails HMRC will stop all future interim repayments until a successful submission is made.
- Scottish rate of income tax – from *January 2018*, HMRC will notify scheme administrators operating relief at source of their individual members' tax residency status. Annual returns in respect of Scottish residence members will have to be submitted using the Secure Data Exchange Service (SDES). Although submissions can be made using SDES as well as existing methods in 2018, from 2019 only SDES can be used.
- Changes to publication of ROPS notification list – the newsletter reminds scheme administrators of the planned changes to the scheduled publication of the Recognised Overseas Pension Schemes (ROPS) notification list as follows.

- Suspension of the ROPS notification list from June 2, 2017.
- The updated list was due to be published on June 5, 2017, but routine publication of the ROPS list will recommence on June 15, 2017.

View the [Newsletter](#).

## Lloyds employees make legal bid for equalisation of GMPs

### Legal background

In November 2016, the Department for Work and Pensions (DWP) consulted on a re-worked proposed calculation basis for the equalisation of guaranteed minimum pensions (GMPs). Consultation respondents broadly welcomed the new method, which involves a one-off actuarial comparison with opposite sex comparators and conversion to ordinary scheme benefits.

Several technical changes to existing secondary legislation governing formerly contracted-out salary-related schemes (on which the DWP also consulted) have now been finalised in the Occupational Pension Schemes and Social Security (Schemes that were Contracted-out and Graduated Retirement Benefit) (Miscellaneous Amendments) Regulations 2017 (the Amending Regulations). Among other things, the Amending Regulations extend the period during which formerly contracted-out schemes may pay contributions equivalent premiums where they have used HMRC's scheme reconciliation service to reconcile their GMP data. They also revise the rate of fixed-rate GMP revaluation for those leaving pensionable service after April 5, 2017. The new rate will be set at 3.5 per cent a year, a reduction from the current 4.75 per cent rate, and below the four per cent rate originally proposed by the DWP. The amending regulations came into force on *April 6, 2017*.

### The Lloyds case

A legal bid has been launched by female employees of Lloyds Bank, alongside pension trustees and the Lloyds Trade Union, in an effort to equalise GMPs. The group are looking to close an apparent pension gap of around £2,000 between men and women employees in Lloyds's defined benefit (DB) schemes. This affects around 230,000 female scheme members who joined the scheme between 1978 and 1997.

According to Lloyds Trade Union, the part 8 claim is seeking *'the Court's ruling on whether the equalisation obligation (if any) is only engaged if an opposite sex comparator can be identified for the affected member, or if the obligation arises without the need to identify a comparator'*.

### Comment

The outcome of this case will be watched closely by those involved with final salary schemes. If successful, the claim could cost Lloyds an approximate £508 million, with the cost of equalising the 2,400 contracted-out pension schemes in the DB sector amounting to a further £20 billion.

It is anticipated that the case will be heard by the High Court later in 2017.

## ***British Airways plc v Airways Pension Scheme Trustee Limited [2017]*** **BA to appeal High Court decision that trustees' introduction of discretionary pension increase power following switch to CPI was valid**

In our [May 2017 update](#), we reported on the High Court decision that the trustees of the Airways Pension Scheme (the Scheme) had exercised validly the scheme's power of amendment to introduce a new power allowing them to pay additional discretionary pension increases. The subsequent exercise of the discretionary increase power providing a 0.2 per cent increase for 2013 was also valid and effective.

### **Background**

Under the Scheme rules, pension increases were calculated by reference to annual pension increase review orders (PIROs) issued by the Treasury (in line with increases to public-sector pensions). Historically, the PIROs used the retail prices index (RPI) as a measure of inflation. However, in 2010 the Government announced that it would switch to the consumer prices index (CPI) as the increase basis from April 2011. Consequently, CPI pension increases automatically applied to the Scheme from April 2011. The trustees considered what they should do in response to this change, as Scheme members held expectations of RPI increases.

### **Amendment to introduce discretionary increase power**

In February 2011, the trustees voted unanimously to exercise their unilateral power of amendment to introduce a discretionary power, exercisable by a two-thirds majority of the trustees, to grant a discretionary pension increase (in addition to that awarded in the annual PIRO) (the 2011 decision). Any discretionary increase was also subject to the trustees taking professional advice.

A deed of amendment to introduce the discretionary increase power was executed in March 2011.

### **Exercise of the discretionary increase power**

The new discretionary pension increase power was not exercised until February 2013, when the trustees voted unanimously to award an increase of 50 per cent of the gap between RPI and CPI for 2013 (0.2 per cent). The trustees' minutes recorded that the additional 0.2 per cent would be paid after completion of the actuarial valuation. The amount of the increase would be reviewed, and a payment date fixed, once the valuation had been finalised (the February 2013 decision).

In June 2013, the trustees confirmed the February 2013 decision to grant a 0.2 per cent discretionary increase. However, it was unclear whether the trustees had made an effective decision as to when that increase would take effect (the June 2013 decision).

In November 2013, the trustees considered the matter afresh and voted by a majority to grant a discretionary increase of 0.2 per cent with effect from December 1, 2013 (the November 2013 decision).

British Airways plc (BA), the scheme's principal employer, issued proceedings against the trustees challenging the 2011 decision and the February, June and November 2013 decisions. The case was heard before Morgan J in a seven-week trial between October-December 2016. BA's initial allegations that the trustees' decisions were perverse and irrational and that the professional advisers had acted inappropriately were either dropped or given little weight by the end of the trial.

## Decision

Morgan J dismissed BA's claim almost entirely, with the exception of the challenge to the June 2013 decision, which was held to be invalid due to the failure to agree an effective date for the increase. The High Court held that the trustees' decision to amend the rules to introduce a discretionary increase power was a valid exercise of their power. The 2011 decision and the November 2013 decision were both valid and effective. The conclusion was that the members were entitled to a discretionary increase of 0.2 per cent with effect from December 1, 2013.

## BA to appeal High Court decision

Further to the High Court's decision, Morgan J has granted BA

- Permission to appeal two technical aspects of the May 2017 judgment
  - The meaning of 'benevolent or compassionate' in the trust deed and the conclusion that the trustees' decisions were within the scope of the amendment power and the discretionary increase power.
  - In exercising the amendment power and/or the discretionary increase power, the trustees did not act inconsistently with the purposes of the Scheme or otherwise for an improper purpose.
- An injunction preventing the trustees from paying the discretionary increase until the appeal is determined. If BA's appeal fails, BA is to pay affected members interest on the discretionary increase at two per cent above base rate from May 25, 2017, to the date of decision by the Court of Appeal.

## Comment

Whilst the case is inevitably confined to its facts, the High Court judgment provides a useful reminder of the Court's approach to the interpretation of a pension scheme's rules and the factors trustees must consider when exercising their discretionary powers. The case also highlights the importance of a thorough decision-making process and the need for those decisions to be accurately recorded in the meeting minutes.

The judgment confirms that the Court will not seek to infer an employer consent requirement where the scheme rules contain a power for the trustees to amend unilaterally. Equally, where trustees undertake a detailed and thorough decision-making process, taking into account all relevant and excluding irrelevant factors, it will be difficult for employers (or members) to challenge those decisions.

As for the appeal, Morgan J was sympathetic to the members' position and recognised that many of them were likely to die before the appeal was concluded. He also recognised that the trustees' discretionary decision on whether or not to pay the increase while the appeal is pending will not be easy. The Judge noted that in granting the injunction and requiring BA to compensate members in the event of failure of the appeal, the Court was taking a difficult decision out of the trustees' hands, whilst eventually granting members some compensation for the delay in payment.

Morgan J accepted that BA had a 'real' prospect of success on appeal, although he remained of the view that the appeal would ultimately fail. He noted that had he not granted permission to appeal, BA would have sought permission to appeal directly from the Court of Appeal, causing a further delay of perhaps six months. Even with permission, it seems likely that the CA's heavy caseload will mean that an appeal decision could take longer than 18 months.

## ***Buckinghamshire v Barnardo's RPI/CPI: permission granted for Supreme Court appeal***

This case is of interest to schemes providing DB benefits. In our [November 2016 update](#), we reported that the High Court had held that the rules governing an employer's DB pension scheme did not give the trustees power to switch from using the Retail Prices Index (RPI) to the Consumer Prices Index (CPI) in revaluing deferred pensions and indexing pensions in payment so long as RPI remained an officially published index.

The Court of Appeal (CA) subsequently upheld that decision on appeal, meaning that whether RPI can replace by CPI will continue to depend on individual schemes' rules. Lewison LJ, whose judgment formed part of the majority decision, held that the natural meaning of the first part of the definition was that a 'replacement' of the RPI had to precede the adoption of any such replacement by the trustees. The second sentence, referring to replacement and re-basement of the RPI, was helpful in interpreting the first sentence of that definition.

The RPI (he said) can only be 're-based' by the authority responsible for publishing it. As the terms 'replacing' and 'rebasing' were used together in the second sentence, the same person had to carry out both the 'replacing' and the 'rebasing'. The term 'replacing' had the same meaning in both the first and second parts of the definition. It followed that any 'replacing' could only be carried out by the authority responsible for publishing the RPI and that, without its official replacement, there was no other 'replacement' which the trustees could adopt instead.

Vos J's dissenting judgment in the CA took a different approach to the interpretation of the definition of the RPI. In his view, whilst 'rebasing' could only be carried out by the publishing authority, 'replacing' could be carried out either by that authority or by the trustees. The use of both terms together, he considered, did not necessarily mean that they were both to occur as a result of the actions of the same entity. His preferred interpretation was that the definition should be read to mean that 'Retail Prices Index' could be the Index of Retail Prices or any replacement which is adopted by the trustees.

Permission to appeal the CA judgment in the Supreme Court was granted on *April 6, 2017*.

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### **Pensions Ombudsman: Mrs K (PO-15939) – scheme provider to pay tax charges and upper limit award for distress following long death benefit delay**

The Deputy Pensions Ombudsman (DPO) has given her determination in a complaint by Mrs K against Fast Pensions Limited (FPL) which provided the EP1 Retirement Fund (the Scheme), holding that a scheme provider's delays in paying a deceased member's lump-sum death benefits to his widow constituted maladministration and significant distress and inconvenience by reason of it.

The DPO upheld the widow's complaint that there had been a failure to pay the spouse's pension within the two years prescribed by the Scheme rules. FPL had delayed the payment process and had failed to correspond with either the member's widow or the Pensions Ombudsman. As a result, the widow had been unable to meet mortgage payments and other costs incurred as a result of her husband's death.

FPL was directed to pay out the lump-sum death benefits of nearly £80,000, together with any late payment tax charges imposed by HMRC, as well as £1,600 for the significant distress and inconvenience caused by their maladministration.

## Contacts

If you would like further information please contact:

### London



**Lesley Browning**

**Partner**

Tel +44 20 7444 2448

lesley.browning@nortonrosefulbright.com



**Peter Ford**

**Partner**

Tel +44 20 7444 2711

peter.ford@nortonrosefulbright.com



**Lesley Harrold**

**Senior knowledge lawyer**

Tel +44 20 7444 5271

lesley.harrold@nortonrosefulbright.com

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