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## What's Happening in Pensions

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- **Pensions Regulator powers:** The government has again promised to strengthen the hand of the Pensions Regulator, following the collapse of Carillion with a substantial pension scheme deficit. It may now go further than previously expected but we await the white paper this spring for details.
- **Pension protection levy and contingent assets:** The PPF has published its 2018/19 pension protection levy determination and accompanying appendices and guidance. There are new standard form contingent asset agreements but existing agreements can be recertified this year without the need for amendment. Certifying or recertifying a guarantee may now require the preparation of a "guarantor strength report".
- **CPI for RPI – BT Pension Scheme:** The High Court has ruled that BT cannot switch from RPI to CPI as the basis for pension increases in one section of the BT Pension Scheme because (in accordance with the scheme rules) RPI had not "become inappropriate" and had not been "so amended as to invalidate it as a continuous basis".
- **Pensions Ombudsman and TPAS:** The Pensions Advisory Service's dispute resolution function will move to the Pensions Ombudsman by 1 April 2018.
- **Amendment power restriction – "the rights of any member":** The High Court has ruled that Wedgwood companies issued an effective termination notice in 2006, under a new termination power introduced by amendment of the trust deed in 2001 to replace a more restricted one. It held that the introduction of the new termination power was not in breach of the amendment power, which protected "the rights of any member", but that the new termination power was subject to an implied fetter on when it could be exercised, which was satisfied in the circumstances.
- **Judges' and firefighters' discrimination cases:** The Employment Appeal Tribunal has given its decisions in the discrimination cases brought against the government by younger judges and firefighters in relation to protections given to older workers when implementing the public sector pension reforms. It upheld the Employment Tribunal's decision in favour of the judges (though on different grounds) but referred the firefighters' case back to the Tribunal.
- **21st century trusteeship:** The Pensions Regulator has added to its website part four of its 21st century trusteeship programme: "Trustee training and improving your knowledge".
- **PPF compensation and bridging pensions:** Regulations have been finalised modifying the PPF compensation rules so that compensation reflects bridging pensions and similar arrangements in schemes admitted to the PPF.

- **Financial Guidance and Claims Bill:** The government has made amendments to the Financial Guidance and Claims Bill which will impose new duties on pension scheme trustees and providers to recommend that individuals should take financial guidance or advice before accessing or transferring their pension.
- **Professional standards for independent trustees:** The Professional Trustee Standards Working Group has published a consultation on draft "comply or explain" standards for professional trustees of occupational pension schemes.
- **GMP equalisation – public service pensions:** The government has published a response to its consultation on how to address the implications of state pension reforms for public service pension scheme members with GMPs who are below state pension age. It is extending its interim arrangements until 5 April 2021.
- **NEST changes:** The government has confirmed that changes will be made to the NEST Order, among other things allowing contractual enrolment into NEST.
- **Bulk transfers of contracted-out rights:** The government has consulted on draft regulations regarding the bulk transfer of contracted-out rights without members' consents to schemes that were never contracted-out.
- **ESG factors:** The government has published an interim response to the Law Commission's report on how far pension funds may or should consider issues of social impact when making investment decisions. It intends to clarify legislation in this area.

## Pensions Regulator powers

The collapse of Carillion with a significant pension scheme deficit has led to the government reiterating its 2017 manifesto promise to strengthen the hand of the Pensions Regulator, and perhaps indicating that it will go further than was previously expected following the DB pensions green paper (see **WHIP Issue 63**).

Writing in **the Observer**, Theresa May said: "*In the spring, we will set out tough new rules for executives who try to line their own pockets by putting their workers' pensions at risk – an unacceptable abuse that we will end*". This is a reference to the forthcoming DB pensions white paper.

Esther McVey, the new Secretary of State for Work and Pensions, later **said in Parliament**:

*"Our manifesto in June 2017 [proposed] to give the regulator the power to impose punitive fines alongside contribution notices so that pension scheme members are fully protected. The details of the fine would be worked through with all the relevant stakeholders, but it would represent a significant strengthening of the deterrent. We also intend to make certain corporate transactions subject to mandatory clearance by the Pensions Regulator, but we must take care to ensure that these measures do not have an adverse effect on legitimate business activity and the wider economy.*

*I should tell colleagues that we have received 800 responses to the Green Paper, and they are being reviewed by the Department. The White Paper is in progress and will be published in the spring. Effective regulation is dependent on a prompt flow of information between the parties concerned, and on compliance with rules and processes. Following the publication of the White Paper, we will introduce new regulation to ensure that the regulator gets the information it requires to conduct investigations and casework effectively and efficiently. It remains the case that the Government support free markets, enterprise and businesses, but this has to be conducted responsibly."*

In answer to a question about the position of pension schemes as unsecured creditors, she said:

*"That is key—where do they fit in the line of creditors? Are people being given the correct protection for their pensions? That is why the Pension Protection Fund was brought in. Again, this is something that needs to be brought forward under the governance rules for pensions."*

## Pension protection levy and contingent assets

The Pension Protection Fund **has published** its **pension protection levy determination, appendices and guidance** for the 2018/19 levy year. It has also published new standard form contingent asset agreements.

The key points are as follows:

- The schemes of employers who are in insolvency risk bands 1, 2 or 3 can expect, all other things being equal, to see their levies increase.
- There are new standard form agreements for contingent assets such as associated company guarantees. Existing contingent asset agreements can be certified or recertified to the PPF this year without the need for amendment but guarantees that have fixed liability caps in particular may require amendment by March 2019 in order to be recognised for a reduction of the 2019/20 levy.
- Certification or recertification of a guarantee may now require a "guarantor strength report" to be prepared by a professional adviser and submitted to the PPF, concerning the ability of the guarantor(s) to meet the certified "realisable recovery" amount.
- Where there is more than one guarantor, an individual realisable recovery amount may now be certified in respect of each guarantor (ie, it is no longer necessary to certify that each guarantor is separately able to pay a single certified realisable recovery amount). This may help to reduce a scheme's levy where one (or more) of multiple guarantors is not as strong as the other(s).
- The certification of deficit reduction contributions has been simplified.
- Certification and recertification deadlines for contingent assets are Thursday 29 March (for submission of any hard copy documents) and Saturday 31 March (for online submissions). Note that this is the Easter weekend.

Please see our briefing note "**Pension protection levy: changes for the 2018/19 levy year**" for more detail.

## CPI for RPI – BT Pension Scheme

The High Court **has ruled** that BT cannot switch from RPI to CPI as the basis for pension increases in one section of the BT Pension Scheme.

The BT Pension Scheme's revaluation index switched automatically from RPI to CPI in 2010 for all sections of the scheme when the method for calculating public sector scheme increases was changed (see **WHiP Issue 20**). This also happened for increases to pensions in payment ("indexation") in sections A and B of the scheme, but not section C. Section C is for members who joined the scheme between 1 April 1986 and 31 March 2001 (when it was closed to new members). Up to approximately 80,000 members are reportedly affected.

Section C has two indexation rules. One of them requires increases in line with RPI but BT (in consultation with the trustees) may change the index if RPI "ceases to be published or becomes inappropriate"; the other allows RPI to be replaced by BT (again in consultation with the trustees) if it has been "so amended as to invalidate it as a continuous basis". The questions for the High Court were (very broadly) whether RPI has become inappropriate or invalidated (or neither); who is to decide that; on what basis; and whether, because the relevant rules were re-adopted in April 2016, changes to RPI that happened before then cannot be taken into consideration.

The High Court decided:

- The question whether RPI has become inappropriate is an objective question, ultimately to be decided by the courts. There were no grounds for interpreting the rules as including the power for BT to make the determination or for implying such a power.
- Matters which occurred before the rules were re-adopted in April 2016 can be taken into account in deciding whether or not RPI has become inappropriate.
- Specific changes to the RPI formula (including the de-designation of RPI as a national statistic) were not such as to have caused RPI to have become inappropriate, either individually or cumulatively. Nor were they such as to permit BT to form the view that RPI has been so amended as to invalidate it as a continuous basis.

BT has obtained permission to appeal the decision to the Court of Appeal.

## Pensions Ombudsman and TPAS

The Pensions Advisory Service's (TPAS) dispute resolution function **is moving** to The Pensions Ombudsman by 1 April 2018. This includes the TPAS dispute resolution team and volunteer network of over 350 advisers. The Pensions Ombudsman says:

*"Customers will be able to access all pension dispute resolution, previously handled by two services, whether pre or post IDRPs, in one place. This will lead to a smoother customer journey and improved complaint handling. TPAS will continue to focus on providing pension information and guidance, and will become an integral part of the new Single Financial Guidance Body."*

## Amendment power restriction – "the rights of any member"

In *Wedgwood Pension Plan Trustee Limited v Salt*, the High Court ruled that Wedgwood companies had issued an effective notice to terminate accrual in the pension scheme in 2006. The case concerned a restriction on exercising the scheme's amendment power. A new termination power had been introduced by amendment in 2001 to replace a more restrictive one. The Court held that the introduction of the new termination power was not in breach of the amendment power, which protected "the rights of any member", but that the new termination power was subject to an implied fetter on when it could be exercised, which the judge found was satisfied in the circumstances. The notice was therefore effective to terminate future accrual and break active members' final salary links.

The Wedgwood Group Pension Plan amendment power includes a restriction such that "no alteration modification or addition shall be made which ... shall prejudice or adversely affect any pension or annuity then payable or the rights of any member". The scheme's original termination power allowed employers to cease participating in the plan in circumstances where it was "impracticable or inexpedient" to continue to participate. In 2001, the rules were completely rewritten and the new employer termination power allowed employers to stop contributing by notice in any circumstances (ie, regardless of practicability or expedience).

The trustee applied to the High Court for directions as to whether a 2006 termination notice given under the new termination power was effective to terminate future accruals and sever the final salary link for active members. This involved asking whether the new termination power was validly introduced, in the light of the amendment power restriction, and whether there was an implied fetter on its exercise.

The deputy judge held as follows:

- The words “the rights of any member” in the amendment power mean the rights that had accrued to a member as a result of past service and not benefits which might in the future be obtained as a result of future service with the employer. It appears from later comments in the judgment that the deputy judge considered that the restriction protects the final salary link.
- The replacement of the termination power was an amendment to the rules which prejudiced or adversely affected the rights of any members because it made it easier for participating employers to cease to contribute to the scheme.
- The new termination power was validly introduced by the amendment but it was subject to an implied fetter, incorporating the language of the original termination power, so protecting the members' rights: the new termination power could not be exercised by an employer unless it has first from any cause been found by the employer to be impracticable or inexpedient to continue to participate in the scheme.
- Wedgwood would still have exercised the amendment power to amend to the termination power if it had realised the need to comply with the fetter when exercising the new termination power. There was also evidence to the effect that the participating employers in 2006 would have found it inexpedient to continue to participate in the Plan. The fetter was therefore overcome and the employers' 2006 termination notice was effective both to terminate future accrual and to break the final salary link.

## Judges' and firefighters' discrimination cases

The Employment Appeal Tribunal (EAT) has given its decisions in the discrimination cases brought against the government by younger judges and firefighters in relation to protections given to older workers when implementing the recent public sector pension reforms. The EAT upheld the Employment Tribunal's (ET) decision in favour of the judges (though on different grounds) but referred the firefighters' case back to the ET.

Age discrimination is lawful if it is objectively justified. This is achieved if the relevant party demonstrates that it had a legitimate aim and that the measures it took to achieve that aim were proportionate.

### Judges

In *Ministry of Justice v McCloud and Mostyn*, 210 judges claimed that the government's protections for older judges unlawfully discriminated against younger judges directly on grounds of age (and indirectly, in some cases, on grounds of sex and race). As part of the public sector pension reforms, protections were given to judges who were within ten years of retirement. Younger judges did not benefit in this way and also became subject to the annual and lifetime allowances. The EAT ruled, contrary to the ET's decision (see **WHiP Issue 62**), that the government had established legitimate aims for giving the protections. It also held, however, that the government had not shown that the measures it took to achieve those aims were proportionate. The ET's finding in favour of the judges was therefore upheld.

The government sought to justify any otherwise unlawful discrimination by reference to a legitimate aim of protecting those closest to retirement from the financial effects of the changes. This had been dismissed by the ET. The EAT overturned this aspect of the ET decision, finding that the ET had been wrong to conclude that no legitimate aims had been shown. In particular the government had legitimate social policy aims and the ET had not taken into account the "complex of moral and political judgments".

The Tribunal had also expressed the view that the protections had not been shown to be a proportionate way of achieving the government's aims, since no evidence had been put forward as to why lesser protections, a shorter protection period or a higher qualifying age would not have satisfied the purported aims. The EAT agreed with this and found in favour of the judges on this basis: ie, objective justification was not established because the means used were not shown to be proportionate means of pursuing the legitimate aim. The judge said:

*"I am satisfied ... that the conclusions of the [ET] ... that the extremely severe impact of the transitional provisions on the Claimants far outweighed the public benefit of applying the policy consistently across the whole public service pension sector cannot be faulted and cannot be characterised as perverse."*

The EAT did not consider sex and race discrimination issues because the parties agreed that it would not be asked to do so if the age discrimination appeal failed.

The government is reportedly seeking permission to appeal the decision to the Court of Appeal.

## **Firefighters**

In *Sargeant v London Fire and Emergency Planning Authority*, the EAT upheld the decision of the ET (see **WHiP Issue 63**) that the government had established a legitimate social policy aim in protecting firefighters nearing retirement against adverse pension changes but referred back to the ET the question of whether the government's measures to achieve that aim were proportionate because it had taken the wrong approach to determining that question.

When the government reformed public service pensions in 2015, it gave transitional protections against the changes to firefighters within 14 years of their normal pension age. A full exception was given to those within ten years, with a taper for those between ten and 14 years. Over 5,000 younger firefighters in England and Wales claim that transitional protections given to older members of the Firefighters' Pension Scheme discriminate unlawfully against them. The discrimination claimed is direct discrimination on grounds of age, equal pay, and indirect discrimination on grounds of sex and race.

The ET had ruled, and the EAT agreed, that the government had established a legitimate aim, this being a social policy designed to:

- protect individuals who had the least time to adjust their financial affairs;
- take account of the greater legitimate expectation for those closer to retirement that their entitlements would not change significantly;
- have a tapering arrangement so as to avoid a "cliff edge" between fully protected and unprotected workers; and
- apply a consistent approach across the public sector.

With regard to the age discrimination claims, the ET had also found that the method of achieving the aim was proportionate. The EAT, however, held that the ET had taken the wrong approach in allowing the government a "margin of discretion" in relation to proportionality (as opposed to establishing a legitimate aim, where the employer is to be allowed a margin of discretion). The EAT said that the ET should have made up its own mind on the proportionality question. The matter therefore requires fresh consideration by an ET.

Some firefighters also complained of unequal pay and indirect sex and race discrimination. The ET had rejected these claims on the basis that the differing treatment was entirely due to age and that there was therefore no need for the discrimination to be objectively justified (but that if there was a need then it was justified on the same basis as for the age discrimination). The EAT upheld the ET's decision to reject the equal pay claims but decided that the ET should reconsider the indirect sex and race discrimination claims. This was because of recent Supreme Court decisions which established that objective justification needs to be considered in indirect discrimination claims even where there is direct discrimination (whether lawful or unlawful) on another ground.

## 21st century trusteeship

The Pensions Regulator has added to its website part four of its **21st century trusteeship** programme: "**Trustee training and improving your knowledge**".

## PPF compensation and bridging pensions

**Regulations** have been finalised which will modify the PPF compensation rules so that they reflect bridging pension and similar pension adjustments under schemes admitted to the PPF. A government **consultation response** has also been published.

At present, individuals who are not yet in receipt of pension receive PPF compensation based on the starting level of the scheme pension for the whole period of payment, even if the scheme pension would have been reduced after a certain period. In an earlier consultation (see **WHiP Issue 66**), the government had proposed that PPF compensation be adjusted and paid on a smoothed basis over the beneficiary's lifetime. In the light of responses, however, the government changed its proposal so that PPF compensation will start at a higher level and reduce at around the same time the scheme pension would have done.

The regulations came into force on 24 February 2018 and will apply only to members of schemes that enter a PPF assessment period on or after that date.

## Financial Guidance and Claims Bill

**Government amendments** to the Financial Guidance and Claims Bill will impose new duties on pension scheme trustees and providers to recommend that individuals take financial guidance or advice before accessing or transferring their pension. These replace provisions previously inserted by the House of Lords.

The Secretary of State will be required to make regulations imposing a duty on trustees to ask members with DC benefits whether they have received guidance or independent financial advice before accessing their benefits or transferring them to another scheme. If the member says that they have not then the trustees or provider must recommend that they seek guidance or advice and ask whether they wish to do so before proceeding. The FCA will be required to make equivalent rules for personal pension providers.

The government has also **announced** that it will amend the Bill to introduce a regulation making power for the purposes of prohibiting pensions cold calling.

## Professional standards for independent trustees

The Professional Trustee Standards Working Group **has published** a consultation on draft standards for professional trustees of occupational pension schemes. This follows a consultation with the pensions industry.

The standards are intended to apply to anyone within the definition of "professional trustee" used by the Pensions Regulator in its August 2017 policy document (see **WHiP Issue 66**), whether they are an individual or corporate entity. The standards will work on a "comply or explain" basis. Employers and/or trustees who are selecting a professional trustee for appointment to their board are advised to ask to view the professional trustee's disclosure document. The Pensions Regulator supports the standards and will consider compliance with these them as an indicator of fitness and propriety.

There are separate additional standards for professional trustees who act as chairs or sole trustees.

The consultation closes on 2 March 2018 and the standards are expected to be finalised in April or May 2018. Details of an accreditation framework will be published in 2018.

## GMP equalisation – public service pensions

The government **has published** a response to its consultation (see **WHIP Issue 61**) on how to address the implications of state pension reforms for public service pension scheme members with GMPs who are below state pension age. It is extending its interim arrangements until 5 April 2021 while it continues to consider addressing the issues by use of GMP conversion.

The abolition of the additional state pension and the "contracted-out deduction" in April 2016 leads to GMP-related inequalities in public service pension schemes. The government considers that none existed before then. A temporary arrangement has been in place to address this while the government considers permanent solutions.

## NEST changes

A government **consultation response** has confirmed changes to be made to the NEST legislation. The changes will (among other things) allow participating employers to contractually enrol their workers into NEST and clarify that individuals may join NEST in the event of a bulk transfer with consent. The changes are expected to take effect from 1 April 2018.

## Bulk transfers of contracted-out rights

The government **has consulted** on draft regulations designed to enable the bulk transfer of contracted-out rights without members' consents, in certain circumstances, to schemes that were never contracted-out (for example, a scheme newly established for a scheme merger or de-merger, or in relation to a regulated apportionment arrangement restructuring).

Before the abolition of contracting-out, arrangements could be made for a newly established scheme to become contracted-out and then accept the contracted-out rights without member consents but this has not been possible since 6 April 2016.

## ESG factors

The government **has published** an interim response to a Law Commission report on how far pension funds may or should consider issues of social impact when making investment decisions. A full response is expected by June 2018.

The government has indicated that it plans to clarify legislation around:

- consideration of broader long term financial risks;
- pension schemes' ability to consider members' non-financial or ethical concerns; and
- the role of engagement alongside voting as an important aspect of stewardship of pension scheme assets.



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This will include changes to what schemes have to cover as regards their ESG policies in their statements of investment principles.

It is also working with regulators as they too consider the recommendations.

This and previous issues of WHiP can be found on our website [here](#).

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If you wish to discuss any points arising from this note, please speak to your usual contact in the Travers Smith Pensions team or to one of the Pensions partners: Susie Daykin, Daniel Gerring, David James, Dan Naylor, Paul Stannard and Philip Stear.

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