

Draft Regulations laid before Parliament under paragraph 5(1) and (5) of Schedule 5 to the Retained EU Law (Revocation and Reform) Act 2023, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2023 No.

RETAINED EU LAW REFORM, NORTHERN IRELAND

PENSIONS, NORTHERN IRELAND

The Occupational Pension Schemes (Amendment) (Equal Treatment) (Northern Ireland) Regulations 2023

Made - - - - *****

Coming into force in accordance with regulation 1(2)

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 11(1) and 13(2), (3)(a) and (b) and (7) of the Retained EU Law (Revocation and Reform) Act 2023(a) (“the 2023 Act”).

The Secretary of State is a relevant national authority(b) for the purposes of section 11(1) of the 2023 Act.

A draft of this instrument has been laid before Parliament and approved by a resolution of each House of Parliament in accordance with paragraph 5(1) and (5) of Schedule 5 to the 2023 Act.

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Occupational Pension Schemes (Amendment) (Equal Treatment) (Northern Ireland) Regulations 2023.

(2) These Regulations come into force immediately before the end of 2023.

(3) These Regulations extend to Northern Ireland only.

Amendment of the Equal Pay Act (Northern Ireland) 1970

2.—(1) The Equal Pay Act (Northern Ireland) 1970(c) is amended as follows.

(2) After section 1A(d) (meaning of “political office” in section 1(7C)(a)) insert—

(a) 2023 c. 28.

(b) “Relevant national authority” is defined in section 21(1) of the 2023 Act.

(c) 1970 c. 32 (N.I.). Subsections (1B) and (1C) of section 6 were substituted for subsections (1A) and (2) by S.I. 1995/3213 (N.I. 22).

(d) Section 1A was inserted by S.R. 2005 No. 426.

“Equal treatment in respect of pensions

1B.—(1) An equality clause does not operate in relation to terms relating to a person’s membership of, or rights under, an occupational pension scheme, being terms in relation to which, by reason only of any provision made by or under Articles 62 to 64 of the Pensions (Northern Ireland) Order 1995^(a) (equal treatment), an equal treatment rule would not operate if the terms were included in the scheme.

(2) Subsection (3) applies where a person (“A”) is or has been in pensionable service under an occupational pension scheme (regardless of whether section 1 also applies).

(3) If the terms of A’s service do not (by whatever means) include an equality clause, they are to be treated as including one.

(4) For the purposes of subsection (3), an equality clause has the effect that if, by virtue of the application of the guaranteed minimum pension provisions, any term of A’s service that relates to membership of or rights under the scheme concerned is less favourable to A than it would be if A were of the opposite sex, the term, in so far as an equal treatment rule would have effect in relation to it, is modified so as not to be less favourable.

(5) The provisions of this Act apply in relation to an equality clause having effect under subsection (3) as they apply in relation to an equality clause having effect under section 1(1).

(6) In this section—

“equal treatment rule” has the meaning given by Article 62 of the Pensions (Northern Ireland) Order 1995;

“guaranteed minimum pension provisions” means so much of the Pension Schemes (Northern Ireland) Act 1993^(b) and of any other statutory provision as relates to guaranteed minimum pensions (within the meaning of that Act);

“occupational pension scheme” has the meaning given by section 1 of the Pension Schemes (Northern Ireland) Act 1993;

“pensionable service” has the meaning given by Article 121(1) of the Pensions (Northern Ireland) Order 1995;

“statutory provision” has the meaning given by section 1(f) of the Interpretation Act (Northern Ireland) 1954^(c).”

(3) In section 6 (exclusion from ss.1 to 5 of pensions etc.)—

(a) for the heading substitute “Exclusions from sections 1 to 5”;

(b) omit subsections (1B) and (1C).

Amendment of the Pensions (Northern Ireland) Order 1995

3.—(1) The Pensions (Northern Ireland) Order 1995 is amended as follows.

(2) In Article 62 (the equal treatment rule), after paragraph (6) insert—

“(7) Where a person (“A”) is or has been in pensionable service under an occupational pension scheme, an equal treatment rule has the effects set out in paragraphs (8) and (9).

(8) If, by virtue of the application of the guaranteed minimum pension provisions, any of the terms referred to in paragraph (2) is less favourable to A than it would be if A were of the opposite sex, the term is modified so as not to be less favourable.

(9) If—

(a) any of the terms referred to in paragraph (2) confers on the trustees or managers of an occupational pension scheme, or any other person, a discretion which, in a case

(a) S.I. 1995/3213 (N.I. 22).

(b) 1993 c. 49.

(c) 1954 c. 33 (N.I.).

within paragraph (7), may be exercised so as to affect the way in which persons become members of the scheme, or the way in which members of the scheme are treated, and

- (b) by virtue of the application of the guaranteed minimum pension provisions, the discretion is capable of being exercised in a way that would be less favourable to A than it would be if A were of the opposite sex,

the term is modified so as to prevent the exercise of the discretion in that way.

(10) In paragraphs (8) and (9), “guaranteed minimum pension provisions” means so much of the Pension Schemes Act and of any other enactment as relates to guaranteed minimum pensions (within the meaning of that Act).

(11) In Articles 63 to 65, references to the terms referred to in paragraph (2) include a term within paragraph (9)(a) and references to the effect of those terms include the effect of any exercise of a discretion conferred by any such term; and references to the terms on which members of an occupational pension scheme are treated are to be read accordingly.”.

(3) In Article 63(4) (equal treatment rule: supplementary – construction of article 62), for “section 1” substitute “sections 1 and 1B”.

(4) Omit Article 66(1) (equal treatment rule: effect on terms of employment, etc. – amendment to section 6 of the Equal Pay Act (Northern Ireland) 1970).

Amendment of the Pensions (Northern Ireland) Order 2005

4.—(1) Article 155 of the Pensions (Northern Ireland) Order 2005 (equal treatment)(a) is amended as follows.

(2) In paragraph (1), for “This Article” substitute “Paragraph (2)”.

(3) After paragraph (4) insert—

“(4A) Paragraph (4B) applies where a person has been in pensionable service under an occupational pension scheme (regardless of whether paragraph (2) also applies in that person’s case).

(4B) If, apart from this paragraph, any of the payment functions so far as it relates (directly or indirectly) to that pensionable service—

(a) is, by virtue of the application of the guaranteed minimum pension provisions, or

(b) becomes, by virtue of the application of those provisions,

less favourable to that person than it would be if that person were of the opposite sex, that function has effect with such modifications as are necessary to ensure that the provision is not less favourable.”.

(4) In paragraph (6), before the definition of “payment function” insert—

““guaranteed minimum pension provisions” means so much of the Pension Schemes Act and of any other enactment as relates to guaranteed minimum pensions (within the meaning of that Act);”.

Amendment of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003

5.—(1) Regulation 28 of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 (exception for benefits dependent on a person’s status)(b) is amended as follows.

(2) The existing text becomes paragraph (1).

(3) After paragraph (1) insert—

(a) S.I. 2005/255 (N.I. 1).

(b) S.R. 2003 No. 497. Regulation 28 was substituted by S.R. 2005 No. 520.

“(2) Paragraph (1)(a) does not apply in relation to access to a benefit payable under an occupational pension scheme to the surviving spouse or surviving civil partner of a deceased member or deceased pension credit member of the scheme.

(3) In paragraph (2), in relation to an occupational pension scheme—

“member” means any active member, deferred member or pensioner member;

“pension credit member” has the meaning given by Article 121(1)(a) of the Pensions (Northern Ireland) Order 1995;

and “deceased member” and “deceased pension credit member” mean a person who was a member or a pension credit member (as the case may be) immediately before death.

(4) In this regulation—

“active member”, “deferred member” and “pensioner member” each has the meaning given by Article 121(1) of the Pensions (Northern Ireland) Order 1995;

“occupational pension scheme” has the meaning given by section 1(1)(b) of the Pension Schemes (Northern Ireland) Act 1993.”.

Signed by authority of the Secretary of State for Work and Pensions

Date

Name
Parliamentary Under Secretary of State
Department for Work and Pensions

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations codify, to a limited extent and in the particular context of occupational pension schemes, the effects of Article 157 of the Treaty on the Functioning of the European Union (“the right to equal pay”) and of the right to non-discrimination on grounds of sexual orientation as regards employment and occupation established by Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000 p. 16-22) (“the Framework Directive”). The effects to be codified form part of domestic law by virtue of section 4 of the European Union (Withdrawal) Act 2018 (c. 16).

These Regulations codify the right to equal pay to allow a notional (rather than actual) opposite sex comparator to be used in certain circumstances to establish the existence of discrimination caused by legislation – a principle established in *C-256/01 Allonby v Accrington and Rossendale College and others* [2004] ICR 1328. Regulations 2 to 4 give effect to this principle by—

- (a) inserting new section 1B into the Equal Pay Act (Northern Ireland) 1970 (c. 32 (N.I.)) to modify certain provisions relating to the rules of an occupational pension scheme of which a person is a member,
- (b) amending Article 62 of the Pensions (Northern Ireland) Order 1995 (S.I. 1995/3213 (N.I. 22)) to modify certain provisions relating to the rules of an occupational pension scheme of which a person is a member, and
- (c) amending Article 155 of the Pensions (Northern Ireland) Order 2005 (S.I. 2005/255 (N.I. 1)) to modify certain functions of the Board of the Pension Protection Fund,

to secure that those rules and functions do not, in relation to pensionable service on and after 17th May 1990, discriminate on the grounds of sex where, as a result of legislation on guaranteed minimum pensions, a person would otherwise be subject to less favourable treatment compared to a person of the opposite sex.

(a) The definition of “pension credit member” was inserted by S.I. 1999/3147 (N.I. 11).

(b) Section 1 was renumbered as section 1(1) by S.I. 2005/225. Section 1(1) was amended by S.I. 2005/225, S.I. 2019/193 and paragraph 23 of Schedule 20, and Schedule 27, to the Finance Act 2007 (c. 11).

Regulation 5 codifies the right to non-discrimination on grounds of sexual orientation as regards employment and occupation established by the Framework Directive by amending regulation 28 of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 (S.R. 2003 No. 497) to secure that that regulation does not apply in respect of access to benefits payable to the surviving spouse or civil partner of a deceased member or pension credit member of an occupational pension scheme – a principle established in *Walker v Innospec Ltd and others* [2017] UKSC 47.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

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