

2023 No. 1308

RETAINED EU LAW REFORM

PENSIONS

**The Pensions Act 2004 and the Equality Act 2010 (Amendment)
(Equal Treatment by Occupational Pension Schemes)
Regulations 2023**

Made - - - - 4th December 2023

Coming into force in accordance with regulation 1(b)

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) of Schedule 5 to the 2023 Act.

Citation, commencement and extent

1. These Regulations—

- (a) may be cited as the Pensions Act 2004 and the Equality Act 2010 (Amendment) (Equal Treatment by Occupational Pension Schemes) Regulations 2023;
- (b) come into force immediately before the end of 2023;
- (c) extend to England and Wales and Scotland.

Amendment of the Pensions Act 2004

2.—(1) Section 171 (equal treatment) of the Pensions Act 2004(c) is amended as follows.

(2) In subsection (1), for “This section” substitute “Subsection (2)”.

(3) After subsection (4) insert—

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

(a) 2023 c. 28.

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

(c) 2004 c. 35.

(4B) If, apart from this subsection, any of the payment functions so far as it relates (directly or indirectly) to that pensionable service is or becomes, by virtue of the application of the guaranteed minimum pension 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 subsection (6), before the definition of “payment function” insert—

““guaranteed minimum pension provisions” means so much of the Pension Schemes Act 1993(a) and of any other enactment as relates to guaranteed minimum pensions (within the meaning of that Act);”.

Amendment of Chapter 3 of Part 5 of the Equality Act 2010

3.—(1) Chapter 3 of Part 5 of the Equality Act 2010(b) is amended as follows.

(2) After subsection (2) of section 64 (relevant types of work) insert—

“(3) Sections 66 to 68 and 70 apply where a person (A) is or has been in pensionable service under an occupational pension scheme (regardless of whether those sections also apply in A’s case by virtue of subsection (1)).”.

(3) In section 66 (sex equality clause)—

(a) at the beginning of subsection (2) insert “Where this section applies by virtue of section 64(1),”;

(b) after subsection (4) insert—

“(5) Where this section applies by virtue of section 64(3), a sex equality clause is a provision that has the effect that if, by virtue of the application of the guaranteed minimum pension provisions, a term of A’s 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 a sex equality rule would have effect in relation to it, is modified so as not to be less favourable.

(6) “Guaranteed minimum pension provisions” means so much of the Pension Schemes Act 1993 and of any other enactment as relates to guaranteed minimum pensions (within the meaning of that Act).”.

(4) In section 67 (sex equality rule)—

(a) at the beginning of subsection (2) insert “Where this section applies by virtue of section 64(1),”;

(b) after subsection (2) insert—

“(2A) Where this section applies by virtue of section 64(3), a sex equality rule is a provision that has the following effect—

(a) if, by virtue of the application of the guaranteed minimum pension provisions, a relevant term 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;

(b) if, by virtue of the application of those provisions, a term confers a relevant discretion 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.

(2B) “Guaranteed minimum pension provisions” means so much of the Pension Schemes Act 1993 and of any other enactment as relates to guaranteed minimum pensions (within the meaning of that Act).”.

(a) 1993 c. 48.

(b) 2010 c. 15.

Amendment of Schedule 9 (work: exceptions) to the Equality Act 2010

4. After sub-paragraph (1B) of paragraph 18(a) (benefits dependent on marital status, etc.) of Schedule 9 to the Equality Act 2010 insert—

“(1C) Sub-paragraph (1) 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.”.

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

Paul Maynard

Parliamentary Under Secretary of State
Department for Work and Pensions

4th December 2023

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 and 3 give effect to this principle by amending, respectively—

- (a) section 171 of the Pensions Act 2004 (c. 35), to modify certain functions of the Board of the Pension Protection Fund, and
- (b) sections 64, 66 and 67 of the Equality Act 2010 (c. 15), to modify certain provisions relating to the terms of a person’s work, or the rules of an occupational pension scheme of which they are a member,

to secure that those functions, terms and rules 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.

Regulation 4 codifies the right to non-discrimination on grounds of sexual orientation as regards employment and occupation established by the Framework Directive by amending paragraph 18 of Schedule 9 to the Equality Act 2010 to secure that that paragraph 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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(a) Paragraph 18 was amended by paragraph 17(2) and (3) of Schedule 4 to the Marriage (Same Sex Couples) Act 2013 (c. 30).

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