

SCHEDULES

SCHEDULE 5

Section 23.

EMPLOYMENT-RELATED SCHEMES FOR PENSIONS OR OTHER BENEFITS: EQUAL TREATMENT FOR MEN AND WOMEN

PART I

COMPLIANCE BY SCHEMES

Schemes to comply with the principle of equal treatment

- 1 Every employment-related benefit scheme shall comply with the principle of equal treatment.

The principle

- 2 (1) The principle of equal treatment is that persons of the one sex shall not, on the basis of sex, be treated less favourably than persons of the other sex in any respect relating to an employment-related benefit scheme.
- (2) Sub-paragraphs (3) to (6) below have effect, where applicable, for the purpose of determining whether a scheme complies with the principle of equal treatment.
- (3) Where any provision of the scheme imposes on both male and female members a requirement or condition—
- (a) which is such that the proportion of persons of the one sex (“the sex affected”) who can comply with it is considerably smaller than the proportion of persons of the other sex who can do so, and
 - (b) which is not justifiable irrespective of the sex of the members,
- the imposition of that requirement or condition shall be regarded as less favourable treatment of persons of the sex affected.
- (4) No account shall be taken of—
- (a) any difference, on the basis of the sex of members, in the levels of contributions—
 - (i) which members are required to make, to the extent that the difference is justifiable on actuarial grounds, or
 - (ii) which the employer makes, to the extent that the difference is for the purpose of removing or limiting differences, as between men and women, in the amount or value of money purchase benefits;
 - (b) any difference, on the basis of sex, in the amount or value of money purchase benefits, to the extent that the difference is justifiable on actuarial grounds;
 - (c) any special treatment for the benefit of women in connection with pregnancy or childbirth;

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- (d) any permitted age-related differences;
- (e) any difference of treatment in relation to benefits for a deceased member's surviving husband, wife or other dependants;
- (f) any difference of treatment in relation to any optional provisions available;
or
- (g) any provisions of a scheme to the extent that they have been specially arranged for the benefit of one particular member of the scheme;

but where the scheme includes any unfair maternity provisions, it shall to that extent be regarded as according less favourable treatment to women on the basis of sex.

- (5) Where the scheme treats persons of the one sex differently according to their marital or family status, that treatment is to be compared with the scheme's treatment of persons of the other sex who have the same status.
- (6) The principle of equal treatment applies in relation to members' dependants as it applies in relation to members.
- (7) If any question arises whether a condition or requirement falling within subparagraph (3)(a) above is or is not justifiable irrespective of the sex of the members, it shall be for those who assert that it is so justifiable to prove that fact.

- (8) In this paragraph—

“money purchase benefits” has the meaning given by section 84(1) of the 1986 Act, but with the substitution for references to a personal or occupational pension scheme of references to an employment-related benefit scheme;

“optional provisions available” means those provisions of a scheme—

- (a) which apply only in the case of members who elect for them to do so;
and
- (b) whose purpose is to secure for those members—
 - (i) benefits in addition to those otherwise provided under the scheme; or
 - (ii) a choice with respect to the date on which benefits under the scheme are to commence; or
 - (iii) a choice between any two or more benefits;

“permitted age-related difference” means any difference, on the basis of sex, in the age—

- (a) at which a service-related benefit in respect of old age or retirement commences; or
- (b) at which, in consequence of the commencement of such a benefit, any other service-related benefit either ceases to be payable or becomes payable at a reduced rate calculated by reference to the amount of the benefit so commencing.

- (9) For the purposes of this paragraph—

- (a) any reference to a person's family status is a reference to his having an unmarried partner or any dependants; and
- (b) a person “has an unmarried partner” if that person and some other person to whom he is not married live together as husband and wife.

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Non-compliance: compulsory levelling up

- 3
- (1) To the extent that any provision of an employment-related benefit scheme does not comply with the principle of equal treatment, it shall be overridden by this Schedule and the more favourable treatment accorded to persons of the one sex shall also be accorded to persons of the other sex.
 - (2) Where more favourable treatment is accorded to any persons by virtue of sub-paragraph (1) above, that sub-paragraph requires them, in accordance with the principle of equal treatment—
 - (a) to pay contributions at a level appropriate to the treatment so accorded; and
 - (b) to bear any other burden which is an incident of that treatment;but persons of either sex may instead elect to receive the less favourable treatment and, in accordance with the principle of equal treatment, pay contributions at the level appropriate to that treatment and bear the other burdens incidental to it.
 - (3) Where any provision of a scheme is overridden by sub-paragraph (1) above, nothing in this Schedule shall affect any rights accrued or obligations incurred during the period before the date on which that provision is so overridden.
 - (4) Sub-paragraph (1) above is without prejudice to the exercise, in compliance with the principle of equal treatment, of any power to amend the scheme.

Modification of schemes by the Occupational Pensions Board

- 4
- (1) On an application made to them in respect of an employment-related benefit scheme, other than a public service scheme, by persons competent to make such an application, the Occupational Pensions Board (the “Board”) may make an order modifying, or authorising the modification of, the scheme, for the purpose—
 - (a) of making provision implementing the principle of equal treatment otherwise than as provided by sub-paragraph (1) of paragraph 3 above; or
 - (b) of reflecting in the rules of the scheme any changes consequential upon the operation of that sub-paragraph.
 - (2) In relation to any employment-related benefit scheme, the persons competent to make an application to the Board under this paragraph are—
 - (a) the trustees or managers of the scheme;
 - (b) any person other than the trustees or managers who has power to alter the rules of the scheme;
 - (c) any person who is an employer of persons in service in an employment to which the scheme applies; and
 - (d) such other persons as regulations may specify, in relation to any category of schemes into which the scheme falls, as being proper persons to make an application for the purposes of this paragraph in respect of a scheme of that category.
 - (3) The Board shall not entertain an application for an order by them under this paragraph unless they are satisfied that the modification of the scheme in question—
 - (a) cannot be achieved otherwise than by means of such an order; or
 - (b) can only be achieved in accordance with a procedure which is liable to be unduly complex or protracted, or involves the obtaining of consents which cannot be obtained, or can only be obtained with undue delay or difficulty.

- (4) Subject to sub-paragraph (3) above, the Board may on an application under this paragraph make (with the consent of the applicants) an order under sub-paragraph (1) above and may exercise their powers under this paragraph from time to time; and the extent of their powers under this paragraph is not limited, in relation to any purposes for which they are exercisable, to the minimum necessary to achieve those purposes.
- (5) An order of the Board under sub-paragraph (1) above authorising the modification of a scheme shall be framed so as to confer the power of modification on such persons as the Board think proper (including persons who were not parties to the application made to the Board) and shall include such directions as the Board think appropriate indicating the modifications which they consider to be desirable.

Unfair maternity provisions

- 5 (1) In this Schedule “unfair maternity provisions”, in relation to an employment-related benefit scheme, means any provision—
 - (a) which relates to continuing membership of, or the accrual of rights under, the scheme during any period of paid maternity absence in the case of any woman who is (or who, immediately before the commencement of such a period, was) an employed earner and which treats such a woman otherwise than in accordance with the normal employment requirement; or
 - (b) which requires the amount of any benefit payable under the scheme to or in respect of any such woman, to the extent that it falls to be determined by reference to her earnings during a period which included a period of paid maternity absence, to be determined otherwise than in accordance with the normal employment requirement.
- (2) In the case of any unfair maternity provision—
 - (a) the more favourable treatment required by paragraph 3(1) above is treatment no less favourable than would be accorded to the women in accordance with the normal employment requirement;
 - (b) paragraph 3(2) above does not authorise the making of any such election as is there mentioned; and
 - (c) paragraph 4(1)(a) above does not authorise the making of any modification which does not satisfy the requirements of paragraph (a) above;

but, in respect of a period of paid maternity absence, a woman shall only be required to pay contributions on the amount of contractual remuneration or statutory maternity pay actually paid to or for her in respect of that period.
- (3) In this paragraph—
 - (a) “period of paid maternity absence” means any period—
 - (i) throughout which a woman is absent from work due to pregnancy or confinement; and
 - (ii) for which her employer (or, if she is no longer in his employment, her former employer) pays her any contractual remuneration or statutory maternity pay;
 - (b) “the normal employment requirement” is the requirement that any period of paid maternity absence shall be treated as if it were a period throughout which the woman in question works normally and receives the remuneration likely to be paid for doing so.

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Unfair family leave provisions

- 6 (1) Where an employment-related benefit scheme includes any unfair family leave provisions (irrespective of any differences on the basis of sex in the treatment accorded to members under those provisions), then—
- (a) the scheme shall be regarded to that extent as not complying with the principle of equal treatment; and
 - (b) subject to sub-paragraph (3) below, this Schedule shall apply accordingly.
- (2) In this Schedule “unfair family leave provisions” means any provision—
- (a) which relates to continuing membership of, or the accrual of rights under, the scheme during any period of paid family leave in the case of any member who is an employed earner and which treats such a member otherwise than in accordance with the normal leave requirement; or
 - (b) which requires the amount of any benefit payable under the scheme to or in respect of any such member to the extent that it falls to be determined by reference to earnings during a period which included a period of paid family leave, to be determined otherwise than in accordance with the normal leave requirement.
- (3) In the case of any unfair family leave provision—
- (a) the more favourable treatment required by paragraph 3(1) above is treatment no less favourable than would be accorded to the members in accordance with the normal leave requirement;
 - (b) paragraph 3(2) above does not authorise the making of any such election as is there mentioned; and
 - (c) paragraph 4(1)(a) above does not authorise the making of any modification which does not satisfy the requirements of paragraph (a) above;
- but, in respect of a period of paid family leave, a member shall only be required to pay contributions on the amount of contractual remuneration actually paid to or for him in respect of that period.
- (4) In this paragraph—
- (a) “period of paid family leave” means any period—
 - (i) throughout which a member is absent from work for family reasons; and
 - (ii) for which the employer pays him any contractual remuneration;
 - (b) “the normal leave requirement” is the requirement that any period of paid family leave shall be treated as if it were a period throughout which the member in question works normally but only receives the remuneration in fact paid to him for that period.

Meaning of “employment-related benefit scheme” etc.

- 7 In this Schedule—
- (a) “employment-related benefit scheme” means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employments so as to provide service-related benefits to or in respect of employed or self-employed earners—
 - (i) who have qualifying service in an employment of any such description or category, or

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- (ii) who have made arrangements with the trustees or managers of the scheme to enable them to become members of the scheme,
but does not include a limited scheme;
- (b) “limited scheme” means—
 - (i) any personal scheme for employed earners to which the employer does not contribute;
 - (ii) any scheme which has only one member, other than a personal scheme for an employed earner to which his employer contributes;
 - (iii) any contract of insurance which is made for the benefit of employed earners only and to which the employer is not a party;
- (c) “personal scheme” means any scheme or arrangement which falls within paragraph (a) above by virtue of sub-paragraph (ii) of that paragraph (or which would so fall apart from paragraph (b) above);
- (d) “public service scheme” has the meaning given by section 51(3)(b) of the 1973 Act;
- (e) “service-related benefits” means benefits, in the form of pensions or otherwise, payable in money or money’s worth in respect of—
 - (i) termination of service;
 - (ii) retirement, old age or death;
 - (iii) interruptions of service by reason of sickness or invalidity;
 - (iv) accidents, injuries or diseases connected with employment;
 - (v) unemployment; or
 - (vi) expenses incurred in connection with children or other dependants;
 and includes, in the case of a member who is an employed earner, any other benefit so payable to or in respect of the member in consequence of his employment.

Extension of ban on compulsory membership

- 8 Section 15(1) of the 1986 Act (which renders void any provision making membership of a pension scheme compulsory for an employed earner) shall apply in relation to a self-employed earner as it applies in relation to an employed earner, but with the substitution for references to a personal pension scheme of references to an employment-related benefit scheme which would be such a pension scheme if self-employed earners were regarded as employed earners.

Jurisdiction

- 9 (1) The court, on the application of any person interested, shall have jurisdiction to determine any question arising as to—
- (a) whether any provision of an employment-related benefit scheme does or does not comply with the principle of equal treatment; or
 - (b) whether, and with what effect, any such provision is overridden by paragraph 3 above.
- (2) In sub-paragraph (1) above “the court” means—
- (a) in England and Wales, the High Court or a county court; and
 - (b) in Scotland, the Court of Session or the sheriff court.

- (3) An application under sub-paragraph (1) above may be commenced in a county court notwithstanding—
- (a) any financial limit otherwise imposed on the jurisdiction of such a court; or
 - (b) that the only relief claimed is a declaration or an injunction.

Interpretation

- 10 Expressions other than “benefit” which are used in this Part of this Schedule and in the principal Act have the same meaning in this Part of this Schedule as they have in that Act.

Supplemental

- 11 In consequence of the foregoing provisions of this Schedule—
- (a) sections 53 to 56 of the Pensions Act (equal access to schemes for men and women), and
 - (b) section 64(3)(dd) of the 1973 Act (functions of the Occupational Pensions Board relating to equal access),
- shall cease to have effect.

Future repeal of actuarial provisions

- 12 The Secretary of State may by order repeal paragraph 2(4)(a)(i) above; and if and to the extent that he has not done so before 30th July 1999 it shall cease to have effect on that date.

PART II

AMENDMENT OF ENACTMENTS RELATING TO EMPLOYMENT

Equal Pay Act 1970 (c. 41)

- 13 In section 6 of the Equal Pay Act 1970 (equality clauses and pensions etc) in subsection (1A)(a) for the words following “1975” there shall be substituted the words “which is also an employment-related benefit scheme, within the meaning of Schedule 5 to the Social Security Act 1989, so far as those terms relate to any matter in respect of which the scheme has to comply with the principle of equal treatment in accordance with that Schedule; but”.

Sex Discrimination Act 1975 (c. 65)

- 14 (1) In section 4(1) of the Sex Discrimination Act 1975 (victimisation of complainants etc)—
- (a) in paragraphs (a), (b) and (c) after the words “Equal Pay Act 1970” there shall be inserted the words “or Part I of Schedule 5 to the Social Security Act 1989”; and
 - (b) at the end of paragraph (d) there shall be added the words “or proceedings under Part I of Schedule 5 to the Social Security Act 1989”.

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(2) In section 6 of that Act, in subsection (4) (disapplication of certain provisions in relation to death or retirement) for the words from “except” to “retirement, they” there shall be substituted the words “except as provided in subsections (4A) and (4B) below.

(4A) Subsection (4) does not prevent the application of subsections (1)(b) and (2) to provision in relation to retirement in so far as those subsections”.

(3) After subsection (4A) of that section there shall be inserted—

“(4B) Subsection (4) does not prevent the application of subsections (1)(b) and (2) to provision in relation to death or retirement in so far as those subsections render it unlawful for a person to discriminate against a woman—

- (a) in such of the terms on which he offers her employment as make provision in relation to the way in which he will afford her access to any benefits, facilities or services under an occupational pension scheme; or
- (b) in the way he affords her access to any such benefits, facilities or services; or
- (c) by refusing or deliberately omitting to afford her access to any such benefits, facilities or services; or
- (d) by subjecting her to any detriment in connection with any such scheme;

but an act of discrimination is rendered unlawful by virtue of this subsection only to the extent that the act relates to a matter in respect of which an occupational pension scheme has to comply with the principle of equal treatment in accordance with Part I of Schedule 5 to the Social Security Act 1989.

(4C) In the application of subsection to discrimination against married persons of either sex, Part I of Schedule 5 to the Social Security Act 1989 shall be taken to apply to less favourable treatment of married persons on the basis of their marital status as it applies in relation to less favourable treatment of persons on the basis of sex, and references to persons of either sex shall be construed accordingly.”

(4) At the end of that section there shall be added—

“(8) In this section “occupational pension scheme” means an occupational pension scheme, within the meaning of the Social Security Pensions Act 1975, which is also an employment-related benefit scheme, within the meaning of Schedule 5 to the Social Security Act 1989.”

Employment Protection (Consolidation) Act 1978 (c. 44)

15 In section 45 of the Employment Protection (Consolidation) Act 1978 at the end of subsection (2) (rights on return to work after maternity absence) there shall be added the words “but subject to the requirements of paragraph 5 of Schedule 5 to the Social Security Act 1989 (credit for the period of absence in certain cases).”