

EXPLANATORY MEMORANDUM TO
THE JUDICIAL PENSIONS (FEE PAID JUDGES) (AMENDMENT) REGULATIONS
2017

2017 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 These Regulations amend the Judicial Pensions (Fee-Paid Judges) Regulations 2017 (“2017 Regulations”) which established the Fee-Paid Judicial Pension Scheme (FPJPS). The purpose of the amendment is to add specified judicial offices to the FPJPS and clarify periods of service for which judicial office holders are eligible to accrue pension in accordance with those regulations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

- 4.1 The 2017 Regulations establish a pension scheme for eligible fee-paid judges which provides benefits for those office holders which are comparable to the pension benefits available for salaried judges under the “JUPRA scheme” established by the Judicial Pensions and Retirement Act 1993 (“1993 Act”) and regulations made under it. For the purposes of the 2017 Regulations, judicial offices are specified in the Schedule to those regulations.

5. Extent and Territorial Application

- 5.1 This instrument extends to the whole of the United Kingdom.
5.2 The territorial application of this instrument is to the United Kingdom.

6. European Convention on Human Rights

- 6.1 The Lord Chancellor and Secretary of State for Justice, The Right Honourable David Lidington MP has made the following statements regarding Human Rights:
- 6.2 The Employment Tribunal in *McCloud v MoJ* held that transitional provisions in the Judicial Pensions Regulations 2015 were not lawful under EU equality law and the Equality Act 2010. The Lord Chancellor is currently appealing that judgment to the Employment Appeal Tribunal. Given that these regulations extend the transitional provisions in the 2017 Regulations to an additional class of judicial office holders

(who would not otherwise benefit from transitional provision) and given the similarities between the obligations under EU law and the provisions of Article 14 of the Convention, the Lord Chancellor cannot, at the present time, certify that this legislation is compatible with the Convention Rights. The Lord Chancellor nevertheless considers that it is right to make these amendment regulations now to ensure that this class of judicial office holders is not unlawfully treated less favourably by reason of their previous fee-paid/part-time status. If the appeal against the judgment in *McCloud v MoJ* is ultimately unsuccessful steps will be taken to remove that incompatibility.

7. Policy background

- 7.1 The 2017 Regulations were implemented in April 2017 in order to provide a remedy following the judgments in the case of *O'Brien v MoJ* and related cases. In this litigation, it was determined that the absence of pension and other specified benefits for fee-paid judges amounted to less favourable treatment on the grounds of their part-time status and was unlawful. These regulations provide pension benefits for eligible current and former judicial offices in respect of their service from 7 April 2000 to 31 March 2015, and for service beyond that date in respect of those entitled to transitional protection. This instrument makes two changes to the 2017 Regulations.
- 7.2 Firstly, this instrument adds eight judicial offices to the Schedule and clarifies the periods when the respective office holders are eligible to receive a pension. This is necessary to make the correct provision for pension benefits from the dates specified as follows:
- Deputy Adjudicator, HM Land Registry (but only in relation to service in this office after 1st January 2009), Judge First-tier Tribunal (Property Chamber) HM Land Registry (but only in relation to service in this office after 1st January 2009), Judge First-tier Tribunal (Property Chamber) Residential Property (but only in relation to service in this office after 1st July 2013), Judge, First-tier Tribunal (Property Chamber) Agricultural Land and Drainage (but only in relation to service in this office after 1st July 2013), Judge First-tier Tribunal (Social Entitlement Chamber) Asylum Support (but only in relation to service in this office after 31st March 2007), Asylum Support Adjudicator (but only in relation to service in this office after 31st March 2007), Member (Chair only) First-tier Tribunal (Social Entitlement Chamber) Criminal Injuries Compensation (but only in relation to service in this office after 2nd November 2008) and Judge, First-tier Tribunal (Social Entitlement Chamber) Criminal Injuries Compensation (but only in relation to service in this office after 2nd November 2008).
- 7.3 The respective dates represent the point in time when comparator salaried office holders in the relevant jurisdictions had access to a pension under the JUPRA scheme. The pensionable service and remedy for the years prior to the respective dates is still the subject of ongoing litigation before the Employment Tribunal.
- 7.4 These regulations also add a newly created judicial office to the Schedule, namely President of the Welsh Tribunals, appointed under Part 3 of the Wales Act 2007. This enables future office holders to be members of the pension scheme established by the 2017 Regulations where eligible.

Consolidation

- 7.5 Consolidation will be considered when the O'Brien and Miller litigation has concluded.

8. Consultation outcome

- 8.1 The Ministry of Justice consulted on a draft of the 2017 Regulations from 15 September to 31 October 2016. This public consultation focussed on whether the draft provided the appropriate remedy for eligible fee-paid judicial office holders in respect of pension entitlement. The consultation set out the underpinning policy for determining the period for which respective office holders would be eligible to receive pension. The consultation response confirmed that the service for these offices would be pensionable under the 2017 Regulations from the date when the office holders' salaried judicial comparators became eligible for service under JUPRA. This instrument amends the legislation in line with this policy and related litigation decisions. We have also engaged with the respective judicial office holders affected by this amendment to inform them of the changes and responded to any queries raised, explaining the rationale.
- 8.2 In relation to the President of Welsh Tribunals, there was no requirement for a public consultation, however, we have engaged with the Welsh Government and the Lord Chief Justice, and their views have been reflected accordingly.

9. Guidance

- 9.1 No specific guidance is necessary in relation to this instrument. The Judicial Pensions Board (JPB) has oversight of the scheme established by the 2017 Regulations. The JPB is responsible for assisting the Lord Chancellor as the scheme manager to administer the Judicial Pension Schemes. A scheme guide will be available on the Judicial Pension Board website: www.gov.uk/government/groups/judicial-pension-board.
- 9.2 These judicial office holders will receive confirmation of their full pension arrangements from the Ministry of Justice when the litigation has concluded. In advance of this, the Ministry of Justice has issued communications to inform the respective judicial office holders about the provisions of this Instrument.
- 9.3 No specific guidance is deemed necessary in relation to the President of the Welsh Tribunals.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There are no new costs associated with the pension provision under this Instrument as they were included in the original valuation completed by the Government Actuary Department (GAD) of the overall pension liability owed to eligible fee-paid judiciary under the FPJPS. The costs of providing benefits under the FPJPS are accounted for within the Judicial Pension Scheme annual accounts, which are separate to those for the Ministry of Justice. This was calculated as an overall pension liability of £578m as at 31 March 2016. The Welsh Government is responsible for the employer costs related to adding the office of the President of the Welsh Tribunals to the scheme.
- 10.3 An impact assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The Judicial Pensions Board oversees the governance of the fee-paid pension scheme.

13. Contact

13.1 Harvey James at the Ministry of Justice (Telephone: 07980744401 or email: harvey.james@hmcts.gsi.gov.uk) can answer any queries regarding the instrument.