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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.

Commencement Information

- II** Sch. 5 Pt. I para. 1 partly in force; Sch. 5 Pt. I para. 1 not in force at Royal Assent see s. 33(2)(3); Sch. 5 Pt. I para. 1 in force for specified purposes at 23.6.1994 by S.I. 1994/1661, art. 2, Sch. Pt. I

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—
- 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
 - 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—
- any difference, on the basis of the sex of members, in the levels of contributions—
 - which members are required to make, to the extent that the difference is justifiable on actuarial grounds, or

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- (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;
- (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

F1

- (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 same meaning given by [F2section 181(1) of the Pension Schemes Act 1993], 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

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- (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.

Textual Amendments

- F1** Words in Sch. 5 para. 2(4) repealed (1.10.2010) by Equality Act 2010 (c. 15), ss. 211, 216, Sch. 27 Pt. 1 (with ss. 6(4), 205) (as substituted by S.I. 2010/2279, arts. 1(2), 13, Sch. 2); S.I. 2010/2317, art. 2(15)(c)(f) (with art. 15)
- F2** Words in Sch. 5 para. 2(8) substituted (7.2.1994) by 1993 c. 48, s. 190, Sch. 7 para. 2(a); S.I. 1994/86, art. 2

Commencement Information

- I2** Sch. 5 para. 2 partly in force; Sch. 5 para. 2 not in force at Royal Assent see s. 33(2); Sch. 5 para. 2(1)(2)(4)(c)(5)(9) in force at 23.6.1994 by S.I. 1994/1661, art. 2, Sch. Pt. I

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.

Commencement Information

- I3** Sch. 5 para. 3 partly in force; Sch. 5 para. 3 not in force at Royal Assent see s. 33(2)(3); Sch. 5 para. 3(1)(3)(4) in force for specified purposes at 23.6.1994 by S.I. 1994/1661, art. 2, Sch. Pt. I; Sch. 5 para. 3 in force for further certain purposes at 24.8.2007 by S.I. 2007/2445, art. 2(b)

Modification of schemes by the Occupational Pensions Board

^{F3}4

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Textual Amendments

- F3** Sch. 5 Pt. 1 para. 4 repealed (6.4.1997) by 1995 c. 26, ss. 151, 177, Sch. 5 para. 13(2), Sch. 7 Pt. III; S.I. 1997/664, art. 2, Sch. Pt. II

Unfair maternity provisions

5 **F4**

Textual Amendments

- F4** Sch. 5 para. 5 repealed (1.10.2010) by Equality Act 2010 (c. 15), ss. 211, 216, Sch. 27 Pt. 1 (with ss. 6(4), 205) (as substituted by S.I. 2010/2279, arts. 1(2), 13, Sch. 2); S.I. 2010/2317, art. 2(15)(c)(f) (with art. 15)

^{F5}Unfair paternity leave provisions

Textual Amendments

- F5** Sch. 5 paras. 5A, 5B inserted (6.4.2005) by Pensions Act 2004 (c. 35), ss. 265(1), 322(1) (with s. 313); S.I. 2005/275, art. 2(7), Sch. Pt. 7 (subject to art. 2(12))

- 5A (1) Where an employment-related benefit scheme includes any unfair paternity 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), this Schedule shall apply accordingly.
- (2) In this paragraph “unfair paternity leave 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 paternity leave in the case of any member who is (or who, immediately before the commencement of such a period, was) an employed earner and which treats such a member 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 member, to the extent that it falls to be determined by reference to earnings during a period which included a period of paid paternity leave, to be determined otherwise than in accordance with the normal employment requirement.
- (3) In the case of any unfair paternity leave provision—
- (a) the more favourable treatment required by paragraph 3(1) is treatment no less favourable than would be accorded to the member in accordance with the normal employment requirement; and
 - (b) paragraph 3(2) does not authorise the making of any such election as is there mentioned;

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but, in respect of any period of paid paternity leave, a member shall only be required to pay contributions on the amount of contractual remuneration [^{F6}, ordinary statutory paternity pay or additional statutory paternity pay] actually paid to or for him in respect of that period.

(4) In this paragraph—

“period of paid paternity leave”, in the case of a member, means a period—

- (a) throughout which the member is absent from work in circumstances where sub-paragraph (5), (6) [^{F7}, (7) or (8)] applies, and
- (b) for which the employer (or if he is no longer in his employment, his former employer) pays him any contractual remuneration [^{F8}, ordinary statutory paternity pay or additional statutory paternity pay]; and

“the normal employment requirement” is the requirement that any period of paid paternity leave shall be treated as if it were a period throughout which the member in question works normally and receives the remuneration likely to be paid for doing so.

(5) This sub-paragraph applies if—

- (a) the member’s absence from work is due to the birth or expected birth of a child, and
- (b) the member satisfies the conditions prescribed under section 171ZA(2)(a)(i) and (ii) of the Social Security Contributions and Benefits Act 1992 in relation to that child.

(6) This sub-paragraph applies if—

- (a) the member’s absence from work is due to the placement or expected placement of a child for adoption under the law of any part of the United Kingdom, and
- (b) the member satisfies the conditions prescribed under section 171ZB(2)(a)(i) and (ii) of that Act in relation to that child.

(7) This sub-paragraph applies if—

- (a) the member’s absence from work is due to the adoption or expected adoption of a child who has entered the United Kingdom in connection with or for the purposes of adoption which does not involve the placement of the child for adoption under the law of any part of the United Kingdom, and
- (b) the member satisfies the conditions prescribed under section 171ZB(2)(a)(i) and (ii) of that Act (as applied by virtue of section 171ZK of that Act (adoption cases not involving placement under the law of the United Kingdom)) in relation to that child.

[This sub-paragraph applies if—

- ^{F9}(8) (a) the member's absence from work is due to the fact that he is caring for a child, and
- (b) in relation to that child, the member satisfies the conditions prescribed—
 - (i) under section 171ZEA(2)(a)(i) and (ii) of that Act,
 - (ii) under section 171ZEB(2)(a)(i) and (ii) of that Act, or
 - (iii) under section 171ZEB(2)(a)(i) and (ii) of that Act as applied by virtue of section 171ZK of that Act (adoption cases not involving placement under the law of the United Kingdom).]

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Textual Amendments

- F6** Words in Sch. 5 para. 5A(3) substituted (6.4.2010) by [Work and Families Act 2006 \(c. 18\)](#), ss. 11(1), 19(1), [Sch. 1 para. 1\(2\)](#); S.I. 2010/495, [art. 4\(d\)](#)
- F7** Words in Sch. 5 para. 5A(4)(a) substituted (6.4.2010) by [Work and Families Act 2006 \(c. 18\)](#), ss. 11(1), 19(1), [Sch. 1 para. 1\(3\)\(a\)](#); S.I. 2010/495, [art. 4\(d\)](#)
- F8** Words in Sch. 5 para. 5A(4)(b) substituted (6.4.2010) by [Work and Families Act 2006 \(c. 18\)](#), ss. 11(1), 19(1), [Sch. 1 para. 1\(3\)\(b\)](#); S.I. 2010/495, [art. 4\(d\)](#)
- F9** Sch. 5 para. 5A(8) inserted (6.4.2010) by [Work and Families Act 2006 \(c. 18\)](#), ss. 11(1), 19(1), [Sch. 1 para. 1\(4\)](#); S.I. 2010/495, [art. 4\(d\)](#)

Modifications etc. (not altering text)

- C1** Sch. 5 para. 5A: power to apply (with modifications) conferred (6.4.2005) by [Pensions Act 2004 \(c. 35\)](#), ss. 265(2), 322(1) (with s. 313); S.I. 2005/275, [art. 2\(7\)](#), Sch. Pt. 7 (subject to [art. 2\(12\)](#))

Unfair adoption leave provisions

- 5B (1) Where an employment-related benefit scheme includes any unfair adoption 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), this Schedule shall apply accordingly.
- (2) In this paragraph “unfair adoption leave 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 adoption leave in the case of any member who is (or who, immediately before the commencement of such a period, was) an employed earner and which treats such a member 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 member, to the extent that it falls to be determined by reference to earnings during a period which included a period of paid adoption leave, to be determined otherwise than in accordance with the normal employment requirement.
- (3) In the case of any unfair adoption leave provision—
- (a) the more favourable treatment required by paragraph 3(1) is treatment no less favourable than would be accorded to the member in accordance with the normal employment requirement; and
 - (b) paragraph 3(2) does not authorise the making of any such election as is there mentioned;
- but, in respect of any period of paid adoption leave, a member shall only be required to pay contributions on the amount of contractual remuneration or statutory adoption pay actually paid to or for him in respect of that period.
- (4) In this paragraph—
- “period of paid adoption leave”, in the case of a member, means a period—
- (a) throughout which the member is absent from work in circumstances where sub-paragraph (5) or (6) applies, and

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- (b) for which the employer (or, if he is no longer in his employment, his former employer) pays him any contractual remuneration or statutory adoption pay; and

“the normal employment requirement” is the requirement that any period of paid adoption leave shall be treated as if it were a period throughout which the member in question works normally and receives the remuneration likely to be paid for doing so.

(5) This sub-paragraph applies if—

- (a) the member’s absence from work is due to the placement, or expected placement, of a child for adoption under the law of any part of the United Kingdom, and
- (b) the member is a person with whom the child is, or is expected to be, placed for such adoption.

(6) This sub-paragraph applies if—

- (a) the member’s absence from work is due to the adoption or expected adoption of a child who has entered the United Kingdom in connection with or for the purposes of adoption which does not involve the placement of the child for adoption under the law of any part of the United Kingdom, and
- (b) the member is a person by whom the child has been or is expected to be adopted.]

Modifications etc. (not altering text)

- C2** Sch. 5 para. 5B: power to apply (with modifications) conferred (6.4.2005) by [Pensions Act 2004 \(c. 35\)](#), [ss. 265\(2\), 322\(1\)](#) (with [s. 313](#)); [S.I. 2005/275](#), [art. 2\(7\)](#), [Sch. Pt. 7](#) (subject to [art. 2\(12\)](#))

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—

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- (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.

Commencement Information

I4 Sch. 5 Pt. I para. 6 partly in force; Sch. 5 Pt. I para. 6 not in force at Royal Assent see s. 33(2)(3); Sch. 5 Pt. I para. 6(1)(2)(3)(a)(4) in force at 23.6.1994 by S.I. 1994/1661, art. 2, Sch. Pt. II

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
 - (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);

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- (d) “public service scheme” has [^{F10}the same meaning as “public service pension scheme” in section 1 of the Pension Schemes Act 1993];
- (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.

Textual Amendments

F10 Words in Sch. 5 para. 7(d) substituted (7.2.1994) by 1993 c. 48, s. 190, Sch. 7 para. 2(b); S.I. 1994/86, art. 2

Commencement Information

I5 Sch. 5 Pt. I para. 7 partly in force; Sch. 5 Pt. I para. 7 not in force at Royal Assent see s. 33(2)(3); Sch. 5 Pt. I para. 7(a)-(c)(e) in force for specified purposes at 23.6.1994 by S.I. 1994/1661, art. 2, Sch. Pt. I

PROSPECTIVE

Extension of ban on compulsory membership

- 8 [^{F11}Section 160(1) of the Pension Schemes Act 1993] (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.

Textual Amendments

F11 Words in Sch. 5 para. 8 substituted (7.2.1994) by 1993 c. 48, s. 190, Sch. 7 para. 2(c); S.I. 1994/86, art. 2

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

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- (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.

Commencement Information

I6 Sch. 5 Pt. I para. 9 partly in force; Sch. 5 Pt. I para. 9 not in force at Royal Assent see s. 33(2)(3); Sch. 5 Pt. I para. 9 in force for specified purposes at 23.6.1994 by S.I. 1994/1661, art. 2, Sch. Pt. I

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.

Commencement Information

I7 Sch. 5 Pt. I para. 10 partly in force; Sch. 5 Pt. I para. 10 not in force at Royal Assent see s. 33(2)(3); Sch. 5 Pt. I para. 10 in force for specified purposes at 23.6.1994 by S.I. 1994/1661, art. 2, Sch. Pt. I

Supplemental

^{F12}11

Textual Amendments

F12 Sch. 5 para. 11 repealed (7.2.1994) by 1993 c. 48, s. 118, Sch. 5 Pt.I; S.I. 1994/86, art. 2

PROSPECTIVE

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.

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PART II

AMENDMENT OF ENACTMENTS RELATING TO EMPLOYMENT

Equal Pay Act 1970 (c.41)

F13¹³

Textual Amendments

F13 Sch. 5 para. 13 repealed (7.2.1994) by 1993 c. 48, s. 188, **Sch. 5 Pt.I**; S.I. 1994/86, **art. 2**

Sex Discrimination Act 1975 (c.65)

F14¹⁴

Textual Amendments

F14 Sch. 5 Pt. II para. 14 repealed (6.4.1997) by 1995 c. 26, s.177, **Sch. 7 Pt. I**; S.I. 1997/664, art. 2, **Sch. Pt. II**

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

F15¹⁵

Textual Amendments

F15 Sch. 5 para. 15 repealed (10.6.1994) by 1993 c. 19, s. 51, **Sch.10**; S.I. 1994/1365, art. 2, **Sch.** (with transitional provisions in **art. 3**)

Status:

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