BMA

Pension contribution alternative reward policy

Policy descriptor

This policy outlines arrangements and options for employees who are current active members of the NHS Pension Scheme (the NHS Scheme) who may become affected by the annual allowance and lifetime allowance in respect of their pension savings in registered pension schemes in the UK.

Contents and summary

1. Introduction

1.1. This policy outlines an option for employees who are current active members of the NHS Pension Scheme (the NHS Scheme) who may become affected by the annual or lifetime allowances in respect of their pension savings in registered pension schemes in the UK. For most employees, it will likely be in their best financial interests to remain in the NHS Pension Scheme. This policy is only intended for those employees affected by these tax issues and sets out one option for these individuals. This may not be the best financial option for affected employees and so individuals should consider this policy and any associated information carefully before making a decision. Employees are strongly encouraged to obtain their own financial advice before making any changes.

1.2. This policy has been introduced to address operational risks that have been identified as a result of the pension tax regime. In particular, the Trust has experienced a number of requests for reduced contractual hours, a reluctance to take on additional work and a desire to focus on private work as a direct result of the pension tax regime, in particular following the introduction of the tapered annual allowance. This policy is an attempt to address these operational issues by setting out an alternative option. Other options for addressing this issue may be available.

1.3. This policy does not form part of any employee's contract of employment and the Trust may amend or remove it as its sole and absolute discretion.

1.4. This policy will come into effect on 1st October 2019. No retrospective payments would be made for those eligible staff who had opted out of the pension scheme prior to the approval of the policy, but all eligible staff - irrespective of whether they had previously opted out - may access the restructuring payments from the date the policy is initiated.

1.5. In July 2019, the Government published a consultation on proposals to enable high-earning clinicians to halve pension contributions in exchange for halving the rate of pensions growth. In August 2019, it was then announced that the Department of Health and Social Care will open a new consultation replacing this consultation to enable senior clinicians to have full flexibility over the amount they put into their pension pots. It may be that legislative change in this area is on the horizon, but nothing is certain at present.

2. Purpose

2.1. To provide an optional alternative to pension contribution for those employees who can demonstrate that they are impacted by the pension tax thresholds and have decided to opt out of the pension scheme.

3. Lifetime and annual allowance tax limits

3.1. The pension tax regime imposes limits on the value of pension savings that an individual can build up (with the benefit of tax reliefs) each year and over the course of a lifetime.

3.2. These limits are known as the Annual Allowance (AA), and the Lifetime Allowance (LTA).

4. Annual allowance

4.1. While there are no limits on the amount of pension savings an individual may make each tax year, the AA is the maximum amount of saving that you can make in a registered pension scheme each tax year without incurring a tax charge.

4.2. For the 2021/22 tax year the AA is £40,000. Any pension savings in excess of this will be subject to an annual allowance tax charge. The government may change these limits in the future. Different annual allowance limits may to apply to any separate defined contribution pension savings you may have.

4.3. From April 2016, the annual allowance for "high income individuals" tapers was introduced from £40,000 to £10,000 depending on the individual's level of income. From 2020, following changes by Government, those affected are those with income (less pension contributions) from all sources over £200,000 and income including pension contributions of over £240,000. For these individuals, for every £2 of income (including pension contributions) earned over £240,000 will reduce their annual allowance by £1 subject to a maximum reduction of £30,000 at £300,000. Once an income goes above £300,000, the annual allowance gradually falls from £10,000 to £4,000 meaning that it is £4,000 only for anybody earning in excess of £312,000. You can work out if the taper applies to you here: https://www.gov.uk/guidance/pension-schemes-work-out-your-tapered-annual-allowance.

4.4. As the calculation of the taper is based on levels of pensionable and non-pensionable income from all sources, it is likely that requests Trusts are seeing for reduced hours or a reluctance to take on additional shifts are based on concerns around the impact of the tapered annual allowance.

4.5. Currently unused AAs from the preceding three tax years can be carried forward, and these can reduce or in some cases eliminate an AA charge that would otherwise apply.

4.6. If you exceed your AA you will have to report this in your annual tax return, and any pension savings which exceed the AA will be taxed at your marginal rate.

4.7. If an annual allowance tax charge arises, you may (depending on the circumstances) be able to request that the NHS Scheme pays the tax charge on your behalf. This means that any tax charge is paid from your pension rather than you having to pay this from your other savings. This is referred to as "scheme pays". Further information on scheme pays for the NHS Scheme can be found here: https://www.nhsbsa.nhs.uk/member-hub/annual-allowance.

5. Lifetime allowance

5.1. While there are no limits on the amount of pension you can build up or the amount which can be paid into your pension arrangement over the course of your working life, the LTA is the maximum amount of pension savings that you can build up in all of your registered pension schemes without incurring a tax charge.

5.2. For the 2021/22 tax year the lifetime allowance is set at £1,073,100 (unless you have lifetime allowance protection). The LTA will be indexed rising annually in line with the increase in the Consumer Prices Index (CPI). The government may decide to change these limits in the future. Current HMRC limits in place from time to time can be found here: https://www.gov.uk/tax-on-your-private-pension/lifetime-allowance.

5.3. The test against LTA is normally assessed at the date that any of your benefits are drawn, or age 75 if you have not taken your benefits by then. This is known as a benefit crystallisation event.

5.4. Currently, in basic terms, pension savings which exceed the LTA on the date of a benefit crystallisation event will be subject to a one-off tax charge of 25% and will then be taxed at your marginal income tax rate. Additionally, any benefits above the LTA taken as a lump sum payment will be subject to a tax charge of 55%.

5.5. Those staff with pension benefits that are approaching the lifetime allowance value may wish to discuss their options with an independent financial advisor.

6. How do annual and lifetime allowances operate?

6.1. The AA and LTA operates differently dependent on the relevant pension scheme arrangement, as summarised in the table below:

	AA	LTA
Defined contribution	Total amount of contributions paid in by you or anyone else.	Capital value of all pension pots that goes towards paying benefits, however you decide to take them.
Defined benefit (such as the NHS Scheme)	The annual increase in the pension benefits promised to you when you retire in accordance with the rules of the scheme.	Calculated using a set formula of usually 20 times the pension you get in the first year plus your lump sum.

If you have been building up pension benefits or have pensions savings in more than one registered pension scheme in the UK, the you will need to add up the amount in all the pension schemes you belong to when determining if you are approaching or have reached the AA or the LTA (as applicable).

7. Your options

7.1. If you are currently an active member of the NHS Scheme, and will be affected by the AA or LTA you can:

a. Continue in the NHS Scheme and bear any additional tax charges that arise; or

b. You can opt out of the NHS Scheme and be paid a separate cash payment as explained in 9.2 below (“Separate Cash Payment”).

If you opt out of the NHS Scheme you will become a deferred member. You will also not be able to make any further money purchase additional voluntary contributions into the NHS Scheme.

The Separate Cash Payment that will be paid to you in the event that you opt out of the NHS Pension Scheme will be the sum equivalent to the Employer’s Contribution (amount that the employer would pay into the relevant NHS Pension Scheme if you were still a member of that NHS Pension Scheme) net of the employer’s National Insurance contributions, maintaining cost neutrality to the NHS. This will be paid as a supplement to your salary and so will be subject to income tax.

From 01.04.2019 this will be 17.75% of your pensionable pay (20.6% of pensionable pay net of employer’s national insurance contributions at a rate of 13.8%).

Your pensionable pay for the purpose of calculating the Separate Cash Payment will be determined by the Trust but will be based on what your pensionable pay would have been for the purpose of calculating employer contributions to the NHS Scheme had you continued to participate in the NHS Scheme.

7.2. If you opt out of the NHS Pension Scheme it is your responsibility to provide the pension scheme administrator with effective notice of the opt-out. You must provide the Trust with a copy of this notification and evidence that the opt-out is effective, before any cash payment will be paid.

7.3. If you opt out of the NHS Scheme there may be a significant impact on the level of benefits you may receive from the NHS Scheme. In particular, there is likely to be a notable reduction in your ill-health benefits and death benefits from the NHS Scheme, and benefits if you were to be made redundant. You should carefully review and consider the impact of opting out of the NHS Scheme on all of your benefits.

7.4. This is only one option that may be available to you. Other options may be available. If you are concerned about this issue, we suggest you discuss the matter with the Trust to determine the options available to you.

8. Impact of the separate cash payment

8.1. The Separate Cash Payment would not form part of your base salary and would not be included in the calculation of any overtime, bonus, long-term incentive plan, or other benefit entitlements that you may have.

8.2. Although not forming part of your base salary, the Separate Cash Payment will increase the amount that you receive each month. It will also impact on the following:

a. The amount of holiday pay received by you. Such calculation will include an element to reflect the Separate Cash Payment.

b. The amount of any redundancy pay calculation, but only in so far as the statutory cap (currently £508). Where your week's pay is higher than the statutory cap applicable at the point of redundancy, then the Separate Cash Payment will not be included in the calculation.

8.3. The Separate Cash Payment would be paid in equal monthly instalments in arrears. Payments would be subject to deduction for income tax and national insurance contributions. You may wish to consider whether it would be financially beneficial to you to receive the Separate Cash Payment (subject to income tax and national insurance contributions) as compared with paying an additional pension tax charge by staying in the NHS Scheme, as it will count towards threshold and adjusted income for the assessment of Annual Allowance liability. You should also consider the effect on your pension benefits by staying in the Scheme versus opting out. You are strongly encouraged to obtain your own financial advice.

8.4. As noted at the onset of this policy document, the Trust may amend or remove the policy at any time. The Trusts' discretion is absolute in relation to the policy as a whole and/or its ongoing application to any individual employee, and that discretion will be exercised taking into account the purpose of this policy as set out in paragraph 1.2 above (i.e. there will need to be a clear and justifiable operational need to retain the member of staff before the Trust can agree to making a Separate Cash Payment).

9. Making a request

9.1. In order to make a request under this policy you must provide evidence that you are affected (or about to be affected) by the AA (including the tapered AA) or the LTA if your current pension arrangements continue.

9.1. Individuals are responsible for obtaining whatever advice is necessary for them to make an informed decision, including where appropriate (though not limited to) professional advice from an accountant or independent financial advisor, guidance from the NHS pension scheme (https://www.nhsbsa.nhs.uk/nhs-pensions), information from reputable sources such as professional organisations and unions, HM Revenue & Customs

9.2. Retrospective Evidence that you are or would be affected by:

a. The AA will usually be in the form of acceptable document evidence from NHS Business Services (and any other applicable pension provider) confirming the annual increase in you NHS pension benefits (and any other contributions paid to any other applicable pension scheme) and acceptable documentary evidence confirming that you may be subject to an annual allowance tax charge (note that if you are subject to the tapered annual allowance this may take the form of proof of earnings from all income sources);

b. The LTA will usually be in the form of confirmation (such as benefit statements) from all your pension arrangements detailing your total pension entitlement

9.3. Prospective Evidence that you will be affected will typically be in the form of pension/pay modelling data using evidence from sources contained within 9.2 & 9.3 taking into account, for example, incremental pay progression and changes in working patterns and/or proof of projected income from multiple sources.

9.4. If your request is granted and the Trust subsequently determines that you that you did not have reasonable grounds to anticipate being subject to AA/LTA charge (as applicable), any sums paid to you as cash payments in accordance with this policy may be deducted from your salary or any other sums owed to you by the Trust if determined appropriate and reasonable in the circumstances. Vulnerability to AA charge will be judged with regard to the possibility of large Pension Input Amounts in future years through, for example, incremental progression.

9.5. If you are interested in taking advantage of this policy, you should speak to the HR department before submitting a formal request to change your current pension arrangements. You will be provided with a copy of a Request Form, which will require completing and submitting with the relevant evidence to make a formal request.

9.6. In some cases we will need to have a meeting with you before making a decision.

9.7. Your request should be made in good time and ideally at least two months before you would like the changes to take effect. The Trust accepts no responsibility for changes to pension benefits or arrangements not being made in sufficient time to avoid the impact of the AA or LTA (as applicable).

9.8. If your request is accepted, or where the Trust proposes an alternative to the arrangements you requested, we will write to you with details of the new arrangements, an explanation of the changes to your contract of employment, and the date on which the new arrangements will commence. You will be asked to sign and return a copy of the letter. This will be placed on your personnel file to confirm the variation of your terms of employment.

9.9. Changes to your terms of employment will be permanent. However, the Separate Cash Payment will apply to your current role only. In the event that you apply for or otherwise change roles, then the continuation of the Separate Cash Payment will be at the absolute discretion of the Trust, although not unreasonably withheld.

9.10. If your request is refused you will not be able to make another request to change your pension arrangements by means of this policy until twelve months after the date of your most recent request, unless there has been a change in circumstances in terms of how the AA or the LTA (as applicable) affects you. You may still have a separate right to opt-out of the NHS Scheme or discuss alternative options with your Trust.

10. Your responsibilities

10.1. The Trust cannot advice you if the options set out above will be right for you. If you believe that you may be affected by the AA or the LTA (as applicable) you must take a decision based on your individual circumstances and we strongly advise you take independent financial advice. Some Trade Unions (including the BMA) offer advice to their members as part of their membership offering.

10.2. Evidence that you have taken independent financial advice (such as a statement from your Financial Advisor) or a statement from you that you have fully understood the risks of choosing a particular option with regard to your pension will need to be submitted with your Request Form. The Trust accepts no liability or responsibility for the consequences of any changes to your pension benefits or arrangements, or consequences of no changes being made.

10.3. The Trust will not provide you with financial advice. You may receive certain notifications from the NHS Pension Scheme about your annual and lifetime allowances. However, ultimately you are responsible for keeping track of your total pension benefits and for managing your personal tax allowances and affairs. You are responsible for notifying the Trust if you are affected by the AA or the LTA and wish for your pension arrangements to be changed in accordance with this Policy.

10.4. You are responsible for monitoring the AA and the LTA limits (as applicable) in place from time to time. If you are affected by the AA or the LTA (as applicable) it is your responsibility to report this to HMRC and to ensure that any tax charges are paid.

11. Automatic enrolment

11.1. If you opt out of the NHS Scheme the Trust will be under an obligation to automatically re-enrol you into a qualifying pension scheme in the future (unless you have LTA protection or are not eligible for automatic enrolment). This may be the NHS Scheme. You will need to arrange with the Trust's Pension Manager to opt out of membership of any qualifying pension scheme you are re-enrolled to before contributions are paid to ensure that further pension benefits do not start to accrue. If you choose to remain within that qualifying pension scheme, any Separate Cash Payment would be reviewed and could be stopped or adjusted to take into account the employer contributions being paid on your behalf.

12. Monitoring

A report will be produced six monthly in order to monitor the demand, financial impact and in line with any legislative or national changes. This will be reviewed through the Trust Executive Committee.

13. References

NHS Employers – Lifetime Allowance and Annual Allowance

14. Workforce planning & development considerations

The committee/group responsible for the development of this policy will work with staff from the Workforce Planning and Development service to support the development/ maintenance of the competences required by staff in various roles throughout the organisation/service to ensure that the policy can be implemented safely and effectively to enable high quality delivery of services.

Signed on Behalf of Trust

Signed on Behalf of Staff Side

Date for Review

Appendix A

Equality impact compliance assessment

1. General

Title of document	Pension contribution alternative award assessment
Purpose of document	
Intended scope	Members of the NHS Pension Scheme

2. Consultation

Which groups/associations/ bodies or individual were consulted in the formulation of this document?	Local negotiating committee Local partnership forum
What was the impact of any feedback on the document?	Feedback was used in the development of this policy.
Who was involved in the approval of the final document?	Trust executive committee
Any other comments to record?	None

3. Equality Impact Assessment

Does the document unfairly affect certain staff or groups of staff? If so, please state how this is justified.	No See Appendix E
What measures are proposed to address any inequity?	-
Can the document be made available in alternative formal or in translation?	-

4. Compliance Assessment

Does the document comply with relevant employment legislation? Please specify.	Yes. Pension Automatic Enrolment (Pensions Act 2008)

5. Document assessed by:

Name	
Post title/position	
Date	

Appendix B

Privacy Impact Assessment Screening Questionnaire

Project/Policy/Procedure Title: Pension Contribution Alternative Award Policy

Project Lead:

Date:

Assessment question		Yes	No
1	Does the project/policy/procedure use or suggest new or extra technologies that will have a greater impact on privacy?		x
Comments:			
2	Is the justification for the new data-handling unclear or unpublished?		x
Comments:			
3	Does the project/policy/procedure involve an additional use of existing identifier?		x
Comments:			
4	Does the project/policy/procedure involve use of a new identifier for multiple purposes?		x
Comments:			
5	Does the project/policy/procedure involve new or substantially changed identity authentication requirements?		x
Comments:			
6	Will the project/policy/procedure result in handling of significant amount of new data about each person, or significant change in exiting data-holdings?		x
Comments:			
7	Will the project/policy/procedure result in the handling of new data about a significant number of people or a significant change in the population coverage?		x
Comments:			

8	Does the project/policy/procedure involve new linkage of personal data in other collections, or significant changes in data linkage?		x
Comments:			
9	Does the project/policy/procedure involve new or changed data collection policies or practise that may be unclear or intrusive?		x
Comments:			
10	Does the project/policy/procedure involve new or changed data quality assurance processes and standards?		x
Comments:			
11	Does the project/policy/procedure involve new or changed data security arrangements?		x
Comments:			
12	Does the project/policy/procedure involve new or changed data access or disclosure arrangements?		x
Comments:			
13	Does the project/policy/procedure involve new or changed data retention arrangements?		x
Comments:			
14	Does the project/policy/procedure involve changing the medium of disclosure for publicly available information in such a way that data becomes more readily available that it was before?		x
Comments:			
15	Will the project give rise to new or changed data-handling that is in any way exempt from legislative privacy protections?		x
Comments:			
Does the project/policy/procedure require further privacy impact assessment?			x

If the project/policy/procedure does not require any further Privacy Impact Assessment, this document should be signed by the Project Lead/Policy Author and relevant Information Asset Owner. The project/policy/procedure should state that it is exempt from a Privacy Impact Assessment, and this questionnaire should be kept with the project/policy/procedure documentation.

No further Privacy Impact Assessment need.

Signed______________________________ Date_______________________
Project Lead/Policy Author

Signed______________________________ Date_______________________
Information Asset Owner

Appendix C

Pension contribution alternative award policy

Request Form for Separate Cash Payment

Full name	
Job title	
ESR assignment number	
NHS Pension Scheme membership reference	
Proposed opt out date of the NHS Pension Scheme	

I confirm that:

- I have read and understood the Pension Contribution Alternative Award Policy.
- I am affected (or about to be affected) by the Annual Allowance or Lifetime Allowance if my current pension arrangements continue and have provided evidence of this (as per section 9.3 & 9.4 of the policy).
- I have obtained whatever advice is necessary to allow me to make an informed decision in relation to this application and have provided evidence of this (as per section 10.2 of the policy).

I understand that:

- The policy and the separate cash payment do not form part of my contract of employment.
- The Trust may amend or remove this policy and payment at its sole and absolute discretion.
- The separate Cash Payment does not form part of my base salary and is not included in the calculation of any overtime, bonus, long-term incentive plan, or other benefit entitlements that I may have.
- Payments will be subject to deduction for income tax and national insurance contributions.
- The Trust accepts no liability or responsibility for the consequences of any changes to my pension benefits or arrangements, or any consequences of no changes being made. I have considered and understand that opting out of the NHS Pensions Scheme may have a significant effect on my pension, ill health, death and redundancy benefits from the NHS Pension Scheme.

Signed	
Name	
Date	

Appendix D

Pension Contribution Alternative Award Policy

Application Process for Separate Cash Payment

Employee identifies that they are affected (or about to be affected) by the Annual Allowance or Lifetime Allowance if their current pension arrangements continue.

↓

Employee obtains whatever advice is necessary for them to make an informed decision, as outlined in Section 9.2 of the policy.

↓

Employee collects evidence that they are affected or about to be affected by the Annual Allowance of Lifetime Allowance. Acceptable forms of evidence are outlined in Section 9.3 & 9.4 of the policy.

↓

Employee contacts HR and is provided with a Request Form.

↓

Employee completes Request Form and submits form and evidence to HR. This should be done at least two months before the employee would like the changes to take effect.

↓

HR considers request and evidence and responds to employee within one month.

Request approved	Request declined
↓	↓
HR writes to employee to confirm arrangements and employee is asked to sign and return a copy of this letter.	Employee is able to re-apply after 12 months if they wish to do so.
↓	
HR informs Payroll of new arrangements and start date.	

Appendix E

Pension contribution alternative award policy
Legal considerations FAQs

Although the BMA is not a public sector employer, and therefore it does not have the responsibility of providing an Equalities Impact Assessment, the BMA had sought legal opinion from a lead QC to address those issues which have been noted as potential concerns by trusts.

Please note that advice from the lead QC has been taken on the Policy in general. If a Trust adapts or amends the Policy, or applies it in a way that has not been anticipated, then it may be that the legal position differs in relation to how the Policy has been adopted. If a Trust is seeking to amend/implement the Policy in a different manner, then it may wish to take separate legal advice.

1. Would it be lawful for an NHS Body to adopt and implement the Policy?

1.1. The QC advice that has been provided to the BMA states that it would be lawful to do so, as part of its overall response to the challenges in seeking to retain senior, experienced staff, with no identified grounds of legal challenge to the policy which have any reasonable prospect of success.

2. What areas have been considered by the QC with regard to possible legal challenge?

2.1. Breach of section 54 of the Pensions Act;
2.2. Unlawful discrimination; and
2.3. Equal pay challenges

3. What is the QC opinion regarding Section 54 of the Pensions Act legal challenge?

3.1. Section 54 prohibits an employer from taking "any action for the sole or main purpose of .... inducing a worker to give up membership of a relevant scheme without becoming an active member of another relevant scheme". The statutory purpose of the section is to prevent employers from seeking to induce or persuade employees not to join a recognised pension scheme

3.2. This policy would not be introduced by an NHS employer for a purpose which is prohibited by section 54. The main purpose of introducing such a scheme would be to persuade employees not to leave the Trust's employment, not to persuade them to leave the NHS pension fund.

3.3. Hence the policy could not be successfully challenged on the grounds that it constituted a breach of the Trust's duties under section 54.

4. What is the QC opinion regarding unlawful age or sex discrimination legal challenge?

4.1. The Policy is available equally to all employees of any age and to men and women employees. It could be assumed that a higher proportion of older employees will meet the qualifying conditions, and that a higher proportion of such employees will be men. It follows that any discrimination challenge would have to be mounted on the basis that the policy constituted indirect discrimination contrary to section 19 of the Equality Act 2010 ("EA"). The Policy would potentially come within section19(1) EA. Section 19(2) EA provides:

"(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim"

A younger employee who was not facing the tax consequences of the AA or the LTA would still be entitled to leave the NHS pension fund but would not qualify under the Policy and thus would not obtain the benefit of the employer's contribution paid to him or her in cash as an addition to his or her salary. It is thus arguable that the conditions in (a) to (c) in section 19(2) would be met. However, the Policy would not constitute discrimination if the employing Trust could show that the Policy was "a proportionate means of achieving a legitimate aim".

4.2. NHS Trusts would have little difficulty in showing that the Policy had a legitimate aim, namely that it was introduced to seek to persuade senior staff to continue to work and provide their services to NHS patients as opposed to retiring. The "efficient planning of the departure and recruitment of staff" and "facilitating the participation of older workers in the workforce" have both been recognised as legitimate aims by the European Court: see Fuchs v Land Hessen (Joined Cases C-159/10 and C-160/10) [2012] ICR 93; [2011] 3 CMLR 1299 and Mangold v Helm (Case C-144/04) [2006] All ER (EC) 383. In Seldon v Clarkson Wright & Jakes (Secretary of State for Business, Innovation and Skills and another intervening) [2012] UKSC 16 Lady Hale approved this approach saying at §65:

"I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it. In the particular context of inter-generational fairness, it must be relevant that, at an earlier stage in his life, a partner or employee may well have benefited from a rule which obliged his seniors to retire at a particular age."

4.3. The Trust can demonstrate that this policy is "cost neutral" in that no additional NHS resources were applied to this employee as compared to an employee who stayed within the pension fund and all employees received the same "pay" within the meaning of that term under EU law (see below for more details). All that the Policy provides is that employer pension contributions are paid to the employee as opposed to being paid to the NHS Pension Scheme. Secondly, the Trust could also legitimately say that it would be unlawful for the Trust to extend this type of policy to all employees who decided to leave the NHS pension scheme (without the qualifying criteria) because that would constitute a breach of section 54.

4.4. **There is therefore no realistic prospect of a successful challenge to the Policy on the grounds that it constitutes unlawful indirect discrimination**

5. What is the QC opinion regarding equal pay legal challenge?

5.1. The final way in which this Policy could be challenged is on the grounds that it breaches equal pay legislation. An NHS employee who remained in the NHS pension fund may complain that the employee who has left the pension scheme but is doing the same job is, in effect, given a higher salary. NHS employers are prohibited from discriminating against employees on the basis of any protected characteristic in the terms on which they offer to employ workers: see section 39 EA. However, if the Policy is justified under section 19 EA, the Policy does not constitute discrimination and thus does not offend against section 39.

5.2. In any event, the Policy does not result in one employee being "paid" less than another employee. Both receive a total remuneration package which costs the same to the NHS Trust. The European Court has repeated recognised that pensions are a form of deferred pay and this concept is now in article 157 of the Treaty for the Functioning of the European Union which provides:

"For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer"

5.3. Hence the "pay" that an employer is obliged to pay to the employee consists of a combination of payments to the employee and contributions that the employer makes on the employee's behalf to the relevant pension fund. In Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank Plc & Ors [2018] EWHC 2839 (Ch) Morgan J said:

"I am not persuaded that the concept of pay for the purposes of Article 157 allows one to adopt an approach which treats the same benefits as being pay for some purposes and not pay for other purposes"

5.4. It follows that, whilst an NHS employee who is outside the Policy may receive less monthly cash than a person who is within the scheme, but as a matter of law the 2 employees receive the same overall "pay" under EU law. Hence the policy could not be successfully challenged on the grounds that it brought unequal pay.

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