

**IN THE MATTER OF**

**THE LOCAL GOVERNMENT PENSION SCHEME**

**THE CORONERS AND JUSTICE ACT 2009**

**AND**

**ASSISTANT CORONERS**

--

**REVISED OPINION**

--

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## *Introduction*

1. I am asked to advise the Local Government Association (LGA) in relation to the eligibility of Assistant Coroners to membership of the Local Government Pension Scheme.
2. I understand that the LGA services the Secretariat to the Local Government Pensions Committee which is a Committee of Councillors constituted by the LGA in association with the Welsh Local Government Association (WLGA) and the Convention of Scottish Local Authorities (COSLA).
3. The problem arises following the overhaul of the Coronial service in consequence of the Coroners and Justice Act 2009 (the 2009 Act) which introduced a class of coroner called an Assistant Coroner and made various other amendments to the nomenclature and functions of coroners, their administration and powers.
4. This Act superseded the previous law and was essentially brought into force with effect from 25 July 2013.<sup>1</sup>

## *Short overview of the 2009 Act*

5. Section 22 of, and schedule 2 to, the 2009 Act provides for Coroner Areas. In many cases these are county areas but this is by no means always the case. There is nevertheless a close relationship with local authority areas. For a full list of those areas see [http://www.coronersociety.org.uk/images/coroner\\_area\\_map\\_2014\\_final.pdf](http://www.coronersociety.org.uk/images/coroner_area_map_2014_final.pdf)
6. Section 23 of, and schedule 3 to, the 2009 Act provides for the appointment within those Coroner Areas of Senior Coroners, Area Coroners, and Assistant Coroners. Each such Area must have a Senior Coroner: schedule 3 paragraph 1(1).
7. The appointment of Area and Assistant Coroners is ordinarily discretionary; however the Lord Chancellor may require the appointment of (a) an area coroner, or a specified number of area coroners, and/or (b) a minimum number of assistant coroners: schedule 3 paragraph 2.

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<sup>1</sup> See Coroners and Justice Act 2009 (Commencement No 15, Consequential and Transitory Provisions) Order 2013.

8. There is no difference in the qualifications for each such post. These are to be under the age of 70, and to satisfy the judicial-appointment eligibility condition<sup>2</sup> on a 5-year basis: schedule 3 paragraph 3.

*Coroners and the Local Government Pension Scheme*

9. The current relevant regulations governing the Local Government Pension Scheme are the Local Government Pension Scheme Regulations 2013 (the 2013 Regulations)<sup>3</sup> made under powers conferred by sections 7 and 12 of, and Schedule 3 to the Superannuation Act 1972.

10. Part 4 of schedule 2 to the Local Government Pension Scheme Regulations 2013 states so far as relevant that<sup>4</sup> –

Column 1: Person eligible for membership	Column 2: Body deemed to be Scheme employer
...	...
A coroner	The authority which appointed the coroner
...	...

11. The term “coroner” is not further defined in these Regulations.
12. A previous provision was made in Regulation 9 of the Local Government Pension Scheme (Administration) Regulations 2008 (the 2008 Regulations).<sup>5</sup> At the point that this provision was repealed on the 31<sup>st</sup> March 2014 it said so far as relevant –

**9.— Eligibility in certain cases of persons who are not employees**

(1) A person may be an active member if he is—

...

(b) a coroner (other than a coroner to whom paragraph (2) applies);

...

(2) This paragraph applies to—

(a) the Queen's coroner and attorney;

(b) the coroner of the Queen's household; and

<sup>2</sup> This is a reference to section 50 of the Tribunals, Courts and Enforcement Act 2007.

<sup>3</sup> 2013/2356

<sup>4</sup> See also Regulation 3(1)(d).

<sup>5</sup> SI 2008/239.

(c) a coroner who—  
(i) held office immediately before 6th April 1978, and  
(ii) did not choose, in accordance with article 3(b) of the Social Security (Modification of Coroners (Amendment) Act 1926) Order 1978, that the provisions of the Coroners (Amendment) Act 1926 relating to pensions should not apply to him.  
...  
(4) If a coroner is an active member, he must be treated—  
(a) if appointed by a local authority, as being in employment with that local authority; or  
(b) if appointed by the Common Council of the City of London, as being in employment with that Council.  
...

13. The word coroner was not further defined in the 2008 Regulations.
14. The LGA are concerned to know whether Assistant Coroners are within the scope of the 2008 Regulations and whether they were (potentially) within the scope of the 2013 Regulations.
15. The concern raised by the LGA is whether the meaning of the word “coroner” in these two sets of regulations was definitively fixed by the class of coroner then in existence at the time of the 2008 Regulations. My instructions explain the nature of this class at [2.6.1] – [2.6.5]. It is not necessary for me to set it out here.
16. As an alternative it is said at [2.7] of my instructions –

2.7 The alternative approach would be to conclude that:

- as the Local Government Pension Scheme (Administration) Regulations 2008 [SI 2008/239], although made before the Coroners and Justices Act 2009 came into effect, refer to a “Coroner” without defining the term, and
- as the Local Government Pension Scheme Regulations 2013 [SI 2013/2356] were made after the Coroners and Justices Act 2009 came into effect and refer to a “Coroner” without defining the term,

“Coroner” must, by default, cover all Coroners appointed under the Act by an authority and so, from the effective date of the Act, all Coroners have been eligible for membership of the Local Government Pension Scheme.

2.8 This alternative interpretation, although going beyond what appeared to be the intention of the Coroners and Justices Act 2009, has the advantage that the appointing authority would not then have to arrange a separate qualifying scheme for the purposes of the Pensions Act 2008 (automatic enrolment) for Assistant Coroners who do not meet the 'protected Assistant Coroner' conditions in (b) above (assuming that such Assistant Coroners are 'workers' for the purposes of the Pensions Act 2008 and are not exempted 'office holders').

17. I have no doubt whatsoever that the two sets of regulations by not defining who was a coroner (save by excluding from its ambit a very special class of coroner) intended all persons who held a coronial office of any (other) kind at any time while the Regulations were in force to be within the scope of their application.
18. I say this because the Regulations are not written to express a view that the class of coroner within their ambit is fixed for all time at the point at which they are made.
19. The consequence is that when the 2009 Act re-organised the coronial service to create Senior, Area and Assistant Coroners, the regulations (in particular the latter regulations) applied immediately to all those classes of coroner from the point at which the 2009 Act commenced.
20. I do not agree that this went beyond what the 2009 Act intended.
21. My instructions consider the impact of the amendments made by the 2009 Act to the Pensions (Increase) Act 1971 at [3]. While I consider that the interpretation of those provisions is probably correct I do not think that they assist with the key question of application of the 2008 and now the 2013 Regulations.
22. This is because both sets of Regulations apply to coroners spelt with a small "c". Indeed in the 2013 Regulations this word "coroner" is expressly prefaced by the indefinite article thus "A coroner". That phrase "A coroner" thus means, in short, any coroner. It does not set the reader on a course of discovery of some special defined class to be discovered by a retrospective consideration of the previous legislation.
23. I am quite clear thus that the answer to the question posed on the application of these Regulations is most closely set out in my instructions at the latter end of [4.3.3] –

4.3.3 ... following the introduction of the Coroners and Justices Act 2009, the reference to “Coroner” in regulations 9(2) and (4) of the Local Government Pension Scheme (Administration) Regulations 2008 [SI 2008/239] and in Part 4 of Schedule 2 to the Local Government Pension Scheme Regulations 2013 [SI 2013/2356] should be interpreted as meaning all Coroners.

24. However I would expressly it differently. It is not that the 2009 Act changed what the 2008 and 2013 Regulations meant. There is no doubt that the 2013 Regulations always applied to any type of coroner that may exist while these Regulations are in force save those expressly excluded from their ambit.

### *The Pensions Act 2008*

25. This renders it unnecessary to answer the question whether the current main varieties of coroner (Senior, Area and Assistant) are workers for the purposes of the Pensions Act 2008 (the 2008 Act). Nonetheless I am inclined to think that they could be, and I shall shortly explain my reasons for this conclusion.

26. The law on auto-enrolment is set out in the 2008 Act and the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010<sup>6</sup> (the 2010 Regulations) made under powers in that Act.<sup>7</sup> These obligations relate primarily to “jobholders” and as explained below these are “workers” that fall into a specific category.

27. Section 1 of the 2008 Act, which is in Part 1, defines a jobholder thus –

(1) For the purposes of this Part a jobholder is a worker –

(a) who is working or ordinarily works in Great Britain under the worker's contract,

(b) who is aged at least 16 and under 75, and

(c) to whom qualifying earnings are payable by the employer in the relevant pay reference period (see sections 13 and 15).

(2) Where a jobholder has more than one employer, or a succession of employers, this Chapter applies separately in relation to each employment.

(3) Accordingly –

<sup>6</sup> 2010/772

<sup>7</sup> See the Preamble to the 2010 Regulations.

- (a) references to the employer are references to the employer concerned;
- (b) references to membership of a pension scheme are references to membership in relation to the employment concerned.

28. It is thus clear that the relevant chapter of the 2008 Act applies to “worker” who has “a contract” with an “employer”. These terms are defined in section 88 of the 2008 Act, which is also in Part 1, as follows –

- (1) This section applies for the purposes of this Part.
- (2) “Contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
- (3) “Worker” means an individual who has entered into or works under –
  - (a) a contract of employment, or
  - (b) any other contract by which the individual undertakes to do work or perform services personally for another party to the contract.
- (4) But a contract is not within subsection (3)(b) if the status of the other party is by virtue of the contract that of a client or customer of a profession or business undertaking carried on by the individual concerned.
- (5) For the purposes of subsection (3)(b), it does not matter whether the contract is express or implied or (if it is express) whether it is oral or in writing.
- (6) Any reference to a worker's contract is to be read in accordance with subsections (3) to (5).
- (7) “Employer”, in relation to a worker, means the person by whom the worker is employed (subject to sections 37(5) and 38(6)).
- (8) “Employment” in relation to a worker, means employment under the worker's contract, and related expressions are to be read accordingly.

29. The key question thus, is whether or not fee-paid Assistant Coroners are ‘workers’ for the purposes of this legislation and as noted above this has to be



determined by reference to the 2008 Act definition. It is clear that if a fee-paid Assistant Recorder works under a contract of employment then he or she is within the definition of a worker.

30. A coroner has always held an “office”. This is of ancient common law origin.<sup>8</sup> A coroner now holds a *statutory* judicial office.<sup>9</sup> He or she sits in a court of record.<sup>10</sup> There is no doubt that a coroner is therefore a special kind of judge. This has always been the case and to that extent the 2009 Act made no difference.

31. Historically coroners have not generally been seen as holding an employment in the sense of working under a *contract* of employment because as they held an office it was not considered necessary. This analysis is consistent with the analysis of the position of District Judges by the President of the Employment Appeal Tribunal (EAT), Simler J. in her judgment in *Gilham v Ministry of Justice (Gilham)*.<sup>11</sup>

32. The 2009 Act may have changed things though. Thus the 2009 Act states that Senior and Area Coroners are to be paid a “salary”, which is to be defined by agreement.<sup>12</sup> They are also entitled to “pensions, allowances or gratuities”.<sup>13</sup>

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<sup>8</sup> Certainly until the 2009 Act judges of the High Court were able to sit as Coroners: Halsbury's Laws of England > CORONERS (VOLUME 24 (2010)) > 2. THE OFFICE OF CORONER > (2) CORONERS EX OFFICIO > 7. Coroners ex officio.

<sup>9</sup> See paragraph 3 of Schedule 3 to the 2009 Act.

<sup>10</sup> Halsbury's Laws cites: 4 Co Inst 271; Com Dig Officer G 5; *Garnett v Ferrand* (1827) 6 B & C 611 at 625 per Lord Tenterden CJ; *Thomas v Churton* (1862) 2 B & S 475 at 478 per Crompton J; *R v West Yorkshire Coroner, ex p Smith (No 2)* [1985] QB 1096, [1985] 1 All ER 100, DC; but see the doubt expressed in *Jewison v Dyson* (1842) 9 M & W 540 at 586 per Lord Abinger. The coroner's court has also been considered to be a court of record in Canada (see *Davidson v Garrett* (1899) 30 OR 653 at 656, CA; *R v Hammond* (1899) 29 OR 211 at 225) and in Australia (see *Chippett v Thompson* (1868) 7 SRNSW 349). As to the characteristics of courts of record see [COURTS AND TRIBUNALS vol 24 \(2010\) PARA 618](#). As an inferior court of record, a coroner's court has the power to impose a fine for contempt committed in the face of the court only: see *R v West Yorkshire Coroner, ex p Smith (No 2)* [1985] QB 1096, [1985] 1 All ER 100, DC; and [PARA 160](#).

<sup>11</sup> See her judgment of the 31<sup>st</sup> October 2016 at

[http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKCAT/2016/0087\\_16\\_3110.html&query=\(gilham\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKCAT/2016/0087_16_3110.html&query=(gilham))

I do not entirely agree with her analysis and indeed I (with Ms Crasnow who acted for Ms Gilham) had made the argument that Recorders were working under a contract of employment to the Supreme Court (SC) in *Ministry of Justice (formerly Department for Constitutional Affairs) v O'Brien (Council of Immigration Judges intervening)* [2013] UKSC 6, [2013] I.C.R. 499, at [13]. The SC did not rule that it was wrong but merely that it was unnecessary to decide.

<sup>12</sup> See paragraph 15 of Schedule 3 to the 2009 Act.

<sup>13</sup> See paragraph 17 of Schedule 3 to the 2009 Act.

33. Moreover after reciting various mandatory conditions of the work of Senior and Area Coroners, Part 4 of Schedule 3 to the 2009 Act emphasises the apparently contractual nature of the work by saying in paragraph 19–

Subject to the preceding provisions of this Part, the senior coroner or an area coroner or assistant coroner for an area holds office on *whatever terms are from time to time agreed* by that coroner and the relevant authority for the area. (Italics added for emphasis)

34. When it comes to Assistant Coroners the 2009 Act provides in paragraph 16 of schedule 3 that –

- (1) An assistant coroner for an area is entitled to fees.
- (2) The amount of the fees is to be whatever is agreed from time to time by the assistant coroner and the relevant authority for the area.
- (3) The fees to which an assistant coroner for an area is entitled under this paragraph are payable by the relevant authority for the area.

35. The language of these provisions is therefore materially different from that in *Gilham* and does suggest that there must be an *agreement*.

36. I am also aware that some of the terms of the agreement with Assistant Coroners can replicate much of the language of a typical contract of employment. In my view the most important question becomes: what is the nature of that agreement, that is to say does it fit within either section 88(3)(a) or (b)?

37. Considering the provisions of section 88 first, four points should be emphasised –

- a. Anyone who is an “employee” in the classic sense<sup>14</sup> is a “worker”: see 88(3)(a), but the reverse is not true;
- b. It is a necessary (but not by itself sufficient) condition of being a “worker” that there be a contract between him/her and another;
- c. It is a necessary condition for a person to be a “worker” that this contract has at its heart a personal (that means non-delegable) obligation to “to do work or perform services”, “for” that other party;

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<sup>14</sup> See section 88(2).

- d. It is also a necessary condition for a person to be a “worker” that relationship between him/her and the other party to the contract is not one in which the other party to that contract is a client or customer of a profession or business undertaking carried on by the person.

38. I shall take personal service first

*The Pension Regulators' guidance on personal service workers*

39. The importance of personal service is at the heart of one of the most hard-fought areas of “employment” litigation at the moment: the question whether workers in the so – called “gig” economy are protected by statutory rights. The leading case at present is *Pimlico Lumbers v. Smith* [2017] ICR 657. Permission to appeal to the Supreme Court has been given in that case so in applying it to the situation of Coroners it is necessary to state that the law may change and a review may be necessary!
40. The Pension Regulator has recently published guidance<sup>15</sup> (PR Guidance) on assessing this question. The PR Guidance particularly notes the different kinds of relationship that are on the margins of the concept of “worker” and which may give difficulty.
41. In relation to personal service workers the PR Guidance says –

**Personal service workers**

15. If an individual does not work under a contract of employment, they may still be assessed as a worker for the purposes of the new duties if they have contracted to perform work or services personally, other than as part of their own separate business (‘ a personal services worker’). However, an individual who is paid a fee as a self-employed contractor under a contract for services is not normally a worker.

16. The distinction between such a self-employed contractor and a personal services worker is much debated in employment law and employers will be used to making the assessment of employee status for employment rights and tax purposes.

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<sup>15</sup> See “Employer duties and defining the workforce: An introduction to the new employer duties” April 2017 which can be found at <http://www.thepensionsregulator.gov.uk/docs/detailed-guidance-1.pdf>

17. However, employers should not rely solely on a person's tax status when assessing whether they are a worker. An individual considered by HM Revenue & Customs (HMRC) as self-employed for tax purposes may still be classed as a 'worker' under the new employer duties legislation, if they are in fact working under a contract to perform work or services personally, other than as part of a separate business of their own.

18. No single factor, by itself, is capable of being conclusive in determining whether an individual is a personal services worker. However, individuals are likely to be considered as such if most, or all, of the following statements are true:

- The employer relies on the individual's expertise and expects them to perform the work themselves
- There is an element of subordination between the employer and individual, for example the individual reports to the employer's managers or directors in respect of the specific operation or project on which they are contracted to work
- The contractual provisions state that the contract is not a contract for services between the employer and the individual's own business
- The contract provides for employee benefits such as holiday pay, sick pay, notice, fees, expenses etc
- There is a mutual obligation set down in the contract to provide or do the work
- The individual does not incur any financial risk in carrying out the work
- The employer provides tools, equipment and other requirements to the individual to carry out the work.

19. This list is not exhaustive. As when they are assessing an individual's status for tax purposes, an employer must take into account all relevant considerations

...

### **Office-holders**

35. An office-holder is not normally a worker.

36. An office-holder has no contract or service agreement in relation to their appointment, nor do they usually receive a salary or regular remuneration for their services. They may however, be paid a fee for their services or to cover their expenses.

37. Examples of office-holders who are not normally workers include:

- non-executive directors

- company secretaries
- board members of statutory bodies
- trustees.

38. It is very important to consider the specific circumstances of the individual. Sometimes a person who appears to be an office-holder may also have a contract of service for part of their duties and will therefore be a worker in respect of those duties.

### *Assessment*

42. I agree with this approach and in my view there are reasons for considering that an Assistant Coroner falls within this approach to a service worker, if they are held to have a contract of employment.
43. The Assistant Coroner plainly has to deliver the work his or herself. He or she could not appoint his or her own replacement. The Assistant Coroner will work to the direction of the Senior Coroner whose task is to ensure that the Coronial functions that devolve to him or her through the appointment made by the authority under the 2009 Act are carried out. It is plainly *not* a business relationship as in a contract between a window cleaning company or a supplier of accountancy services.
44. There is plainly a mutual obligation at the heart of the agreement to perform the tasks and to receive the fees. The Assistant Coroner bears no risk in this relationship.
45. It may be that some consideration has been given to the advice given in PR Guidance that office holders are generally not personal service providers. However that guidance is largely premised on the want of a contract or agreement and hence it cannot be taken simply at face value.
46. The one point left over is whether the Assistant Coroner and indeed the others do their work “for” the relevant local government authority, being the counter-party to the relevant agreement. It may be argued that they do not because as judges they work to achieve a particular statutory judicial purpose as defined by the coronial jurisdiction.
47. The fact is that the received idea of the law in relation to judicial offices – if not in flux – is under challenge in *Gilham*. So it is not appropriate to be definitive about this prior to the judgment of the Court of Appeal at the

earliest. However if it is accepted as I have set out that all save those statutorily excepted coroners are within the scope of the 2008 and 2013 Regulations this is a moot point.

### *Conclusion*

48. In my view all coroners of whatever kind then existing are within the scope of the 2013 Regulations, save to the extent that any particular coronial office is excluded by statute or statutory instrument.

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<sup>16</sup> Note in the earlier version of this Opinion I had incorrectly put 2019 and not 2017.