STEPHENSON HARWOOD
pensions law group

Snapshot

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Overview

- **Impact of the result of the general election on pensions**
  Following the Labour Party's victory in the general election, the new Chancellor Rachel Reeves pledged to "turn our attention to the pensions system, to drive investment in homegrown businesses".

- **No exceptional circumstances to preclude The Pensions Regulator from imposing penalty notice –Trustee of the Smith & Wallace & Co 1988 Pension Plan v Pensions Regulator**
  This case concerned a challenge by the trustees to a penalty notice issued by The Pensions Regulator (the "**Regulator**") for non-compliance with the chair statement obligations. Whilst the trustees' challenge failed, the Tribunal made an interesting finding that, whilst legislation required that the Regulator "must" issue a penalty notice for the failure to comply with the chair statement requirement, it rejected that the "*mere use of mandatory language without more excludes from consideration any explanation offered for the breach, however compelling*". The judge noted that Parliament's intention was that a penalty notice should ordinarily follow a breach, but that the Regulator would be precluded from penalising trustees where "*wholly exceptional circumstances fully explained and excused their non-compliance and imposition of a penalty would be manifestly unjust.*"

- **Pension Ombudsman's plans for member complaints**
  The Pensions Ombudsman (the **Ombudsman**) is to require complainants to complete schemes' formal complaint processes, like the internal dispute resolution procedure (**IDRP**), before initiating a case. This change, which could require IDRPs and member communications to be updated, is expected to be fully in place by autumn 2024.

- **Retrospective equalisation and compliance with scheme rules (CAS-38639-F6P7)**
  The Ombudsman dismissed a complaint by a member that the trustees had retrospectively increased her normal retirement date (**NRD**). It was held that such an increase could occur in respect of benefits accrued before the date of the Barber judgment (17 May 1990) as the power of amendment in that scheme permitted retrospective amendments. Section 67 of the Pensions Act 1995 would not be applicable where the amendment was made before that provision was in force.

- **Early Retirement Rights Post-TUPE Transfer (CAS-41116-C8M0)**
  Mr R, a deferred member of AstraZeneca's pension scheme since 2010, was denied an unreduced early retirement pension following his 2016 employment transfer to Avara under TUPE. In order for a deferred member to benefit from enhanced early retirement terms, they had to leave service at the employer's request. The Ombudsman determined that the TUPE transfer did not meet the scheme's criteria for leaving at the employer's request, so Mr R was not eligible for the pension he sought.

- **Rail renationalisation – a pensions perspective**
  The Labour Party plans to renationalise UK rail passenger services by transitioning them to a new public entity, "Great British Rail," as current National Rail contracts expire, though details on the transition mechanics and pensions implications remain unspecified. Labour's vision of a single employer structure for the new entity suggests a potential unified pension scheme, but this raises complex challenges and liabilities for stakeholders.

In detail

Impact of the result of the general election on pensions

In the wake of the recent general election, which saw the Labour Party win a landslide majority, there have been murmurs of potential changes within the pensions landscape, with details to follow. The new Chancellor, Rachel Reeves, has made a commitment to reviewing the pensions landscape, and in her first speech as Chancellor, promised to "turn our attention to the pensions system, to drive investment in homegrown businesses and deliver greater returns to pension savers".

What Labour has pledged

Labour has pledged to maintain the triple lock on the state pension. The triple lock increases the state pension by the highest of CPI inflation, average earnings percentage increase and 2.5%.

The Labour Party has said it will establish a voluntary scheme for defined contribution pension funds, allowing them to invest a portion of their holdings in UK-based growth-oriented investments. These investments will include areas such as venture capital, equity in small-cap companies and infrastructure projects. A supervisory committee will create an accredited list of venture capital and small-cap equity funds based in the UK. The participating investors will be requested to invest a small proportion of their funds into the scheme and will have total discretion as to which funds from the accredited list that they invest in.

Appointment of Sir Stephen Timms

Sir Stephen Timms, who previously chaired the Work and Pensions Select Committee, has been appointed as the minister of state in the Department for Work and Pensions (**DWP**). While Sir Stephen has not yet provided a detailed outline of the forthcoming pensions review, his past comments at the Pensions Expert Defined Contribution Strategic Summit in May 2024 could offer some insight into possible future directions. At the summit, he reportedly advocated for a consensus on the need to raise auto-enrolment minimum contributions and was quoted as favouring an increase in contributions to at least 12% of pay, with an equal split between employer and employee contributions, suggesting that such changes should be implemented by the early 2030s and emphasising the need for a published plan to set clear expectations.

Emma Reynolds' dual role

Emma Reynolds' appointment as a Parliamentary Secretary in both the Treasury and the DWP could be indicative of a move towards increased collaboration between these two departments as the pensions review begins. However, this remains speculative at this point.

No exceptional circumstances to preclude the Regulator from imposing penalty notice –Trustee of the Smith & Wallace & Co 1988 Pension Plan v Pensions Regulator

This case will be of particular interest to trustees of defined contribution pension schemes, who are required to prepare an annual governance statement signed by the chair within seven months of the end of each scheme year. The case relates to the Smith & Wallace & Co 1988 Pension Plan and a failure by the trustee to prepare the chair's statement by the due date.

Facts of the case

The Regulator issued a penalty notice to the trustee requiring it to pay a penalty for failure to prepare a chair's statement by the due date. The trustee appealed, arguing that the Regulator had not informed the trustee that it needed to prepare the statement and had refused to engage with it about a review of the penalty notice.

In its submissions to the First-tier Tribunal, the Regulator noted:

- It was obliged to impose a penalty due to regulation 28(2) of The Occupational Pension Schemes (Charges and Governance) Regulations 2015 (the "**2015 Regs**"), which states that, "*Where…the Regulator is of the opinion that the trustees or managers have failed to prepare the* [chair's] *statement…the Regulator* ***must*** *issue a penalty notice to the trustees or managers in relation to a first failure in connection with a scheme year*." The Regulator's position was that the word "must" should be given its clear and natural meaning and, as such, no discretion exists for the Regulator and the reason for the breach is therefore irrelevant, no matter how compelling.

- The Regulator might have a discretion under regulation 31 of the 2015 Regs to review and revoke a penalty notice for failure to submit a chair's statement. However, this is in limited circumstances where:

    - after investigation, it was concluded that no breach had occurred;
    - it would be procedurally unfair to maintain the penalty owing to steps taken by the Regulator; or
    - some other "*specific, extenuating circumstance*" means it is clearly unfair to maintain the penalty.

The Regulator submitted that none of the above applied.

The Tribunal's decision

The judge had some sympathy for the trustee's position, noting that there had been no explanation from the Regulator for "*what appears to be a deliberate policy*" not to draw the chair's statement requirements to trustees' attention. The judge found this "*puzzling*" considering the effort made by the Regulator to publicise other statutory duties, such as automatic enrolment.

Nevertheless, the judge dismissed the appeal, concluding that there were no narrow or exceptional circumstances in this case which might preclude the Regulator from imposing a penalty notice. Additionally, it was not open to the Tribunal to hold that the Regulator had incorrectly declined the trustee's request to review the penalty notice.

However, the judge did not accept that the "*mere use of mandatory language without more excludes from consideration any explanation offered for the breach, however compelling*". The judge noted that Parliament's intention was that a penalty notice should ordinarily follow a breach, but that the Regulator would be precluded from penalising trustees where "*wholly exceptional circumstances fully explained and excused their non-compliance and imposition of a penalty would be manifestly unjust.*"

As such, the Regulator's position was "*unreasonably restrictive*" and "*somewhat absurd*", as it would mean that in the rare case where exceptional circumstances excused non-compliance, the Regulator would nevertheless be required to impose a penalty notice which it would then immediately review and revoke.

The judge therefore disagreed with the Regulator about when the Regulator must take account of any "*truly exceptional explanation for non-compliance*". The judge's view was that this must be when the penalty notice is issued and not at the review stage as maintained by the Regulator. Nevertheless, the trustee had not provided valid mitigating circumstances and so the Regulator was obliged to impose the penalty notice.

Ombudsman's plans for member complaints

The Ombudsman has acknowledged a sustained increase in the demand for its services and has recognised that that the current demand exceeds its capacity to resolve cases promptly. Consequently, an extensive review of the operational model was conducted, resulting in a strategic plan aimed at addressing the backlog of cases, as well as shortening queue lengths and waiting times. The Ombudsman plans to discuss these changes in the coming months through a series of blog posts, with the first change focusing on interactions with schemes and providers' complaint processes.

A significant change in the Ombudsman's approach involves reinforcing the requirement for complainants to fully engage with the respondent's formal complaint handling process, such as IDRP, before the Ombudsman will investigate a complaint. The upcoming change is designed to encourage schemes and members to take greater responsibility for resolving disputes internally. While the resolution team will only investigate after the IDRP process is complete, volunteer advisers will continue to offer support to individuals during the IDRP process, particularly in cases involving vulnerable members or urgent cases.

The implementation of these changes is a priority and is expected to be fully operational by autumn 2024.

As part of these changes, IDRPs and template member communications may need to be amended to reflect the fact that the IDRP process will need to be exhausted before the complainant can go to the Ombudsman. We will keep you up to date as and when the Ombudsman provides more information.

Retrospective equalisation and compliance with scheme rules – CAS-38639-F6P7

On 29 April 2024, the Ombudsman did not uphold a complaint made by Mrs E, a former member of the Avis UK Pension Plan (the **Plan**), which was a defined benefit occupational pension scheme. Mrs E argued that her Plan benefits had been reduced as a result of early payment, because the Trustee had incorrectly increased the NRD for her pre-Barber benefits. The Plan had different NRDs for men and women, 65 and 60 respectively. The trustee amended the rules on 23 November 1992 to equalise the NRD at 65 for men and women for benefits accrued before the date of the Barber judgment on 17 May 1990, a process known as "levelling down". The Barber judgment required occupational pension schemes to treat men and women equally in relation to benefits derived from their pensionable service, including their NRDs. It is established law that the impact of the Barber judgment is that NRDs are automatically "levelled up" and so the least advantaged category benefit from the most favourable (and therefore lower) NRD applicable to the advantaged category. In this case, this would have required NRDs to have been levelled up at to 60 for both male and female members. Schemes can then level-down prospectively from the date of a scheme amendment. However, in this case the trustee retrospectively amended the rules such that the NRD for all members was set at 65. The rules explicitly provided that any modification to the rules may have retrospective effect.

The Claimant argued that her NRD should have remained at 60 for the benefits she accrued before the date of the judgment. She claimed that she was entitled to a late retirement uplift for the portion of her benefits with an NRD of 60, as she wished to retire at age 64 in October 2019. She also relied on section 67 of the Pensions Act 1995, which restricts the power to alter schemes in a way that negatively affects members' subsisting rights (i.e. making changes that negatively impact members' benefits retrospectively).

The Pensions Ombudsman did not uphold Mrs E's complaint and found that no further action was required by the employer, the administrator, or the trustee. The Ombudsman agreed with the Adjudicator's opinion that the trustee had acted in accordance with the Plan rules which allowed retrospective amendment, that section 67 of the 1995 Act was not applicable to Mrs E's case, as it was not in force before 6 April 1997. The requirement to 'level up' NRDs

(rather than level down) only applied to benefits accrued on and after the date of the Barber judgement (17 May 1990).

Early Retirement Rights Post-TUPE Transfer – CAS-41116-C8M0

Mr R, a former AstraZeneca PLC employee and pension scheme member, became a deferred member in 2010, opting out of future service accrual and continuing contributions. AstraZeneca's guide indicated less favourable early retirement terms for deferred members except in redundancy cases, later extended to include redundancy due to AstraZeneca's actions.

In 2016, Mr R's employment transferred to Avara under TUPE. He was denied an unreduced early retirement pension he sought, as the scheme required leaving service at the employer's request. The Ombudsman assessed if the TUPE transfer equated to leaving "at the request of the employer" and if there was an external agreement for enhanced redundancy rights.

The Ombudsman concluded that the TUPE transfer did not constitute a request by the employer as per the scheme rules or under case law, therefore Mr R was not entitled to an unreduced early retirement pension.

Rail renationalisation – a pensions perspective

The Labour Party committed, before the election, to renationalise rail passenger service provision, currently performed (largely) by private companies under the National Rail Contracts (**NRCs**), aka the 'rail franchises'. Labour stated that it intends to do so by taking passenger services back in-house, as the current NRCs expire, or are otherwise brought to an end, to be handed (eventually) to a new entity to be called "Great British Rail" (**GBR**).

The precise mechanics of how this transition may work are too complex for this snapshot, however Stephenson Harwood's industry leading rail team have produced a number of briefings looking at how this might work, which can be found here.

Nevertheless, whatever the transfer mechanics, the Labour Party has not set out how the pensions aspects of this transition will be dealt with. However, Labour has stated that, eventually, GBR will use a single employer structure, which might indicate that there will be one, uniform pension arrangement across the renationalised passenger services. Whether that is correct or not, the move to renationalisation poses a number of pensions challenges, costs and liabilities for employers, employees, the Railways Pension Scheme and the government, which our pensions team is uniquely placed to help with.

We have produced a more detailed note looking at the pensions aspects of Labour's plans here.

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