HYMANS ROBERTSON

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Articles this month:

Electioneering
Tribunal tide turns against Regulator
Chair’s statement fining not fully mandatory
Ombudsman falls back to ‘IDRP-first’ position
Public sector round-up

Electioneering

All but the most resolutely news-averse will know that a general election is imminent, on 4 July 2024. In the period since the announcement, the political parties have set out their stalls with the publication of manifestos. Without wishing to seem like single-issue voters, we thought we should bring together in one place the pensions-related promises that have been made.

Headliners

Starting with the (historically) three biggest UK-wide parties, the superannuation-sympathetic manifesto pledges are as follows (in order of publication, quickest-off-the-mark first).

The **Liberal Democrat** manifesto undertakes to—

- have another look at the pensions rules affecting ‘gig-economy’ workers;
- require pension funds and others to demonstrate that they are investing in line with the Paris Agreement, with powers for regulators to intervene if climate risks are not managed;
- retain the State pensions triple lock;
- properly compensate women adversely affected by (mis-)communication of increases to State pensionable age (SPA);
- develop plans to close the gender pensions gap and provide pensions saving for working-age carers; and
- provide more helplines dedicated sorting out State pension problems, with a special mention for '*the scandal of lost top-up payments*'.

The **Conservative Party**'s manifesto says that it would—

- operate a '*Triple Lock Plus*', so that not only the basic and new State pensions, but also pensioners' tax-free allowances are increased by the highest of price inflation, earnings inflation, and 2.5 per cent;
- issue a '*Pensions Tax Guarantee*' to the effect that there will be no new taxes on pensions (this entails retention of the 25-per-cent tax-free-cash option, marginal-rate contributions tax relief, and NI-free employer contributions);
- carefully consider the Parliamentary and Health Service Ombudsman (PHSO)'s report on the complaints from women adversely affected by the governmental communication strategy for increases to SPA, and provide an appropriate and swift response;
- exclude War Pensions and Armed Forces Compensation Scheme awards from the definition of income for tax and benefits purposes; and
- implement the Mansion House reforms.

The **Labour Party**'s manifesto promises to—

- take advantage of consolidation and scale to increase productive investment in UK markets by pension funds, and conduct a review to see what else could be done to improve outcomes;
- end the '*injustice*' of the surplus arrangements for the Mineworkers' Pension Scheme (the Government guaranteed that members would get at least the benefits accrued up to the time of privatization, increased in line with inflation, in return for which it would receive 50% of any surplus—an arrangement that has, with the benefit of hindsight, worked out quite nicely for the Treasury);
- oblige pension funds (and banks, asset managers, insurers and FTSE 100 companies) to develop and implement credible transition plans that align with the 1.5°C Paris Agreement climate goal;
- retain the triple lock for the State pension; and
- establish a National Wealth Fund, capitalized with £7.3bn over the course of the next Parliament, with the aim of attracting 3x investment from the private sector.

Supporting acts

Of course, the UK has more than three parties vying for Parliamentary seats in this election. Here is a sample of pensions-front policies from some others that got their manifestos out before we went to press.

The **Green Party**'s manifesto involves—

- obliging pension funds to remove fossil fuel assets from their investment portfolios, securities transactions and balance sheets by 2030;
- campaigning to '*Ensure that pensions are always uprated in line with inflation and keep pace with wage rises across the economy*' (if this is a reference to State pensions, it seems like the Greens might advocating a *double* lock);
- capping pension tax relief at the basic rate, and putting the proceeds toward higher benefits for low-income pensioners and disabled persons; and
- working with the higher education sector to mitigate the effects of Teacher's Pension Scheme employer contribution demands.

A recent voting-intention poll placed **Reform UK** one percentage point ahead of the Conservatives. Reform's manifesto (or rather '*Contract with You*') pledges that—

- ownership of British '*critical national infrastructure*' would be shared 50/50 between the public and UK pension funds;
- pensions provision would be reviewed, being currently 'riddled with complexity, huge cost and poor returns leading to less uptake';
- all of the surplus in the Mineworkers' Pension Scheme would accrue to its members.

The **Scottish National Party** was, until the dissolution of Parliament, the third largest by number of MPs at Westminster. Its manifesto says that it will press the UK Government to—

- deliver '*full, fast and fair*' compensation for women wronged by SPA-increase communications (the SNP also says that it will oppose any acceleration of the current schedule for SPA increases, and any additional escalation in age);
- maintain the triple lock and move towards a '*wellbeing pension*' (one set at a level that covers basic needs);
- reverse a change to State pension credit eligibility (since 15 May 2019, both partners in a couple have generally needed to reach SPA before receiving pension credit) and maximize benefit take-up via a comprehensive strategy;
- exempt War Disablement Pension from the assessment of income for veterans who require social care services
- provide full restitution those who suffered losses from Government maladministration in connection with the regulatory returns of the Equitable Life Assurance Society from 1992 to 2000.

There are some near-universalities (State-pension 'locks'), and other shared passions (Labour and Reform, with their promises of pension reviews, and the Conservatives and SNP, despite similar policies on veterans' pensions, seem unlikely bedfellows), but otherwise the manifestos are evidence of different pensions priorities.

Tribunal tide turns against Regulator

A couple of recent First-tier Tribunal (FTT) rulings contain surprising judicial responses to the Pension Regulator's compliance and enforcement practices in automatic-enrolment cases. In both cases the employers contended that they had not received the notices sent to them by the Regulator—and were successful. (There's another FTT reversal, on a different subject, elsewhere in this month's news.)

The Tribunal has generally supported the Regulator's hard line when employers have challenged its auto-enrolment penalties. It has pointed to the statutory presumption that a properly addressed notice was received by the intended recipient, and has said that a mere assertion to the contrary is insufficient to overcome that presumption. It has also tended to uphold the Regulator's fining decisions, occasionally waving away employer's objections with observations to the effect that 'penalties are meant to be burdensome'.

Presumption rebutted

In the first of the recent FTT cases, a small, family business managed to overturn the presumption that the notices sent by the Pensions Regulator were delivered.[1]

A compliance notice, followed by a fixed penalty notice and then an escalating penalty notice had been issued, for failure to submit a declaration that the employer had complied with its auto-enrolment duties. The employer argued that it had not received any of the notices, and that it had only found out about the penalties when a Sheriff Officer turned up at its business premises, asking for almost £14,500.

Unusually, the employer was ultimately successful in challenging the fines. It took considerable doggedness, two FTT decisions and an appeal to the Upper Tribunal to achieve that result, though; and only because it was able to provide evidence of chronic unreliability of postal deliveries to it and the neighbouring businesses with which it shared an address.

There was less evidence challenging the reliability of email transmission. The employer, however, provided a report from a non-expert who had conducted a search on the employer's email system in an unsuccessful attempt to find ten email reminders that the Regulator had sent (the employer had a Heath Robinson system whereby one email account forwarded all messages to another). The judge did not doubt that the messages were sent, but said that there were a range of reasons why emails might be '*waylaid*', and that the Regulator had not provided evidence of steps taken to avoid them being mis-identified as 'spam'.

The Regulator's cause was perhaps not helped by the revelation that it had, shortly before the hearing, sent correspondence to the employer's registered office instead of using the employer's preferred contact address, a practice that the judge described as 'unwise' and 'bound to give rise to inadvertent non-compliance and disputes'. However, this slip was subsequent to the events complained about and was not considered relevant to the outcome.

The '*quite exceptional set of facts*' led the judge to conclude that the Regulator's notices were not delivered, giving the employer a reasonable excuse for not responding. He ruled that the penalty notices should be set aside.

The case report also contains some interesting insights into the Regulator's processes for issuing notices. These tasks, which are seemingly all contracted out to service providers and entirely

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[1] *Philip Freeman Mobile Welders Limited v The Pensions Regulator* [2024] UKFTT 91 (GRC).

automated, are described in some detail. The FTT judge found the systems to be ‘reliable and robust’, but said that the Regulator should be prepared to provide evidence of reliability in future appeals, and that even isolated and minor failures may be disclosable.

Penalty ‘wholly disproportionate and oppressive’

The second FTT case concerned another small employer that had atypical success in its appeal against an auto-enrolment fine.[2] The judge’s evaluation of the Regulator’s approach in the case was notably trenchant (one might even say ‘unseasonable’, for reasons that we will explain).

In this example it was an unpaid contributions notice that was, when no response was forthcoming, followed up with fixed and escalating penalty notices. The employer asserted that it had not received the notices, and provided the Regulator with evidence that the communications from it and the National Employee Savings Trust (the employer’s auto-enrolment scheme) had been sent to the business’s previous accountant, who had not forwarded them on.

The employer asked the Regulator to review the escalating penalty, which had accrued at £500 a day for over a month, and far exceeded the unpaid contributions (which had been paid immediately after the problem came to light). It said that it was only when it received an email from the Regulator, several months after the first notice, that it became aware of the problem. The Regulator upheld its decision to issue the penalty notices, taking the view that the notices were served in accordance with the law, that the employer had not rebutted the presumption that they had been received, and that the penalties were, accordingly, automatic. The employer appealed to the FTT.

The tribunal judge was highly critical of how the Regulator dealt with its review of the escalating penalty notice, and ruled that it should be revoked. He said that the issue was not whether the Regulator had been entitled to issue the penalty notices, but whether, on reviewing the case and the employer’s representations, it should confirm, vary, or revoke the notices, or substitute different ones—the options available to it under the notice-review legislation. Whilst the Regulator’s strict approach had the merit of simplicity, said the FTT, it was not entirely consistent with the penalty regime.

The judge was just warming up to his theme, though. He went on to say the Regulator’s approach was ‘fundamentally at odds with what a competent regulator would do.’ A competent regulator, he said, would have deferred its decision until it had established the facts, what remedial action was required from the employer and whether it had been taken promptly, and would have striven to be fair. The Regulator had applied the review provisions in a way that ‘effectively… deprived [them] of all content.’

The judge said that an escalating penalty was intended to act as an incentive to comply swiftly, and that there was no incentive unless the penalty was communicated. As soon as the Regulator tried a readily available alternative means of communicating with the employer (emailing the company’s director using an address provided in its most recent declaration of compliance), it was effective, and the missed contributions were paid without any detriment to the company’s employees—an objective that ‘could have been achieved many months earlier without any sanction at all.’

The circumstances of the breach, the lack of intent, the Regulator’s failure to use the email address provided, the absence of harm to the scheme members, and the magnitude of the fine relative to the missed contributions

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[2] *Gianni's Glasgow Ltd v The Pensions Regulator* [2024] UKFTT 00507 (GRC).

all added up to make the escalating penalty ‘wholly disproportionate and oppressive.’ The judge consequently upheld the initial, fixed fine, but revoked the escalating sanction,

The second ruling will have been uncomfortable reading for the Regulator. For the rest of us, it stands out in part owing to the judge’s frequent allusions to Charles Dickens’ A Christmas Carol, occasioned by the ‘unwelcome visitation’ that the employer had experienced, ‘on the Eve of Christmas’ (it was actually 19 December, but one must allow some measure of artistic licence). It will be interesting to see how the Regulator responds to such criticisms of its compliance-and-enforcement approach as this:

‘Jacob Marley’s reformation of Ebeneezer Scrooge’s relations with his employee was effective because it was communicated. [In] its obsession with its entitlement to serve a penalty notice the Regulator entirely lacked Dickens’ psychological insight.’

Chair’s statement fining not fully mandatory

In a recent decision about the annual governance ('Chair’s) statement requirements for money purchase schemes, the First-tier Tribunal (FTT) has pushed back against the Pensions Regulator’s interpretation of the law.[3] The FTT judge rejected the Regulator's argument that the imposition of penalties for statement breaches is entirely automatic under the legislation. The trustee’s success on that point may be cold comfort to him, however, as the fine in this case was upheld.

The legislation on Chairs’ statements says that the Regulator ‘*must*’ issue a penalty notice, requiring payment of between £500 and £2,000, if trustees fail to meet their obligations. Elsewhere in pensions legislation, fining provisions typically say instead that the Regulator ‘*may*’ issue a penalty notice, suggesting that it has some discretion in the matter. The Regulator has, perhaps unsurprisingly, interpreted that as an indication that fines for breach of the Chair’s statement requirements are mandatory. It has been a frequent cause for criticism, directed at both the Regulator and the Department for Work and Pensions (DWP—which has responsibility for the legislation), as penalty notices have, consequently, been issued for even the most minor of infractions.

It may therefore have come as some surprise to the Regulator to hear an FTT judge say that its hard line was '*unreasonably restrictive as a matter of statutory interpretation*', and '*the sort of thing that gets institutions a bad name.*' Although, in his view, '*Parliament’s intention was that a penalty should <u>ordinarily</u> follow a breach*' (our emphasis), it was the case that '*TPR 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.*'

The judge also described the Regulator's stance as '*somewhat absurd*'. That was because it had accepted that it had some discretion if trustees asked for a review of the penalty notice. So, on the Regulator's interpretation, said the judge, it would be obliged to issue a penalty even if it knew that the trustees had a valid excuse, and that ('*armed with exactly the same information as* [it] *had when* [it] *imposed it*') it would revoke the fine if they asked for a review. The judge described that sort of practice as '*Janus-like antics'*.

Note, however, the reference to '*wholly exceptional circumstances*' in the judge’s deliberations. Cases in which trustees could expect the Regulator to decline to fine are expected to be '*exceedingly rare*', he said. The point

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[3] *James Caldwell (Trustee of the Smith & Wallace & Co 1988 Pension Plan) v The Pensions Regulator*

[2024] UKFTT 505 (GRC).

was illustrated during the hearing using the extreme example of a '*trustee bound and gagged for seven months or the trustee negligently or even maliciously misled by TPR*'.

No such exceptional circumstances applied in this case, so the trustee's appeal was dismissed. However, the judge had '*considerable sympathy*' for him, and could '*well understand why he feels let down by TPR*' and '*what appears to be a deliberate policy not to draw the duty to provide the Chair's Statement, the applicable deadline and the potentially painful consequences of non-compliance to trustees' attention.*' He contrasted the Regulator's Chair's statement enforcement practices with its policy in auto-enrolment cases, in which it '*goes to enormous lengths to draw attention to statutory duties and to warn in advance of the possible consequences of non-compliance.*'

The judge also raised the possibility that someone in future might successfully challenge the Regulator's policy of adding 10p per scheme member onto the £500 starting point for penalties. That point did not arise in this case, in which the fine was just £500.70 (the scheme had only seven members).

This judgment has parted the curtains a smidge, admitting the faintest glimmer of light for trustees who, despite their best endeavours, inadvertently run afoul of the Chair's statement rules. In practice it may not brighten many people's day much, as the regulatory-kidnapping scenario painted in the hearing indicates, albeit in exaggerated form, how unusual it might still be for the Regulator to waive penalties.

Relief could come more realistically if the next Government presses ahead with the Mansion House reforms announced in July 2023. The DWP suggested as part of the package that Chair's statements might eventually be phased out as plans for a new value-for-members framework are implemented.[4]

Ombudsman falls back to 'IDRP-first' position

A blog post written by Dominic Harris, the Pensions Ombudsman, gives the outcome of a review of his office's operating model. It foreshadows a return to insisting that members attempt to resolve problems via their schemes' internal dispute resolution processes (IDRPs) before turning to the Ombudsman for help.

The Pensions Ombudsman's office is currently receiving more applications complaints than it can easily deal with, creating a backlog that has struggled to reduce. The legislation establishing the Ombudsman's jurisdiction generally requires that members go through their schemes' IDRPs before their cases can be accepted for investigation. However, that principle was relaxed somewhat, informally, when the Ombudsman inherited one of the functions (as well as many of the staff) of The Pensions Advisory Service (TPAS), and created a separate 'Early Resolution Service'.

It is hoped that reversion to the requirement that members make use of schemes' IDRPs will stem the flow of complaints. There will still be volunteer advisers available to help members with problems, but it seems that their efforts will be concentrated on cases where a quick resolution is especially desirable (for example, when vulnerable people are involved).

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[4] *Government-Regulator Response to 'Value for Money: A Framework on Metrics, Standards and Disclosures'* (July 2023), paragraph 231.

Signposting

In separate news, the PO's office has updated its 'Signposting' factsheet, which gives some examples of wording that can be used by trustees and scheme managers to direct complainants toward the PO service, in their IDRP responses, or on a scheme webpage.

Public sector update

McCloud tax newsletter

His Majesty's Revenue and Customs published a June 2024 issue of its *Newsletter on the public service pensions remedy*, concerning the transitional provisions connected with the move to career-average salary-related schemes, declared discriminatory in the *McCloud* judgement.

HMRC's '*Calculate your public service pension adjustment*' service has been suspended '*due to a technical issue*'. It is taking the opportunity afforded by the downtime to introduce some improvements, listed in the Newsletter. The plan is to re-activate the service in mid-July, though some of the planned changes will not be online until September 2024.

In the meantime, there is an email address for scheme administrators to send requests for help with member submissions.

Staff transfers

The Government Actuary's Department (GAD) issued a note on the actuarial assumptions that it will use, for broad comparability assessments for staff transferring between public service pension schemes under the Government's 'Fair Deal' policy, for cases processed from June 2024 onward.

And Finally…

Though the mills of God grind slowly
Yet they grind exceeding small;
Though with patience He stands waiting,
With exactness grinds He all.

—Henry Wadsworth Longfellow

Terrific stuff, we're sure you'll agree, although its solemnity and poignancy has been diminished somewhat by modern associations of 'grind' with a risqué dance move and a dating app of lubricious repute. Anyway, the imagery of patient-but-inexorable justice sprang to *AF*'s mind when reading a 542-page High Court judgment in a case brought by liquidators on behalf of the BHS Group against two former directors. Some eight years after the companies went into administration, the ex-directors were held liable for wrongful trading and misfeasance (fancy insolvency-law-speak for dodgy dealings) in connection with the acquisition and insolvency of the high-street retailer. They were ordered to pay back nearly £20m.

Similar accusations have been levelled against Dominic Chappell, the principal scoundrel in a cast of characters who all seemed to take a turn at playing the role of pantomime villain. The trial of the claims against him was postponed to be heard in separate proceedings, in large part because when they were brought he was already in chokey. Chappell is a serial bankrupt who was disqualified from acting as a director for ten years, convicted of being *economical with the actualité* in his interactions with the Pensions Regulator, and received a six-year custodial sentence for non-payment of tax on money extracted from BHS. The judge in the tax case said that Chappell was '*not of positive good character*', which *AF* suspects is the judicial equivalent of calling someone a… well, something that we can't say here unless we want an '18' rating from the BBFC.

Chappell is also a former racing car driver who began his involvement in the BHS case, appropriately enough, as the chauffeur for another prospective BHS buyer (himself with multiple bankruptcies and an overseas fraud conviction under his belt). Neither had experience of retailing or running large companies of any sort.

AF had almost forgotten the James Bond element of the saga, with its billionaires, superyachts, powerful automobiles, slippery briefs (as in lawyers), and schmoozing in Monaco. There is doubtless more legal (fine-)grinding to come...

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