NCN **[2024] UKFTT 00505 (GRC)**.

First-tier Tribunal
(General Regulatory Chamber)
Pensions Regulation

Appeal Reference: PEN/2023/0149

Decided following a hearing on 21 March 2024

Before

JUDGE ANTHONY SNELSON

Between

JAMES CALDWELL
(TRUSTEE OF THE SMITH & WALLACE & CO 1988 PENSION PLAN)

Appellant

and

THE PENSIONS REGULATOR

Respondent

DECISION

On hearing the Appellant in person and Mr W Franklin, in-house solicitor, on behalf of the Respondent;
And on reading the written representations submitted by the parties following the hearing;

The Tribunal determines that the appeal is dismissed and the matter remitted to the Respondent.

REASONS

1. The Appellant, Mr James Caldwell, was at all relevant times the sole trustee of the Smith & Wallace & Co 1988 Pension Plan ('the Scheme'). By this reference he challenges a penalty notice ('PN') issued by the Pensions Regulator ('TPR') on 27 March 2023, requiring him to pay a penalty of £500.70 for failing to comply with his obligation to prepare a governance statement in relation to the Scheme by the required date, 31 October 2022.

The statutory framework

2. Trustees of an occupational pension scheme providing money purchase (*ie* defined contributions) benefits are required by the Occupational Pension Schemes (Administration) Regulations 1996 ('the Administration Regulations'), reg 23 to provide an annual statement regarding governance. Although the duty falls on all the trustees, the statement must be signed by the Chair. It is commonly known as the 'Chair's Statement' and will be so called below. A Chair's Statement is required for all 'relevant schemes', namely all money purchase schemes other than those excepted under the Administration Regulations, reg 1(2). The Statement, which must be delivered within seven months of the end of each scheme year, must contain specified information about the scheme's investment strategy, financial processes and charges and about the trustees' compliance with the requirement[1] for them to possess sufficient knowledge and understanding to perform their functions.

3. If trustees fail to prepare a Chair's Statement in accordance with the Administration Regulations, reg 23, TPR is required to ('must') impose on them a PN: Occupational Pension Schemes (Charges and Governance) Regulations 2015 ('the Governance Regulations'), reg 28(2). The penalty must be at least £500 and must not exceed £2,000 (*ibid.* reg 28(4)(b)).

4. TPR may review a PN on the application of a trustee or of its own volition and, having done so, may confirm, revoke or vary it or substitute a fresh PN (*ibid.* reg 31).

5. By the Governance Regulations, reg 32(1) and (2), trustees may make a reference to the First-tier Tribunal ('FTT') to challenge a PN, provided that a review has been carried out or TPR has declined an application for a review.

6. In dealing with a reference the powers of the FTT are very wide. The Pensions Act 2004, s103 includes:

> **(4) On a reference, the tribunal concerned must determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it.**

In *In the matter of the Bonas Group Pension Scheme* [2011] UKUT B 33 (TCC) Warren J, sitting in the Upper Tribunal, held that there was nothing in s103 or elsewhere to restrict the tribunal's approach to a reference. Its function is not that of an appellate court considering an appeal.[2] It must simply make its own decision on the evidence before it (which may differ from that before the Regulator). This said, the Tribunal must accord 'great respect' and 'considerable weight' to any public authority's policy on financial penalties (see *Waltham Forest LBC v Marshall and Ustek* [2020] UKUT 0035).

The appeal and TPR's response

7. In his notice of appeal, as developed in his written case and oral argument, Mr Caldwell did not dispute the following matters: that the Scheme fell within the scope of the Administration Regulations and no exemption was applicable; that the Chair's Statement had been due on 31 October 2023; that the Chair's Statement had not been delivered by that date; and that, as at 31 October 2023, he had been the sole trustee of the Scheme.

[1] Under the Pensions Act 2004, ss 247 and 248
[2] Although the terminology of 'appeal', 'appellant' etc is used

8. Mr Caldwell nonetheless challenged the PN, relying principally on the following points:

(1) He had spoken with members of TPR's staff on a number of occasions before completing the 2022 Scheme Return. Nothing was said to him about the need provide a Chair's Statement.
(2) Likewise, written communications from TPR prior to the submission of the Scheme Return had made no reference to the requirement for a Chair's Statement.
(3) The pro forma Scheme Return document appeared to treat presentation of a Chair's Statement as optional, merely asking if one would be provided.
(4) Since imposition of the PN, TPR has refused to engage with Mr Caldwell on his grievance about the PN, merely stating that its function is to enforce.

9. In response, TPR argued:

(1) The Scheme was not exempted under the Administration Regulations.
(2) As the sole trustee, Mr Caldwell was solely responsible for compliance with the duty to deliver a Chair's Statement.
(3) Mr Caldwell did not comply by the due date.
(4) Under the legislation, TPR was *obliged* to impose a penalty of £500-£2,000.
(5) The PN in the sum of £500.70 applied TPR's policy, which provides for the starting-point figure to be increased by 10p per scheme member.

10. The matter came before me for hearing by CVP on 21 March 2024, with one hour allocated. Mr Caldwell appeared in person; Mr William Franklin, an in-house solicitor, represented TPR.

11. After some debate, I concluded that it was necessary in the interests of justice to request further assistance from TPR on the applicable law. Accordingly I gave directions for the delivery of written submissions directed to three matters: (a) whether the mandatory language of the Governance Regulations, reg 28 precludes consideration of *any* reasonable excuse for non-compliance; (b) the scope (if any) for TPR, in exercise of its powers of review under the Governance Regulations, reg 31, to take account of *any* reasonable excuse for non-compliance; and (c) the legal significance of a point taken by Mr Caldwell concerning the alleged rejection before the hearing of his request for the appeal to be heard in Scotland and/or under Scots law. I will call these points (a), (b) and (c).

12. In a commentary accompanying the directions, I explained what I was looking for and why I was putting the parties to the trouble of providing it. The material parts of the commentary are as follows:

> **2. … Mr Franklin submitted that, once it was established (as it was) that the Chair's Statement had not been prepared by the due date, the Respondent had no option but to apply a penalty of not less than £500, given the mandatory language of the Regulations, reg 28(2)(b) and (4)(b). I pressed him with an extreme example of a case where the Respondent was told, and accepted, that the reason for the infringement by the trustee was that he had been kidnapped and held bound and gagged in a place from which he could not communicate with the outside world throughout the seven-month period allowed for compliance. Mr Franklin told me that the Respondent's obligation in such circumstances would have been to impose a minimum penalty of £500. Asked for binding authority that *no* excuse, however reasonable, could prevent this consequence, he pointed to the statutory use of the word 'must', maintaining that it admitted of no discretion, however compelling the circumstances. He also said that there was no direct authority,**

although he did draw attention to some decisions of the First-tier Tribunal which, he said, were consistent with his case.

3. … It seemed to me at the very least open to question whether Parliament can have intended the Regulations to have been capable of producing the grotesquely unjust consequences which Mr Franklin was prepared to contemplate. Time for reflection suggests another, somewhat less outlandish example for his consideration. Say the Chair's Statement is prepared one day late and the Respondent accepts that the reason is that the trustee was misled by a member of the Respondent's staff as to the true compliance date. Would Mr Franklin maintain that here also, the Respondent would have no option but to impose the penalty? And would the answer be the same even if the misrepresentation concerning the compliance date had been not merely careless but deliberate and malicious?

4. In my view, it is not good enough simply to say that there is no binding authority. I cannot accept, at this stage, that there is no decision of *any* court of record which may assist the Tribunal, tangentially if not directly, to a proper understanding of how penal legislation of the sort under consideration here is properly to be applied. The leading texts on statutory interpretation would surely be a good starting-point.

5. So much for para (1)(a) of my Order. As to para (1)(b), I understood Mr Franklin to maintain that, despite the apparently wide wording of the Regulations, reg 31(5) and (6), the Respondent was no more free at the review stage to take account of the *reason* for the trustee's non-compliance than when considering the matter at first instance under reg 28. Again, Mr Franklin cited no authority for his argument. Again, I cannot accept, at this stage it least, that there is no learning reasonably accessible through proper research, capable of informing (by analogy if not directly) my decision as to (a) the scope of the Respondent's power of review in a case of this sort, and (b) the significance (if any) of that scope (or lack of scope) for my purposes as the next appellate authority.

6. As to para (1)(c) of my Order, this addresses a point raised late in the hearing (we had already overrun the one-hour allocation). In the circumstances, and given that I was already minded to invite further submissions on the above points, I considered it right to allow the parties time to consider and make representations on this matter also. On the face of it, the Appellant appears to complain of some form of procedural irregularity arising out of the (alleged) failure of the Tribunal to engage with his request for the case to be considered in Scotland and under Scottish law. The Tribunal requires assistance as to principles relating to territoriality generally across the FTT and specifically in the context of the pensions jurisdiction. (I have not got further than noting that, it appears, the relevant pensions legislation (at least the Pensions At 2014) extends to England, Wales and Scotland.) That may (or may not) dispose of the question of territorial reach. Regardless of territorial reach, what gives me (sitting in England) jurisdiction to determine a complaint which arises out of an act done in Scotland (assuming for these purposes that the act is done where the penalty notice is received)? If no question arises as to my jurisdiction to consider the appeal, what of the Appellant's contention that it should in any event be determined in accordance with Scottish law? Is Scottish law for present purposes different in any material respect from the law of England and Wales? More generally, what significance (if any) attaches to the (alleged) procedural shortcoming of the Tribunal, which resulted in his application receiving no consideration prior to the hearing?

7. I make no apology for putting the Respondent to the trouble of providing the further assistance required by my Order. The Respondent's obligations go beyond enforcement of the pensions legislation. Since the Appellant is unrepresented, it owes him, and the Tribunal, the important duty of ensuring that all relevant law is brought forward, whether it helps or hinders the Respondent's case. In my view the Appellant is understandably aggrieved by the penalty applied to him. If the law compels me to uphold it, justice will, at the very least, require me to be fully equipped to explain why.

13. TPR duly delivered written submissions dated 12 April addressing the concerns which I had raised. I pay tribute to Mr Franklin for the careful and comprehensive way in which he addressed the task which I had set him.

14. As to point (a), Mr Franklin maintained the position which he had taken at the hearing. He reminded me of the cardinal principle of statutory interpretation that words must be given the clear and natural meaning. The word 'must' in the Governance Regulations, reg 28(2) means what it says. There is no ambiguity. There is no scope for the provision to be tempered by any principle or canon of construction such as the principle against dubious penalisation. No discretion arises and the reason for any breach of the duty to prepare the Chair's Statement, however compelling, is strictly irrelevant.

15. Turning to point (b), Mr Franklin fairly acknowledged that the analysis which he had put forward at the hearing had been overstated and that, in certain very limited circumstances, TPR would have a discretion under the Governance Regulations, reg 31 to review and revoke a PN. He proposed three categories of case in which such a discretion might arise: first, where on investigation it transpired that no breach had occurred; second, where, owing to some steps taken by TPR, it would be procedurally unfair to maintain the penalty; third, where some other 'specific, extenuating circumstance' would make it manifestly unfair to maintain the penalty. But, submitted Mr Franklin, none of the narrow exceptions to the general rule was applicable in the instant case.

16. Finally, Mr Franklin addressed point (c), submitting by reference to the Pensions Act 2014 and other relevant statutory materials that the legislation had effect in Scotland as it did in and England, that no question of jurisdiction arose, and that, even if his request for a hearing 'in Scotland' had been overlooked, Mr Caldwell had suffered no prejudice.

17. Mr Caldwell delivered written submissions in reply dated 17 April. These sought to go well beyond the scope of my directions. In summary, he argued, as I understand him, as follows. First, there is no legal requirement for the Chair's Statement to be in writing and information conveyed by other means to TPR before the deadline was sufficient to satisfy the obligation under the Administration Regulations, reg 23. Second, because he had been invited in the summer of 2022 to wind up the scheme, the obligation to deliver the Chair's Statement was somehow inapplicable. Third, the fact that the scheme was small and had only seven members excused the trustee from the requirement to have extensive knowledge of the applicable rules and legislation, or at least diminished the rigour of that requirement. Fourth, the fact of the deadline (or 'due date') for delivery of the scheme return having been extended should be seen as a factor in favour of the appeal. Fifth (to repeat the central argument already advanced), TPR had taken no steps to draw to Mr Caldwell's attention the duty to provide the Chair's Statement until the time limit for doing so had expired.

18. TPR delivered submissions in reply dated 10 May, challenging Mr Caldwell's attempts to introduce new facts and evidence and, in any event, resisting all his points on their merits.

Analysis and conclusions

19. I prefer to adopt an inclusive approach to Mr Caldwell's case because I am satisfied that it is possible to do so without the risk of prejudice to TPR. Moreover, to do otherwise might prejudice Mr Caldwell: I am mindful that, following delivery of the submissions of 12 April, he was confronted with a different case on the law from that presented at the hearing (see above).

20. All this having been said, and taking Mr Caldwell's case at its widest, I am satisfied that the only proper course open to me is to dismiss this appeal. I have four reasons for this view. First, there is nothing in the new argument seeking to deny an infringement of the Administration Regulations, reg 23. Second, no narrow or exceptional circumstance of the sort which might preclude TPR from imposing a PN applies. Third, it is not open to the Tribunal to hold that TPR erred in declining Mr Caldwell's application for review. Fourth, there is no substance in the complaint of some sort of jurisdictional bar based on the fact that Mr Caldwell was and is resident in Scotland and/or the contention that the case should have been determined in Scotland and/or under Scots law.

21. On the first point, I am satisfied that Mr Caldwell's position is hopeless. It is plain and obvious from the legislation that the Chair's Statement needs to be in writing. As Mr Franklin points out, there is an explicit requirement for it to be 'signed'(see the Administration Regulations, reg 23€).

22. It is convenient to take the second and third points together. Here I start by joining issue with Mr Franklin on his central analysis. I simply do not accept that the mere use of mandatory language without more excludes from consideration *any* explanation offered for the breach, however compelling. I do not accept that it was Parliament's intention that the trustee bound and gagged for seven months or the trustee negligently or even maliciously misled by TPR as to time limits should be visited with a penal sanction under reg 28(2). In my view, Parliament's intention was that a penalty should ordinarily follow a breach but that, by necessary implication, 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.

23. In my view, Mr Franklin's argument as developed is not only unreasonably restrictive as a matter of statutory interpretation but also somewhat absurd. The logic appears to be that in the exceedingly rare case where wholly exceptional circumstances explained and excused the non-compliance, TPR would remain under an obligation to impose a PN, which he would immediately have to follow with a review and revocation of the same PN (see Mr Franklin's submissions on point (b)). This is the sort of thing that gets institutions a bad name. The logic of a revocation is that something has been done which is wrong and needs to be undone. But Mr Franklin would have TPR say, in effect, 'My PN was entirely proper and I had no option but to impose it but now (armed with exactly the same information as I had when I imposed it) the law compels me to revoke it because it would be unfair not to.' The bewildered onlooker could only wonder how it could possibly have been right to impose the PN in the first place. I do not accept that Parliament can have intended the Tribunal to sanction such Janus-like antics.

24. Although I disagree with Mr Franklin about the stage at which TPR must take account of any truly exceptional explanation for non-compliance (I say at the PN stage, he at the review stage), I accept his argument that Mr Caldwell's points, which he quite understandably sees as valid mitigating circumstances, cannot avail him in this appeal. In particular, I am clear that his complaint about TPR not drawing his attention to the risk of a penalty for failing to prepare the Chair's Statement by the due date leaves him a long way short of establishing any kind of misrepresentation. In these circumstances, I find that TPR was under an obligation to impose the PN.

25. I also find that there was no basis on which TPR could properly have revoked the PN on appeal. Under the law, the PN was proper. The power of review could not be used to convert the mandatory requirement to impose a penalty into a discretionary exercise. In so far as it applies to decisions as to whether or not to impose a PN (rather than discretionary decisions as to the *amount* of any penalty), it exists to enable TPR to correct errors. There was, as I have found, no error here to correct.

26. As to the fourth point, I agree with Mr Franklin's submissions. The relevant statutory regime applies in England, Wales and Scotland. There is no question of any want of jurisdiction. It seems that Mr Caldwell asked for his hearing to be 'in Scotland' and that request was overlooked. If so, that is regrettable but he suffered no prejudice. In the event, a 'remote' hearing was held. He participated from Scotland. If the hearing is properly seen as having been 'held' in England, he suffered no disadvantage.

Disposal and postscript

27. For the reasons stated, the appeal is dismissed.

28. I should add for completeness that there is a further point which might have been taken by Mr Caldwell (but was not), concerning the precise level of the penalty. It seems to me that TPRs policy of increasing PNs by 10p per scheme member *might*, in a suitable case, be vulnerable to challenge on a number of grounds (as a matter of general principle and/or having regard to the particular facts of the case). I neither express not imply any view. But in any event Mr Caldwell quite rightly raised no challenge purely on *quantum*. The PN here was increased from the £500 starting point by £0.70, and it would have been absurd to litigate over less than a pound. The Tribunal could only have dismissed an appeal so put as *de minimis*.

29. Finally, although I am very clear that the appeal is not well-founded given the statutory language and the principles of interpretation which I must apply, I would add that I have considerable sympathy for Mr Caldwell. I can well understand why he feels let down by TPR and I have seen no clear explanation for 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. The primary function of a regulator should be to encourage adherence to statutory duties through support and education, rather than to penalise. It is notable how, in other areas of its operations (automatic enrolment in particular), TPR goes to enormous lengths to draw attention to statutory duties and to warn in advance of the possible consequences of non-compliance. It is, to me, puzzling that this supportive spirit is not readily discernible in the context of the Administration Regulations. In his submissions, Mr Franklin appeared to say that TPR's harsher approach in enforcing the provisions under consideration here is justified because the penalties are mandatory, rather than discretionary. This seems to me remarkable. I would have thought that common sense and simple fairness would argue the very opposite.

Anthony Snelson
Judge of the First-tier Tribunal

Date: 14 June 2024