

**REVIEW BY REGULATOR OF DISCIPLINARY PENALTY- approach-  
applicant's changed financial circumstances- relevance of reduction of another  
party's penalty.**

**THE PENSIONS REGULATOR TRIBUNAL**

**MRS ADRIENNE MORRIS**

**Applicant**

**- and -**

**THE PENSIONS REGULATOR**

**Respondents**

**Tribunal: JUDGE DAVID MACKIE CBE QC (Chairman)  
MS SANDI O'NEILL  
MR TERRY CARTER**

**Sitting in public in London on 19 April 2007**

**The Applicant did not appear and was not represented**

**Ms Christine Brightwell, counsel, for the Respondents**

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## DECISION

1. This Reference concerns the approach of the Regulator to requests that a disciplinary penalty be reviewed in the light of subsequent events.

### **Procedural history**

2. This is a Reference by the Applicant Mrs Morris from a review by the Regulator on 27<sup>th</sup> September and 23<sup>rd</sup> October 2006 of disciplinary decisions taken by OPRA as long ago as 19<sup>th</sup> September and 19<sup>th</sup> November 2001. After Directions had been given by the President the hearing took place before us on 19 April 2007. Mrs Morris did not appear and was not represented, relying on her written submissions. The Regulator was represented by Ms Christine Brightwell of Counsel. At the end of the hearing the Tribunal expressed the provisional view that the reference should be dismissed. The Tribunal considered however that Mrs Morris may not have appreciated the significance of her decision not to attend and give evidence. Ms Brightwell also raised matters at the hearing which had not been included in the skeleton argument earlier sent to Mrs Morris. The Tribunal therefore directed that the Regulator provide, within 7 days, a written summary of its submissions at the hearing for Mrs Morris to consider. Mrs Morris was then to have a further 14 days after receiving those submissions to seek a further hearing if she wished. Mrs Morris subsequently paid the penalty of £5,000 which had been in issue indicating in writing that she *“does not want to fight this matter any more as it is making me ill”*. The Rules permit the Tribunal to allow an applicant to withdraw a reference before or at the Hearing. As in one sense the hearing was not complete when Mrs Morris paid the penalty we have power to allow the Reference to be withdrawn on terms. That is not a power we would agree to exercise on this occasion in view of the advanced stage the case had reached and the Regulator’s understandable request for a Decision. Our Decision can be relatively brief however now that Mrs Morris has paid the penalty.

### **Jurisdiction**

3. The Regulator’s jurisdiction is not disputed. This reference arises out of disciplinary decisions taken by the Determinations Commission of the Occupational Pensions Regulatory Authority (“OPRA”) on 19 September and 19 November 2001. Mrs Morris exercised her right under Section 96 of the Pensions Act 1995, then in force to require a review of those decisions by OPRA. The provision for a review procedure is similar to that found in other statutes and disciplinary rules giving power to OPRA to reconsider a decision and to vary or cancel a penalty. That review was postponed for reasons we will come to shortly. In the meantime by Section 7 of the Pensions Act 2004 all OPRA’s functions were transferred to the Regulator. Transitional provisions made the adjourned review the task of the Regulator.

### **Facts**

4. C W Cheney & Son Limited was a small manufacturing firm in Hockley, Birmingham. It made locks such as those used on luggage. The Cheney pension scheme was established in 1973 as a final salary scheme for employees. By 1999 the pension fund had grown to some £3.1 million. By early 2000 the company had ceased to be a going concern and its largest asset was the pension fund. The company and the fund were acquired by Cumberland Leasing Corporation and the then trustees

of the pension scheme resigned. Mrs Morris, who was then connected with an insolvency firm controlled by those who owned Cumberland, was appointed a director of the company and on 28<sup>th</sup> April 2000 became one of the new trustees of the fund. In a few months some £750,000 was extracted from the fund. In September 2000 Cheney was sold on by Cumberland. Mrs Morris and another resigned as trustees of the fund on 11<sup>th</sup> September. A further £2.2 million was then removed from the fund before OPRA appointed Independent Trustee Services Ltd on 20 October 2000 with powers under section 7 of the Pensions Act 1995 . Those involved were later charged with conspiracy to steal and the ringleaders received substantial prison sentences.

5. OPRA took action against Mrs Morris and others in respect of their service as trustees of the Cheney pension scheme. Penalties were imposed upon Mrs Morris and two colleagues for various rule breaches including failure to obtain and consider proper advice on the question of whether investments undertaken after 28 April 2000 were satisfactory. OPRA determined through its Determination Committee that Mrs Morris should pay separate financial penalties of £500 and £5,000, be prohibited from being a trustee of the Cheney pension scheme and be disqualified from being a trustee of any occupational pension scheme. The penalty of £5,000 was then the maximum which OPRA could impose. Mrs Morris does not challenge OPRA’s findings on liability, the prohibition or the disqualification. Her application is limited to the penalty of £5,000. The issue on the £500 penalty which had been imposed for a failure to appoint auditors fell away for reasons irrelevant to the rest of this Decision.

**Review of the penalty by the Regulator**

6. Mrs Morris originally sought a review at the end of 2001 and this was set down for an oral hearing in June 2002. Mrs Morris’s solicitors applied however for an adjournment of the review pending the outcome of criminal proceedings which Mrs Morris then faced at Birmingham Crown Court. OPRA agreed to adjourn the review indefinitely. In the event the criminal charges against Mrs Morris were withdrawn before trial. The trial of those we have described as the ringleaders ended in November 2005.

7. On 6 March 2006 the Regulator wrote to the Mrs Morris stating that it intended to enforce the penalty unless she wished to proceed with the review. Mrs Morris confirmed that she wished to proceed with her review and after further correspondence this was conducted by the Determinations Panel of the Regulator. As a result by a Determination Notice dated 23 October 2006 the Regulator upheld the penalty on the following grounds set out in the relevant parts of Paragraphs 6 and 7:-

*“1. The Determinations Panel did not feel that Mrs Morris had provided sufficient and detailed evidence of her means.*

*In particular:*

- (a) she had failed to state whether or not she had any further accounts in this country or abroad;*
- (b) she had not provided a statement of her Abbey National account;*

- (c) *she had not provided full details of her Lloyds bank statement (there were pages missing);*
- (d) *she had not provided full information in relation to her Housing Benefit and Incapacity Benefit.*
2. *Mrs Morris' failure to comply with the law constituted a serious breach of trust.*
3. *The consequences of these breaches had been:*
- (a) *to put the scheme at risk;*
- (b) *to cause a huge dissipation of scheme assets.*
4. *The panel were of the view that any appeal against the penalty of £500 for failure to appoint a scheme auditor was barred because of the regulations, but even if it had not been, the panel would not have reduced it in view of points 1-3 above.*
1. *That the financial penalty of £5,000 imposed for failure to obtain and consider proper advice on the question of whether investments undertaken after 28 April 2000 were satisfactory should be upheld.*

8. On 9 November 2006 Mrs Morris filed a Reference Notice with the Tribunal. Her grounds were :-

*"I wish the Tribunal to consider the issue of my financial situation. As explained I have no income except my Income Support. Also Mr Brennan the other trustee was given a very reduced penalty to pay because of his financial situation".*

**Function of the Tribunal**

9. We are not hearing an appeal against the Regulator's decision but reviewing from the start the facts and matters which led to it. It is for us in effect to repeat those parts of the exercise carried out by the Regulator which are in issue, bearing in mind of course the overall context. We deal in turn with the two separate grounds upon which Mrs Morris relies.

**Financial penalty now disproportionate to her means?**

10. Once Mrs Morris had indicated that she was relying on this ground and claiming that she was living on Income Support, the Regulator sought and obtained from the Tribunal a Direction requiring her to produce copies of various credit card and bank statements and evidence in support of an insurance claim. In the light of the evidence and the information provided by Mrs Morris following the Direction, the Regulator identified a number of payments made to Mrs Morris in the period before she received Housing Benefit and Income Support including £5,000 received from a Barclays account and a payment of £10,000 into her account on 12 June 2003 to pay to the trustee in bankruptcy of her partner Mr Sykes who is currently in prison. The Regulator claims that Mrs Morris has had other income over and above her Income Support and Housing Benefit which she started receiving in September 2004 and that

5 the pattern of spending is not consistent with an individual relying entirely upon  
Income Support. Mrs Morris apparently lives in a flat belonging to her son and pays  
him rent. The Regulator submitted that in the year 2006 Mrs Morris received £8,400  
for Housing Benefit but paid rent to her son of only £2,850. Mrs Morris has  
apparently at times received payments from her mother, from a friend for the benefit  
of Mr Sykes and from other sources which she does not recollect or has not  
explained.

10 11. The Regulator also contends that at the time the penalty was imposed in 2001  
Mrs Morris had sufficient means to pay it. Even by March 2006 Mrs Morris still had  
over £5,300 in her Abbey National account and generally had well over £1,000 in  
her current account. The Regulator also places emphasis on the fact that on 15 March  
15 2006, two days after making an application for the financial penalty to be reduced  
on the grounds of inability to pay, Mrs Morris spent £3,500, apparently at the request  
of her ex-husband, on her daughter's wedding. The Regulator considers that this was  
inappropriate since Mrs Morris had a pre-existing obligation to pay the penalty.  
Mrs Morris was, as we have mentioned, given an opportunity after the hearing to deal  
with these matters but declined to do so. This is no criticism of Mrs Morris because  
20 she then made the decision to end this case by paying the penalty in issue. However  
these matters remained unexplained and therefore we reject Mrs Morris' claim that by  
the time of her review consideration in 2006 she had no income other than Income  
Support.

25 12. When we asked counsel for the Regulator whether, in considering Mrs Morris'  
financial position we should do so at the date the penalty was imposed, at the date of  
her review or at the present date she submitted that we should have regard to all three.  
If that is a submission that we should consider the overall position including the  
particular conditions under which the penalty was imposed and an Applicant's current  
30 circumstances we agree. We do consider however that the circumstances at the time  
when the penalty was invoked are of particular importance because that is the point at  
which an Applicant comes under an obligation to pay the penalty and is fully aware  
of it. The fact that an Applicant, by operating a process of appeal or review, is  
granted a suspension of his or her obligation to pay is no justification whatsoever to  
35 behave as though the liability did not exist. The applicant should from that  
point be careful to preserve sufficient assets to meet the penalty if and when  
required to pay it. In this case Mrs Morris would, if her appeal had proved  
unsuccessful, have had to pay the penalty within a few weeks or months of it  
being imposed. These are unusual circumstances in that, at Mrs Morris's request, her  
40 review was adjourned for a period of years but the principle remains precisely the  
same. Mrs Morris was unwise to conduct her affairs as though this liability did not  
exist and, if as a result of her doing so, she fell into difficulties she has only herself to  
blame. Although the Regulator, like the Tribunal, has a wide discretion it seems to us  
unlikely that he or we would, except in very unusual circumstances, give relief to an  
45 applicant who is unable to pay only because the money that would have been  
available to meet a penalty had been spent on something else.

#### **The relevance of a reduced penalty for another trustee**

50 13. Before on 19 November 2001 confirming penalties provisionally imposed two  
months before, OPRA considered representations from Mrs Morris and her  
former colleagues. While maintaining a fine of £5,000 on Mrs Morris and on a Mr  
Nyack OPRA reduced the proposed penalty on Mr Brennan from what would have

5 been £5,000 to £1,500. The Determination Committee did this “*solely because it is disproportionate to his means: this in no way reduces the gravity of the offence*”. It is clear from the material available on the file that OPRA gave careful consideration to the fairness of all three penalties. They decided in one case to reduce the penalty but in the other cases not to do so. There is no evidence before us either about Mr Brennan’s means or about the alleged parallels between his position and that of Mrs Morris. It is however common for a carefully considered application to be granted for one applicant but refused for another. There was nothing unfair about that process or inconsistent about its result.

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14. It is worth emphasising that the fraud perpetrated upon the pension fund was a particularly serious and unpleasant one. The Tribunal entirely shares the Regulator’s view about the seriousness of the breaches of trust. If the maximum penalty which OPPRA could impose in 2001 had not been limited to £5,000 Mrs Morris might well have been ordered to pay a much higher sum. For these reasons we dismiss Mrs Morris’ reference and uphold the Regulator’s decisions.

20 **JUDGE DAVID MACKIE CBE, QC**  
**CHAIRMAN**

**RELEASED:**

25 PRT 2006/0005