[2017] UKUT 0323 (TCC)

Reference number: FS/2017/003

PENSIONS REGULATOR – penalty for failure to file notification that scheme had been wound up - whether trustee failed to take all reasonable steps to secure compliance-no-whether amount of penalty appropriate-yes-reference dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ALL METAL SERVICES LIMITED **Applicant**

- and -

THE PENSIONS REGULATOR **Respondent**

TRIBUNAL: Judge Timothy Herrington

The Tribunal determined the reference on 1 August 2017 without a hearing pursuant to the terms of Directions released by the Tribunal on 4 May 2017

DECISION

Introduction

1. This is a reference in respect of a financial penalty of £300 imposed by The Pensions Regulator ("TPR") on the Applicant in its capacity as trustee of the occupational pension scheme known as All Metal Services Limited (the "Scheme") in relation to the late filing of a return in respect of the Scheme.

2. The financial penalty was imposed on the basis that despite reminders the Applicant failed to provide a periodic return containing prescribed information concerning the Scheme in breach of its duty to do so under s 64 (1) of the Pensions Act 2004.

3. The Applicant contends that it was unaware of the need to file the return until it received a determination notice from TPR on 27 February 2017 informing it of the imposition of the financial penalty and had received no previous communications from TPR regarding the matter. The Applicant says that it had now notified TPR that the Scheme was wound up in June 2015.

4. Consequently, TPR now seeks to impose the same penalty on a different basis, namely that the Applicant failed to notify TPR of the fact that the Scheme had been wound up in breach of its duty to do so under s 62 (5) of the Pensions Act 2004.

Legal and Regulatory Background

5. As this is the first occasion on which a reference of this nature has been made to this Tribunal, it is helpful to set out the background against which the financial penalty has been imposed in this case.

6. Section 59 (1) of the Pensions Act 2004 ("PA 2004") imposes upon TPR the obligation to compile and maintain a register of occupational pension schemes and personal pension schemes which are "registrable schemes". Section 59 (3) PA 2004 requires TPR to record in the register the "registrable information" most recently provided to it in respect of each registrable scheme.

7. Regulation 2 of the Register of Occupational and Personal Pension Schemes Regulations 2005 (the "Regulations") defines "registrable scheme". The definition includes an occupational pension scheme which has more than one member and provides benefits which are not solely payable on the death of a member and which is or has been registered with HMRC.

8. Section 60 PA 2004 and Regulation 3 of the Regulations define "registrable information". As well as information concerning the contact details for the scheme and details of the scheme's trustees, the definition includes information regarding the status of the scheme, that is whether it is open to new members, open to accrual of further benefits, open to payment of further contributions, whether it has any active

members, the categories of benefits under the scheme, the number of members of the scheme, the names (past and present) and addresses of any relevant employer and the nature of the employer's business.

9. Section 62 PA 2004 provides that trustees of a registrable scheme are under an ongoing duty to notify TPR as soon as reasonably practicable if a scheme becomes or ceases to be registrable, registrable information changes, or if a registrable scheme is wound up.

10. Section 63 PA 2004 provides that TPR must issue a scheme return notice to each registrable scheme on a periodic basis (either annually or triennially depending on the characteristics of the scheme) requiring a scheme return to be provided by the return date specified in the scheme return notice. Similar to the requirement imposed on a company registered under the Companies Act 2006 to file an annual return, a scheme return is a means of periodically requiring trustees to update the registrable information held by TPR, in addition to the trustees' ongoing duty to notify TPR of any changes to registrable information as soon as reasonably practicable.

11. Section 64 (1) PA 2004 provides that the trustees or managers of a registrable scheme in respect of which a scheme return notice is issued must, on or before the return date, provide a scheme return to TPR.

12. Section 65 (4) PA 2004 provides that a scheme return notice in respect of a registrable scheme must require all registrable information in relation to the scheme and may require other information which TPR reasonably requires for the purposes of the exercise of its functions in relation to the scheme.

13. TPR says, which I accept, that the provision of registrable and other information, in particular through the scheme return, is an essential and fundamental administrative requirement in order to enable TPR to carry out its functions. For example:

(1) it is vital that TPR has up-to-date contact details for each scheme, its trustees and any employers, so that it can communicate with them quickly and effectively;

(2) it is necessary for TPR to know the category of each scheme and the number of members each scheme has, since it is this information which determines the amount of the various fees and levies which TPR collects in respect of the scheme;

(3) the scheme return provides an important tool for TPR to monitor compliance with regulatory requirements enabling TPR to take targeted action to deal with schemes, trustees or employers who are non-compliant;

(4) the information required of trustees can be analysed in order to identify risks, ensuring that TPR can use its resources on a proportionate and targeted manner;

(5) failure to comply with the requirement to provide a scheme return is a key indicator for other regulatory risks;

(6) the information held by TPR is used to enable members to search for and secure the benefits to which they are entitled; and

(7) information held by TPR is used to inform TPR's understanding of the pensions landscape as a whole, feeding into education initiatives, policy formulation and (where necessary) enforcement action.

14. Section 10 of the Pensions Act 1995 ("PA 1995") gives TPR the power to impose a financial penalty on a person in respect of any act or omission to which the section applies. The maximum amount of any such financial penalty is £5,000 in the case of an individual and £50,000 in any other case.

15. By virtue of s 62 (6) PA 2004, s 10 PA 1995 applies to any trustee who has failed to take all reasonable steps to secure compliance with his obligations under s 62 to notify as soon as reasonably practicable changes in registrable information or the fact that a registrable scheme has ceased to be a registrable scheme or is wound up.

16. By virtue of s 64 (2) PA 2004, s 10 PA 1995 applies to any trustee who has failed to take reasonable steps to secure compliance with the obligation to provide a scheme return to TPR.

TPR's approach to the imposition of financial penalties for breaches of ss 62 and 64 PA 2004

17. Although TPR has had the power to impose financial penalties for breaches of the obligations contained in s 62 and s 64 PA 2004 since those provisions came into force, it has only recently adopted a policy of exercising the power.

18. TPR is now the view that it is appropriate to impose financial penalties for breaches of s 62 and s 64 PA 2004 which comply with the following principles:

(1) the penalty should be proportionate to the nature of the breach and any harm caused;

(2) the amount of the penalty should aim to change the behaviour of the person in breach; and

(3) the penalty should aim to deter repetition of the breach among the wider regulated community.

19. TPR has taken the approach of recommending a flat rate penalty of £300 for such breaches (which is doubled for a professional trustee) for the following reasons:

(1) failure to comply with ss 62 or 64 is a breach of an essential administrative requirement which impacts upon TPR's ability to carry out its activities effectively, irrespective of the nature or size of the scheme;

(2) TPR offers comprehensive support to trustees in completing their scheme return and gives non-compliant trustees multiple warnings over a period of several months before proceeding to recommend a penalty and in those

circumstances, there are unlikely to be mitigating factors which fall short of the trustee taking all reasonable steps to comply;

(3) TPR requires an administratively workable approach given the high-volume caseload as scheme returns are sought from every registrable scheme in the country within any given three-year period;

(4) ensuring consistency by the careful weighing of largely subjective aggravating and mitigating factors by a team of case officers would require a disproportionate commitment of resources, especially in light of the factors had (1) and (2) above so the penalty is fixed without regard to the specific circumstances (mitigating or aggravating) of any particular case;

(5) a flat rate penalty is consistent with the penalties imposed by secondary legislation for other failures to comply with basic administrative requirements, such as the fixed rate penalties for late filing of company accounts and late submission of tax returns;

(6) the amount of £300 is proportionate to the nature of the breach and the harm caused and is not set so low as to imply that the breach is trivial;

(7) the amount of £300 is necessary both to change the behaviour of the person in breach and to deter repetition of the breach amongst the wider regulated community. A lower penalty would risk creating a false perception that failing to provide registrable information is of little importance;

(8) the amount is consonant with penalties imposed by other legislation for failures to comply with basic administrative requirements, such as the initial penalty of £100 for late submission of a tax return, escalating to £1000 after 6 months and £150 for the late submission to the Registrar of Companies of a private company's accounts, escalating to £1,500 after 6 months; and

(9) if penalties imposed for failures to provide information are significantly lower than those imposed for other failures to provide information, then this risks creating a false perception that cooperation with TPR is less important than cooperation with other government bodies.

TPR's process for imposing a financial penalty

20. I return later to my specific findings of fact in relation to the circumstances leading to the imposition by TPR of a financial penalty of £300 on the Applicant but deal at this point with the process by which the penalty was imposed. In order to impose a financial penalty, TPR needs to follow what is known as the "standard procedure" prescribed by s 96 (2) PA 2004. This provides for:

(a) the giving of notice to such persons as it appears to TPR would be directly affected by the regulatory action under consideration (a "warning notice");

(b) those persons to have an opportunity to make representations;

(c) the consideration of any such representations and the determination whether to take the regulatory action under consideration;

(d) the giving of notice of the determination to such persons as appear to the Regulator to be directly affected by it (a "determination notice");

(e) the determination notice to contain details of the right of referral to the Tribunal under s 93(3);

(f) the form and further content of warning notices and determination notices and the manner in which they are to be given; and

(g) the time limits to be applied at any stage of the procedure.

21. In this case, a warning notice addressed to the Applicant was issued on 17 January 2017 which stated that TPR was considering imposing a financial penalty of £300 on the Applicant for failure to comply with the requirement to provide a scheme return and inviting the Applicant's representations on the notice.

22. The warning notice noted that TPR had not been notified that the Scheme had been wound up and therefore stated that if the case were referred to the Determinations Panel of TPR for the issue of a determination notice, the Determinations Panel would be asked to decide whether or not to impose a financial penalty for failure to take reasonable steps to provide a scheme return, alternatively failing to notify TPR as soon as reasonably practicable of changes to registrable information or alternatively failing to notify TPR as soon as reasonably practicable that the Scheme has ceased to be a registrable scheme or is wound up.

23. No representations were received on the warning notice and accordingly on 27 February 2017 TPR's separate decision maker, the Determinations Panel, issued a determination notice. However, despite the alternative grounds for the financial penalty set out in the warning notice, the determination notice stated that the Determinations Panel had determined to issue a civil penalty notice in the amount of £300 to the Trustee on the grounds that "a penalty was appropriate as the Trustee had not submitted a scheme return to [TPR] when it was required to do so" and "The trustee had not provided any evidence to suggest that it had taken reasonable steps to comply with the obligation to provide a scheme return."

24. Section 96 (3) PA 2004 provides that "the determination which is the subject-matter of the determination notice" may be referred to this Tribunal by its recipient. The Applicant has exercised that right in this case. There is a question as to what has actually been referred, bearing in mind the difference between the regulatory action proposed in the warning notice and that which was ultimately determined by the Determinations Panel. I return to that issue later.

Role of the Tribunal on a reference

25. Section 103 (3) to (9) PA 2004 set out the role and powers of the Tribunal in determining a reference as follows:

"(3) On a reference, the tribunal concerned may consider any evidence relating to the subject-matter of the reference, whether or not it was available to the Regulator at the material time.

(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.

(5) On determining a reference, the tribunal concerned must remit the matter to the Regulator with such directions (if any) as it considers appropriate for giving effect to its determination.

(6) Those directions may include direction to the Regulator –

(a) confirming the Regulator's determination and any order, notice or direction made, issued or given as a result of it;

(b) to vary or revoke the Regulator's determination, and any order, notice or direction made, issued or given as a result of it;

(c) to substitute a different determination, order, notice or direction;

(d) to make such savings and transitional provision as the tribunal concerned considers appropriate.

(7) The Regulator must act in accordance with the determination, of and any direction given by, the tribunal concerned (and accordingly sections 96 to 99 (standard and special procedure) do not apply).

(8) The tribunal concerned may, on determining a reference, make recommendations as to the procedure followed by the Regulator or the Determinations Panel.

(9) An order of the tribunal concerned may be enforced –

(a) as if it were an order of a county court, or

(b) in Scotland, as if it were an order of the Court of Session."

26. It is apparent from those provisions that this is not an appeal against TPR's decision to impose a financial penalty but a complete reconsideration afresh of the issues which gave rise to that decision. In effect, the determination notice given by TPR will be superseded by whatever directions the tribunal gives to TPR on determining the reference and TPR will be bound to implement those directions.

27. Therefore, it also follows, and this is clearly apparent from the wording of s 103 (6) (b) above, that this Tribunal has a full merits jurisdiction either to discharge, vary or confirm the amount of any financial penalty which TPR has determined to impose.

28. In that context, the question arises as to the extent to which the Tribunal should have regard to TPR's penalty policy in determining the financial penalty, if it decides that a financial penalty is appropriate.

29. This is an issue which this Tribunal has dealt with many times when considering the appropriate level of financial penalty to be imposed when determining disciplinary references brought in respect of decisions of the Financial Conduct Authority and its predecessor, where the Tribunal's powers on such a reference mirror those contained in s103 PA 2004.

30. The Financial Conduct Authority has adopted a detailed policy for the determination of financial penalties, following a five-step approach based on reference to certain criteria which results in the determination of a penalty amount.

31. As this Tribunal indicated in *Tariq Carrimjee v FCA* [2015] UKUT 0079 (TCC) the Tribunal is not bound by the Authority's policy when making an assessment of a financial penalty on a reference but it pays the policy due regard when carrying out its overriding objective of doing justice between the parties. In so doing the Tribunal looks at all the circumstances of the case.

32. This approach was recently followed by the High Court in *FCA v Da Vinci Invest Limited and others* [2015] EWHC 2401 where Snowden J said in the context of the imposition of a penalty for market abuse at [201]:

> "It was the FCA's submission, and I accept, that in determining any penalty under section 129, the starting point for the court should be to consider the relevant DEPP penalty framework that was in existence at the time of commission of the market abuse in question. To do otherwise would risk introducing an inequality of treatment of defendants depending upon whether the proceedings were taken against them under the regulatory route or the court route, and depending upon how long the proceedings had taken to come to a conclusion. By the same token, however, in common with the Upper Tribunal, the court is not bound by that framework, or by the FCA's view of how it should be applied. But if the court intends to depart from the framework in a particular case, it should explain why it considers it appropriate to do so. It occurred to me that in this regard there is some analogy with the approach of the criminal courts to the application of the sentencing guidelines produced by the Sentencing Council."

33. I see no reason to depart from this approach in relation to financial penalties which TPR decides to impose and which are the subject of references to this Tribunal. Accordingly, in my view the correct approach will be to take TPR's policy as the starting point (assuming the Tribunal finds no flaw in the policy itself) and decide whether in all the circumstances I should accept the proposed figure of £300 or depart from it in any respect.

34. As the matter proceeds in the Tribunal afresh, starting with TPR's statement of case, the burden of proof lies with TPR and the standard of proof to be applied is the ordinary standard on the balance of probability, namely whether the alleged breach more probably occurred than not.

Procedural Matters

35. A reference of this nature does not fall happily within the extensive procedures prescribed by Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 which provide for the exchange of detailed pleadings and extensive disclosure

obligations. These procedures are designed for more complex references with which this Tribunal is usually concerned in respect of financial services cases.

36. A straightforward reference in respect of a relatively small financial penalty does not merit the full imposition of the procedure set out in Schedule 3. TPR made an application to strike out the reference on the grounds that it had no reasonable prospects of success. In directions made on 4 May 2017 I dismissed that application on the basis that since the reference involved a financial penalty and the Tribunal has a full merits jurisdiction to consider whether a financial penalty was appropriate, and if so, in what amount, a strike out application was inappropriate.

37. However, since TPR's strike out application set out the essence of its case on financial penalty and the amount of the penalty sought I directed that the application should be treated as TPR's statement of case and I then made directions which gave TPR the opportunity to make any supplementary submissions and for the Applicant to reply to both the statement of case and the supplementary submissions. As TPR was content for the reference to be determined on the papers, I gave the Applicant the opportunity to state whether it wished the matter to be dealt with at a hearing, on the basis that if the Applicant did so then the case would proceed directly to a hearing without the need for any further directions by the Tribunal.

38. In the event, the Applicant did not request a hearing and made no further submissions in response to the statement of case and supplementary submissions within the time prescribed by my directions. Accordingly, I have proceeded to determine the reference on the basis of the Applicant's case as stated in its reference notice and the documentation provided by TPR, all of which has been copied to the Applicant.

The evidence

39. The only evidence provided by the Applicant was what was stated in its reference notice, which was prepared by an employee of the Scheme's employer. I can quote what was said in full as follows:

> "The scheme was wound up in June 2015. The finance director who was the contact, and manager of the scheme left the employ in January 2016.
>
> No one else at the company were aware of the return.
>
> I was acting as Finance Director for All Metal Services from January 2016 and have emails forwarded to mine for the previous finance director.
>
> I have not received any communication at all until i received the determination notice regarding the late return on 27 February 2017.
>
> I have filed the return and have notified the pension regulator that the scheme wound up in June 2015."

40. TPR relies on evidence from its records of it having sent all of the scheme return notice (which TPR says was issued on 13 October 2016), a scheme return

reminder, notification of failure to file the return and the warning notice to the Trustee's registered office, being the same address to which the determination notice was sent and which the Applicant admits was received and seen by the employer's Finance Director.

Findings of Fact and issues to be determined

41. There is no dispute that the Scheme was a registrable scheme until it was wound up and accordingly was subject to the provisions in ss 62 and 64 PA 2004 outlined above. I therefore find that to be the case.

42. I do not need to make findings as to whether the Applicant did receive the various communications from TPR referred to at [40] above because I accept the Applicant's admission in its reference notice that the Scheme was wound up in June 2015. That being the case, as TPR accept, the scheme return was not due and the scheme return notice issued to the Trustee was not valid. There can therefore be no question of imposing a financial penalty pursuant to the power contained in s 64(2) PA 2004.

43. Therefore, the only issues that may be determined on this reference are whether there is power to impose a financial penalty for a failure on the part of the Trustee to notify TPR that the Scheme had been wound up in breach of s 62 (5) PA 2004 and, if so, whether a financial penalty should be imposed and, if so, of what amount.

Discussion

44. On the basis of the finding at [42] above, there can be no doubt that the Trustee was in breach of its obligation under s 62 (5) (b) PA 2004 to notify TPR of the fact that the scheme was wound up in June 2015. That notification was not given until it was contained in the Applicant's reference notice, and therefore it was not made "as soon as reasonably practicable" after the event occurred, as required by s 62 (5) PA 2004. Therefore, that failure potentially gives rise to the imposition of a financial penalty pursuant to s 62 (6) PA 2004.

45. I must therefore consider whether the Tribunal has power to impose such a penalty on the determination of this reference in circumstances where the determination notice sought to impose a penalty on a different basis, namely for a breach of s 64 PA 2004. Whether that is the case depends on whether it can be said that question as to whether or not to impose a penalty pursuant to s 62 (6) PA 2004 can be said to constitute the "subject-matter of the reference" as referred to in s 103 (3) PA 2004, as set out at [25] above. In my view, that will depend on whether that issue can be said to be within the scope of "the determination which is the subject – matter of the determination notice" as referred to in s 96 (3) PA 2004: see [23] above, because it is that provision which gives the Tribunal's jurisdiction over TPR's determination.

46. This question has been the subject of previous judicial consideration in this Tribunal.

47. In terms of where the boundaries of the Tribunal's jurisdiction lie the starting point is s 96 PA 2004, which deals with the "standard procedure" that TPR must follow when exercising its regulatory functions, including the determination to impose a financial penalty. In particular, s 96(2) (a) provides that the process is started by the giving of a warning notice "to such persons as it appears to TPR to be directly affected by the regulatory action under consideration". After receiving and considering representations TPR (acting through the Determinations Panel) must determine "whether to take the regulatory action under consideration" (s 96(2) (c)) and if it determines to do so it must issue a determination notice to those who appear to TPR to be directly affected by it (s 96(2) (d)).

48. In this Tribunal's decision in *Michel Van De Wiele NV v The Pensions Regulator* [2011] UKUT B3 (FS) Warren J considered that the scope of the regulatory process that TPR was bound to follow under section 96 set the boundaries of the Tribunal's jurisdiction which is provided for in s 96(3) as follows:

> "Where the standard procedure applies, the determination which is the subject matter of the determination may be referred to the Tribunal …"

49. This led Warren J to conclude at paragraph 55 of the decision:

> "… the "determination" within the meaning of section 96 is the determination whether to take the regulatory action under consideration … The reasons for the determination are not part of the determination itself …"

50. He reinforced this in paragraph 61 as follows:

> "The matter referred to the Tribunal is, so far as relevant to the present case, the determination which may be referred pursuant to section 96(3). In other words it is the determination which directly affects the person making the reference."

51. This analysis had the following consequences, as explained at [70] of the decision:

> "In my view, the Regulator is entitled to argue that the Tribunal should depart from the determination of the Panel so as to exercise the relevant regulatory function in the way which it, the Regulator, considers appropriate at the time when the matter is dealt with by the Tribunal. The Panel, as we have seen, exercises powers on behalf of the Regulator; it is no doubt for that reason that the Regulator itself cannot refer the determination of the Panel to the Tribunal. But once the decision of the Panel has been challenged, there is no reason, in my view, why the Regulator should be bound by that determination. By referring the matter to the Tribunal, the target must accept that he becomes subject to the power of the Tribunal to determine the appropriate action. The Regulator must be allowed, in my judgment, to present to the Tribunal what it sees as the appropriate regulatory action at that time. It may be that it cannot go beyond the relief sought in the warning notice, but that issue does not arise in the present case."

52. It is clear from this passage that Warren J draws attention to the "relief sought in the warning notice" as possibly marking the limits of the Tribunal's jurisdiction. This was stated in more unequivocal terms at [84] of the decision as follows:

> "… Once the relevant determination has been identified (for instance a determination to issue a contribution notice to a person in a specified sum) it is open as a matter of jurisdiction for the Tribunal to rely on any act identified in the evidence before the Tribunal to support the regulatory action originally sought in the warning notice. But it is not open to the Tribunal to decide that regulatory action not identified in the warning notice should be taken."

53. This clearly links the Tribunal's jurisdiction back to the regulatory action specified in the warning notice that must be given pursuant to s 96(2)(a) PA 2004. Therefore, in this case the outer limit of the Tribunal's jurisdiction is the consideration of the determination to impose a financial penalty on the Applicant, so that neither the grounds on which such regulatory action is sought, nor the basis on which the proposal was put before the Determinations Panel to make its determination mark the limits of the Tribunal's jurisdiction.

54. Consequently, the starting point for the Tribunal in terms of jurisdiction is TPR's statement of case. TPR may base its case for a financial penalty on the evidence available to it at that time, which in this case, was that the Scheme had been wound up, a matter which TPR was unaware of until the reference was made.

55. This issue was also considered by this Tribunal in *Trustees of the Lehman Brothers Pension Scheme v Pensions Regulator* [2012] Pens. LR. 435, in relation to one of the issues in dispute which was not appealed to the Court of Appeal. The question was whether on a reference the Trustees of the Scheme could ask the Tribunal to consider whether it was appropriate to include within the scope of a financial support direction certain targets who were named in the warning notice but whom the Determinations Panel determined not to include amongst the subjects of its determination. The Tribunal said at paragraph 88 of its decision:

> "In our view the issue of the warning notice, giving details of the Targets against whom regulatory action is proposed, is critical in establishing both the permitted boundaries of the DP's determination and of what can be regarded as the "subject matter of the determination" that, pursuant to s 96(3), is capable of being referred to the Tribunal."

56. The Tribunal went on to consider the breadth of s 96(3) in the light of its analysis of the relevant passages in *Michel Van De Wiele NV* and stated in paragraph 94 of its decision:

> "… in the light of that analysis, the inevitable conclusion is that "the determination which is the subject matter of the determination notice" must be what is determined in relation to the proposals that were set out in the warning notice and upon which the determination has been made, whether that be a determination to exercise the power against all, some or none of the Targets against whom regulatory action was proposed in the warning notice."

57. Therefore, in my view, because, as recorded at [22] above, the warning notice in this case contemplated the imposition of a financial penalty upon the Applicant for failure to notify TPR of the winding up of the Scheme, the question as to whether to impose such a penalty does fall within the jurisdiction of the Tribunal in respect of this reference. It is perhaps unfortunate that the Determinations Panel did not refer to that fact in the determination notice but, in my view, that does not affect the position.

58. It would make no sense to require TPR to issue a fresh warning notice and go through the standard procedure all over again in order to bring before the Tribunal the question as to whether to impose a penalty pursuant to s 62 (6) PA 2004. Once it has been established that the regulatory outcome sought in broad terms is the same as that set out in the original warning notice, then the particular outcome sought on the basis of the evidence available following the making of the reference is to be determined by TPR's statement of case. There is no prejudice to the Applicant, because it has had an adequate opportunity to reply to the basis on which TPR now makes its case, although it has decided not to make any further representations.

59. In particular, the Applicant has made no representations on the question as to whether it had taken reasonable steps to secure compliance with the obligation to notify TPR of the winding up of the Scheme. I therefore infer from what is said in the reference notice that no steps were taken to secure compliance so, at the very best, the failure arose as a result of an oversight. In those circumstances, it is open to the Tribunal to direct that a financial penalty be imposed.

60. I now turn to the question of whether it is appropriate to impose a financial penalty in this particular case.

61. I have accepted that it is important for TPR to have up-to-date information as to the schemes it regulates and that includes the question as to whether a scheme has been wound up. By having this up-to-date information, TPR will be able to manage its resources efficiently and ensure that it can take targeted action. Its resources will be wasted if it seeks to exercise its regulatory powers on the basis of out of date information. So, in this case, TPR went through the unnecessary process of endeavouring to enforce the trustee's obligation to file a scheme return because it was unaware of the fact that the Scheme had previously been wound up.

62. In those circumstances, in my view it is appropriate that a financial penalty should be imposed in order to deter repetition of such a breach among the wider regulated community. There will therefore be a further incentive for the trustee of a registrable scheme to comply with its obligations under s 62 (5) PA 2004.

63. I therefore turn to the question of the appropriate penalty to be imposed in this case.

64. As TPR recognise in its penalty policy, the amount of the penalty should be proportionate to the nature of the breach and any harm caused. I agree with TPR that the penalty should be of such amount as is consistent with the level of penalties

imposed for similar breaches, such as the failure to file a company's accounts or a tax return on time.

65. A penalty of £300 is considerably in excess of the minimum amount of the fixed penalties imposed by statute for the kind of defaults referred to at [64] above. Neither PA 1995 nor PA 2004 give TPR or this Tribunal the power to impose a penalty of a fixed amount. It is clear to me that TPR has adopted a policy in relation to penalties in respect of defaults falling within ss 62 and 64 PA 2004 as if it had the power to impose a fixed penalty, for the reasons which it gives and which I summarise at [19] above. In particular, for administrative convenience TPR does not seek to investigate whether there are special circumstances justifying a higher or lower penalty in any particular case.

66. Nevertheless, in my view it is not an unreasonable starting position for TPR to seek to impose a flat rate penalty of £300 in the warning notices which it issues on the basis that the Determinations Panel can then consider if the particular circumstances of the case justify a different level of penalty, having received representations on the warning notice. For example, a simple default for a short period of time by an individual in respect of a small scheme might justify a penalty nearer the £100 fixed penalty imposed for individual taxpayers who are late with their tax return, or the £150 fixed penalty imposed for the late filing of a company's accounts. In other cases, involving larger schemes where the potential for harm is greater if TPR does not have up-to-date information about the Scheme a larger penalty may be justified.

67. Therefore, in this case, consistent with what I have said at [33] above, I take TPR's proposed penalty of £300 as the starting point. The Applicant has chosen not to make any representations on the amount of the penalty and I therefore have no information as to the circumstances of the Scheme or the trustee on the basis of which I might consider an adjustment to the amount of the penalty. I therefore see no reason to depart from the starting point in this case.

68. I am conscious that this appears to be a very long decision for what has ultimately been a short point to determine. However, since this is the first reference to this Tribunal in respect of a decision by TPR to impose a financial penalty it has been necessary to deal with all of the relevant issues in some detail. It may be expected that as a result, future decisions on similar subject matter should be considerably shorter.

Directions

69. In relation to this reference I determine that the appropriate action for TPR to take is to impose on the Applicant a financial penalty of £300 pursuant to s 62 (6) PA 2004 and s 10 PA 1995 for failure to comply with the requirements of s 62 (5) PA 2004 by failing to notify TPR of the fact that the Scheme had been wound up soon as reasonably practicable after that event occurred.

70. I therefore remit the reference to TPR with a direction that effect be given to my determination.

Disposition

71. The reference is dismissed.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 21 August 2017