



Reference number: FS/2018/060

PENSIONS REGULATOR – penalty for failure to complete necessary valuations for pension scheme - whether trustees failed to take all reasonable steps to secure compliance-no-whether amount of penalty appropriate-yes-references dismissed

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

**DR DAVIE VIVE-KANANDA (1)
DAVID SOOKHOO (2)
KRIS RUNGEN (3)**

Applicants

- and -

THE PENSIONS REGULATOR

Respondent

TRIBUNAL: Judge Timothy Herrington

The Tribunal determined the reference on 16 April 2019 without a hearing pursuant to the terms of Directions released by the Tribunal on 15 March 2019

DECISION

Introduction

5 1. These are references made in respect of financial penalties imposed on each of
the Applicants in their capacity as trustees of the occupational pension scheme known
as the Leicestershire DVK Retirements Benefits Scheme (the “Scheme”) in relation to
failures by the Applicants Dr Davie Vive-Kananda (“Dr Vive-Kananda”), Mr David
Sookhoo (“Mr Sookhoo”) and Mr Kris Rungen (“Mr Rungen”) to complete the
10 necessary triannual valuations for the Scheme, as required in accordance with the
statutory duty imposed under s 224 Pensions Act 2004 (“PA 2004”).

2. The financial penalties were imposed in respect of the failure to prepare a
valuation as at the effective date of 1 April 2013 (the “2013 Valuation”) and as at the
effective date of 1 April 2016 (the “2016 Valuation”) (together the “Valuations”). In
15 that regard the Determinations Panel (“DP”) of The Pensions Regulator (“TPR”)
determined that Penalty Notices under s 10 of the Pensions Act 1995 (“PA 1995”)
should be issued to each of the Applicants, in relation to each of the late Valuations
for the Scheme. In particular, the DP determined that:

20 (1) a Penalty Notice in the sum of £7,000 should be issued to Dr Vive-Kananda
in relation to the 2013 and 2016 Valuations;

(2) a Penalty Notice in the sum of £7,000 should be issued to Mr Sookhoo in
relation to the 2013 and 2016 Valuations; and

(3) a Penalty Notice in the sum of £3,500 should be issued to Mr Rungen in
relation to the 2016 Valuation.

25 3. In its Statement of Case TPR asks the Tribunal to direct TPR to impose
financial penalties on the Applicants of not less than the amounts determined by the
DP.

4. The Applicants contend that they relied upon an adviser to organise the Scheme
and advise on their responsibilities. They say that documentation relating to the
30 Scheme was forwarded to the adviser, but little response was given by him. They
contend that they have been let down badly by that adviser but they are now
proactively seeking assistance to avoid any re-occurrences of their failings. They
request clemency as regards the financial penalties.

Legal and Regulatory Background

35 5. As required by Section 224 (1) and (4) PA 2004 as trustees of the Scheme the
Applicants were required to obtain and receive in the prescribed period, at least once
every 3 years, an actuarial valuation valuing the Scheme’s assets and calculating the
Scheme’s technical provisions. Section 224 (7) PA 2004 requires the trustees to make
the actuarial report obtained available to the employer.

6. The valuation is a necessary tool to ascertain whether there is a deficit in the Scheme and, if so, what steps need to be taken to address the deficit.

7. For example, if such a valuation shows a deficit, s 226 PA 2004 imposes a duty on the trustees to prepare a recovery plan and submit it to TPR. Section 227 PA 2004 requires the trustees to prepare, and from time to time review and if necessary revise, a schedule of contributions and have it certified by the scheme actuary and if the actuarial valuation shows a deficit, to submit that schedule of contributions to TPR. Where the scheme is in deficit, pursuant to s 229 PA 2004, the trustees must obtain the agreement of the Scheme's employer to the methods and assumptions be used in calculating the Scheme's technical provisions, any matter to be included in the statement of funding principles, any provisions of the recovery plan and any matter to be included in the schedule of contributions. Where agreement cannot be reached with the employer, the trustees must report the failure to TPR.

8. TPR says, which I accept, that the comprehensive statutory funding regime of Part 3 of PA 2004, of which s 224 PA 2004 forms part, is of overall importance in ensuring the protection of members' benefits and proper administration of defined benefit pension schemes. I accept that the failure to obtain an actuarial valuation is a very serious breach because it precludes other measures contemplated by the statutory funding regime being taken if necessary. That may jeopardise scheme funding levels and can put members' benefits at risk and there is a significant public interest in ensuring that the funding of pension schemes is regulated properly.

9. 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.

10. Section 227 (8) PA 2004 provides that where any of subsections (1), (4) or (7) of that section is not complied with, section 10 of the Pensions Act 1995 (c. 26) (civil penalties) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance.

TPR's approach to the imposition of financial penalties for breaches of s 224 PA 2004

11. In August 2017 TPR published its monetary penalties policy setting out how it will generally use its powers to impose monetary penalties, including those under s 10 PA 1995.

12. The policy makes it clear that in calculating the amount of any penalty, TPR take account of relevant factors, including the person's engagement and cooperation with TPR.

13. In the policy document, TPR sets out a number of other factors which it regards as relevant in cases where it seeks to impose a penalty for a failure to comply with a statutory obligation (such as s 224 PA 2004) as follows:

- whether adequate internal controls were in place, including identifying and assessing risks, producing and implementing an action plan and monitoring the performance of tasks
- 5 • whether all reasonable efforts were made in advance to ensure compliance with legal obligations (for example to obtain any information needed from a third party)
- whether TPR were notified of the issue causing the breach in advance of the statutory deadline for compliance
- 10 • any unforeseeable events or events outside a person’s control that have adversely affected their ability to comply with their duties and other relevant circumstances (including the resources and support available to the person to assist them in meeting their duties).

14. TPR also makes it clear that in determining whether to impose a discretionary penalty, it will take account of the underlying objective in imposing a penalty, relevant circumstances of the breach and any representations made. Factors to be taken into account include those concerning the nature and impact (or potential impact) of the breach as well as the person concerned and their conduct.

15. TPR states that the following principles will guide them in determining the amount of a penalty:

- 20 • the penalty should be proportionate to the nature of the breach and any harm caused;
- the amount of the penalty should aim to change the behaviour of the person in breach; and
- 25 • the penalty should aim to deter repetition of the breach among the wider regulated community.

16. Section 9 of the policy sets out a framework for calculating the amount of a penalty by reference to examples of particular failings, by reference to three monetary bands. The amount of the penalty will generally depend on the person concerned, band level and any aggravating or mitigating factors. In relation to individuals, penalties for failing to submit scheme returns on time are assessed in Band 1 in a range from £0 to £1,000. Band 2 has a range of £0 to £2,500. An example of a failure falling within this band is failing to comply with an improvement notice. Band 3 has a range of £0 to pounds £5,000 (the latter being the statutory maximum for individuals) and an example of a failure falling within this band is failing to secure that core financial transactions are processed promptly and accurately.

17. In order to determine what band level a breach falls into considerations to be taken into account are stated to include:

- the likelihood that and/or extent to which a breach may have a detrimental impact on members (including the number of members affected)
- the likelihood that and/or extent to which a breach may result in an increased reliance on the employer covenant
- 5 • the likelihood that and/or extent to which a breach may lead to compensation being payable from the Pension Protection Fund
- whether there is evidence of dishonesty, lack of integrity, fraud, deliberate concealment or intentional or reckless breach
- 10 • the likelihood that and/or extent to which a breach may impact TPR’s ability to carry out its regulatory activities effectively
- the likelihood that and/or extent to which a breach may pose a significant or systemic risk to TPR’s statutory objectives
- the likelihood that and/or extent to which a breach may undermine public confidence in pensions
- 15 18. In calculating the penalty amount, TPR chooses a starting amount (within the relevant band range) which is appropriate, having regard to proportionality and the likelihood of achieving its underlying objective. It will first consider whether the middle of the relevant band range should be the starting amount but may depart from it if considered appropriate.
- 20 19. TPR may then adjust the starting amount to take account of relevant factors, primarily relating to the person concerned. Among those factors are:
 - The track record of the person in complying with their duties and obligations
 - Whether the breach could have easily been prevented
 - The extent to which the breach was caused or exacerbated by circumstances outside the person’s control
 - 25 • Where the person is a trustee, whether they are able to demonstrate that they possess adequate knowledge and understanding and have a training schedule in place
 - The conduct of the person once issues have been identified, including whether they notify TPR in advance of an issue which may cause a breach, the speed and cooperation shown to address any issues effectively, including both remedying any detrimental impact on members and preventing future breaches, whether they accept responsibility for the non-compliance or demonstrate entrenched behaviours and their willingness to engage and cooperate with TPR
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- whether a person is a professional trustee

TPR’s process for imposing a financial penalty and the determination of the DP

20. 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:

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- (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
10 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
15 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.

20 21. In this case, a warning notice addressed to the Applicants was issued on 12 June 2018 which stated that TPR was considering imposing a financial penalty of minimum of £5,000 against each of the Applicants in respect of a failure to comply with Part 3 of the PA 2004.

25 22. No representations were received on the warning notice and accordingly on 9 November 2018 the DP issued a determination notice which stated that the DP had determined to issue a civil penalty notice in the amount of £7,000 to each of Dr Vive-Kananda and Mr Sookhoo and £3,500 to Mr Rungen on the grounds that the Applicants had failed to take all reasonable steps to secure compliance with their statutory duties under s 224 (1) and (4) PA 2004. In the case of Dr Vive-Kananda and Mr Sookhoo, the DP found that there were two breaches relating to the 2013 and 2016
30 Valuations and imposed a penalty on each of them of £3,500 for each breach. In the case of Mr Rungen, the DP found that liability was made out only in respect of the 2016 Valuation and imposed a fine of £3,500 in respect of that breach.

35 23. The DP considered that the halfway point of Band 3, £2,500, was an appropriate starting point but considered that there were a number of aggravating factors in the case of each breach as follows:

- (1) The fact that there are successive late Valuations;
- (2) The fact that the late Valuations have not been remedied subsequently;

- (3) The repeated lack of engagement by the Applicants, both with TPR and with others such as the Scheme actuary, including a repeated failure to put in place a timetable or a revised deadline for each Valuation;
- (4) The fact that there was increasing difficulty in obtaining progress updates as time went on;
- (5) The fact that no excuse been offered for the failures; and
- (6) The fact that there appear to have been mis-contributions, shortfall in contributions or other concerns about the assets, which underlines the need to have ensured timeous compliance with all the obligations under Part 3 PA 2004.

24. In assessing the seriousness of the breaches, the DP took into account as an aggravating factor the fact that, because no Valuations were conducted, the Trustees were unable to put in place a recovery plan or schedule of contributions, or obtain the agreement of the employer. In the DP’s view, the result was as serious as if these obligations had arisen because a Valuation had been obtained but was not then complied with.

25. The DP also took into account the fact that Part 3 of PA 2004 was designed to ensure that schemes are funded properly and that remedial measures are put in place timeously and appropriately if the statutory funding objective is not met.

26. The DP concluded that the penalties needed to be pitched at a level that might realistically change future conduct and attitudes and in the light of the aggravating factors identified imposed penalties considerably above the starting point of £2,500 for each breach.

27. 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 Applicants have exercised that right in this case.

Role of the Tribunal on a reference

28. 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;
 - 5 (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
10 (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 –
- 15 (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.”

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

30. 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 the DP has determined to
25 impose.

31. 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.

32. The Tribunal considered that issue in *All Metal Services Limited v The Pensions Regulator* [2017] UKUT 0323. It said at [33] that 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 it should accept the figures determined by the DP by application of TPR’s penalty policy, as summarised above. I shall therefore follow this approach.

35 33. 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.

The evidence

34. TPR provided a bundle of documents which included, among other things, the registration details of the Scheme held by TPR as well as copies of the Scheme's returns for the years 2015/16, 2016/17 and 2017/18. It also provided copies of the extensive correspondence between the Regulator and the Applicants and their representatives, commencing on 3 July 2014, regarding the failure on the part of the Applicants to prepare the Valuations. It is clear from that correspondence, that most of the contact was between TPR and the employer, Leicestershire County Care Limited ("the Employer") who it is to be presumed was acting, somewhat inappropriately, on behalf of the Applicants. There has been very little direct contact between TPR and the Applicants.

35. The Applicants filed very little evidence of their own. The Tribunal was provided with copies of correspondence between Elizabeth North, an employee of the Employer who appears to be responsible for the administration of the Scheme but also appears to act on the instructions of the Applicants in their capacity as trustees. This correspondence relates purely to the steps which the Applicants are taking to rectify the current situation through the appointment of new advisers.

Findings of Fact

36. The Applicants did not dispute any of the factual matters relied on by TPR in its Statement of Case. Those matters are supported by the copy correspondence provided by TPR in its bundle. Accordingly, from that material I make the following findings of fact.

The Scheme and details of its trustees

37. The Scheme is a defined benefit pension scheme, which is closed to new members. The Scheme was established on 28 September 2012.

38. On registration of the Scheme, TPR was notified that, as at 27 September 2016, the Scheme had 106 members, consisting of 73 active, 31 deferred and 2 pensioner members.

39. The Scheme is a defined benefit final salary occupational pension scheme, so is subject to the scheme funding regime contained in Part 3 of PA 2004.

40. TPR is unaware of the current value of the assets of the Scheme or of the size of the liabilities to be taken into account in calculating the Scheme's technical provisions, and consequently TPR does not have any knowledge of the size of the deficit (if any).

41. Dr Vive-Kananda and Mr Sookhoo have been trustees of the Scheme since it was established. Mr Rungen was appointed as a trustee on 29 February 2016.

The Scheme's triennial valuation cycle

31. The effective date of the 2013 Valuation was 1 April 2013 and so the date for full compliance with the trustees' obligations under Part 3 of PA 2004 was 1 July 2014.

5 42. By 1 July 2014 the trustees should have agreed the statement of funding principles with the Employer and obtained the 2013 Valuation based on the corresponding statement.

43. The effective date of the 2016 Valuation was 1 April 2016, and so the date for compliance with the trustees' obligations under Part 3 of PA 2004 was 1 July 2017.

10 44. By 1 July 2017 the Trustees should have agreed the statement of funding principles with the Employer and obtained the 2016 Valuation based on the corresponding statement.

45. If either of the Valuations revealed a deficit, an appropriate recovery plan and schedule of contributions should have been agreed by the same respective date, and the information submitted to TPR within a reasonable period thereafter.

15 ***Interaction with TPR regarding the 2013 Valuation***

20 46. On 3 July 2014 Mrs Audrey Hay, the Scheme's actuary, informed TPR by email that she had been unable to certify the technical provisions or the adequacy of the schedule of contributions for the funding assessment for the Scheme due as at 1 April 2013. She said this had been caused by lack of response from the trustees of the Scheme (the "Trustees") and the Employer. She said she was unable to confirm expected deadlines for the funding assessment exercise as it was dependent on when the data was available from the Trustees. Mrs Hay's email was copied to Dr Vive-Kananda.

25 47. Following this email, TPR identified that the Scheme was not yet registered on its online registry, as required by s 62 PA 2004. As a consequence, TPR did not have the Trustees' names and contact details and so asked Mrs Hay for them as well as for further information in relation to the valuation process.

30 48. Despite two reminders, further information was not forthcoming; Mrs Hay emailed TPR on 28 August 2014 saying she had made several attempts to obtain responses from the Trustees but was having difficulties, her contact having been typically through an adviser.

35 49. Mr Iain Booth, the financial controller of the Employer, then took on responsibility for the correspondence but was unable to progress matters. On 24 October 2014 TPR emailed Mr Booth, copying in Dr Vive-Kananda, for whom it appeared it now had an email address, expressing concern at the lack of engagement from the Trustees despite numerous attempts to contact them.

50. On 28 October 2014 Mr Chris Salmon, a partner in the Employer's external auditor, Frances James & Partners, emailed TPR advising that he was working with

the Trustees and Scottish Widows, with whom the assets of the Scheme were invested, to bring all matters up to date.

51. On 20 November 2014 Mr Salmon informed TPR by email that information had been sent to Scottish Widows to allow work to proceed, the completion of which would allow work to begin on the Scheme's recovery plan, if needed. On 28 November 2014 Mr Salmon advised TPR that he had received further information from Scottish Widows in order that he could prepare the accounts for the accounts for the 2013 Valuation.

52. On 9 January 2015 TPR emailed Mr Salmon (copying in Dr Vive-Kananda and Mr Sookhoo) expressing concern in relation to the ongoing breach of s 62 and 224 PA 2004. TPR drew attention to its power to impose civil penalties under s 10 PA 1995 on trustees who have failed to take all reasonable steps to secure compliance with these statutory requirements.

53. Despite reminders, no response was received. On 11 March 2015 TPR contacted Mrs Hay to discuss the lack of responses from the Scheme's advisers and the Trustees. Mrs Hay confirmed that she had found it particularly hard to communicate with the Scheme advisers and the Trustees.

54. TPR received no further emails, letters or other contact from the trustees or its advisers until 1 October 2015 when Mrs Hay contacted TPR to advise that she been discussing the funding assessment with Mr Salmon who had been asked to update TPR following a trustee meeting scheduled for the following week.

55. On 29 October 2015 Mr Salmon finally completed the registration of the Scheme with TPR, which was acknowledged by TPR on 30 October 2015. At the same time TPR requested that the outstanding information in relation to the 2013 Valuation be provided as a matter of urgency.

56. On 19 January 2016, no further information having been received, TPR again advised that it may impose civil penalties for the ongoing legislative breaches. It said that if it did not receive a response by 22 January 2016 the matter would be referred to its lawyers regarding the potential penalties that could be imposed.

57. On 27 January 2016 Mr Salmon informed TPR that subject to receiving one last piece of information he would complete the accounts over the coming weekend and get them to Mrs Hay so that Scottish Widows could carry out their work. He also confirmed that two of the Trustees recently attended a course on their responsibilities and that the third Trustee and the administrator who now looks after the Scheme were booked on a course for the following month.

58. However, there was no further contact with TPR until 29 February 2016 when it was copied in on an email sent by Mr Salmon to Mrs Hay in which it was stated that progress was being made in producing an actuarial valuation incorporating a recovery plan because a shortfall in the payments from the Employer to the Scheme had been identified.

59. In an email of 13 May 2016 to Mr Salmon, TPR noted the contents of the email of 29 February 2016 stating that on that basis they did not intend to take any action in relation to the breach of law at this stage but in order to maintain that position they would expect the Trustees to agree with the Employer a timetable for finalising the valuation and submitting it to TPR. It finished the email by stating that it would expect Mr Salmon to contact them if the submission of the 2013 Valuation remained outstanding after 29 July 2016.

60. No response to that email was received, and TPR did not after 29 July 2016 follow up on the continuing absence of the 2013 Valuation until the issue was revived in the context of the failure to submit the 2016 Valuation.

Interaction with TPR regarding the 2016 Valuation

61. On 8 June 2017 Mrs Hay emailed TPR advising that the 2016 Valuation would not be completed by the statutory deadline. She also said that the 2013 funding assessment had not yet been completed and that she still had not received a copy of the 2013 scheme accounts for the Scheme or accounts for any subsequent years.

62. On 13 June 2017 TPR opened an enquiry to investigate the continuing breaches of legislative requirements.

63. On 22 June 2017 Mrs Hay emailed TPR again to make it aware that she had requested from the Trustees details of assets of the Scheme held outside Scottish Widows but had received no response despite reminders.

64. On 12 July 2017 TPR replied to Mrs Hay and copied in Gemma Steel, the person recorded on TPR's records as the contact for the Trustees. The email explained that TPR was considering exercising its regulatory powers in relation to the failures to submit the Valuations, including the imposition of penalties. TPR requested further information (to be provided by 26 July 2017) as to what steps the Trustees and others were taking to achieve compliance and the reasons for the failures to meet the statutory deadlines, together with a timetable for completing the outstanding valuations. The email to Ms Steel was returned undelivered, although her email address was confirmed as the contact for all Trustees on the latest return for the Scheme dated 24 March 2017.

65. It appears, however, that the email did reach the Trustees because on 28 July 2017 (after the deadline had expired) Ms Elizabeth North, the Scheme's administrator, sent a response which she stated the Trustees had asked her to send on their behalf. In that email Ms North said that the Trustees were working with the Scheme's bankers, accountants and actuaries in order to resolve the outstanding matters, explaining that there were problems with obtaining details of staff from former employers and thereafter problems with regard to the provision of bank statements which prevented the accounts being finalised. Ms North said that once those bank statements had been obtained the actuaries would be able to carry out the outstanding triannual valuations. Ms North said that the Trustees had spoken to the accountants who had confirmed that following receipt of the bank statements they

would be able to prepare the accounts within two weeks. She also informed TPR that the Trustees had all attended relevant training courses in respect of their job responsibilities as trustees and appreciated the importance of ensuring the outstanding matters were dealt with in a timeous manner.

5 66. On 7 August 2017 TPR responded by asking again for a timetable to be
provided so that it could monitor progress towards completion of the outstanding
Valuations, requesting a response by 21 August 2017. Ms North was chased for a
update on 23 August 2017. She responded on 31 August 2017, stating that the
auditors had been prompted to complete the finalised accounts, hoping matters could
10 progress to completion in the next few weeks.

67. On 11 September 2017, in response to a prompt from TPR, Mrs Hay advised
that she had not received the accounts yet. On the same day TPR emailed Ms North
stating that it was yet to receive an expected submission date for the outstanding
Valuations and that it could not continue to take no action in relation to the breaches.

15 68. On 29 September 2017 TPR sent a rather more formal letter to the Employer,
copied to the Trustees and Mrs Hay. TPR stated that it was very concerned by the
Trustees' lack of engagement with TPR in relation to the breaches which it said was
exacerbated by their failure to maintain accurate contact information on TPR's
Register. It explained that the breaches could result in enforcement action being taken,
20 which may include penalties. It also expressed concern about the Trustees' knowledge
and understanding in view of the continued non-compliance and urged the Employer
to consider whether the appointment of new trustees (including a professional trustee)
may be appropriate to improve the governance and administration of the Scheme.

69. TPR requested that Ms North acknowledge receipt of this letter by 6 October
25 2017 and provide confirmation by 13 October 2017 as to when the outstanding
Valuations were expected to be concluded.

70. This deadline passed with no response. On 2 November 2017 Mrs Hay
contacted TPR to advise the that she was yet to receive any communication from the
trustees. TPR confirmed that it was considering taking enforcement action in relation
30 to the outstanding Valuations and was concerned with the lack of engagement from
the trustees.

71. On 7 November 2017 TPR wrote directly to the Trustees, copied to the
Employer, Mrs Hay and Mr Salmon, notifying all parties that it was considering using
its powers to issue Improvement Notices to the trustees under s 13 PA 2004 and a
35 Third Party Notice to the Employer under s 14 PA 2004, the purpose being to record
TPR's expectation that the Valuations will be submitted by a revised date which TPR
considers appropriate. The letter concluded by stating that before considering whether
regulatory action is required, it was asking once again that TPR be provided with a
detailed timetable which had been agreed by all parties. A response was requested by
40 21 November 2017, warning that in the absence of a response TPR may proceed with
enforcement action.

72. The Trustees did not respond to this letter, neither did the Employer respond to it or to the earlier letter of 29 September 2017.

73. On 5 March 2018 Mrs Hay emailed TPR updating them following a conversation she had with Mr Salmon that day. She said that she had not seen any further progress with the funding, had not received copies of accounts for the Scheme and had not received copies of assets statements or confirmation that contributions are being paid in line with the Schedule of Contributions as she had requested. In a conversation with TPR on 22 March 2018 Mrs Hay noted that she had not heard anything further from the Trustees with regards progress towards the Valuations since her call with Mr Salmon on 5 March 2018.

74. On 26 March 2018, having failed to get Dr Vive-Kananda to return telephone calls made, TPR emailed the Trustees via their nominated contact, Ms Steel, and the Scheme contact, Mr Salmon, in relation to queries relating to late payments of contributions, communications with members and an overdue scheme return. Dr Vive-Kananda responded by email on 29 March 2018, stating that the Trustees were working with their accountants and actuaries to bring the audited accounts and valuations up to date. However, no further contact was made with TPR prior to it commencing enforcement proceedings.

The regulatory proceedings

75. As mentioned above, TPR issued a Warning Notice to each of the Applicants on 12 June 2018 with regard to the contemplated exercise of regulatory powers to impose a penalty under s 10 PA 1995. The Warning Notice gave a period of time for the Applicants to provide their representations in response but none were received. Consequently, the Warning Notice was referred to the DP on 6 August 2018 and, following a further period during which the Applicants had another opportunity to serve representations but did not do so, the DP issued its determination imposing penalties on the Applicants on 9 November 2018.

Events since the conclusion of the regulatory proceedings

76. On 7 December 2018 the Trustees referred the matter to this Tribunal. In a covering letter accompanying the reference notice, Dr Vive-Kananda stated that he was requesting a review by the Tribunal so as to give a further 28 days or longer grace to enable them to “to start and complete the work on the required valuations.” Doctor Vive-Kananda stated that they were liaising with Frances James & Partners to produce the outstanding Valuations.

77. On 5 March 2019 Ms North provided the Tribunal with a copy of an email received from Mr Dermot O’Connor of a firm of independent financial advisers, Higgs Boson Consultants, who appears to have been engaged to advise on investment matters. It appears from this email that Mr O’Connor has been liaising with Mr David Dickson, an actuary at Royal London Consulting Actuaries, who it appears is supporting Ms North in the completion of returns required by TPR. In an email to Mr O’Connor Mr Dickson commented that “in general, it sounds like Elizabeth is

progressing the most urgent issues and is able, and prepared, to do the ground work for a lot of the administrative and governance tasks, at least in the short term.”, Nothing is said in this correspondence about the outstanding Valuations and when they might be submitted.

5 78. On 18 March 2019, Ms North wrote to the Tribunal stating that “we have had a successful and informative meeting with [Mr O’Connor] and [Mr Dickson)” and that they had engaged Mr O’Connor to work with them to address and rectify matters and “thereby deliver investment advice enabling all parties to move forward”. She also said they had received a contract from Royal London to engage their help and support
10 as “we regain control over the pension scheme.” Again, nothing is said as to progress on completing the outstanding Valuations.

Issues to be determined

79. The following issues fall to be determined on this reference:

- 15 (1) whether the 2013 and 2016 Valuations have been obtained by the relevant trustees, as required by s 224 (1) and (4) PA 2004;
- (2) if not, whether the relevant trustees have taken all reasonable steps to ensure compliance with their obligations under s 224 (1) and (4) PA 2004; and
- (3) if not, whether a financial penalty should be imposed on any of the Applicants and, if so, of what amount.

20 Discussion

Issue 1: whether the Valuations have been obtained

80. The 2013 and 2016 Valuations have still not been obtained by the relevant Trustees. Accordingly, as provided by s 224 (8) PA 2004, unless it can be shown that the relevant Trustees have taken all reasonable steps to secure compliance with the
25 obligations imposed on them by s 224, TPR has the power to impose penalties on the relevant Trustees in accordance with the provisions of s 10 PA 1995.

Issue 2: whether the Applicants have taken all reasonable steps to ensure compliance

81. The correspondence detailed above does not evidence what, if any, steps the
30 Trustees themselves have taken to attempt to progress matters as regards the preparation of the outstanding Valuations. They have never individually engaged with TPR or sought to explain to them what steps they had personally taken to progress matters. Indeed, the evidence shows that they have persistently ignored requests from TPR for an explanation as to how the situation has arisen and what steps they were
35 taking to address the matter. They appear at all times to have left matters in the hands of either the Employer or various advisers, without taking responsibility themselves for ensuring that matters are progressed and, if some reason they cannot be, offer an explanation to TPR. That behaviour is clearly unacceptable and falls far below the standards expected of a trustee of an occupational pension scheme.

82. Even in his letter of 7 December 2018 to the Tribunal referred to at [76] above, Dr Vive-Kananda offers no explanation as to why the Valuations still have not been prepared, what work still remains to be done and when they will be completed.

5 83. The only explanation offered on behalf of the Applicants for how this situation arose and still continues is to be found in their Reply to TPR's Statement of Case in these proceedings.

10 84. They say that when in 2012 the Employer took over nine care homes and responsibility for the employees who worked in those homes, pension matters were dealt with by an adviser who was responsible for setting up the Scheme and procuring that the employees became members of the Scheme. The Employer says that documentation relating to the Scheme was forwarded to this adviser, but it received little response. It feels it has been let down badly by its adviser and are no longer using his services and have also found changes of staff over the years have contributed to lack of knowledge and continuity. The Employer also says that Mrs
15 Hay has informed them that she is no longer their actuary despite never having received an official resignation. It also says that it received no training from Scottish Widows, although Dr Vive-Kananda, a pension administrator and a senior member of the Employer's HR team have attended a training course run by Royal London which gave a basis of how to fulfil their roles and responsibilities.

20 85. The Employer says that it has "re-established arrangements" with its auditor and now deals with him directly and are now proactively seeking assistance to avoid any re-occurrence of the past failures. It says that it has learned lessons from the past and the Employer wishes to uphold its principles in "honouring the member's pension schemes." However, no detail is provided as to what the difficulties with the auditor had been and why the arrangement needed to be "re-established".
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30 86. Unfortunately, all of what the Employer says is aspirational and demonstrates no concrete progress as regards the outstanding Valuations. Neither the Applicants nor the Employer have provided any up-to-date information as to what steps they are taking to address the failures. The Applicants cannot continue to blame matters on previous advisers. It was their own responsibility to ensure that matters progressed, and if they did not have the necessary skills themselves to do so in what might have been a difficult situation caused by failures on the part of their advisers, then they should have considered seeking the help of professional trustees, as was suggested by TPR at one point: see [68] above. It is clear, that the Applicants have been guilty of
35 letting matters drift unacceptably and accordingly I find that each of them have failed to take all reasonable steps to secure compliance with their respective obligations under s 224 (1) and (4) PA 2004.

Issue 3: financial penalty

40 87. I turn first to the question of whether it is appropriate to impose a financial penalty in this particular case.

5 88. I have accepted at [8] above that the failure to obtain an actuarial function is a very serious breach because it precludes other measures contemplated by the statutory funding regime being taken if necessary. The breach has been aggravated by the length of time for which the Valuations have been outstanding, which is nearly 4 years in the case of the 2013 Valuation. In addition, TPR has had to devote significant resource to chasing the Applicants fruitlessly over a number of years for the outstanding Valuations.

10 89. In the circumstances, in my view it is appropriate that significant financial penalties should be imposed on each of the Applicants in order to deter repetition of such breaches both by themselves and amongst the wider regulated community and to incentivise trustees to comply with their obligations under s 224 PA 2004.

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

15 91. I find no flaw in TPR's policy as it relates to penalties of this kind, that is penalties to be imposed on individuals for breach of their statutory obligations. I therefore take the policy as my starting point.

92. As TPR recognise in its policy, the amount of the penalty should be proportionate to the nature of the breach and any harm caused.

20 93. In view of the nature of the breaches, I accept that the starting point should be on Band 3 of the penalty framework. I agree with the DP's assessment, as summarised at [23] above that the halfway point of Band 3, £2,500, was an appropriate starting point, bearing in mind that no allegations of dishonesty or a lack of integrity are made in this case, but the evidence demonstrates a clear failure on the part of each of the Applicants to take reasonable steps to comply with their statutory obligations.

25 94. I also agree with the DP that there are a significant number of aggravating circumstances which justify an increase in the penalty beyond the amount indicated for the middle of the Band. Those factors were correctly identified by the DP in its determination, as summarised at [23] to [26] above.

30 95. The DP identified no mitigating factors and neither have the Applicants to any material extent. They have simply asked for "clemency" on the basis that they are now taking steps to address the failures. However, as I have said, there is no evidence of any substantial progress as regards the obtaining of the Valuations.

35 96. There is one further potential relevant mitigating factor to which I have given consideration. Based on the number of members, the Scheme is a relatively small one and therefore the potential financial impact as a result of the failures may be correspondingly small. However, in the absence of any up-to-date information as to the financial position of the Scheme it is impossible to make an informed judgment on that issue. Therefore, although such a factor may be relevant in particular cases, I do not find it to be relevant in this case.

97. I therefore see no reason to depart from the determination of the DP as to the appropriate penalties to be imposed on each of the Applicants in this case.

Directions

5 98. In relation to these references I determine that the appropriate action for TPR to take is:

(1) to impose on Dr Vive-Kananda a financial penalty of £3,500 pursuant to s 224(8) PA 2004 and s 10 PA 1995 for failure to take reasonable steps to secure compliance with his obligation to obtain an actuarial valuation for the Scheme by the due date of 1 July 2014;

10 (2) to impose on Doctor Vive-Kananda a financial penalty of £3,500 pursuant to s 224 (8) PA 2004 and s 10 PA 1995 for failure to take reasonable steps to secure compliance with his obligation to obtain an actuarial valuation for the Scheme by the due date of 1 July 2017;

15 (3) to impose on Mr Sookhoo a financial penalty of £3,500 pursuant to s 224 (8) PA 2004 and s 10 PA 1995 for failure to take reasonable steps to secure compliance with his obligation to obtain an actuarial valuation for the Scheme by the due date of 1 July 2014;

20 (4) to impose on Mr Sookhoo a financial penalty of £3,500 pursuant to s 224 (8) PA 2004 and s 10 PA 1995 for failure to take reasonable steps to secure compliance with his obligation to obtain an actuarial valuation for the Scheme by the due date of 1 July 2017; and

25 (5) to impose on Mr Rungen a financial penalty of £3,500 pursuant to s 224 (8) PA 2004 and s 10 PA 1995 for failure to take reasonable steps to secure compliance with his obligation to obtain an actuarial valuation for the Scheme by the due date of 1 July 2017.

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

Disposition

30 100. The references are dismissed.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 9 May 2019

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