



Adjudication Panel Meeting

17 & 18 March 2021

Held by Video Conference

Respondent: Peter Gatenby FIA

Category: Fellow since 25 December 1988

Region: Malaga, Spain

Panel Members: Jules Griffiths (Chair, Lay member)
Simon Head FIA (Actuary member)
Janet Moss FIA (Actuary member)

Legal Adviser: Elaine Motion

Judicial Committees Secretary: Hinna Alim

Allegations

The allegations against the Respondent are that, in relation to his appointment as a single joint expert to report on the division of pension assets during divorce proceedings between Person A and Person B:

A1 he did not confirm his understanding of the terms of his instructions before preparing his report;

A2 his actions at A1 were in breach of paragraph 2 of APS X3: The Role of the Expert in Legal Proceedings version 2.0, effective from 20 April 2018;

A3 he prepared a report dated 4 May 2018 and Addendum to the report dated 27 March 2019 which did not fulfil the instructions provided to him and/or was inadequate in that he:

A3.1 did not report on all the alternative retirement dates for each party as instructed and/or completed the equalisation of income calculations on a basis unfair to Person A;

A3.2 did not address within the report the “compulsory retirement age” of Person A or B as instructed;

A3.3 failed to take into account in his offsetting calculations the basis upon which police transfer values are calculated which was unfair to Person A;

A3.4 did not address within the report the possible impact of Person A having to retire early on medical grounds as instructed;

A3.5 did not discuss the various methods by which pensions can be apportioned to the various defined marriage periods;

A3.6 did not address his report to the Court and/or summarise his instructions;

A3.7 did not state whether his report was compliant with Technical Actuarial Standard 100: Principles for Technical Actuarial Work version 1.0 effective from 1 July 2017

A4 his actions at A3.6 were in breach of paragraph 9.1 of Court Practice Direction 25B “The Duties of an Expert, the Expert’s Report and arrangements for an Expert to attend Court”;

A5 his actions at A3.6 and A4 were in breach of paragraph 4.2 of APS X3: The Role of the Expert in Legal Proceedings version 2.0, effective from 20 April 2018;

A6 his actions at A3.7 were in breach of Technical Actuarial Standard 100: Principles for Technical Actuarial Work version 1.0 effective from 1 July 2017;

A7 his actions at A1 and/or A3 were in breach of the principle of competence and care in the Actuaries' Code (versions 2.0 and 3.0);

A8 his actions at A1 and/or A3 were in breach of the communication principle in the Actuaries' Code (versions 2.0 and 3.0);

A9 his actions at A1, A2, A3.6, A3.7, A4, A5 and/or A6 were in breach of the compliance principle in the Actuaries' Code (version 2.0 and 3.0);

A10 his actions, in all or any of the above, constituted misconduct in terms of Rule 4.2 of the Disciplinary and Capacity for Membership Schemes of the Institute and Faculty of Actuaries (Effective 1 February 2018).

Panel's determination:

The Panel considered a combined bundle (205 pages) which contained the Case Report and appendices submitted by the Case Manager and Investigation Actuary and the Respondent's response to the Case Report. The Panel also considered the advice of the Legal Adviser. The Panel determined that the Case Report disclosed a *prima facie* case of Misconduct.

The Panel accordingly invited the Respondent to accept that there had been Misconduct and the following sanctions:

- Reprimand
- Fine in the sum of £1,500 to be paid within 28 days of the Respondent's acceptance of the Panel's invitation

Background:

The Respondent has been a Fellow of the IFoA since 1988. On 19 January 2018 he was jointly instructed by lawyers on behalf of Person A and Person B to provide an expert actuarial report in relation to their divorce proceedings. In terms of his instructions he was to lodge his report with the Court.

His Report is dated 4 May 2018. Following a Court hearing in March 2019 he was asked to consider an additional question and produced an Addendum dated 27 March 2019. The Court authorised the additional question asked of him and it was again a joint request by the lawyers for Person A and Person B.

On 25 June 2019 Person A submitted a complaint to the IFoA. She provided an expert report which had been commissioned solely by her solicitors, which supported her complaint that the Respondent's report had not complied with the above instructions and "was not sufficiently competent and was inaccurate for reliance upon at a final hearing".

As part of their subsequent investigation the IFoA instructed an expert to offer a preliminary view on the matters complained of. In a report dated 1 September 2020 the expert concluded that "*It was not reasonable for {the Respondent} to interpret the instructions he received as he did without confirming his understanding of them with the clients before undertaking the work*". He made a number of detailed comments which gave rise to the allegations before the Panel. A copy was provided to the Respondent.

The Panel understands that the investigation and presentation of the Case Report containing the allegations were delayed due to the disruption caused by COVID-19 and to a lesser extent by the Respondent being out of the country.

The Respondent has co-operated with the investigation, and provided detailed comments on the expert report provided by Person A. In summary he does not accept the criticisms of his methodology or calculations. He has not commented on the preliminary view report, other than to accept that his Report did not expressly refer to TAS 100, nor was it expressly addressed to the court.

Before convening the Panel became aware that references to Person B in allegations A3.1, A3.3 and A3.4 were incorrect and should have been Person A. This was corrected by the Investigation team and the Panel proceeded on that basis.

Decision and Reasons on the Allegations:

Allegations A1 and A2

The Panel reviewed the letter of instruction dated 19 January 2018, noting in particular that it identified:

- 1- the possibility of Person A having to retire early on medical grounds,
- 2- disputes between the parties as to the period of accrual that is relevant for pension sharing,
- 3- disputes between the parties of the date of separation;

and that it requested multiple permutations of different scenarios.

The Panel acknowledged that the Respondent had made some further enquiries before completing his report, but these were primarily focussed on explaining disparities in the information provided by the pension scheme administrators.

In deciding which assumptions to use he did not go back to confirm that his interpretation and approach were consistent with the clients' requirements.

The Panel also reviewed the "preliminary view" report dated 1 September 2020, paragraph 13 of which says:

"Were the instructions reasonable in the first place?"

13 In essence the instructions seem to be that pensions should be estimated under two retirement scenarios and then apportioned to the marriage under, eventually, seven different definitions of the period of marriage (making a total of 14 alternative calculations - or possibly 28 alternatives if each retirement age scenario was to be associated with both retirement alternatives for the other party), plus there were further questions relating to the impact of Person A's health, offsetting and current pensions. This was too complicated. PG should have asked to see a copy of the Court Order giving rise to these instructions (and advised his clients that such instructions would considerably increase his fees for this work)."

Allegation A1 - he did not confirm his understanding of the terms of his instructions before preparing his report.

The Panel noted the conclusions of the preliminary view report dated 1 September 2020 which in paragraph 16 said:

"My conclusion is that it was not reasonable for Mr Gatenby to interpret the instructions he received as he did without confirming the understanding of them with the clients before undertaking the work."

On this basis the Panel concluded that the enquiries he made after instruction were not sufficient to confirm his understanding and therefore **allegation A1** is proved.

Allegation A2 - his actions at A1 were in breach of paragraph 2 of APS X3.

The Panel reviewed APS X3, in particular section 2.2 which requires members to establish clearly the nature and scope of their instruction. The Panel noted that the previous version of APS X3, in force until April 2018 contained a similar requirement. The Panel concluded that, by accepting complex and ambiguous instructions, without confirming his methodological approach, the Respondent did not comply with this requirement and therefore **allegation A2** is proved.

Allegation A3 - the report and Addendum did not fulfil the instructions and/or were inadequate.

The Panel carefully reviewed the letter of instruction and the report and Addendum and took full account of the preliminary view report dated 1 September 2020. The Panel concluded that the report and Addendum did not fulfil the instructions given in three respects, and was inadequate in four respects.

The Panel found the following to be the case:

Allegation A3.1

The report did not include all the alternative retirement dates for each party as had been instructed. This part of allegation A3.1 is therefore found proved. Although the calculations may have been perceived to disadvantage Person A, there was no evidence before the Panel that the Respondent was intentionally unfair in his approach, so that part of the allegation is not capable of proof.

Allegation A3.2

The report did not address the compulsory retirement age of Person A and Person B as instructed. Therefore this allegation is proved.

Allegation A3.3

The offsetting calculations did not acknowledge that Police transfer values underestimate the value of pensions for those still in service. This was misleading and potentially a serious disadvantage to one Party or the other. Therefore this allegation is proved.

Allegation A3.4

The report does not address the possibility of Person A retiring early on medical grounds, despite it being included in the instructions. Therefore this allegation is proved.

Allegation A3.5

The report did not discuss the various methods by which pensions can be apportioned. Although he was not specifically instructed to do so, the Respondent could, and should, have been clearer in explaining the assumptions he had made, the method he had adopted to apportion pensions and/or any alternative approaches which might have reasonably been used. To that extent the Panel concluded that the report was inadequate in this respect. Therefore this allegation is proved.

Allegation A3.6

The Panel noted that the Respondent referenced his letter of instruction quite clearly in his report; the Panel did not identify a requirement for him to summarise his instructions as alleged. However, the Respondent has accepted that he did not specifically address his report to the Court, and therefore this allegation is proved only to that extent.

Allegation A4

The Panel found that his actions as admitted in allegation A3.6 amounted to a breach of Paragraph 9.1 of Court Practice Direction 25B "The Duties of an Expert, the Expert's Report and arrangements for an Expert to attend Court" states that "an expert report shall be addressed to the Court". Therefore this allegation is proved.

Allegation A5

The Panel further concluded that the failing identified in allegations A3.6 and 4 breached Paragraph 4.2 of APS X 3 which required that “*Members must familiarise themselves with, and adhere to, the rules and procedures that apply in the jurisdiction, and to the Proceedings, in which they are instructed.*” Therefore this allegation is proved.

Allegation A3.7

The Respondent had accepted that he did not state that his report was compliant with TAS100. Therefore this allegation is proved.

Allegation A6

As he failed as set out in allegation A3.7, and given this is a requirement of the Compliance Section of TAS100, this allegation is proved.

Breaches of the Actuaries Code

The Panel reminded itself that the Competence and Care principle of the Code requires Members to perform their professional duties competently and with care, and to take care that the advice or services they deliver are appropriate to the instructions and needs of the client. The Communication principle requires Members to ensure that communication is accurate, not misleading and sufficient.

Allegations A7 and A8

The Panel concluded that, by failing to confirm that his understanding of the instructions was correct, as found in Allegation A1, and in producing a report which was not compliant with the instructions and not comprehensive, as found in Allegation A3, the Respondent breached both of the above principles. Therefore these allegations are proved.

Allegation A9

The Panel also concluded that the matters found in Allegations A2, A3.6, A3.7, A4, A5 and A6 are breaches of the Compliance principle, which requires members to comply with all

relevant legal, regulatory and professional requirements. Therefore this allegation is proved to that extent.

Decision and Reasons on Misconduct:

The Panel then considered whether there was a *prima facie* case that the Respondent's actions as proved above amounted to Misconduct.

For the purposes of the Disciplinary and Capacity for Membership Schemes, Misconduct is defined as any conduct by a Member, whether committed in the United Kingdom or elsewhere, in the course of carrying out professional duties or otherwise, constituting failure by that Member to comply with the standards of behaviour, integrity, competence or professional judgement which other Members or the public might reasonably expect of a Member having regard to the Bye-laws of the Institute and Faculty of Actuaries and/or to any code, standards, advice, guidance, memorandum or statement on professional conduct, practice or duties which may be given and published by the Institute and Faculty of Actuaries and/or, for so long as there is a relevant Memorandum of Understanding in force, by the FRC (including by the former Board for Actuarial Standards) in terms thereof, and to all other relevant circumstances.

The Panel acknowledged that the work was done in the context of the breakdown of the relationship between Person A and Person B, and that matters were brought to the IFoA's attention by Person A who was presumably seeking to protect her interests as matters were proceeding through the Court system. As stated above, the Panel is not concerned with whether the report was unfair to one side or the other. However, the Panel considers that those instructing an Expert are entitled to expect that their report will be comprehensive and clear, and will be based on underlying assumptions which have been checked and agreed with those instructing. Members of the profession, the Court and the public more generally, have a legitimate expectation that work will be compliant with published standards and requirements.

Taking all of the above into account, the Panel determined that there was a *prima facie* case that the Respondent's actions were sufficiently serious as to constitute Misconduct under the Disciplinary and Capacity for Membership Schemes.

Decision and Reasons on Sanction:

In reaching its decision, the Panel had regard to the Indicative Sanctions Guidance (January 2020). The exercise of its powers in the imposition of any sanction is a matter solely for the Panel to determine and it is not bound by the Indicative Sanctions Guidance. If however it departed from the Guidance the Panel should give reasons for doing so.

The Panel was aware that the purpose of sanction is not to be punitive although it may have that effect. Rather, the purpose of sanction is to protect the public, maintain the reputation of the profession and declare and uphold proper standards of conduct and competence. The Panel is mindful that it should impose a sanction, or combination of sanctions necessary to achieve those objectives and in so doing it must balance the public interest with the Respondent's own interests.

In considering sanction, the Panel noted that the Respondent had no previous disciplinary history, and had co-operated with the investigation. The case did not involve criminal matters, dishonesty or a lack of integrity.

However, the Panel concluded that the failings were serious, and had the potential to harm the reputation of the profession. The Panel noted that the Respondent is an experienced Actuary and was solely responsible for the report. This was a piece of work with great significance to Person A and Person B, who were entitled to have confidence in it. The Court was also so entitled. It appears that Person A's concerns about the quality of the Respondent's report contributed to a delay in reaching a settlement, though the Panel acknowledge that there may well have been other points of dispute and reasons for delay. The Panel acknowledged that the instructions were complex and could have been more clearly expressed but was satisfied that the Respondent had a direct and personal responsibility to confirm his understanding. The Panel had little evidence of insight or remorse from the Respondent.

Taking everything into account, the Panel concluded that this was not a case that warranted no sanction.

The Panel considered whether to impose a Reprimand. It concluded it should but that this alone would not be appropriate for matters which not only had potential to harm the clients but also the reputation of the profession.

The Panel considered whether to impose a Fine, and decided that a fine of £1,500 would be appropriate to mark the seriousness of the Respondent's failings. In deciding on the amount, the Panel took account of confidential information provided by the Respondent concerning his financial situation and the agreed cost of the report.

The Panel considered whether to impose a period of education, training or supervised practice, in order to give the public confidence that the Respondent will address shortcomings in his performance. The Panel was not able to identify an appropriate sanction of this type on the information available. However, in the light of the deficiencies in his report, the Panel suggests that the Respondent should reflect whether he has the experience and resources to undertake work of this nature. The Panel directs the Respondent's attention to APS X2: Review of Actuarial Work which requires members of the profession to consider whether to apply work review or independent peer review to actuarial work for which they are responsible.

Publication:

Having taken account of the Disciplinary Board's Publication Guidance Policy (May 2019), the Panel determined that, if the Respondent accepted the findings of the Panel, this determination will be published and remain on the IFoA's website for a period of five years from the date of publication. A brief summary will also be published in the next available edition of *The Actuary Magazine*.

That concludes this determination.