Disciplinary Tribunal Panel Hearing

20 July 2021

Online hearing

Respondent:	Mark Theaker (resigned) Not present and not represented in absence.
Category:	Resigned (student, 1989 - 2019)
Region:	London, UK
IFoA Case Presenter:	Stephen Ferson, Barrister instructed by the IFoA.
Panel Members:	Peter Wrench (Chair/Lay member) Julian Ellacott FIA (Actuary member) Melisa D'Mello (Lay member)
Legal Adviser:	Alan Dewar QC
Judicial Committees Secretary:	Julia Wanless

Charge:

Mark Theaker, being at the material time a member of the Institute and Faculty of Actuaries, the charge against you is that:

1. between 12 May 2016 and 7 August 2019 you acted as Chief Actuary to Company A without holding the relevant Practising Certificate;

2. your actions at paragraph 1 above were in breach of:
    a. paragraph 3.1 of Actuarial Professional Standard G1 (effective 1 January 2016);
    b. paragraph 2.1 of Actuarial Professional Standard G1 (effective 1 September 2017);
    c. paragraph 1.1 of the Institute and Faculty of Actuaries' Practising Certificate Scheme (versions 2015/16, 2016/17, 2017/18 and 2018/19);

3. your actions at paragraphs 1 and/or 2 above were in breach of the compliance principle of the Actuaries' Code (versions 2.0 and/or 3.0);

4. you failed to fully co-operate with the investigation of the allegations detailed at paragraphs 1, 2 and/or 3 above, under the Disciplinary Scheme of the Institute and Faculty of Actuaries, in that you failed to supply information, evidence and/or explanations when requested to do so by the Case Manager;

5. your actions at paragraph 4 were in breach of Rule 4.15 of the Disciplinary Scheme of the Institute and Faculty of Actuaries (effective 1 February 2018);

6. your actions at paragraphs 4 and/or 5 were in breach of the compliance principle of the Actuaries' Code (version 3.0);

7. your 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).

Service of Charges:

1. The Panel noted that the Respondent was not present and was not represented in his absence. Having considered the submissions of the Case Presenter and having accepted the advice of the Legal Adviser, the Panel was satisfied that the charges had been served in accordance with the provisions of the Disciplinary Scheme.

Proceeding in the Absence of the Respondent:

2. In considering whether to exercise its discretion to proceed in the absence of the Respondent, the Panel had regard to the submissions of the Case Presenter and accepted advice from the Legal Adviser.

3. The Panel noted that the discretion to proceed in the absence of a Respondent should be exercised with the utmost care and caution. The Panel must consider matters such as whether the Respondent has requested an adjournment, whether he would be likely to attend any adjourned hearing, or whether, in all the circumstances, the Respondent had absented himself voluntarily from the hearing. The Panel heard that there had been no communication at all from the Respondent to the IFoA since an email sent on 7 August 2019, at the point when he resigned his membership. There had been a stream of communications from the IFoA to him during their investigation and in preparation for today's hearing, and he had made no response. It was his responsibility to keep his contact details up to date and post sent to his last registered address was delivered and signed for. The Panel was therefore satisfied that the Respondent had chosen voluntarily to absent himself and that there was nothing to indicate that an adjournment would be likely to secure his attendance at a later date. In all the circumstances, the Panel determined that it was fair to proceed in the absence of the Respondent. He had chosen not to participate and any disadvantage to him had been brought upon himself and was substantially outweighed by the public interest in the expeditious disposal of the case.

Panel's Determination:

4. The Panel found parts 1-7 of the charge proved.
   The Panel determined that the most appropriate and proportionate sanctions were:

   - A fine of £2,000.
   - Exclusion from IFoA membership. The Respondent may not apply for readmission for a period of 3 years.

5. The Panel also ordered the Respondent to pay to the IFoA costs of £4,793.62.

Background:

6. The Respondent became a member of the IFoA as a student in 1989. He remained on that level of membership until his resignation on 7 August 2019. He has headed the actuarial team at Company A since 2007. From 1 January 2016 new regulations came into effect which required Chief Actuaries in Non-Life Insurance roles to be approved by the Prudential Regulation Authority (PRA). It is not a requirement of PRA approval that such a Chief Actuary holds a particular level of membership in the IFoA or, indeed, that the Chief Actuary is a member of the IFoA at all. However, the IFoA introduced parallel regulatory requirements from 1 January 2016 to require that any of its members holding a position of Chief Actuary in Non-Life Insurance would need to hold a relevant practising certificate, issued by the IFoA. Further, the applicant for a practising certificate must be a Fellow of the IFoA who qualified by examination or has been admitted under the terms of a mutual recognition agreement with another actuarial organisation.

7. In 2019 the IFoA conducted an audit against their own records of Chief Actuaries listed on the Financial Conduct Authority's (FCA) register. They found that the Respondent was listed as the Chief Actuary of Company A by the FCA, but did not hold an IFoA practising certificate. The IFoA emailed the Respondent on 13 June 2019 to query this. He replied on the same day and said:

   My job title here at [Company A] is 'Head of Actuarial' and I picked that job title specifically for the reason that you outline below - I wasn't aware of the requirements to hold a PC but I also assumed that calling myself anything with the term Actuary in it may be misleading.

He asked why the FCA were listing him as Chief Actuary and said he would check with his firm's compliance department. He then sent a further email on 24 June which said:

> *You are indeed correct that my name is listed as the SMF20 Chief Actuary for [Company A]. I was aware that [Company A] were putting me forward for this at the time, but I did not have any idea that it was a requirement to be a qualified actuary - indeed that was my main question at the time.*
> *What are the next steps? I assume that [Company A] will need somebody else to carry out this role.*

The IFoA replied on 23 July and asked if he had now resigned as Chief Actuary of Company A. They chased a response on 6 August and the respondent replied on the following day saying that he had resigned from the IFoA

8. The IFoA wrote to the Respondent on 15 August acknowledging his resignation but making clear that this would not prevent further investigation by them, stating that former members remained within the jurisdiction of the Disciplinary Scheme when a conduct matter had taken place during the period of membership. The IFoA made clear to the Respondent in the email that, from May 2016 to the date of his resignation, the Respondent had been undertaking the role of Chief Actuary at Company A without the relevant practising certificate, as required by the Actuarial Professional Standard (APS) G1.

9. There has been no further communication from the Respondent to the IFoA. An allegation was formally referred to the Disciplinary Investigations Team on 9 October 2019. He made no response to repeated efforts by that team to obtain further information from him. On 1 May 2020 a further allegation was referred, namely that the Respondent had failed to co-operate in the ongoing investigation of the practising certificate matter. The Respondent has not responded to any communication about either allegation since that point. When the IFoA checked the FCA register on 10 December 2020, the respondent was still listed as the Chief Actuary of Company A.

Findings of Fact:

8. The Panel was aware that the burden of proof rests on the IFoA, and that the standard of proof is the civil standard, namely the balance of probabilities. This means that the facts

will be proved if the Panel was satisfied that it was more likely than not that the incidents occurred as alleged. There is no requirement for the Respondent to prove anything.

10. In reaching its decisions on the various parts of the charge, the Panel took into account the documentary evidence in this case together with the submissions of the Case Presenter. The Panel accepted the advice of the Legal Adviser. The Panel has drawn no adverse inference as a consequence of the Respondent's absence.

11. The Case Presenter proposed not to call the IFoA's two witnesses to give oral evidence. Having read all the written evidence, the Panel was satisfied that there was no need for oral evidence. The witnesses were both IFoA employees whose statements largely served to exhibit the correspondence and other documentation containing the key evidence in the case.

12. Charge 1. The Panel was satisfied that this charge was proved. The PRA have confirmed to the IFoA that their records show that the Respondent was the Chief Actuary of Company A between 12 May 2016 and 7 August 2019. The Respondent's email of 24 June 2019 acknowledged that he was the Chief Actuary at that point, and there is no evidence before the Panel that he subsequently ceased to fulfil that role. At the same time, the evidence from the IFoA's witnesses makes clear that no practising certificate was issued to the Respondent in the relevant period.

13. Charge 2. The Panel was satisfied that this charge was proved. The detailed wording of the relevant Actuarial Professional Standard changed between the versions in force prior to 1 September 2017 and subsequently. However, the provision at paragraph 2.1 of the later version has been substantially the same throughout:

> *Chief Actuaries must hold either a Chief Actuary (non-Life with Lloyd's) Practising Certificate or a Chief Actuary (non-Life without Lloyd's) Practising Certificate. If performing this function within the Society of Lloyd's or a Lloyd's managing agent, Chief Actuaries must hold a Chief Actuary (non-Life with Lloyd's) Practising Certificate.*

Similarly, there have been minor changes in the wording of the IFoA's Practising Certificate Scheme over the period, but the basic requirement of paragraph 1.1 has been consistent with the version applying from September 2018:

There are specific roles identified in legislative, regulatory requirements and/or guidance which are reserved for actuaries, or which are commonly held by actuaries. IFoA members who hold the following roles must hold the relevant Practising Certificate (PC):

- *o Scheme Actuary to a pension scheme;*
- *o Chief Actuary with accountability for the actuarial function under Article 48 of the Directive on Solvency II;*
- *o Small Insurer Chief Actuary to a life insurance business;*
- *o Reviewing Actuary, advising the auditor of a life insurance business;*
- *o Appropriate Actuary to a life insurance business;*
- *o With-Profits Actuary to a life insurance business; and*
- *o The Actuary providing an Actuarial Opinion for a Lloyd's Syndicate.*

It is clear that acting as Chief Actuary without a practising certificate was a breach of these requirements.

14. Charge 3. The Panel was satisfied that this charge was proved. The compliance principle is summarised in version 2 of the Code as:

Members will comply with all relevant legal, regulatory and professional requirements, take reasonable steps to ensure they are not placed in a position where they are unable to comply, and will challenge non-compliance by others.

and in version 3 as:

Members must comply with all relevant legal, regulatory and professional requirements.

Given that charge 2 has been found proven, it is inevitable that "relevant…regulatory and professional requirements" have not been met and the compliance principle has been breached.

15. Charge 4. The Panel was satisfied that this charge was proved. As noted above, the Respondent made only limited responses to the IFoA's initial enquiries in 2019 and ended all communication after resigning from the IFoA on 7 August 2019. He therefore provided nothing at all in response to requests from the Case Manager.

16. Charge 5. The Panel was satisfied that this charge was proved. Rule 4.15 provides that "*every Member has, at all times, a duty to co-operate fully with any investigation, process or procedure under the Disciplinary Scheme…*". And rule 4.19 makes clear that rule 4.15 applies to any former member "*…whose conduct, at the date their membership of the IFoA ceased, was subject to disciplinary proceedings under the Disciplinary Scheme*." The Panel considered whether it might be possible to argue that the Respondent was not formally "subject to disciplinary proceedings" when he resigned his membership on 7 August 2019, given that a formal allegation was not referred until 9 October 2019. The Panel did not find that argument attractive: the Respondent clearly knew that the matter was under active consideration by the IFoA, and he was specifically warned, when he tendered his resignation, that this would not preclude further investigation. It should have been clear to him in August 2019 that (in the words of rule 4.15) an "…investigation, process or procedure" was underway.

17. Charge 6. The Panel was satisfied that this charge was proved. By analogy with charge 3, having found proved the specific breach of requirements alleged in charge 5, it is inevitable that the broader compliance principle was also breached.

Misconduct Charge

18. The Panel considered whether the actions and omissions of the Respondent amounted to misconduct. In considering this matter, the Panel took account of the definition of misconduct, for the purposes of the Disciplinary Scheme, which is '*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*'.

19. The Panel was in no doubt that the Respondent's behaviour fell well below what fellow professionals and members of the public would expect. He failed for over 3 years to

reconcile the inconsistency that he was acting as a Chief Actuary in circumstances where the IFoA required him to hold a practising certificate which he did not hold. He claimed initially that he did not know that a practising certificate was required. However, the Panel had before it evidence of an extensive communication effort by the IFoA specifically designed to ensure that members were aware of the new requirements coming into force in 2016. The Respondent also dissembled in his initial response to the IFoA by stating that he was not formally a Chief Actuary. When he then accepted the evidence that he was indeed Company A's Chief Actuary, he apparently sought to evade the issue by resigning his IFoA membership.

20. Further, as detailed in the Respondent's 2016 SIMF20 application to the PRA, as submitted by Company A, it states that the Respondent had been undertaking the role since 2007 and that the appointment to the SIMR20 function was agreed by Company A's Board in November 2015. The Panel also noted that the Respondent's curriculum vitae (which formed part of the SIMF20 application) showed that he had held the role of Chief Actuary for five years prior to joining Company A. In the Panel's determination, he ought to have known that he was obliged as an IFoA member to hold a practising certificate if he wanted to work as a Chief Actuary. And, when the matter was raised with him, he should have tried to resolve the problem, but chose to run away from it instead.

21. Putting charges 1-6 together there was a prolonged failure to act upon a clear regulatory omission, followed by a sustained failure, once confronted with it, to face up to the matter and co-operate in its resolution. This was, cumulatively, serious misconduct of a sort which fellow professionals would find deplorable.

Sanction:

22. In considering the matter of sanction, the Panel had regard to the submissions of the Case Presenter and accepted the advice of the Legal Adviser. The Panel also had careful 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.

23. 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.

24. In considering sanction, the Panel took into account the following aggravating factors identified by the Case Presenter:
    - the length of time for which the Respondent was acting as a Chief Actuary without the necessary practising certificate; and
    - the persistent failure to co-operate with the IFoA's investigations.

    In the Panel's view, the sustained nature of the failings was an aggravating factor, as was what amounted to a fundamental flouting of regulatory requirements in his responses to the IFoA. His reply to the IFoA's first enquiry was disingenuous, at best. Once confronted with clear evidence of a regulatory failing, his only response was to resign and ignore the continuing disciplinary proceedings.

25. The Panel also took into account the matter raised by the Case Presenter in mitigation, namely that there were no earlier disciplinary findings against the Respondent. In the Panel's view, this was more to be seen as a lack of a potential aggravating factor rather than one counting positively in the Respondent's favour. However, the Panel did note that there had been no suggestion in the IFoA's case that the Respondent had performed incompetently in acting as a Chief Actuary, or that any actual harm had been caused to his employers or their clients. The findings against him were regulatory matters which called for a sanction which would adequately declare and uphold proper professional standards, rather than one specifically designed to protect the public from any risk of harm.

26. The Panel considered whether this was a case that warranted no sanction, or whether a reprimand might suffice. It might be argued that the findings of fact and misconduct against the Respondent gave a clear signal that his conduct had been unacceptable, and that, given his resignation from the IFoA, a heavier sanction was not required. However, the Panel concluded that to take no action or simply to give a reprimand would be incompatible with the seriousness and sustained nature of the proven misconduct in this case.

27. The Panel considered whether to impose a fine and concluded that this should form a part of the sanction it imposed. It was appropriate to mark that there had been a financial advantage to the Respondent - not only in avoiding the practising certificate fee, but also in continuing to enjoy the benefits of IFoA membership at the lower subscription rate of a

student. Had he sought to regularise his position and obtain a practising certificate he would also have needed to progress to a higher level of membership. There was no evidence before the Panel as to the Respondent's means. The Panel concluded that a fine of £2,000 would be appropriate, given the identified benefits to him.

28. The Panel considered whether to impose a period of education, training or supervised practice might also form part of the sanction. It concluded that this was not appropriate for someone who has already resigned from IFoA membership.

29. The Panel was also unable to consider suspension of the Respondent's membership, as there is currently no membership to suspend.

30. The Panel therefore found little alternative to the heaviest sanction available to it of exclusion of the Respondent from membership of the IFoA. It was satisfied that more than a fine alone was necessary to mark the seriousness of the misconduct and concluded that exclusion for a period of 3 years would be proportionate in all the circumstances. The Panel has no evidence that the Respondent would want to seek to return at that point, given his voluntary departure from membership. However, it makes clear that it needs to be recognised that there would be no guarantee of a successful application after 3 years have elapsed. That is simply the minimum period before any application can be made: any application that might be made after that point will be considered on its merits, with the Respondent needing to satisfy the IFoA's applicable requirements and to show that he is a fit and proper person to be admitted to membership.

Costs:

31. The IFoA made an application for costs of £4,793.62 incurred in preparation for the hearing and attendance at the hearing by the Case Presenter. The Panel noted that the sum included administrative costs and costs incurred by the Panel and Legal Adviser. The Panel considered the costs sought to be at a reasonable level, and that the work done and costs incurred justified that amount of cost. The Panel therefore ordered the Respondent to pay the IFoA costs of £4,793.62.

Right to appeal:

32. The Respondent has 28 days from the date that this written determination is deemed to have been served upon him in which to appeal the Panel's decision.

Publication:

33. Having taken account of the Disciplinary Board's Publication Guidance Policy (May 2019), the Panel determined that 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.