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| <p>The Pensions Regulator</p> | <p>DETERMINATION NOTICE under section 10 of the Pensions Act 1995 Mr Azhar Javaid Hussain Mr Saeed Ahmed Mr Mian Asim Baber and Mr Waseem Ahmad of the Pakistan International Airlines Retirement and Death Benefits Scheme (the “Scheme”)</p> | <p>The Pensions Regulator case ref: E102917816</p> |
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1. The Determinations Panel (the “Panel”) of the Pensions Regulator (the “Regulator”) met to consider the issues in a Warning Notice addressed to Mr Azhar Javaid Hussain, Mr Saeed Ahmed, Mr Mian Asim Baber and Mr Waseem Ahmad (“the Respondents”) dated 30 August 2017. The Warning Notice was referred to the Panel on 29 September 2017 following a period for representations.

Matters to be determined

2. The Warning Notice asked the Panel to determine whether to issue a penalty under section 10 of the Pensions Act 1995 (“the 1995 Act”) in respect of the failure of the Respondents, without reasonable excuse, to take all necessary steps to secure compliance with the requirements to obtain:-
 - (a) audited accounts for the Scheme years ending 5 April 2015 and 5 April 2016; and
 - (b) an auditor’s statement about contributions under the Scheme for the years ending 5 April 2015 and 5 April 2016

in breach of Regulations 2(1)(a) and (b) respectively of the Occupational Pension Schemes (Requirement to Obtain Audited Accounts and a Statement from the Auditor) Regulations 1996 (“the 1996 Regulations”).

3. The power to issue a civil penalty under section 10 is a reserved regulatory function and is, therefore, only exercisable by the Panel.

The Decision

4. The Panel determined to issue civil penalty notices in the amount of £500 to each of the Respondents, Mr Azhar Javaid Hussain, Mr Saeed Ahmed, Mr Mian Asim Baber and Mr Waseem Ahmad. The Panel concluded that penalties were appropriate as the Respondents had each failed without reasonable excuse to take all steps as necessary to secure compliance with the requirement to obtain audited accounts and an auditor’s

statement about contributions for the scheme year ending 2015 within the required timeframe. As regards Mr Hussain, Mr Saeed Ahmed and Mr Waseem Ahmad, the £500 penalty referred to is also in respect of the same failures regarding the 2016 audited accounts and auditor's statement.

5. The Panel reached a separate determination in respect of each of the Respondents albeit its decision has, for convenience, been set out in this single Determination Notice.

Next Steps

6. The penalty notices will not be issued until at least 28 days after the date of this determination in case a reference (or challenge) is made to the Upper Tribunal.
7. Penalties are payable 28 days from the date of the penalty notice (in accordance with Regulation 21 of SI 1997/794).
8. This Notice gives the Panel's reasons for its determination.

Directly Affected Parties

9. The Panel considered the following parties as being directly affected by its determination:
 - i. Mr Azhar Javaid Hussain
 - ii. Mr Saeed Ahmed
 - iii. Mr Mian Asim Baber
 - iv. Mr Waseem Ahmad
 - v. [REDACTED]
 - vi. Pakistan International Airline Corporation ("the Employer".)

The Scheme and the Trustees

10. The Warning Notice stated that the Scheme is a defined benefit scheme with 104 members. The exhibits to the Warning Notice show that the Scheme was closed to all members accruing any further benefits with effect from 30 November 2000 and that there was a funding shortfall of £5,385,000 as at 5 April 2013.
11. The Regulator's records indicate that the trustee board is made up of 5 trustees, Mr Javaid Hussain, Mr Saeed Ahmed, Mr Mian Baber, Mr Waseem Ahmad and [REDACTED] ("the Trustees"). According to the Trustees' Report and Financial Statements for the year ended 5 April 2015, Mr Mian Baber resigned on 30 September 2016. [REDACTED] [REDACTED] is not a Respondent to the Warning Notice.

Background to the application

12. Regulations 2(1)(a) and (b) of the 1996 Regulations require that audited accounts and auditor's statements are obtained by scheme trustees or managers annually, not more than 7 months after the end of the scheme year.
13. Regulation 2(1) only applies to occupational pension schemes which are required to appoint an auditor under section 47(1)(a) of the 1995 Act. The requirement under section 47(1)(a) applies to all occupational pension schemes subject to exceptions created by regulations pursuant to section 47(5) of the 1995 Act. Certain exemptions are created under Regulation 3 of The Occupational Pension Schemes (Scheme Administration) Regulations 1996. The Warning Notice stated that none of these exemptions are applicable in relation to the Scheme.
14. Section 47(1) of the 1995 Act applies to occupational pension schemes as defined in section 1 of the Pension Schemes Act 1993. The Warning Notice confirmed that, pursuant to the information on the Regulator's register, the Scheme is an occupational pension scheme pursuant to the Pensions Scheme Act 1993 definition.
15. The Warning Notice further stated that the Scheme year ends on 5 April and, consequently, that audited accounts and an auditor's contribution statement were required to be obtained by 5 November 2015 for the scheme year ending 5 April 2015 and by 5 November 2016 for the scheme year ending 5 April 2016.
16. The Scheme actuary reported to the Regulator on 23 November 2016 that audited accounts had not been obtained for the scheme years ending 5 April 2015 and 5 April 2016. According to the Breach of Law Report, the Trustees and the auditor were aware that the report was being made.
17. In response to this report, the Regulator contacted the Trustees by letter dated 27 January 2017 referring to the Breach of Law Report and requesting confirmation of the position in relation to the 2015 and 2016 accounts. On 3 April 2017, the Regulator spoke with [REDACTED] who indicated that [REDACTED] had never received the letter of 27 January but that this may have gone to the Chairman instead. [REDACTED] explained that the main reason for the delay in submitting audited accounts was that the scheme accountant required a "letter of engagement" which was a new practice. As soon as [REDACTED] found out, [REDACTED] issued the required letter of engagement, dated 20 March 2017.
18. The Regulator had further correspondence with [REDACTED] in April 2017 requesting an update on the position. On 11 May 2017, [REDACTED] advised that [REDACTED] was expecting the 2015 accounts "early next week" and that [REDACTED] would get them signed and sent back as soon as possible. On 13 June 2017 [REDACTED] apologised that [REDACTED] but that the 2015 accounts had been signed. On 6 July 2017, the

Scheme actuary advised the Regulator that the 2015 accounts were with the auditors for signature and that the 2016 accounts were being drafted.

19. On 4 August 2017, the Scheme accountant confirmed by email that completion of the audited accounts for the scheme years 2015 and 2016 remained outstanding. The accountant's email reported that the auditors were "*waiting for two confirmation letters from PIA*" being a letter of representation and comfort letter, before they would "*be happy to sign the 2015 accounts. Regarding 2016 ... the audit had not yet started*".
20. The Scheme accountant also reported in emails to the case team at the Regulator ("the Case Team") of the same date that the auditor's statements about contributions under the Scheme also remained outstanding for the scheme years ending 5 April 2015 and 5 April 2016.
21. On 13 September 2017 the Case Team received an email from the Scheme administrator attaching a copy of the audited accounts and auditor's statement about contributions for the scheme year ending 5 April 2015. The email also stated that the 2016 accounts were in progress.
22. In its Warning Notice, the Case Team stated that the Trustees have breached Regulations 2(1)(a) and (b) of the 1996 Regulations in respect of both the 2015 and 2016 scheme years. Each respective failure to obtain within the statutory timeframe (a) the audited accounts and (b) the auditor's contribution statements represents a separate breach as regards each year.
23. The Warning Notice set out that the duty under Regulation 2(1) of the 1996 Regulations applies to each of the Trustees but that the Case Team did not consider it reasonable to impose a fine on [REDACTED] due to [REDACTED]. [REDACTED] is therefore not included in the Respondents to the Warning Notice. The Warning Notice set out that each of the Respondents is individually liable to penalties under section 10 of the 1995 Act in respect of each breach for each year but recommended a penalty of £500 per Respondent in respect of all breaches.

Reasonable excuse

24. Under Regulation 2(3) of the 1996 Regulations the Regulator can impose a penalty under section 10 of the 1995 Act on the trustees or managers of a scheme if they have failed *without reasonable excuse* to take all such steps as are necessary to secure compliance with the requirements of Regulation 2(1) of the 1996 Regulations.
25. The Case Team submitted that the Respondents have no reasonable excuse for either the failure of the Trustees to procure completion of the audited accounts and the auditor's statements in the statutory timeframe as well as the continuing breach in respect of the 2016 year.

26. The Warning Notice summarised the primary reasons which have been given to the Case Team for the breaches as follows:

- (a) the Scheme accountant required a letter of engagement which was only provided on 20 March 2017;
- (b) the accounts needed to be approved by the Employer's Head Office in Pakistan which was responsible for delays;
- (c) the Chair of Trustees, Waseem Ahmad, was often out of the country;
- (d) a new Chair was to be appointed;
- (e) the accountants and auditors had to resolve some queries with the actuary and
- (f) [REDACTED].

27. In its Warning Notice, the Case Team submitted that none of these reasons made it impossible for the Respondents to secure compliance on time, or, for them to attempt to procure compliance quickly following the actuary's Breach of Law Report dated 23 November 2016. In particular, the Case Team submitted that it is reasonable to expect the Trustees to have had measures in place to ensure that compliance with trustee governance responsibilities was monitored and to have made swift arrangements to address the breaches as soon as they became aware of them. At the latest this would have been at the time of the filing of the actuary's Breach of Law Report on 23 November 2016. In the Case Team's view it is reasonable to expect [REDACTED] responsibilities to have been undertaken by other members of the Trustees as soon as they became aware of [REDACTED].

Representations

28. Saeed Ahmed and Javaid Hussain responded to the Warning Notice on behalf of the Respondents by email dated 13 September 2017. In this email, it was explained that the lapses in the production of the 2015 and 2016 accounts was very much regretted. Various reasons were given, including the following:-

- (a) the pension auditors not having been to visit the offices on their yearly visit due to various Government and Internal Auditor visits from Pakistan;
- (b) delays due to one or other of the Trustees not being available in the office;
- (c) a lack of understanding regarding Trustee roles due to no training;
- (d) multiple visits from Head Office officials meaning that the Trustees were unable to give the auditors any time;
- (e) the fact that the Trustees are expatriates who come to the UK for a period of 3 years when they have to become trustees of the Scheme taking on those additional responsibilities alongside the assignment that they have been sent to undertake;
- (f) [REDACTED] Given that [REDACTED] was undertaking the administrative functions of the Scheme for the

Trustees, this had put an additional burden on the other trustees who have been unable to keep up with [REDACTED] work.

29. The email of 13 September also explained that, in future, the Trustees would be sent on courses to ensure that they understood their responsibilities.

Level of Penalty

30. The Regulator published its Monetary Penalty Policy (“MPP”) on 10 August 2017. The Case Team submitted in its Warning Notice that the breaches in the present case are analogous to a failure to submit a scheme return, for which it is envisaged under the MPP that a Band 1 level fine of £500 will ordinarily be imposed in respect of trustee individuals.
31. The Case Team submitted that it is unlikely that failure to produce scheme audited accounts or an auditor’s contributions statement will have a direct detrimental impact on members in the short term in the context of a defined benefit scheme. However, it may in due course impact on the Regulator’s ability to carry out its regulatory activities effectively. The Scheme actuary has already alerted the Regulator to the fact that he may need to submit a Breach of Law Report in respect of the 5 April 2017 valuation, as he cannot complete the report until the accounts are finalised. The Case Team argued that, if the accounts remain outstanding, this will in turn impact on the ability of the Trustees to comply with their duties under Part 3 of the Pensions Act 2004.
32. For these reasons the Case Team recommended that a fine of £500 for each Respondent would be reasonable and proportionate, having regard to the nature and impact of the breach and the underlying objectives of the penalty pursuant to the principles outlined in the MPP. The Case Team included in its Warning Notice an analysis of mitigating and aggravating factors but did not consider that these factors altered the proposed penalty of £500 per respondent.

The Law

33. The 1996 Regulations set out as follows.

The Occupational Pension Schemes (Requirement to Obtain Audited Accounts and a Statement from the Auditor) Regulations 1996

Regulation 2 - Requirement of trustees or managers to obtain documents

- (1) *Subject to paragraphs (2), (2B) and (2C), where the requirement of section 47(1)(a) of the Pensions Act 1995 (requirement to appoint an individual or a firm as auditor) applies, the trustees or managers of an occupational pension scheme shall obtain not more than seven months after the end of each scheme year which ends on or after 6th April 1997-*

- (a) accounts, prepared in accordance with regulation 3, audited by the auditor;
 - (b) the auditor's statement, prepared in accordance with regulation 4, about contributions under the scheme.
- (2) In the case of an ear-marked scheme, the requirements contained in paragraph (1)(a) shall not apply and the trustees and managers of such a scheme shall-
- (a) upon receiving a written request from a person specified in section 41(4) of the Pensions Act 1995-
 - (i) make available a copy of the most recent accounts published in relation to the insurance companies (whether as part of a group of companies or otherwise) with which they hold ear-marked policies of insurance or annuity contracts in relation to that person; and
 - (ii) make that information available to the person who requested it within a reasonable time of receiving the request; and
 - (b) provide each scheme member within 12 months of the end of each scheme year with a statement detailing the amount of contributions credited to him during that scheme year.
- (2AA) Information may be made available under paragraph (2) in accordance with regulations 26 to 28 of the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (giving information and documents).
- (2B) In relation to a scheme to which section 47(1)(a) of the Pensions Act 1995 does not apply, the requirement to obtain accounts in accordance with paragraph (1)(a) or an auditor's statement in accordance with paragraph (1)(b) shall apply-
- (a) to such a scheme-
 - (i) which falls within regulation 3(1)(c) or (i) of the Occupational Pension Schemes (Scheme Administration) Regulations 1996, and
 - (ii) which has 100 or more members;
 - (b) to such a scheme which falls within regulation 3(1) (m) or (o) of the Occupational Pension Schemes (Scheme Administration) Regulations 1996.
- (2C) The requirement to obtain an auditor's statement in accordance with paragraph (1)(b) does not apply in relation to a scheme for a scheme year in which, on the first day of that scheme year, the scheme has at least 20 participating employers.
- (3) Where the trustees or managers of a scheme have failed without reasonable excuse to take all such steps as are necessary to secure compliance with either the requirement to obtain accounts audited by the auditor of the scheme or the requirement to obtain an auditor's statement about contributions to the scheme in accordance with

paragraph (1)(a) or (b), they shall be liable to pay to the Regulator , within 28 days from the date of its imposition, a penalty not exceeding-
(a) £5,000 in the case of an individual; and
(b) £50,000 in any other case.

34. Section 10 of the 1995 Act provides:

“Civil penalties

(1) Where the Authority are satisfied that by reason of any act or omission this section applies to any person, they may by notice in writing require him to pay, within a prescribed period, a penalty in respect of that act or omission not exceeding the maximum amount.

(2) In this section "the maximum amount" means-

(a) £5,000 in the case of an individual and £50,000 in any other case, or

(b) such lower amount as may be prescribed in the case of an individual or in any other case,

and the Secretary of State may by order amend paragraph (a) by substituting higher amounts for the amounts for the time being specified in that paragraph....”

35. The Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997 (SI 1997/794) state:-

Regulation 21 – Time limits for payment of civil penalties under section 10(1) of the 1995 Act

“For the purposes of section 10(1) of the 1995 Act (civil penalties) the period prescribed for the payment of a penalty to the Authority shall be 28 days from the date of the notice in writing sent by the Authority requiring payment of that penalty.”

Reasons for the Decision

36. In making its decision the Panel had regard to the objectives of the Regulator as set out in section 5 and to the matters listed in section 100 of the Pensions Act 2004.

37. The Panel was satisfied that the Trustees were required to obtain audited accounts and an auditor’s statement in accordance with Regulations 2(1)(a) and (b) of the 1996 Regulations. The Panel was further satisfied that the Respondents had failed to obtain these within the time period stipulated in the 1996 Regulations as regards the 2015 scheme year. As regards the 2016 scheme year, the Panel considered that there was some uncertainty as to whether Mr Baber remained a trustee at the time that the obligation fell due i.e. by 5 November 2016 as the accounts provided stated that he resigned on 30 September 2016. The Panel was, however, satisfied that each of the Respondents, with the exception of Mr Baber, had failed to obtain the audited accounts and auditor’s statement for the 2016 scheme year.

38. The Panel considered whether, in the case of each of the 2015 and 2016 failures, there was a “reasonable excuse” for the Respondents not to have obtained accounts or an auditor’s statement within the statutory timeframe.
39. Taking the ordinary meaning of “reasonable excuse” the Panel did not consider that any of the statements or explanations provided by the Trustees amounted to a reasonable excuse. Whilst the Panel had sympathy regarding the impact of [REDACTED] on the Respondents, and agreed with the Case Team that it was not appropriate to impose any penalty on [REDACTED], the Respondents had had ample opportunity to manage the impact of [REDACTED] absence. In the Panel’s view, the Respondents had treated their trustee obligations as a low priority, even following the Breach of Law Report on 23 November 2016 and had had ample time to try to redress the continuing breaches. No reasonable excuse for not doing so had been provided.
40. The Panel therefore concluded that the Respondents had failed without reasonable excuse to take all such steps as necessary to secure compliance with the 1996 Regulations. Whilst the 2015 audited accounts and statement had ultimately been provided, the 2016 accounts and statement remain outstanding.
41. In applying the MPP it is necessary to allocate the case to the correct Band, determine an appropriate starting point and then calculate the final penalty taking account of any aggravating or mitigating factors.
42. The Panel agreed that this breach could be considered comparable to a scheme return breach and should, therefore fall within Band 1. The Panel agreed with the Case Team that, whilst in this case there may be no direct detrimental impact on members in the short term, it may in due course impact on the Regulator’s ability to regulate effectively.
43. The Panel took into account the provisions of section 9.4. of the MPP in considering whether there were any aggravating or mitigating factors which impacted the level of the penalty. Specifically, the Panel considered the conduct of the Respondents since the breach had been identified, their professional experience and the [REDACTED]
44. As regards their conduct, the Panel accepted that, whilst the Trustees (primarily through [REDACTED]) had had some engagement with the Regulator following the breach, this was primarily initiated by the Regulator and progress had been slow. The breach was not remedied until September 2017 as regards the 2015 accounts and, at that time, the 2016 accounts remained outstanding. The Panel did not therefore consider that this amounted to a mitigating factor. Similarly, the Panel did not consider that the professional experience of the Trustees amounted either to a mitigating or an aggravating factor.

45. With regard to [REDACTED], the Panel considered that, whilst this might be considered to amount to circumstances outside of the Respondents' control, the Respondents had been aware of [REDACTED] [REDACTED] for some time and had not taken adequate steps to manage the difficulties this caused. It was not, therefore, a mitigating factor. Consequently, the Panel did not consider that there were any aggravating or mitigating factors sufficient to warrant an increase or reduction in the penalty against any of the Respondents.
46. The Panel agreed with the Case Team's recommendation of a penalty of £500 for each of the Respondents. In the Panel's view, this was proportionate to the breach(es) that had occurred.
47. The Panel recognised that Mr Baber may not have been a trustee at the point at which the 2016 accounts and auditor's statement were due. The Panel considered that a penalty of £500 was nevertheless appropriate in respect of the 2015 scheme year breaches alone. In the light of the extensive delay in complying with his obligations, the Panel did not, consider it appropriate to reduce the amount for Mr Baber and recognised, as explained in the Warning Notice, that each breach of the audited accounts and the auditor's contribution statement requirements for the 2015 and 2016 year represents a separate breach which could itself lead to a penalty.

Conclusion

48. For these reasons the Panel determined to issue penalty notices in the amount of £500 to each of the Respondents, Mr Azhar Javaid Hussain, Mr Saeed Ahmed, Mr Mian Asim Baber and Mr Waseem Ahmad, payable 28 days from the date of the notice.
49. By virtue of section 96(5) of the Act the penalty notices will not be issued during the 28 day period within which this determination may be referred to the Upper Tribunal and, if so referred, until the reference and any appeal against the Upper Tribunal's determination has been disposed of. If no referral to the Upper Tribunal is made within 28 days, then penalty notices will be issued to the Trustees.
50. **Appendix 1** to this Determination Notice contains important information about the rights to refer this decision to the Upper Tribunal.
51. Although the Panel has, for convenience, issued one Determination Notice in respect of all of the Respondents, the Panel has reached a separate determination in respect of each of them. Therefore, to the extent that one Respondent decides to refer this Determination Notice to the Upper Tribunal, this will not prevent a penalty notice being issued against any non-referring Respondent.



Signed:
Chairman: Pauline Wallace
Dated: 10 November 2017

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Referral to the Tax and Chancery Chamber of the Upper Tribunal

You have the right to refer the matter to which this Determination Notice relates to the Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”). You have 28 days from the date this Determination Notice is sent to you to refer the matter to the Tribunal or such other period as specified in the Tribunal procedure rules or as the Tribunal may allow. A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this Determination Notice.

The Tribunal’s address is:

Upper Tribunal
(Tax and Chancery Chamber)
Fifth Floor
Rolls Building
Fetter Lane
London
EC4A 1NL

Tel: 020 7612 9700

The detailed procedures for making a reference to the Tribunal are contained in section 103 of the Act and the Tribunal procedure rules.

You should note that the Tribunal procedure rules provide that at the same time as filing a reference notice with the Tribunal, you must send a copy of the reference notice to the Pensions Regulator. Any copy reference notice should be sent to:

Determinations Panel Support
The Pensions Regulator
Napier House
Trafalgar Place
Brighton
BN1 4DW.

Tel: 01273 811852

A copy of the form for making a reference, FTC3 ‘Reference Notice (Financial Services)’, can be found at:

http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=3043