



**Adjudication Panel Meeting**

**15-16 April 2020**

**Held by video-link**

<b>Respondent:</b>	Nicholas McCulloch FIA
<b>Category:</b>	Fellow since 28 September 1992
<b>ARN:</b>	5497
<b>Panel Members:</b>	Jules Griffiths (Chair/ Lay member) Graham Cooper FIA (Actuary member) Stephanie Green (Lay member)
<b>Legal Adviser:</b>	James Stythe
<b>Judicial Committees Secretary:</b>	Julia Wanless

**Allegation:**

The allegations against the Respondent are, in relation to his role as Scheme Actuary of Scheme A:

A1. he resigned his appointment as Scheme Actuary in September 2018 and he did not adequately advise the incoming Scheme Actuary of the following:

A1.1.1. the early retirement reductions were too severe;

A1.1.2. the late retirement factors were overgenerous;

A1.1.3. the commutation factors were too low;

A2. his actions at paragraph A1 above were in breach of the communication principle of the Actuaries' Code;

A3. his actions at paragraph A1 above were in breach of the competence and care principle of the Actuaries' Code;

A4. in October 2018, he advised the [redacted] administration team that he had notified the incoming Scheme Actuary that the late retirement factors were overgenerous, when he had not done so;

A5. his actions at paragraph A4 above were in breach of the communication principle of the Actuaries' Code;

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 the Case Report and appendices submitted by the Case Manager and Investigation Actuary, which included a formal statement from the Respondent, and the Respondent's response to the Case Report. The Panel also considered the advice of the Legal Adviser, in particular in relation to the definition of Misconduct and the range of sanctions available.

The Panel determined that the Case Report disclosed a *prima facie* case of Misconduct, in respect of the Allegations which related to breaches of the communication principle of the Actuaries Code (2013) during the Respondent's handover to an incoming Scheme Actuary. The Panel did not uphold the Allegation relating to the breach of the care and competence principle of the Code.

The Respondent has accepted that he did not adequately advise the incoming Scheme Actuary of certain matters when handing over September 2018 (Allegation 1), and that in October 2018 he incorrectly advised the Scheme Administrator that he had advised her of one of these matters (Allegation 4). The Panel accepted his explanation that these were oversights, at a time when he was distracted by other pressing matters to do with the Scheme. Nevertheless, he had a professional obligation to provide accurate information, and although it was not intentionally so, one of these communications was misleading, and the other was incomplete. Principle 5.3 of the Code states that “Members will take such steps as are sufficient and available to them to ensure that any communication with which they are associated is accurate and not misleading, and contains sufficient information to enable its subject matter to be put in proper context”. The Panel determined that, by breaching the Code in this way, the Respondent’s conduct fell below the standard that that would reasonably be expected of him.

The Panel accordingly invited the Respondent to accept that there had been Misconduct. The Panel did not consider that a sanction was appropriate in this case, for reasons given below.

### **Background:**

Nicholas McCulloch (the Respondent) has been a Fellow of the IFoA since 1992, and held a Scheme Actuary Practising Certificate from 1997 until February 2020. These allegations concern his role as Scheme Actuary for Scheme A around the time of his resignation in September 2018.

At that time there had been a number of areas of concern with the Scheme, which had been the subject of enquiries by The Pensions Regulator, leading to the appointment of new Trustees and advisers. The Respondent was aware of a number of matters which needed attention (including those which gave rise to these allegations); he drafted a report for the Trustees to deal with these matters, but the work had not been completed by the time he started to handover to his replacement in July 2018.

The Respondent has co-operated with the investigation. He accepts the facts of the allegations.

### **Decision and Reasons on the Allegations:**

#### Allegations 1, 2 and 3

*A1. he resigned his appointment as Scheme Actuary in September 2018 and he did not adequately advise the incoming Scheme Actuary of the following:*

*A1.1.1. the early retirement reductions were too severe;*

*A1.1.2. the late retirement factors were overgenerous;*

*A1.1.3. the commutation factors were too low;*

With regard to the three allegations, the Respondent has acknowledged that he did not include these outstanding matters in the handover to the incoming Scheme Actuary. The Panel accepts that he had intended to do this, in order to be helpful, but failed to do so.

*A2. his actions at paragraph A1 above were in breach of the communication principle of the Actuaries' Code;*

*A3. his actions at paragraph A1 above were in breach of the competence and care principle of the Actuaries' Code;*

The Panel concluded that the Respondent's letter, whilst not intended to mislead, and which was, on the face of it, accurate, was nevertheless, a breach of the communication principle of the Actuaries Code, in that it did not contain an appropriate level of information. The Panel agreed that, although unfortunate, this human error of omission did not amount to a breach of the competence and care principles.

Accordingly Allegation A3 is not made out, but Allegation A2 is.

#### Allegations 4 and 5

*A4. in October 2018, he advised the [redacted] administration team that he had notified the incoming Scheme Actuary that the late retirement factors were overgenerous, when he had not done so;*

*A5. his actions at paragraph A4 above were in breach of the communication principle of the Actuaries' Code;*

The Respondent has accepted that he stated in an email to the [redacted] administration team that he had drawn the factor review to the attention of the incoming Scheme Actuary, however in fact he had not done so. He had intended to do so, but had overlooked it as he was busy with other matters relating to the Scheme.

The Panel concluded that the Respondent's email, whilst it was not intended to deceive and had no serious consequences, was nevertheless, a breach of the communication principle of the Actuaries Code, in that it was misleading.

### **Decision and Reasons on Misconduct:**

The Panel then considered whether there was a *prima facie* case that the Respondent's actions 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 determined that there was a *prima facie* case that the Respondent's actions described in Allegations 1, 2, 4 and 5 constituted Misconduct under the Disciplinary and Capacity for Membership Schemes. There is a very clear expectation that correspondence from a professional will be accurate and complete and the Respondent has accepted that he failed in this respect.

The Panel was not satisfied that there was a *prima facie* case that the Respondent's actions described in Allegation 3 constituted 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.

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.

The Panel considered first the seriousness of the breaches of the Code. The Panel concluded that, whilst any breach is, of course, a serious matter, this case falls very much at the lower end of the scale. In reaching its view, the Panel had regard to the following factors:

- The Respondent did not intend to mislead, and his failure to give full information to his replacement was an oversight.

- The misconduct was not prolonged, being two breaches in a period of a few weeks.
- The failings did not cause any harm, there was no financial loss, nor was remedial work required.
- The conduct was not motivated by profit and there was no benefit to the Respondent from his actions.

In considering sanction, the Panel found no aggravating factors. The Panel identified the following mitigating factors:

- The Panel accepted that the failings were a result of genuine oversight and were an aberration;
- The Respondent has readily admitted and accepted responsibility for his failings; The only allegations which were found to be capable of proof were those that he had accepted;
- He has co-operated fully with the investigation;
- The Panel considered that the risk of repetition was very low.

The Panel acknowledged that the process of facing allegations and cooperating with an investigation of this nature can be difficult and a finding of misconduct is a salutary experience for a Fellow of the Institute. The Panel also noted that the Respondent no longer has a Scheme Actuary Certificate.

Having taken account of all of the above, the Panel's initial decision was that it was not appropriate to impose a sanction. The Panel recognised that this would be unusual, but was satisfied that there was no risk to the public, there were no ongoing impacts from the Misconduct, and it is unlikely to be repeated.

The Panel moved on to consider whether it was appropriate to impose a Reprimand, but concluded that this would be disproportionate as the finding of Misconduct (and the publication of such) would be sufficient to mark the breaches without an additional sanction.

The Panel concluded that it was not appropriate to impose a sanction.

### **Publication:**

In addition to the allegations referred to above, the Case Report in this matter contained a number of allegations which were considered by the Adjudication Panel and which were not found proved.

In determining the matter of publication of its findings the Panel found, exceptionally but unanimously, that the public interest and the interests of the Respondent respectively are properly served in this matter by publication only in respect of those allegations where the Panel's findings were partially or wholly adverse, the Respondent and the Complainants having been served with the full determination in respect of all allegations in the Case Report.

Having taken account of the Disciplinary Board's Publication Guidance Policy (April 2018), and the circumstances of this case, 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.