Adjudication Panel Meeting

24 to 25 June 2021

Held by Video Conference

Respondent:	Caroline Bayliss FIA
Category:	Fellow since 3 August 1993
Region:	London, UK
Panel Members:	Andy Scott FIA (Actuary/Chair) Bryan Chalmers FFA (Actuary member) Catriona Whitfield (Lay member)
Legal Adviser:	James Stythe (Legal Adviser)
Judicial Committees Secretary:	Julia Wanless

Allegation:

The allegation against the Respondent is:

A1 Between February 2020 and May 2020, whilst acting in the role of Director of Company C, she accepted a joint instruction from solicitors acting on behalf of Person A (the "Referrer") and Person B (the Referrer's wife) to prepare an expert report on pension sharing on divorce. During the course of the instruction she:

1. Did not prepare an adequate report based upon the joint letter of instruction prepared by Stowe Family Law (Person A's solicitors), in that the report:

    a. gave examples only of splitting Person A's and Person B's pensions by Person B buying an annuity, when it was instructed that she consider all different types of pension options;
    b. included incorrect calculations in that the two examples of pension splitting provided did not have the same total CEVs when added up;
    c. included a statement that she could not comment on other types of pensions because she is not licensed and a financial advisor would be required;
    d. included incorrect CEVs for each pension cited;
    e. included state pension predictions even though they were not asked for in the letter of instruction;
    f. did not provide a predicted income for each party after the pension split and after Person A's pension age, despite being instructed to do so;
    g. did not include a future prediction of pensions within the report, despite her being instructed to do so;
    h. referenced Person A's BP levelling pension as having a value of £13826, without providing the calculations supporting this valuation figure.

2. Refused to deal directly with the pension providers, despite not explicitly stating prior to accepting the instruction that she would not do so.

3. Upon being questioned by Person A's instructed solicitor in relation to her calculations, refused to provide any structural answers. In particular, she did not:

a. adequately clarify and explain the specific assumption on mortality that was used in her calculations;
b. in relation to Person A's BP pension scheme, explain sufficiently why she deemed the consideration of the difference between the CE and the fair actuarial value to be relevant;
c. explain sufficiently why she did not think it prudent to update the pension values just prior to the specific quantum of an order being calculated;
d. explain sufficiently how she considered equalising the level of income between the parties, but also the quality of income if Person B proceeded with a drawdown as suggested by the Respondent at Appendix B (1) of her calculations;
e. explain her view on how her calculations would be affected if Person B considered an income drawdown policy at the rate of 4% per year.

A2 Her actions in A1, 1, 2 and 3 above breached the principle of Competence and Care in the Actuaries' Code (version 3.0).

A3 Her actions in A1, 1, 2 and 3 above breached the principle of Communication in the Actuaries' Code (version 3.0).

A4 Her 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 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 in relation to allegations A1 (1f and 3e).

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

Background:

The Complaint stems from a report prepared by Caroline Bayliss FIA ("the Respondent"). She is one of two directors of Company C, which was instructed jointly by the solicitors of Person A ("the Referrer'") and Person B, his wife, to prepare a single joint expert report on issues pertaining to Person A 's and Person B's pension provision arising out of their divorce proceedings.

The Respondent prepared the report, entitled "Actuarial Report on Pensions On Divorce" dated 27 April 2020 ("the Report"). Person A's solicitors were instructed to seek clarification on a number of matters relating to Person A's share of his pensions. The Respondent prepared responses to the matters raised.

Person A was not satisfied with the Respondent's explanations and a number of features of the Report and he raised an allegation in relation to the Respondent on 15 June 2020.

Person A thereafter unilaterally instructed another actuary with experience of pension sharing to prepare a further report. This led to several months of correspondence and discussions between the various parties and which are still ongoing in the settlement of Person A's and Person B's divorce. As a result of these discussions, further evidence came to light and an Addendum to the Case Report was prepared and submitted to the Panel on 17 June 2021 (1 week before the Panel Hearing), together with documents submitted by the Referrer and the Respondent. Although this Addendum and attaching documents provided further information relating to the pension shares of Person A and Person B, the Case Manager and the Investigation Actuary were of the view that nothing contained within the documents should lead to any changes being made to the allegations. Accordingly the Panel restricted their determination to the allegations in the original Case Report.

Decision and Reasons on the Allegations:

Allegation A1

1 a The Panel did not believe that this allegation was capable of proof, as the Respondent was not asked to "look at all different types of pension option" in her joint instruction letter. Indeed, even if she had been, the Panel did not think it feasible, given the

large number of different options and potential possible outcomes. Moreover, the Respondent had explained in her report that the sharing options shown were ***not*** based on Person B buying an annuity, but were a reasonable allowance for Person B using a drawdown approach in the early years of retirement and then converting to annuities at a later age.

1 b The Panel concurred that the same total CEVs were different in the 2 options shown in the report. However, they did not agree that the calculations were incorrect, as the different CEVs were the result of the Respondent using a *Fair Actuarial Value* for the BP Pension rather than a CEV. The Respondent had explained in Appendix B of the report what the FAV was and why she had used it for the BP Pension, and the Panel agreed that her approach was reasonable. The Panel therefore did not believe that this allegation was capable of proof.

1 c The Panel believed that the Respondent was correct to state that she could not comment on other types of pension because she is not licensed. Such advice could only legally be provided by a regulated independent financial adviser. The Panel therefore did not believe that this allegation was capable of proof.

1 d The Panel did not agree that incorrect CEVs had been cited for each pension. The CEVs provided to the Respondent had been at different dates and she had therefore had to adjust them to allow for estimated changes up to the date of the report. This had been explained in Appendix A1 of the report. Whilst the Panel had some concerns that more detail could have been given about the calculations within the report, they did not concur that the CEVs were “incorrect”. The Panel therefore did not believe that this allegation was capable of proof.

1 e The Panel recognised that reports on pension sharing often exclude state pensions, but understood why the Respondent had believed that they should be included, given the wording in the joint instruction letter. In particular, Instruction 2 had said that the Respondent should take into account “all of the pensions available to both parties” and also “Person B’s subsequent receipt of a reduced state pension from July 2026.” The Panel believed therefore that this allegation was not capable of proof.

1 f The Panel agreed that this allegation was capable of proof and, indeed, the Respondent had acknowledged that she was instructed to provide these details and that she should have included them.

1 g The Panel was unsure what exactly the Referrer was alluding to in this allegation (and the Respondent had been equally unsure in the letter and table she had sent to the Case Manager in response to the allegations). There was no request to provide a future prediction of pensions within the joint instruction letter, other than that specified (and not provided) under allegation 1f. The Panel could not therefore make any determination about this allegation and therefore did not believe that this allegation was capable of proof. In any event they did not believe this was a significant misconduct issue.

1 h The Respondent had replied to this allegation in the Table submitted to the IFoA Case Manager, stating that "In line with guidance from the Pensions Advisory Group (PAG) and TAS 100, we provide sufficient information for another technically competent person to understand the matters and assess the judgements and calculations made. For the BP pension, I consider that I set out a reasonable explanation." The Panel had some sympathy for Person A's confusion regarding the calculation of the BP pension as £13,826, but agreed that there was sufficient explanation within the Respondent's report to satisfy PAG and TAS 100. The Panel therefore believed that this allegation was not capable of proof.

2 The Respondent had included in her response letter of 17 February 2020 that her firm would not deal with other providers or administrators regarding information about the parties' pensions, and that it would be up to the parties themselves to contact these firms for any relevant details. The Panel therefore believed that this allegation was not capable of proof.

3 The Panel did not agree that the Respondent had refused to provide structural answers to Person A's solicitors. Indeed, she had responded in some detail in her email of 26 May 2020 to each question put to her by the solicitors, even though their queries were more than just "clarification of the report" and were sent after 10 days of receipt of the report (the grace period specified in the joint instruction letter).

(**Note:** In the remaining allegations under 3, the Referrer talks about the Respondent's failure to "adequately clarify" or "explain sufficiently" certain aspects of her report. The Panel considered carefully what level of explanation was required from the Respondent to these

aspects, as it would be very difficult and time-consuming to explain every one of them to the satisfaction of a lay person. The Panel agreed that it was reasonable for the Respondent to have assumed that the parties' solicitors would have substantial experience in divorce matters and in pension sharing in particular and that her report and responses should be addressed at a level that was understandable to such experienced users. If Person A or Person B then had questions about her response, their solicitors should be able to explain any matters they did not understand. The Panel therefore based their determinations to the remaining allegations under 3 on that level of explanation.)

3 a The Respondent had stated in her email of 26 May 2020 that it was "not possible to provide the details of each probability (due to the size of the table)", and instead she provided the web link to the mortality table so that the solicitors could check for themselves. This seemed perfectly reasonable to the Panel and they therefore concurred that this allegation was not capable of proof.

3 b The Respondent had explained the Fair Actuarial Value (FAV) in Appendix B of her report at a level that the Panel believed should have been understandable to an experienced user. She had also provided a further explanation in her response email of 26 May 2020. The Panel believed that the use of a FAV was appropriate in the circumstances of the pension sharing and that the difference between the FAV and CEV was relevant to the calculations. As a result, the Panel did not believe that this allegation was capable of proof.

3 c The Respondent had stated in para 2.4 of her report that there had been "considerable movements in financial markets" since the date of the joint instruction letter. (These movements referred to the collapse of many stock markets around the world at the start of the COVID 19 pandemic in March and April 2020.) She also stated that "The parties should be aware that any pension sharing order will be applied to the CE at the time of implementation." Further, in her response email of 26 May 2020, she had stated the "the defined contribution funds are currently very volatile" and that she "would be happy to carry out further calculations, if instructed." The Panel did not agree, therefore, that the Respondent thought that it was not prudent to update the pension values just prior to the specific quantum of an order being calculated, and they concurred that this allegation was not capable of proof.

3 d The Panel had some sympathy with the allegation that the Respondent's approach of using a non-levelling pension of £13,826 made it hard to understand how the income levels

would be equalised between the Referrer and Person B post divorce. However, they had difficulty understanding the rest of this allegation (as did the Respondent in her response email of 26 May 2020). Indeed, the Panel speculated whether "quality" should actually have read "equality", but they were obliged to consider only the allegation as printed. The point would appear to have been based on the Referrer's solicitors' email of 22 May 2020 to the Respondent in which they suggested that the pension share should take into account the "significantly more valuable" quality of income from the drawdown option that was available to Person B, but not to the Referrer. The Panel did not understand how a pension share could allow for such "quality of income", but in any event, they believed that the guaranteed income from the BP Scheme was actually more valuable than the drawdown income which would be subject to market movements and carried no guarantee. The Respondent had made similar points in her response email of 26 May 2020 and the Panel again concurred that this allegation was not capable of proof.

3 e The Panel agreed that the Respondent had not explained her view on how the calculations would be affected if Person B considered an income drawdown policy at the rate of 4% per year. She had mentioned this option in para B10 of her report, but had not clarified how it would affect the pension share, as she was not specifically asked to do so in the joint instruction letter. She had subsequently failed to explain her view in her response email of 26 May 2020, but this was due to a misunderstanding of the question - which she subsequently admitted and said that she would have given an appropriate response if she had understood the question. The Panel therefore concurred that this allegation was capable of proof, but was not a deliberate act by the Respondent.

Allegation A2

In determining their response to this allegation, the Panel were only obliged to consider the Respondent's actions in 1f and 3e above, as they were the only ones that were capable of proof.

With regard to 1f, the Panel agreed that the only principle that had been breached within Competence and Care of the Actuaries' Code (version 3.0) was 2.3, namely that "*Members must ensure their work is appropriate to the needs and, where applicable, instructions of user(s).*" The Respondent had acknowledged that she was instructed to provide these details and that she should have included them, and so she had not complied with the joint instructions. The Panel also recognised, however, that these details were a relatively minor

part of the report and that their inclusion would not have affected the Respondent's recommendations. The Panel therefore concluded that this allegation was capable of proof, although it was a low level breach.

With regard to 3e, the Panel again agreed that the only principle that had been breached within Competence and Care of the Actuaries' Code (version 3.0) was 2.3, in that the Respondent had not responded to the question in her response email of 26 May 2020. The Panel also recognised that this was due to a misunderstanding of the question and not a deliberate act by the Respondent. The Panel again concluded that this allegation was capable of proof, but it was a low level breach.

Allegation A3

In determining their response to this allegation, the Panel were again only obliged to consider the Respondent's actions in 1f and 3e above, as they were the only ones that were capable of proof. The Panel also agreed that in determining whether the principle of Communication of the Actuaries' Code (version 3.0) had been breached, the level of explanation should be at the level outlined in the Note above, namely that it was reasonable for the Respondent to have assumed that the parties' solicitors would have substantial experience in divorce matters and in pension sharing in particular and that her report and responses should be addressed at a level that was understandable to such experienced users.

Using those guidelines, the Panel agreed that the only principle that had been breached within the Communication Code with regard to 1f was 6.3, namely that "*Members must take reasonable steps to ensure that any communication for which they are responsible... contains an appropriate level of information."* For the same reasons as in A2, the Panel concluded that this allegation was capable of proof, although it was a low level breach.

With regard to 3e, the Panel again agreed that only principle 6.3 had been breached and for the same reasons as in A2, the Panel concluded that this allegation was capable of proof, but was a low level breach.

Allegation A4

The Panel then considered whether there was a *prima facie* case that the Respondent's actions in Allegation A1 (1f) and (3e) 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 in Allegation A1 (1f) and (3e) did constitute Misconduct under the Disciplinary and Capacity for Membership Schemes, as the Referrer might reasonably expect the Respondent to have fully complied with the joint instruction letter and subsequent request for clarification.

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.

In considering sanction, the Panel were unable to identify any aggravating factors.

The Panel took into account the following factors in mitigation:

- This was the first ever Complaint against the Respondent;
- The Respondent co-operated fully with the investigation;
- She responded to Person A's solicitors' out of time questions;

- She acknowledged her failure in respect of allegation A1 (1 f) and (subsequently) A1 (3e);
- The Respondent offered to provide further calculations and assist with further queries, if instructed;
- Neither Person B nor the actuary appointed by Person A raised any issues regarding Misconduct by the Respondent;
- The actuary appointed by Person A agreed that the assumptions used by the Respondent fell within a "reasonable range";
- The allegations capable of proof did not relate to incorrect advice, but rather to omissions and misunderstanding;
- Her actions presented no risk to the public; and
- There were no ongoing or lasting effects in relation to the allegations capable of proof.

Having considered the mitigating factors above, the Panel considered that any of the sanctions available to the Panel would be disproportionate to the misconduct identified. The Panel therefore determined that this was a case that warranted no sanction.

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 three years from the date of publication. The Panel was satisfied that three years was proportionate to the low level of Misconduct identified in this case. A brief summary will also be published in the next available edition of *The Actuary* Magazine.