

**PENSIONS ACT 2004, PART 2 CHAPTER 6****APPEAL TO PENSION PROTECTION FUND OMBUDSMAN****DETERMINATION BY THE DEPUTY PENSION PROTECTION FUND OMBUDSMAN**

**Applicant** : Mr A T Hawksley, on behalf of the Trustees of the King's College School Pension Scheme (the **Trustees**)  
**Scheme** : The King's College School Pension Scheme

1. The Pension Protection Fund (**PPF**) Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee of the PPF dated 16 October 2007.

**RECONSIDERATION DECISION**

2. The Reconsideration Committee decided:

- 2.1. The Applicant's grounds for requesting a review were (inter alia):

- No proper notice had been given to the Applicant or the Trustees that the School accounts should have been sent to Dun and Bradstreet (**D&B**) by 31 March 2006.
- He did not consider that the process described in Appendix 1, paragraph 5<sup>1</sup> constituted proper notice.
- The Board's and D&B's attitude to the late filing of the accounts, which could have been obtained through the Charity Commission, was "pedantic in the extreme"; particularly since this was the first year of the operation.

- 2.2. The factual matters of the case were:

- The Board had encouraged schemes to liaise with D&B prior to 31 March 2006 and to provide information where appropriate.

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<sup>1</sup> Of the PPF review decision, dated 26 June 2007, setting out the chronology of the consultation process (see paragraph 2.6 below)

- The Board had sought to develop fair and reasonable procedures and methods for calculating the levy and to consult on and publicise these. The steps taken exceeded the public consultation requirements imposed by the Pensions Act 2004.
- The Board also provided a team of advisers, the Stakeholder Support Team, to address queries from stakeholders or their advisers.
- Where the PPF could obtain contact details, it had mailed schemes, alerting them to certain issues connected with the levy and referring them to its website for further information. This raised awareness of the levy in general, of the fact that the Board would use D&B failure scores to assess insolvency risk and gave details of the PPF website and the PPF and D&B helplines. The Scheme was sent such a mailing.
- The Board published the following Frequently Asked Question (FAQ) on its website,

**“I am not legally obliged to file accounts at Companies House, would it help if I gave them to D&B**

D&B are happy to receive signed, audited accounts. They can be posted or scanned/emailed and need to be supported by a ‘letter of authentication’ (delivered by post) signed by a director or authorised person of the business. The letter should confirm the accounts are an accurate representation of the business and give D&B full permission to abstract and reproduce the data.

The addition of audited accounts may or may not affect the D&B Failure Score it is one of a number of factors that are taken into consideration when assessing and calculating the probability of failure of a business. The Failure Score can change for a number of reasons and is often as a result of a combination of factors.

Due to the integration of data across a wide range of products and monitoring services to our customers D&B will not remove the accounts, other than for historic reasons, from the database.

If you wish to provide accounts as indicated please send to ... and mail the ‘letter of authentication’ to ...”

- The Trustees of the Scheme did not submit a certificate in respect of a recognised Contingent Asset to the Board on or before 31 March 2006.

- The Trustees of the Scheme submitted neither the Declaration of Scheme Structure form nor Participating Employer's form on or before 31 March 2006. These forms were annexed to the Board's Determination for the year April 2006 to 31 March 2007.
- 2.3. Under Section 175(5) of the Pensions Act 2004 (see Appendix), before the beginning of each financial year, the PPF Board must determine, in respect of that year:
- The factors by reference to which the pension protection levies are to be assessed;
  - The time or times by reference to which those factors are to be assessed;
  - The rate of the levies; and
  - The time at which the levies become payable.
- 2.4. The Board published its final determination of these matters for financial year 2006/07 on 30 March 2006 (the **2006 Determination**).
- 2.5. As financial year 2006/07 was the first in which the Board was required to impose the levies, it was required to consult in a prescribed manner.
- 2.6. The Chronology of the Board's consultation process for the risk-based levy was as follows:
- |                  |  |
|------------------|--|
| 12 July 2005     | Consultation paper on risk-based levy for 2006/07 issued.  |
| 4 October 2005   | Consultation period closed.  |
| 14 October 2005  | Consultation update published.   |
| 16 December 2005 | Start of second consultation period.   |
|                  | Draft 2006 Determination issued.   |
| 23 January 2006  | Second consultation period closed.   |
| 25 January 2006  | The finalised contingent asset certification, supporting guidance and standard form documentation published. |

- 28 February 2006      Response to second consultation published.
- 28 February 2006      Final form of 2006 Determination published, subject to regulations coming into force.
- 30 March 2006          2006 Determination published.

2.7. A series of ‘roadshows’ were held in London, Manchester, Edinburgh and Belfast.

2.8. The Applicant had asked for a reconsideration of the amount of the Scheme’s risk-based levy. The scope of the review should be whether the calculation in respect of the Scheme’s levy invoice was carried out in accordance with the published 2006 Determination.

2.9. Paragraph 14 of the Schedule to the 2006 Determination sets out the formula for calculating the risk-based levy, as follows:

$U \times P \times 0.8 \times 0.53$ , subject to a cap of 0.5% of the Scheme’s protected liabilities.

2.10. Paragraphs 25 and 26 set out how P is derived, as follows:

“25. P shall be the Pension Protection Fund assumed probability of insolvency associated with the Failure Score which applies to the employer in relation to the scheme, as shown in Appendix 3 to this Schedule or as determined in accordance with paragraph 26(d) or paragraph 27 below, provided that if such assumed probability of insolvency exceeds 0.15, then P shall be taken to be 0.15.

26. The Failure Score which applies to an employer shall be the failure score which [D&B] informs the Board that it has assigned to that employer, after taking such steps to identify or obtain data relating to that employer as the Board has required. **For the avoidance of doubt, the failure scores to be provided to the Board are to be the normal failure scores which were or would have been assigned to that employer by [D&B] in the ordinary course of its business as at 31 March 2006,** [their emphasis] save that –

(a) The Board has instructed [D&B] that the failure scores provided to the Board should be those which would be assigned to the employer if there were to be disregarded any rule or practice whereby [D&B] normally limits the maximum failure score obtainable by any company which has a negative tangible net worth;

(b) The Board has further instructed [D&B] that the failure scores provided to the Board should be those which would be assigned to the employer if there were to be disregarded any rule or practice whereby [D&B] normally limits the maximum failure score obtainable by a company where it is a subsidiary of another company and that parent company is regarded as being at severe risk of insolvency;

(c) This sub-paragraph applies in any case where [D&B] informs the Board that it has decided, following representations made to it by or on behalf of the relevant trustees or managers or employer, that the failure score assigned to an employer as at 31 March 2006, was incorrect or incomplete by comparison with the information which should normally have been taken into account by [D&B] in assigning a failure score at that date. In a case to which this sub-paragraph applies, the Failure Score shall be the higher or lower failure score which [D&B] informs the Board ought to have been assigned to the employer as at 31 March 2006. For these purposes, the Board has instructed [D&B] to give consideration to those, and only to those, representations made to it not later than 28 days after the date shown on the original notification. In a case to which this sub-paragraph applies the Board will where necessary issue a revised notification of the amount of the levies in respect of the scheme;

(d) In the case of employers which are not registered in the United Kingdom, the Board has instructed [D&B] to provide it with the failure score or local equivalent (if any) assigned to such employers by [D&B's] relevant associated undertaking or in the absence of such a failure score or equivalent, with the risk indicator assigned to the employer in question. In such cases the assumed probability of insolvency associated with that failure score or risk indicator will be such as the Board has been advised is appropriate for the purposes of achieving equivalence with Appendix 3 to this Schedule.”

- 2.11. Accordingly, the Board is obliged to use the D&B failure score for the relevant employer in each case.
- 2.12. D&B has its own appeals process, which the Scheme made use of, but was not successful.
- 2.13. Questions as to the extent to which a particular scheme or its advisers were made aware of the rules relating to the levy and what they could do to influence it are not per se relevant to the reviewable matter in question.

- 2.14. However, in view of the significant efforts made to raise awareness and in order to ensure fairness, consistency and certainty, the Board regards all schemes as having had sufficient and reasonable opportunity to access the facilities, information and advice available. In particular, details of the website and helplines were specifically mailed to the Scheme and a FAQ was published on the subject in question.
- 2.15. To the extent that the Applicant raised the question of whether schemes whose employers enjoy charitable status should be obliged to pay the levy, that is a matter for Parliament and not a matter reviewable by the Board.

### **MATERIAL FACTS**

3. The Scheme is a multi-employer scheme. The employer with the most members is Kings College School (the **School**), which is not a limited company. It was assigned a failure score of 74 as at 31 March 2006.
4. In November 2006, the Scheme was issued with invoice number 10000451-00-07-01 for £14,661.08. Of this amount, £14,013.41 was for the risk-based levy, which was calculated as follows:  
  

$$£2,972,434.17 \times 0.011119 \times 0.53 \times 0.8$$
5. The Trustees contacted D&B because they considered the failure score to be too low and submitted the accounts for the School for the year ended 31 July 2006. D&B advised the Trustees that they had reviewed the failure score and were of the opinion that it reflected the information available as at 31 March 2006. D&B went on to say that, as a “non limited entity”, the School was not obliged to file accounts with Companies House and they did not have access to its financial information in order to assess its creditworthiness. They said that, under the guidance of the PPF, they were unable to accept any data in respect of the 2006/07 levy after 31 March 2006.
6. In response, the Trustees pointed out that D&B could have applied to the Charities Commission for a copy of the School’s accounts or accessed a website, which granted access to charities’ accounts online, or contacted the School, itself. Following a further review, D&B confirmed that the School’s failure score had been calculated on the basis of the information available as at 31 March 2006.

7. For the year 2007/08, a failure score of 98 was used to calculate the Scheme's levy. Mr Hawksley has calculated that, had this failure score been applied in 2006/07, the Scheme's risk based levy would have been £2,273.60.
8. In addition to the FAQ referred to by the Reconsideration Committee, the PPF website also includes the following:

**“What data elements and factors are taken into account when producing the D&B Failure Score and what quality controls and verification processes are there in place to ensure its accuracy?”**

In order to calculate the Failure Score, in the UK D&B collects data from a wide variety of public and unique data sources, including:

- Companies House
- London and Edinburgh Gazettes
- County Courts
- Electoral Roll
- Department of Trade and Industry
- Postal Deliverability data
- Telecoms Connectivity data
- D&B's Trade Partners
- D&B's dedicated Call Centres

This data is put through a rigorous verification and validation process before it is inserted into the main D&B database.”

9. The FAQ goes on to explain that there a number of factors which influence the failure score and they fall into five categories:
  - Financials (Liquidity/Cash, Solvency, Profitability,  
Late filing/age of accounts)
  - Trade Payments
  - Principals
  - Public Negative Data

- Demographics

## **APPLICANT'S GROUNDS FOR REFERENCE**

10. The Applicant submits:

- 10.1. Appeal decisions appear to be based purely on whether D&B and the Board followed their laid down procedures. He is not disputing this.
- 10.2. His argument is based, principally, on the fact that it was unclear to him that:
  - (a) accounts had to be filed with D&B by 31 March 2006, or
  - (b) a failure to file such accounts would have a dramatic impact on the levy calculation.
- 10.3. He does not recall it ever being suggested that he look at the PPF website. If it was important for the Trustees to look at the website and/or check the data held by D&B, surely it would have been reasonable to write to, e-mail or telephone those affected. He has no record of receiving any such information.
- 10.4. It seems grossly unfair that D&B are prepared to access company accounts via Companies House, but not to source charities' financial statements through the Charity Commission or an available website.
- 10.5. The 2006/07 levy gives the School and the Trustees every incentive to terminate the Scheme. This seems particularly unreasonable if the reason for the high levy is that financial statements arrived late as a result of poor communication on the part of the PPF. The School Governors and the Trustees do not regard the payment of this levy as a good use of charitable funds; particularly when they are being strongly encouraged to demonstrate public benefit.
- 10.6. The School is a successful and responsible organisation, which aims to break even over a five year period. It has recently embarked on a programme to update its science facilities, which are often poorly provided for in schools. The 2006/07 levy will endanger this project.
- 10.7. The School borrows from its bank at 0.55% over bank base rate, which is an AA rating and would suggest a much more favourable failure score.



## WRITTEN REPRESENTATIONS

11. The PPFO has received written representations from the PPF and from Mr Hawksley. These are summarised below.

### The PPF

12. In addition to the points already made by the Reconsideration Committee, the PPF submits:

- 12.1. The Trustees are entitled to request a review by the PPF Ombudsman. However, whilst the Board's application of the 2006 Determination in calculating the levies is a reviewable matter, the making of the 2006 Determination is not, and neither are matters of general policy, fairness or affordability. The Board and the Ombudsman are not, therefore, in a position to review the terms of the 2006 Determination or the methodology adopted by D&B.
- 12.2. Under Section 181(3) of the Pensions Act 2004 (see Appendix), the Board must determine the schemes in respect of which the levies are imposed, calculate the amount of the levies in respect of each of those schemes, and notify any persons liable to pay the levies of the amount and the date(s) they are payable. It is the calculation under Section 181(3)(b) which is the reviewable matter.
- 12.3. It is fundamental to the approach adopted by the Board, in making the 2006 Determination, that it involved adopting a standard, market-based approach to the assessment of insolvency risk. It would have been completely impracticable for the Board to carry out its own assessment of insolvency risk in relation to every scheme employer. The Board has neither the expertise nor the resources to do so. It was, therefore, necessary for the Board to select a commercial provider of insolvency risk information. Having made the selection, it was essential that a consistent and objective approach be taken, which would apply equally to each scheme. This was achieved by providing for the 2006 Determination to be based upon the failure scores assigned by

D&B in the normal course of its business, subject only to certain defined and clearly stated modifications.

- 12.4. The approach adopted by D&B is that which it uses generally for the purpose of determining failure scores and is not specific to the work it does for the PPF. D&B receives information provided to Companies House through an automated process, whereas to obtain information from the Charities Commission would require D&B to obtain information on each undertaking individually. D&B does take account of information submitted to it, although this does involve it in an additional inputting exercise. It would be a task on a different scale if this were to be undertaken for each body whose accounts are published via the Charities Commission.
- 12.5. The Board did engage with the charitable sector during the consultation process.
- 12.6. The 2006 Determination does not permit or require the Board to become involved in deciding whether D&B should have assigned a higher or lower score in a particular case. Paragraph 26(c) of the Schedule to the 2006 Determination (see paragraph 2.10) provides for schemes to make representations directly to D&B and for D&B to inform the Board, in defined circumstances, if the failure score originally assigned was too high or too low.
- 12.7. It does not appear to be disputed that the failure score of 74 was the failure score which would have been assigned to the School by D&B in the ordinary course of its business as at 31 March 2006.
- 12.8. What the Applicant is, in effect, contending is that there should have been a departure from the 2006 Determination in the Scheme's case, so that the employer was assigned a higher failure score than that assigned in the ordinary course of D&B's business. None of the specific and limited exceptions to the "ordinary score" rule apply here.
- 12.9. Paragraph 26(c) does not apply because D&B has not informed the Board that a higher or lower failure score ought to have been assigned to the School.

12.10. Nor could D&B have done so, because there appears to be no suggestion that the failure score of 74 was based upon information which was incorrect or incomplete by comparison with the information which should normally have been taken into account by D&B. Rather, the Applicant appears to be arguing that D&B's normal approach is unsatisfactory and/or should be departed from, which would amount to a departure from the 2006 Determination.

12.11. The Board went to some lengths to encourage both schemes and scheme employers generally, and charities in particular, to take steps in advance of 31 March 2006 to find out how D&B calculated failure scores.

12.12. Both D&B and the Board encouraged schemes to liaise with D&B prior to 31 March 2006 to provide additional information where appropriate. The Scheme appears on the mailing list for the February 2006 levy mailing. This included a letter from the Board's chairman, which said,

“I urge all schemes to take the action they need in order to reduce their risk and benefit from a lower risk based levy.”

12.13. The two factsheets enclosed with the Chairman's letter describe how D&B information is used as a measure of insolvency risk and the steps which could be taken, e.g. contingent asset arrangements. Although the position of charities is not specifically dealt with, the factsheet indicates that a further explanation of the D&B methodology is set out on the PPF website and provides details of the PPF and D&B helplines.

12.14. The December 2005 consultation document said,

“5.2.17 A large majority of responses to question 7 agreed with the Board's focus on a market-based approach. Some responses did, however, question whether a broad brush market approach would be appropriate for certain organisations e.g. charities and not-for-profit organisations. While the Board will keep such issues under review, we are currently satisfied that the D&B methodology is appropriate for the full range of sponsoring employers of eligible schemes.

5.2.18 As with other employers, the Board would encourage charities and not-for-profit organisations to liaise directly with D&B to understand the scoring methodology, and take action where necessary that could improve their scores. In addition, Charities' Statement of Recommended Practice

(which provides guidance to charities on the preparation of their accounts) allows charities to exclude certain heritage assets from their balance sheets. The Board suggests that charities consider using such real estate as a contingent asset to improve their levy position.”

- 12.15. Paragraph 5.4.2 of the December 2005 consultation document refers to the fact that, on 28 October 2005, comprehensive question and answer information on the D&B methodology was published on the PPF website. Paragraph 5.4.4 said,

“The Board would like to encourage all sponsoring employers to obtain their D&B failure score as soon as possible, so that queries can be raised with D&B before 31 March 2006, the date at which failure scores will be measured for the purposes of the 2006/07 levy calculation.”

- 12.16. The information in the Board’s FAQ (see paragraph 2.2) should have been sufficient to alert Mr Hawksley or the Scheme’s professional advisers to the desirability of checking the School’s failure score with D&B well before 31 March 2006 and/or establishing how D&B would approach the failure score for a charity.
- 12.17. Whether D&B should or might wish to make use of information about charities’ accounts which is, according to Mr Hawksley, in the public domain is, no doubt, a question worthy of attention for the future. However, the fundamental point remains that the 2006 Determination requires the levy calculation to be based upon the failure score which D&B assigns to the relevant employer in the normal course of its business. If D&B does not normally obtain this information unless it is specifically supplied to it, then the 2006 Determination does not require this information to be taken into account.
- 12.18. An element of unfairness might indeed be perceived in that the requirements for charities in terms of managing their failure score by providing information to D&B are not the same as those for companies obliged to file their accounts at Companies House. Those employers not so obliged have to take more steps if they so wish to achieve the same aim. Whilst the Board strives to achieve consistency across eligible schemes, it sought also to achieve a cost effective

solution which would also be a “one stop shop” failure score provider across the Board’s universe of schemes. In the view of the Board, D&B offered the best solution available, particularly as its methodology is transparent and allows employers to take steps to improve their scores.

### **Mr Hawksley**

13. Mr Hawksley submits:

- 13.1. He does not dispute that the PPF followed their own procedures; rather, he questions whether those procedures are fair and whether the PPF’s communications were adequate to warn the Trustees of the dire consequences of not submitting accounts.
- 13.2. In his opinion, information on a website is not sufficient publicity.
- 13.3. If accounts were not filed with D&B through genuine ignorance, and the result was an extra £10,000 levied on a charity, it is to be expected that the PPF would favour late submission of the accounts if that would result in the correct charge being levied. He does not understand why the PPF are taking such an unreasonable attitude and are not interested in finding a negotiated solution.
- 13.4. He questions why companies and charities are not treated the same by the PPF.

### **CONCLUSIONS**

- 14. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 of the Pensions Act 2004.
- 15. The reviewable matter in question is the amount of the risk-based levy required of the Scheme in the financial year 2006/07.
- 16. Section 175(2) of the Pensions Act 2004 provides for the risk based levy to be assessed by reference (inter alia) to the likelihood of an insolvency event occurring in relation to the employer in relation to the scheme. Under Section 175(5), the Board were required to determine the factors by reference to which the 2006/07 levies were

assessed; those factors were set out in the Board's 2006 Determination. The PPF has correctly submitted that the Determination, itself, is not a reviewable matter, nor is the Board able to amend the Determination on an individual application for review or reconsideration.

17. Paragraph 14 of the Schedule to the 2006 Determination set out the formula for calculating the risk based levy. Paragraph 25 explained the derivation of P, and paragraph 26 set out the derivation of a failure score. The failure score was to be that assigned by D&B "in the ordinary course of its business". In the ordinary course of its business, D&B do not take steps to obtain the accounts of those employers who are not required by law to submit such accounts to Companies House. They will, nevertheless, take into account such information if it is submitted to them on a voluntary basis. This was not the case here.
18. Paragraph 26(c) provided for reassessment of the levy in circumstances where D&B notified the PPF that the failure score assigned to the employer as at 31 March 2006 was incorrect. However, this does not assist Mr Hawksley because D&B have confirmed, on appeal, that they consider the failure score they assigned to the School, as at 31 March 2006, to be correct.
19. Mr Hawksley accepts that the PPF have followed the procedures set out in the 2006 Determination, but he considers those procedures to be unfair. I can understand why. If the aim of the PPF was to adopt a consistent and objective approach as between eligible schemes in the calculation of the risk based levy, then the 2006 Determination did not match that aim as between different categories of employer, and in particular so far as charities were concerned. By this I mean the fact that D&B took steps to obtain relevant accounts from third party sources in respect of one set of employers (those obliged to file accounts with Companies House), but not for other employers (most notably charities); even though that information was readily available to them. However, D&B had been asked to produce a failure score as it would "in the ordinary course of its business", and this is what it did.
20. I accept the PPF's assertions that they took steps to notify schemes as to the methodology of calculating the risk based levy and encouraged liaison with D&B. I question, however, why some schemes should be required to be more pro-active in

providing D&B with appropriate information in order to produce an accurate failure score than others. This would not seem to sit well with the consistency across eligible schemes that the PPF argue that they strive for.

21. Having said all that, it is the case that the drafting of the 2006 Determination is not the matter before me.
22. I find that the Board has calculated the risk-based levy in accordance with the provisions of the 2006 Determination and is, therefore, not required to take any action.

**CHARLIE GORDON**  
Deputy Pension Protection Fund Ombudsman

18 November 2008

## APPENDIX

### The Pensions Act 2004

#### “175 Pension protection levies

- (1) For each financial year falling after the initial period, the Board must impose both of the following –
  - (a) a risk-based pension protection levy in respect of all eligible schemes;
  - (b) a scheme-based pension protection levy in respect of all schemes.

...
- (2) For the purposes of this section –
  - (a) a risk-based levy is a levy assessed by reference to –
    - (i) the difference between the value of the scheme’s assets (disregarding any assets representing the value of any rights in respect of money purchase benefits under the scheme rules) and the amount of its protected liabilities,
    - (ii) except in relation to any prescribed scheme or scheme of a prescribed description, the likelihood of an insolvency event occurring in relation to the employer in relation to the scheme, and
    - (iii) if the Board considers it appropriate, one or more other risk factors mentioned in subsection (3) ...

...
- (5) The Board must, before the beginning of each financial year, determine in respect of that year -
  - (a) the factors by reference to which the pension protection fund levies are to be assessed,
  - (b) the time or times by reference to which those factors are to be assessed,
  - (c) the rate of the levies, and



- (d) the time or times during the year when the levies, or any instalment of levy, becomes payable.

...”

“181 Calculation, collection and recovery of levies

...

- (3) The Board must in respect of the levy -
  - (a) determine the schemes in respect of which it is imposed,
  - (b) calculate the amount of the levy in respect of each of those schemes, and
  - (c) notify any person liable to pay the levy ...

...

- (8) Regulations may make provision relating to –
  - (a) the collection and recovery of amounts payable by way of any levy ...
  - (b) the circumstances in which any such amount may be waived.”

“Schedule 9

Reviewable Matters

...

- 19 The amount of the initial levy or any pension protection levy payable in respect of an eligible scheme determined by the Board under section 181(3)(b).”