

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

Applicant	: Mr J D Milligan
PPF	: Pension Protection Fund
Board	: The Board of the Pension Protection Fund (the Board)
OPS	: Atholl Estates Pension Scheme (1974) (the Scheme)
Reconsideration Committee	: The Board's Reconsideration Committee (the Committee)
Reconsideration Decision	: The Board's calculation of the pension protection levies for the Scheme in respect of the period 1 April 2006-31 March 2007.

The Pension Protection Fund (PPF) Ombudsman has received a referral of a reviewable matter, following a decision by the Committee of the PPF dated 27 July 2007.

RECONSIDERATION DECISION

1. Mr Milligan, a Trustee of the Scheme, requested the Committee to reconsider the PPF Board's calculation of the pension protection levy for the Scheme, in respect of the period 2006/2007, as set out in the invoice to the Trustees of the Scheme (the **Trustees**), dated 20 April 2007. This calculation is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004 (the **Act**).

APPLICANT'S GROUNDS FOR REFERRAL

2. Mr Milligan, in his capacity as a Trustee of the Scheme, referred his complaint to me on the grounds that:
 - (i) The invoice calculation is based on completely inaccurate information as at 31 March 2006. In particular, the Risk Based Levy calculation is based on a PPF estimated underfunding risk of £1.8 million, when in fact the Section 179 valuation submitted on 20 March 2007, showed a fund surplus of £0.19 million, as at 6 April 2006.
 - (ii) The calculation uses information held by the PPF at 31 March 2006 and is based on PPF methodology which produces a result which is wildly inaccurate, compared with the actual valuation produced by the Scheme's actuary, and results in an invoice that is grossly overstated.

MATERIAL FACTS

3. The Scheme is an eligible scheme, in respect of which levies are payable to the PPF. Section 175(1) of the Act requires the Board to impose, in respect of the financial year 2006/2007, both a risk based pension protection levy, and a scheme based pension protection levy, in respect of all eligible schemes.
4. The Trustees of the Scheme had not submitted a section 179 valuation to the PPF by 31 March 2006. In accordance with paragraph 9 of the Schedule to the Determination, the PPF used the valuation as at 5 April 2003, contained in the most recent Scheme return dated 12 July 2005. On 20 April 2007, the PPF issued the Scheme with a levy invoice for £4,157.95.
5. On 23 May 2007, Mr Milligan wrote to the PPF asking them to review the levy and to recalculate it, based on the section 179 valuation that had been submitted.
6. He was told on 1 June 2007 that his application had been passed to the Review team. On 27 July 2007, he was issued with a notice of their decision to uphold the original decision.
7. On 23 August 2007, Mr Milligan submitted his application for review by the Committee. In his application he stated that the first section 179 valuation that was required by the Scheme was as at 5 April 2006, and that this had been submitted on 30 March 2007. He also pointed out that the PPF could, under paragraph 13, review the levy amount where it could be shown that it had been based on information which was materially incorrect.
8. On 21 November 2007, the PPF issued its Notice of Reconsideration Decision, which contained the following conclusion:

“The valuation data used by the Board in the calculation of the Scheme’s pension protection levies was, in accordance with the Determination, the Minimum Funding Requirement valuation data provided on the scheme return because the Scheme did not submit a section 179 valuation on or before 31 March 2006. This information was not incorrect and was used in accordance with the Determination to establish the position as at 31 March 2006 on the basis of which the levy calculations can be made.”

Submissions from

9. Mr Milligan

- (i) The PPF was set up to protect pension funds and he fails to see how placing an additional burden on schemes, or participating employers, is helping that.
- (ii) The burden in this case is exacerbated by the fact that the levy has been grossly overstated.
- (iii) There is no other tax system that permits calculation of a liability by reference to information that is wrong. With other taxation systems, even if a liability is calculated by reference to incorrect information, the position is corrected when revised, more accurate, information becomes available.

10. The PPF

- (i) The Board went to considerable lengths to ensure that the trustees and employers of eligible schemes were put into a position to understand how the levy would be calculated. The Board entered into a consultation exercise in 2005 which culminated in the final form of the Board's determination being published on 30 March 2006. There was also a series of 'roadshows' where members of the Board's staff together with representatives of the Institute of Chartered Accountants visited London, Manchester, Edinburgh and Belfast to discuss and explain the risk based levy and related issues.
- (ii) The Determination and the methodologies prescribed by it were widely publicised. The role of MFR data was apparent from October 2005 and the methodology was highlighted in further communications, including the publication in draft and final version of the levy Determination. An e-mail was sent to the actuarial profession on 6 February 2006 regarding data cleansing and the deadline for the section 179 valuations, which highlighted the importance of the scheme return data for the calculation of the levy. Accordingly, the Trustees and their advisers and agents were on notice as to the use to which these data would be put and had the opportunity, through the scheme return process to update these data on or before 31 March 2006.

- (iii) Prior to 31 March 2006, the Board encouraged schemes to provide additional information where appropriate. The Scheme appears on the mailing list for the February 2006 mailing. Paragraph 3 of the introductory letter from the Board's Chairman then sent reads:

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

- (iv) In calculating the amount of the levies in respect of a particular scheme under section 181(3)(b), the Board must apply the published Determination to the relevant facts pertaining to that scheme. The review process is only concerned with whether the published Determination has been properly applied in calculating the particular scheme's levies.
- (v) The Determination provides in summary that the risk based levy shall be calculated using the formula $U \times P \times 0.8 \times 0.53$, subject to a maximum equal to 0.5 per cent of the Scheme's protected liabilities (paragraphs 14 and 15 of the schedule to the Determination). U is a factor broadly based upon the difference between the value of the scheme's assets and the amount of its protected liabilities as at 31 March 2006. P is the PPF assumed probability of insolvency associated with the Failure Score which applies to the employer of the Scheme.
- (vi) The deadline for any information to be submitted to the Board is 31 March 2006. The Board may at its discretion take account of information provided after the applicable deadline, but before the issue of the notification, in cases where it appears that information was despatched at an appropriate time but was delayed, or in any other case where the provider was prevented from meeting the deadline by the temporary inaccessibility of the Board's website, or the interruption of electronic communications, or other like cause, so long as the information was provided as soon as reasonably practicable thereafter.
- (vii) Paragraph 9(b)(iii) of the Schedule to the Determination stipulates that information that supplements or corrects information in the scheme return must be provided on or before 31 March 2006 (or after that date, but only where it is provided in response to a request or requirement of the Board or the Pensions Regulator and is received prior to the calculation of the levies in relation to the scheme concerned).

- (viii) Paragraph 6 of the Schedule to the Determination states that nothing in the Determination shall prevent the Board from reviewing the amount of the levies calculated in respect of a scheme where, among other things, it subsequently appears to the Board that the information upon which the calculation was based was incorrect in a material respect. The Board in its reconsideration decision considered the application of paragraph 6 and concluded that the information on which the levy calculation was based was correct at the relevant time. The applicant had not prepared and submitted more up to date valuation data before 31 March 2006 and, in the absence of such further information, the underlying data was correct.
- (ix) The Board also considered whether any other discretions applied in relation to this matter. It noted that paragraph 11 of the Schedule provides that the Board may take steps to obtain further or amended information prior to calculating or recalculating the levies. In the interests of fairness across all levy payers, this paragraph was not used as a way to allow a scheme to circumvent the data deadline or to 'correct' data that was not incorrect.
- (x) The Board concluded that paragraph 5 was not relevant in this case as the Schedule does make the provision required for a calculation to be performed, as evidenced by the fact that an invoice had been issued.
- (xi) The valuation used in raising the invoice dated 20 April 2007 was the one that was available on 31 March 2006 (the valuation of 5 April 2003). Although a section 179 valuation as at 5 April 2006 was submitted before the invoice was raised, it was not submitted by the deadline date and not until 30 March 2007.
- (xii) It was open to the Scheme to provide a voluntary certificate before 31 March 2006, but it failed to do so. It also failed to submit a deficit reduction contribution certificate in the prescribed form before 7 April 2006 pursuant to which any special contributions could be taken into account. The information on which the levy calculation was based was correct as at 31 March 2006.
- (xiii) The Determination must be applied to all schemes impartially. To make an exception for this scheme would require the Board to depart from the

Determination in calculating the levy. The Board has no power to do so nor can the Ombudsman require the Board to do so.

- (xiv) The information held by the PPF on 31 March 2006 showed by rolling forward the MFR valuation data as at 5 April 2003, that the Scheme had a deficit of £1.8 million as at 31 March 2006, whereas the section 179 valuation submitted by the Scheme in March 2007 showed that the Scheme had a small surplus of £0.19 million as at 5 April 2006. The PPF levy was calculated using the deficit of £1.8 million.
- (xv) Although the applicant maintains that this was incorrect in a material respect, the Board maintains that no incorrect data was supplied and therefore the discretion referred to in paragraph 6 of the Schedule to the Determination does not apply. A distinction must be drawn between data that is “incorrect” and data that is no longer up to date because of the passage of time. Contrary to the applicant’s assertion, the information used by the PPF is correct and the calculation of the levies set out in the Scheme’s invoice is based on the Determination in accordance with the requirements of the Act.
- (xvi) The applicant indicates that he would accept that the correct information had been used if the section 179 valuation had not been submitted by the due date. The applicant has in mind the date for submission of the first section 179 valuation by all schemes; the section 179 valuation was not submitted by the due date for the calculation of the levies, in this case. It was made clear to all schemes that, where no section 179 valuation was submitted in the interim, the information relied upon by the Board would be the information contained in the last scheme return. For this scheme, this was the MFR valuation as at 5 April 2003.

CONCLUSIONS

- 11. This is a reviewable matter, by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004. The reviewable matter in question, is the calculation of the risk-based levy required of the Scheme in the financial year 2006/2007.
- 12. The PPF levies must be calculated in accordance with the Determination. The PPF has correctly submitted that the Determination itself is not a reviewable

matter, nor is the Board entitled to amend the Determination on an individual application for review or reconsideration.

13. For the purposes of calculating a scheme's levies in accordance with the Determination, the Board requires either the submission of a section 179 valuation by the due date, in this case, by 31 March 2006, or, in the absence of a section 179 valuation, data extracted from the valuation contained in the most recent Scheme return.
14. What the Trustees are seeking to argue, is that the Board has discretion, where the information they have used is subsequently revealed to be deficient, to recalculate the levy based on the revised information. They say that the section 179 valuation as at 5 April 2006 more accurately reflected the true position of the Scheme than the valuation as at 5 April 2003.
15. The Reconsideration Committee has considered whether it has discretion to allow a later valuation to be used in calculating the levy payable, but concluded it does not.
16. The complaint in this case seems to have arisen from a misunderstanding on the part of the Trustees. They did not take into account that their first levy invoice would be generated purely from scheme information the PPF had in its possession as at 31 March 2006.
17. It appears that the Trustees were made aware of the significance of supplying information to the PPF by 31 March 2006. It appears, also, that they were provided with adequate opportunity to update the most recent Scheme return, before the deadline date, but failed to do so.
18. The information presented to the Board by the due date cannot be considered to be "incorrect". There is no dispute that the Board correctly used information extracted from the valuation contained in the most recent Scheme return, which in itself was also correct. The information the Board had to hand, therefore, was sufficient and within the parameters of the legislation for them to calculate the levy payable in this case. Paragraph 6 enables the Board to review a levy calculation where it appears that the information upon which the calculation was based was incorrect in a material respect. As I accept the Board's argument that the information used was not incorrect, it follows that I accept that a review in accordance with Paragraph 6 is inappropriate.

19. Mr Milligan's submissions contain criticisms of the legislation that established how the PPF should operate, and are not matters that the Reconsideration Committee needed to consider. I am accordingly unable to reach a conclusion that the Reconsideration Committee reached its decision incorrectly.
20. The complaint is not upheld.

CHARLIE GORDON

Deputy Pension Protection Fund Ombudsman

29 May 2008

APPENDIX

RELEVANT LEGISLATION

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 eligible schemes.

In this Chapter "pension protection levy" means a levy imposed in accordance with this section.

(2) For the purposes of this section-

- (a) a risk-based pension protection levy is a levy assessed by reference to-
 - (i) the difference between the value of a 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 a scheme, and
 - (iii) if the Board considers it appropriate, one or more other risk factors mentioned in subsection (3), and

(b) a scheme-based pension protection levy is a levy assessed by reference to-

- (i) the amount of a scheme's liabilities to or in respect of members (other than liabilities in respect of money purchase benefits), and
- (ii) if the Board considers it appropriate, one or more other scheme factors mentioned in subsection (4).

...

(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 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.

179 Valuations to determine scheme underfunding

(1) For the purposes of enabling risk-based pension protection levies (within the meaning of section 175) to be calculated in respect of eligible schemes, regulations may make provision requiring the trustees or managers of each such scheme to provide the Board or the Regulator on the Board's behalf-

- (a) with an actuarial valuation of the scheme at such intervals as may be prescribed, and
- (b) with such other information as the Board may require in respect of the assets and protected liabilities of the scheme at such times as may be prescribed.

(2) For the purposes of this section, in relation to a scheme-

"an actuarial valuation" means a written valuation of the scheme's assets and protected liabilities prepared and signed by the actuary;

"the actuary" means-

- (a) the actuary appointed under section 47(1) (b) of the Pensions Act 1995 (c. 26) (professional advisers) in relation to the scheme, or
- (b) if no such actuary has been appointed-
 - (i) a person with prescribed qualifications or experience, or
 - (ii) a person approved by the Secretary of State.

(3) Regulations under this section may prescribe how-

- (a) the assets and the protected liabilities of schemes, and
- (b) their amount or value,

are to be determined, calculated and verified.

(4) Subject to any provision made under subsection (3), those matters are to be determined, calculated and verified in accordance with guidance issued by the Board.

(5) In calculating the amount of any liabilities for the purposes of a valuation required by virtue of this section, a provision of the scheme rules which limits the amount of the scheme's liabilities by reference to the value of its assets is to be disregarded.

(6) In this section references to "assets" do not include assets representing the value of any rights in respect of money purchase benefits under the scheme rules.

181 Calculation, collection and recovery of levies

- (1) This section applies in relation to-
 - (a) the initial levy imposed under section 174 in respect of a scheme, and
 - (b) any pension protection levy imposed under section 175 in respect of a scheme.

...

- (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 in respect of the scheme of the amount of the levy in respect of the scheme and the date or dates on which it becomes payable.

The Pension Protection Fund (Valuation) Regulations 2005

Provision of actuarial valuation to determine scheme underfunding

- (1) The trustees or managers of an eligible scheme shall provide the Board or the Regulator on the Board's behalf with its first section 179 valuation-
 - (a) in the case of an eligible scheme which is a registrable scheme prior to 6th April 2007-
 - (i) within 15 months of the relevant time of that valuation; or
 - (ii) by no later than 31st March 2008,

whichever is the earlier;

- (b) in the case of an eligible scheme which becomes a registrable scheme on or after 6th April 2007, within 15 months of the effective date of the first actuarial valuation obtained by them under section 224 of the Act (actuarial valuations and reports).

The Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005

16 Reaching and giving determinations and consequential directions

(1) If the PPF Ombudsman determines that the decision of the Reconsideration Committee in relation to a reviewable matter referred to him was reached correctly, the PPF Ombudsman must-

- (a) determine that it is not appropriate for the Board to take any action in relation to the matter; and
- (b) remit the matter to the Board with any directions.

(2) If the PPF Ombudsman considers that the decision of the Reconsideration Committee in relation to a reviewable matter referred to him was not reached correctly, the PPF Ombudsman-

(a) must-

- (i) determine what action, if any, the Board should take in relation to the matter; and

(ii) remit the matter to the Board with directions for the Board-

(aa) to vary the determination, direction or other decision made by the Reconsideration Committee; or

(bb) to revoke and replace the determination, direction or other decision made by the Reconsideration Committee; and

(b) may direct-

(i) that-

(aa) any determination, direction or other decision which is to be made by the Board in accordance with any determination made or direction given by him; or

(bb) any variation, revocation or substitution of the determination, direction or other decision of the Reconsideration Committee which is to be made by the Board in accordance with any determination made or direction given by him, is to be treated as if it were made at such time (which may be at a time prior to his determination or direction) as he considers appropriate;

(ii) that any notice varied, substituted, issued or given by the Board in accordance with any determination made or direction given by him is to be treated as if-

(aa) it were issued or given at such time (which may be a time prior to his determination) as he considers appropriate;

(bb) it became binding for the purposes of Part 2 of the Act (the Board of the Pension Protection Fund) at the time at which he makes his determination or gives his direction or at such later time as he considers appropriate;

(iii) the Board-

(aa) to pay such compensation as he considers appropriate to such persons as he considers appropriate;

(bb) to take or refrain from taking such other steps as he may specify.

(3) The determination and directions must be in writing and must include-

(a) a statement of the reasons for them;

(b) an explanation as to whether and, if so, to what extent the Board is directed to-

(i) vary or revoke a determination, direction or other decision previously made by the Reconsideration Committee;

(ii) revoke such a determination, direction or other decision and replace it with a different determination, direction or other decision; and

(c) a statement of any legislation relied on by the PPF Ombudsman in reaching the determination.

(4) The PPF Ombudsman must-

(a) give notice of the determination and directions to each party to the reference; and

(b) notify the following persons of the determination and directions in such form and manner as he considers appropriate-

(i) any person notified of the reference under regulation 5(1) (b); and

(ii) any person to whom he has directed that compensation is to be paid.

(5) Subject to section 217 of the Act (determinations of the PPF Ombudsman), the determination and directions are final and binding on-

(a) the persons to whom notice or notification is given under paragraph (4)(a) or (b);

(b) any interested person as interpreted in accordance with regulations made under section 207(1)(b) (review and reconsideration of reviewable matters) of the Act.

(6) The Board has the power to do anything that the PPF Ombudsman directs under this regulation.

(7) The Board's power-

(a) under section 191 of the Act (notices requiring provision of information); and

(b) under regulations made under section 207(1) of the Act,
shall apply for the purposes of dealing with any matter remitted to it.

(8) If the Board is directed under this regulation to-

(a) Vary a determination, direction or other decision previously made by the Reconsideration Committee; or

(b) replace such a determination or direction or other decision with a different determination direction or other decision,

it must send a copy of the varied or replacement determination, direction or other decision to the applicant, the PPF Ombudsman and any person notified of the reference under regulation 5(1) (b).