PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	Albemarle Baptist Church (**the Church**)
Fund	Baptist Ministers' Pension Fund (**the Fund**)
Respondent(s)	Baptist Pension Trust Limited (**the Trustee**) Baptist Union of Great Britain (**the Union**)

Subject

The Church says it was not informed of the implications of enrolling a part time minister into the Fund in 2007 and disputes the fairness of the consequences.

The Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against the Trustee or the Union. They have correctly interpreted the legislation as potentially imposing liability on the Church and were not responsible for the liability arising.

DETAILED DETERMINATION

Material Facts

1. The complaint arises as a result of the indirect impact on the Church of section 75 of the Pensions Act 1995 and regulations under that section - the Occupational Pension Funds (Employer Debt) Regulations 2005 (**the Employer Debt Regulations**).

2. The Fund is an unusual pension scheme in several respects. As originally established it provided for pensions for ministers in a "Qualifying Office", the definition of which listed six such offices. The first of those was "the pastorate of a Baptist Church"; the other five all expressly related to employment in particular roles and/or with particular bodies. There were, until 2011, no references to the participation of specific churches. The Rules merely said that, should a minister decide to join the scheme, the church became liable to pay contributions.

3. The background to this dispute is explained in a lengthy bulletin of March 2011 from the Trustee and the Union to all churches. It opened a period of consultation about pension provision for ministers in the light of a deficit in the Fund and, importantly for this complaint, set out the position in relation to the Employer Debt Regulations.

4. The bulletin explained that the Employer Debt Regulations had applied since 2005. Although ministers were normally regarded as office holders rather than employees, it had become clear over the previous two years that they should be regarded as employees in relation to the Fund, and their churches should be regarded as their employer. Advice had been taken from solicitors and leading counsel on the question, and it had recently been put beyond doubt by a High Court judgment. The bulletin said:

> "The employer debt regulations … have a particularly unfortunate effect on the Fund and its employers, of which there are more than 1,000. The great majority of these are churches which have just one contributing member, their minister, in the Fund at any one time. When that minister in due course moves on, the church is normally without a minister for a period which may range from a few months to several years. This generates a cessation event unless action is taken to prevent this.
>
> When a cessation event happens, the regulations require that the whole fund is revalued by the actuary and the departing employer needs to pay

> into the Fund their share of any pension deficit shown by the valuation, plus the cost of valuation.
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> The change of regulations that came into force in September 2005 moved the yardstick prescribed by law for this valuation. The previous yardstick was satisfied by the Fund, but the new one is the very stringent "buy out" basis.
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> …
>
> The calculation of a church's share of the deficit takes account of the relevant service of every member who has served at that church and who still has served at that church and who still has an entitlement under the Fund. This applies whether that member is still working as a minister, is in some other occupation, is drawing their pension, or their spouse is still drawing a dependent's pension."

5. The bulletin went on to say that although the full impact on the Fund had not been realised, cessation events had been occurring since 2005 and 400 had been identified so far. It continued:

> "The Fund Trustee is legally obliged to apply the regulations strictly, unless there are good legal reasons not to do so. However, a strict application of the regulations would have led to over 400 churches being required to pay lump sums well beyond their immediate financial resources, with disastrous results for those churches and for the denomination as a whole.

6. It was then explained that following discussions with the Pensions Regulator and the Pension Protection Fund the Trustee's policy would be to distinguish between "genuine" and "non-genuine" cessation events. The latter would include where a church might in future participate in respect of a future minister; and where the cessation was regarded as "non-genuine" the debt would not be processed as long as the Trustee was satisfied about arrangements to pay shortfall contributions in future.

7. In November 2011 the Trustee wrote to the Church. It said that there had been a "non-genuine" cessation event on 1 July 2008 and asked for contributions based on "Minimum Pensionable Income" at 8.4% in 2012 and 11% thereafter. In 2012 that amounted to £182 per month. (The contributions were the same for every church with no minister participating in the Fund that had undergone a "non-genuine" cessation event because the Trustee did not have the time, resources or information necessary to attribute past memberships to individual churches.)

8. The deficiency contributions were based on the Fund valuation as at 31 December 2010 and were meant to be payable by participating employers for a period of 24 years from the valuation date. However, there was a commitment to review the deficiency contribution structure after the next valuation (as at December 2013) to determine whether it could and should be more directly related to the Church's liabilities.

9. The cessation event in question had followed the appointment of Revd M as minister from 22 April 2007 to 21 March 2008. She was a part time minister and paid slightly less than half stipend. She suffered from an illness and her condition deteriorated, which led her to resign. During her 11 month ministry she was a member of the Fund and the Church paid a total of £2,012.25 in contributions.

10. Before Revd M's membership the Church had not had a minister participating in the Fund since the 1980s. After Revd M, the Church secured the services of a minister who did not wish to join the Fund.

11. I understand that following the valuation as at December 2013, and in response to a change in the Employer Debt Regulations, the Trustee is exploring a "flexible apportionment arrangement" which will enable the Church (and other churches in a similar position) to pay an estimate of its actual debt to the Fund without the actuarial costs associated with certifying the debt.

Summary of the Church's position

12. The Trustee should have highlighted the implications of section 75 before the Church re-joined the Fund in 2007. It says it was not told that as a participating "Employer", the Church would now be responsible for the Fund deficit. It says that had it been made aware of that, it would not have allowed Revd M to become a member of the Fund but made other arrangements.

13. The Union and Trustee ought to have known from September 2005 about the effect of Employer Debt Regulations as the applied to the Fund.

14. When the Church joined in 2007 the Trustee did not provide the Church with a copy of the Fund rules, but simply told the Church how much to pay.

15. The Church considers the contributions to be an unfair burden; it is a small fellowship of 15 members all of whom are over 60 years of age.

16. It also considers it an injustice that it paid half stipend to Revd M yet the debt to the Fund is calculated based on a full national stipend. It considers that the debt should be reflective of their contributions to the Fund.

17. The Church does not consider the Union to be a corporate entity but a likeminded body serving God. The pension scheme is not a scheme provided and maintained for corporate entities, but for churches.

Summary of the Trustee's and Union's position

18. The deficiency in the funding of the Fund was first identified in the actuarial valuation as at 31 December 2004 – it totalled £9 million. So the Trustee was aware of the shortfall from 2005 onwards. By 31 December 2007, the deficiency had increased to £18 million.

19. The Trustee began to notify churches, members and other employers about the deteriorating funding position during 2008. As a result of a consultation exercise, it was agreed to increase the pension contributions made by both employee and employer.

20. Due to the economic downturn in 2008, the deficiency increased to £60 million. As a result of a further actuarial valuation of 31 December 2010 the Union and Trustee issued their pension bulletin in March 2011, in which all members were informed about actions the Trustee intended to take in relation to cessation events.

21. A cessation event occurred when Revd M ceased being employed by the Church. Thus the Church became liable for the deficiency in respect of not only Revd. M but all the previous ministers who have served the Church in the past if still alive, or any dependents with entitlements.

22. The Church has had several ministers who are still alive and therefore the Church's liability would relate to 271 months of their pensionable service not just the 11 months of Revd M's service.

23. The Union is sympathetic to the difficulties the Church faces but the Trustees had taken legal advice and that they are unable to waive any debt from the 1,200 participating churches as doing so would make the Fund ineligible to participate in the Pension Protection Fund.

24. The Trustee does not consider it its responsibility to inform participating employers including the Church how best to avoid a cessation event by appointing another minister within the period of grace as stipulated within the Employer Debt Regulations.

25. The Fund's rules in place when Revd M was called to the Church were the ones which were effective from 6 April 2006 (the **2006 Rules**) (later revised in 23 December 2011). The 2006 Rules did not include any provision for the addition of new employers (or churches) or for the cessation of existing employers. Accordingly, churches who participate in the Fund have not signed any documentation agreeing to undertake any obligations of other participating employers, but they have agreed de facto to participate in the Fund by paying contributions into the Fund.

26. Whether the Church could be deemed an employer for this purpose was in some legal doubt. The matter remained unresolved until the judgement of the High Court in *PNPF Trust Co Ltd V Taylor* [2010] PLR 261. The Trustee obtained counsel's opinion, shared with churches, which was that, based on that judgment, ministers would be considered as employees as a consequence of being office-holders.

27. In 2011, the Trustee amended the Fund to ensure that "participating employers" was defined clearly. The Trustee took legal advice when redrawing the Fund's rules.

Conclusions

Employer Debt Regulations: the status of the Church in relation to its ministers

28. Essentially, the Trustee says that the Church is an employer for the purpose of the Employer Debt Regulations, relying on the judgment of Warren J in *PNPF Trust Co Ltd v Taylor.* I do not repeat his reasoning here - though it was based on the relevant legislation and, in particular sub-section 1(3) of the Pension Schemes Act 1993. It is sufficient to note that he said, in substance, that for this purpose when asking who a person's employer was, "In relation to an office holder, it is the prescribed person or, in default, the person responsible for paying the office-holder."

29. Warren J held that the definition of employer in the Pensions Act 1995 and in Pensions Act 2004 was to be construed in the same way. The Pensions Act 2004

Part 3 and the Occupational Pension Schemes (Scheme Funding) Regulations 2005 introduced a statutory scheme specific funding requirement requiring schemes to have sufficient assets to cover its liabilities, placing the burden on the employer to make up the funding debt in prescribed circumstances.

30. So I find that the Church was to be regarded as the employer of its ministers for the purposes of the employer debt regulations. I can entirely sympathise with the Church's position that the Union is not a corporate entity, but a body of people sharing a spiritual purpose. And Ministers are not employed by anyone in the traditional sense of employment. But inevitably the Church has worldly obligations – and, however unwelcomely, the law has imposed particular obligations on it as if it were an employer.

The requirement to pay contributions

31. The contributions that the Church is being asked to pay result indirectly from the fact that it would be subject to the Employer Debt Regulations if the debt had crystallised on a cessation event.

32. It is a consequence of the Church's obligation (as the deemed employer) to make up the debt, should it crystallise, that it is liable to contribute towards the deficit. It was, in effect being offered a choice between paying a properly certified debt, which would have been a highly unattractive prospect, or the "one size fits all" contribution.

33. The Church has objected to the amount of contributions because it is disproportionate to Rev M's membership. However, the "one size fits all" approach was a voluntarily offered alternative, which the Church was in theory free to take or leave, to the far less palatable certified debt. I do not think the Trustee can be criticised for offering a pragmatic solution.

34. In any event, it now seems that a solution that approximates to the Church's actual debt is under discussion.

Should the Trustee have told the Church of the consequence of Rev M's membership?

35. The Fund rules unusually provide that a minister can apply to join, with each application to be considered by the Trustee. So Reverend M's joining the Fund was not strictly at the Church's option. Whether the Church understood the full implications of participating in the Fund was not strictly relevant as it had no

choice but to do so. However the Church could have tried to agree an alternative arrangement with Reverend M if it had known what the consequence of her joining might have been.

36. I do not find that the Trustee or the Union was obliged to tell the Church what its statutory obligations were (or could be, at a then future point). However harsh it may seem, the primary responsibility of knowing its obligations lay with the Church. There were no arrangements for it to be provided with professional advice or guidance by the Union or the Trustee.

37. But even if the Church had been pro-active and contacted the Fund – or less probably taken legal advice (it would not have been able to afford it) – about the cost implications when Reverend M joined the Fund, it is unlikely it would have received a clear answer. The law was uncertain.

38. It was not until 2010 that the courts determined the meaning of "employer" for these purposes. The Trustee acted properly in waiting to see the outcome of the PNPF Trust Co Ltd v Taylor, case and the Trustee took appropriate steps to seek clarity from leading counsel in respect of the Fund. When the Trustee became aware of the implications that churches were to be regarded as employers it took steps to notify all the churches.

39. Taking together the facts that the decision to join was Rev M's, that there was no obligation for the Union or the Trustee to tell the Church what its obligations were, and that those obligations were uncertain, I do not find that the either the Union or the Trustee is liable for what has happened in this case.

Overall conclusion

40. For the reasons I have given above, I am unable to uphold the complaint made by the Church.

Tony King
Pensions Ombudsman

18 November 2014