

PENSIONS ACT 2004, PART 2 CHAPTER 6

APPEAL TO PENSION PROTECTION FUND OMBUDSMAN

DETERMINATION BY THE DEPUTY PENSION PROTECTION FUND OMBUDSMAN

Applicant : Righton Pension Trust Limited (the **Trustee**)
Scheme : Righton 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 21 April 2008.

RECONSIDERATION DECISION

2. The Reconsideration Committee decided:
 - 2.1. The reviewable matter to which the Applicant's request for reconsideration related was the calculation by the PPF Board (the **Board**) of the pension protection levies for the Scheme in respect of the period 1 April 2007 to 31 March 2008, as set out in invoice number 100220441-000-08-01, dated 26 October 2007.
 - 2.2. The calculation was a reviewable matter by virtue of paragraph 19 of Schedule 9 of the Pensions Act 2004.
 - 2.3. The Applicant had requested a review on the following grounds:
 - (a) The PPF had calculated a Scheme deficit of £11,338,244.47;
 - (b) If this was correct, the Scheme and the sponsoring Employer had a serious problem;
 - (c) The Employer was not able to make contributions to clear a deficit of £11,338,244.47;
 - (d) The PPF rules had been applied, but the outcome was incorrect;
 - (e) The deficit calculated by the PPF was considerably more than every other measure of net under-funding, which had been carried out recently.

2.4. Certain matters contained in the Board's Review Decision, dated 17 December 2007, were not disputed. These were:

- (a) The Scheme is a single employer scheme; and
- (b) A Section 179 certificate was not submitted in respect of the Scheme on or before 5 p.m. on 30 March 2007; nor was a deficit reduction contribution certificate submitted before 5 p.m. on 5 April 2007.

2.5. The following were relevant dates:

11 September 2006	The Board issued 2007/08 Pension Protection Levy consultation
9 October 2006	Consultation period ended
21 December 2006	The Board issued 2007/08 Pension Protection Levy Estimate consultation
2 February 2007	Consultation period ended
March 2007	Consultation responses published
1 March 2007	Determination under Section 175(5) published (the 2007 Determination)
30 March 2007	Deadline for the submission of: <ul style="list-style-type: none"> • Contingent asset certificates • Section 179 valuation certificates • Scheme return updates
31 March 2007	The date at which Dun & Bradstreet calculated the appropriate failure scores
5 April 2007	Deadline for submission of deficit-reduction contribution certificates
August 2007	The Board published an information paper "Modelling Uncertainty – an introduction to the Pension Protection Fund Long Term Risk Model".

2.6. Under Section 175(5) of the Pensions Act 2004 the Board was required, before the start of each financial year, to determine, in respect of that year:

- The factors by reference to which the levies were to be assessed;
- The time or times by reference to which those factors were to be assessed;
- The rate of the levies; and
- The time at which the levies became payable.

2.7. A review or reconsideration of the amount of a levy was a review of the calculation of the levy in a particular case and not a review of the Board's 2007 Determination.

2.8. The risk-based levy had been calculated using the formula:

$U \times P \times R \times c$ (subject to a cap (K) equal to $0.0125 \times$ the Scheme's protected liabilities)

2.9. There were some specific issues raised in the reconsideration application to which the Committee responded as follows:

(1) Whether the under-funding calculation was correct

The Applicant had contended that the calculation of U (the under-funding element) must be incorrect because it produced a different result to both a valuation done on the FRS17 basis (as at 31 December 2006) and the Section 179 basis (as at 31 March 2007).

A valuation done on the FRS17 basis was not relevant to the calculation of the risk-based levy.

A S179 valuation may be used, but only where it had been submitted to the Board on or before 5 p.m. on 30 March 2007.

Where no S179 valuation had been submitted by the above deadline, paragraph 10 of the Determination provided that the latest MFR valuation was to be used, adjusted by the roll forward methodology set out in the Determination.

Rolling forward the Scheme's latest MFR valuation data produced a deficit of £11,338,244.47. The calculation had been double checked and was confirmed as correct.

(2) Ability of the Employer to fund the Scheme.

The issue of the appropriate funding of the Scheme was a matter for the Trustees and the Employer. It was not a matter for the Board and was not grounds for the review of the levies.

- 2.10. Paragraph 4 of the Schedule to the 2007 Determination stated that, save where the Schedule provided otherwise, the deadline for any information to be provided to the Board was 30 March 2007. The Board may, at its discretion, take account of information provided after the deadline, but before the issue of the levy notification, in certain specific circumstances, e.g. the information amounted to a true correction or had not reached the Board because of a systems failure. Paragraph 4 was not applicable because the S179 valuation was not provided before the levy notification had been issued.
- 2.11. Paragraph 5 of the Schedule provided that, in the event that any situation arises for which the Schedule failed to make the provision required for a calculation to be performed, the Board had the discretion to perform the calculation of the levies in such manner as, in the opinion of the Board, was reasonably practicable and best gave effect to the general approach laid down by the 2007 Determination. Paragraph 5 was not relevant in this case.
- 2.12. Paragraph 6 of the Schedule stated that nothing in the 2007 Determination should prevent the Board from reviewing the amount of the levies where it subsequently appears that the information upon which the calculation was based was "incorrect in a material respect". The Applicant had not suggested that the MFR data was incorrect nor had the Board any reason to think it was. Paragraph 6 did not apply.
- 2.13. Paragraph 12 of the Schedule stated that the Board may take steps to obtain further or amended information as it thought fit. However, it was under no obligation to take such steps where information was not provided before any applicable deadline. The Board had been careful to use this discretion only in unusual circumstances where it would not have been possible to calculate the levy

at all without the additional information. In the interests of fairness, the Board had not allowed the discretion to be used to circumvent deadlines. The Board did not consider it appropriate to take steps to obtain further information in this case.

- 2.14. Paragraph 13 of the Schedule provided that, if at the time of the calculation or recalculation of the levy, information necessary for the calculation of the levy has not been provided in the manner or format or at the time anticipated in the 2007 Determination, the Board may use equivalent information. However, the Board is not obliged to use such equivalent information. This discretion had not been used to allow schemes to circumvent deadlines. It was not appropriate to use this discretion in this case.
- 2.15. The Reconsideration Committee upheld the original calculation of the levies for the Scheme.

APPLICANT'S GROUNDS FOR REFERENCE

3. The Applicant submits:

- 3.1. The Board should have exercised its power of discretion under Paragraph 6 of the 2007 Determination to review the Scheme's levy where "the information upon which the calculation was based was incorrect in a material respect".
- 3.2. The PPF interpret the discretion as meaning that the material upon which the levy calculation was based had to be, in and of itself, incorrect. This is an incorrect interpretation and the correct interpretation is that the discretion may be applied where the information is, in and of itself, correct, but no longer gives an accurate representation of the position of the Scheme at the relevant date. Had this interpretation been applied, the Board would have taken account of the Section 179 valuation submitted to it on 21 November 2007 and the levy would have been substantially less.
- 3.3. The levy is a tax and any provision relating to taxation should be construed in favour of the taxpayer;
- 3.4. The alternative interpretation would allow schemes to present accurate, up-to-date information;

- 3.5. The effect of not allowing schemes to present accurate, up-to-date information is that the PPF has the benefit of funds to which it is not really entitled;
- 3.6. Not allowing the provision of up-to-date information leads to the imposition of a disproportionate and unnecessary levy;
- 3.7. There is nothing invidious in requiring a decision-maker to review a decision reached on out of date or incorrect facts; and
- 3.8. The PPF calculated a net under-funding deficit of £11,338,244.47. As at 31 December 2006, the Scheme's FRS17 net under-funding deficit was £5,290,000. A Section 179 valuation as at 31 March 2007 revealed a deficit of £4,007,000. The Scheme's 2007/08 levy was £199,918.

WRITTEN REPRESENTATIONS

- 4. The PPFO has received written representations from the PPF and from the Applicant. These are summarised below.

The PPF

- 5. In addition to the points already made by the Reconsideration Committee, the PPF submits:
 - 5.1. The Board has calculated the levies in accordance with its 2007 Determination.
 - 5.2. Whilst the Board's application of the 2007 Determination is a reviewable matter, the 2007 Determination itself is not. Nor are matters of general policy, fairness or affordability.
 - 5.3. Neither the Board nor the Ombudsman are in a position to review the terms of the 2007 Determination, once it has been made, or to make exceptions for individual schemes.
 - 5.4. Under Section 175 of the Pensions Act 2004, the Board must impose a risk-based levy and a scheme-based levy. The risk-based levy must be assessed by reference to the difference between the value of the scheme's assets and the amount of its protected liabilities, the likelihood of an employer insolvency event and certain other risk factors as the Board considers appropriate.

- 5.5. The Board must publish details of its determination on the PPF website and, on request, in a paper format.
- 5.6. Section 176 and regulations made thereunder require the Board to consult before making its determination.
- 5.7. The consultation process undertaken between September 2006 and February 2007 exceeded the statutory requirements.
- 5.8. Section 181(3) provides that the Board must determine the schemes in respect of which the levy is imposed, calculate the amount of the levy and notify those liable to pay of the amount of the levy and the due date.
- 5.9. The only basis upon which the decision of the Reconsideration Committee is challenged is that, according to the Applicant, it should have exercised a discretion under paragraph 6 of the Schedule to the 2007 Determination. It is said that, because the Section 179 valuation provides a more accurate figure for the extent of the Scheme's underfunding, the information used in the calculation is "incorrect" within the meaning of paragraph 6.
- 5.10. The power of review exists to be used where something has gone wrong with the application of the 2007 Determination, not where the 2007 Determination has been properly applied. Any justification for review would have to be found within the terms of the 2007 Determination and specifically within paragraph 6.
- 5.11. Paragraph 10(b) expressly requires the MFR valuation to be used where there is no Section 179 valuation (as defined in paragraph 9).
- 5.12. There is no suggestion that a Section 179 valuation in respect of the Scheme was provided to the Board before September 2007 and certainly not that it has been provided by 30 March 2007.
- 5.13. There is no suggestion that the MFR valuation was not used in the manner required by the 2007 Determination, i.e. there was no error in reading the MFR valuation, no miscalculation and no misapplication of the roll-forward provisions.
- 5.14. Paragraph 6 merely provides that nothing in the 2007 Determination shall prevent the Board from reviewing the amount of the levy where the information upon

which it has been based was “incorrect in a material respect”. It is impossible to conclude that the information used in this case was incorrect.

- 5.15. It has been argued that paragraph 6 gives a discretion to review the levy where the information used in the calculation, although “correct”, no longer gives an accurate representation of the position of the scheme at the relevant date. This is an attempt to rewrite the 2007 Determination.
- 5.16. If the information used in the levy calculation is “correct”, it cannot be “incorrect in a material respect”. Information is not “incorrect” merely because the use of other information would give a more up to date picture.
- 5.17. The approach suggested by the Applicant is a “recipe for complete uncertainty”. The question of whether particular information gave an accurate representation of a scheme’s position at a particular date would call for subjective judgement and would lead to endless debate. Since the actual position of a scheme is always changing, any valuation would be subject to review, save in the unlikely event that it was prepared on the very day to which it related.
- 5.18. The reference to taxation is irrelevant. Even if it could be argued that the levy was a tax, which is doubtful, the provisions of the Pensions Act are perfectly clear. The function of the 2007 Determination is to distribute the total levy between schemes. There is no justification for a presumption which would tend to lead to a shortfall in collection, with adverse implications for other schemes or those in receipt of pensions. In any event, the 2007 Determination is unambiguous.
- 5.19. With regard to the desirability of allowing schemes to present up to date information:
 - Schemes did have the opportunity to provide up to date Section 179 valuations, provided they did so by 30 March 2007. It is not the case that the Scheme was not allowed to present up to date information, but that it failed to do so.
 - There is a balance to be struck between the desirability of having up to date information and certainty about when information is to be submitted.

The 2007 Determination struck that balance by setting a deadline for this type of information.

- Whether the Applicant or anyone else agrees with the approach taken by the 2007 Determination or not, it is clear and unambiguous and it is the duty of the Board to apply it in accordance with its terms.

5.20. The Ombudsman has previously accepted that paragraph 6 only applies where the information used to calculate the levy was incorrect in a material respect.

5.21. Even if the power to review had existed, it would have been a matter for the Board's discretion as to whether to exercise it. It would not have been appropriate to do so in this case because:

- The orderly operation of the levy system requires that deadlines be set for the provision of information to the Board.
- Once set, deadlines must be enforced or they become meaningless and the result is inconsistency and unfairness
- Schemes were given the option to submit a Section 179 valuation, although not legally required to produce one, in order to meet the concern that rolling forward the MFR valuation might not give the best information about the current financial position of the scheme. Since schemes had the choice whether or not to submit a Section 179 valuation, it was essential that a deadline was set.
- The requirement to submit a Section 179 valuation by 5 p.m. on 30 March 2007 was well publicised.
- In this case, the Section 179 valuation was submitted nearly eight months after the levy had been calculated and the invoice issued. No explanation has been offered as to why the valuation was not submitted at the proper time.
- The Section 179 valuation was based on audited accounts as at 31 March 2007, so it would seem that it did not even exist as at 30 March 2007.

- 5.22. The Reconsideration Committee did not purport to exercise a discretion under paragraph 6, taking the view that no such discretion existed. With regard to the possible discretion under paragraph 12, the Committee expressed the view that such a discretion should not be used to circumvent deadlines. There is no reason why a different view should have been taken of any discretion under paragraph 6.
- 5.23. The Ombudsman may only interfere with a decision if it has been reached incorrectly. In the case of a discretion, this would be if the Committee misdirected itself or came to a decision not open to a reasonable decision-maker.
- 5.24. Even if the Ombudsman considered that there was a discretion under paragraph 6, it is clear that the Committee would have declined to exercise it, and that decision was reasonably open to it.
- 5.25. If the Ombudsman were to conclude that the Committee had not exercised any discretion correctly, the appropriate course of action would be to remit the matter for a fresh decision.

On behalf of the Applicant

6. The Applicant's representative further submits:
- 6.1. There are two issues before the Ombudsman:
- Whether the Reconsideration Committee erred in its construction of paragraph 6 in concluding it had no or very limited discretion; and
 - Whether the Committee then further erred in the exercise of its discretion.
- 6.2. As a result of the Committee's refusal to review the levy, the Scheme is paying an excessive amount. The PPF does not refute this. The Board has therefore received a windfall to which it is not entitled.
- 6.3. The sole purpose of the levies is to protect against the risks identified in the Pensions Act 2004. The levies should do no more than provide protection against the statutorily defined risks. They must, therefore, do no more than correctly reflect the risk posed by any given scheme. They must, therefore, reflect the assets and risks of any given scheme as properly calculated from time to time.

- 6.4. There is no warrant in the Pensions Act 2004 for the imposition of levies in excess of those required by way of protection or for the imposition of “penal levies”.
- 6.5. To the extent that the Committee views itself as having no or limited discretion to review the levies, it risks imposing excessive levies which are ultra vires the Pensions Act 2004.
- 6.6. A decision-maker acting properly and within its powers should retain a broad discretion to review its decisions to prevent unfairness. Therefore, the Committee and the Board should have a broad discretion to review levies.
- 6.7. As a matter of language, paragraph 6 is broadly framed in two key respects:
- It is expressed to be without prejudice to the 2007 Determination or the Schedule.
- Therefore, it is to be read as granting an additional power to the Board; the exercise of which does not undermine or rewrite the 2007 Determination.
- As the 2007 Determination does not prevent the Board from reviewing the levy, the Committee is entitled to review the levy notwithstanding the terms of the 2007 Determination.
- It allows the Board to review the levy calculation where the information upon which it was based is incorrect in a material respect.
- 6.8. There is nothing in the language of paragraph 6 which limits its application to circumstances in which incorrect and false information has been presented.
- 6.9. The issue is whether the underlying information is “incorrect”. “Incorrect” means “not in accordance with fact” (OED). Information which is not in accordance with the facts (namely the current financial situation of the Scheme) is “incorrect”.
- 6.10. Information can be incorrect (and objectively so) if it does not reflect the risks presented by any given scheme for the purposes of the Pensions Act 2004.
- 6.11. A decision-maker properly directing itself as to its duties and the facts would wish to reach its decision on the basis of the best evidence before it. Where the decision maker has reached a decision on the basis of the information available to it and

then has information presented to it in the requisite statutory form, good administrative practice suggests that the decision should be reviewed.

6.12. A decision-maker acting fairly and properly would want to ensure that the levy accurately reflected the statutory purpose for which it was imposed.

6.13. There is nothing unusual about this approach nor does it lead to uncertainty because:

- It is common for decision-makers to possess remedial review discretion to take account of changing circumstances;
- There is nothing inherently uncertain about a remedial review discretion;
- It is not suggested that there be a rolling review, but that, where a scheme demonstrates by an accepted, objective valuation that the levy imposed by the Board is too high and does not reflect the risk posed by the scheme, the levy should be reviewed; and
- This would not open the floodgates to reviews unless the Board has imposed a large number of excessive levies; in which case, they should, as a matter of fairness and justice, be reviewed.

6.14. Previous decisions by the Ombudsman do not preclude him from considering the Scheme's referral on its own facts. Previous decisions are not binding.

6.15. The Board seems to be suggesting that, once a scheme has missed a deadline, it is not entitled to a review no matter how draconian or irrational the resulting levy is. Such a suggestion should be rejected because:

- It allows the formal requirement of data deadlines to trump the substantive consideration of the proper levy to be imposed within the Board's statutory powers;
- It allows no scope for unfairness to be remedied;
- It penalises those schemes which could not or did not submit a Section 179 valuation and the Board has no power to impose a penalty in those circumstances;

- The Board does not contend that the Scheme’s Section 179 valuation was wrong or that the Scheme is paying anything other than an excessive levy; and
 - The proper order, consistent with the Pensions Act 2004 and Section 6 of the Human Rights Act (including Article 6 and Article 1, First Protocol), is to review and to reduce the levy.
- 6.16. The discretions under paragraphs 6 and 12 address differing issues. A decision under one cannot be determinative of a decision under the other.
- 6.17. The Committee adopted the “deadline” approach to its discretion under paragraph 12, which is not a proper one for it to adopt and cannot, therefore, be relied upon as a defence to the Scheme’s case under paragraph 6.

Further Submissions from the PPF

7. The PPF further submits:

- 7.1. To suggest that the Scheme is paying an excessive amount or that the Board has received a “windfall” indicates a misunderstanding. The legislation does not require or permit the Board to start with a blank page in working out the levy. Rather, it requires the Board to make a set of general rules and apply these to each scheme.
- 7.2. The Board is entitled and obliged to charge the levy for which the 2007 Determination provides. There is no “windfall” if that is what the Board does. Nor is the Scheme paying an “excessive” levy if it has been correctly calculated in accordance with the 2007 Determination.
- 7.3. The Board receives no benefit from the collection of the levy.
- 7.4. It is a misunderstanding of the legislation to think that an individual scheme’s levy must be based upon an individual assessment of its assets, liabilities and risks at the time when the levy is calculated.
- 7.5. The Pensions Act 2004 requires the Board to make the determination before the start of the financial year and then to apply it in calculating the levy of individual schemes. The Board has to determine how and at what point in time the difference

in value between a scheme's assets and liabilities will be measured; paragraphs 9 and 10 of the Schedule to the 2007 Determination do precisely that.

- 7.6. There is no basis for suggesting that these rules are in any way ultra vires and, even if any such suggestion could be made, it would have been a matter for judicial review of the 2007 Determination when it was made; not a matter for a review of an individual scheme's levy.
- 7.7. There is no reason why the retention of a broad discretion to review on grounds of general unfairness should be mandatory. There are good reasons why the absence of any such broad discretion may be regarded as desirable in the interests of certainty, consistency and economy of administration, as well as being in line with the statutory approach of making a general determination and applying it to individual cases. This is a matter of judgement for the Board.
- 7.8. If the 2007 Determination says that the MFR valuation is to be used in certain circumstances and, if those circumstances exist, the correct MFR valuation has been used in the correct way, it cannot sensibly be suggested that this amounts to the use of incorrect information.
- 7.9. The Applicant's arguments would lead to a situation in which it would be impossible to have any meaningful deadline for the receipt of valuation information. But it is, in any case, immaterial. Whatever the arguments as to whether the 2007 Determination might have adopted some other approach, the fact is that it did not.
- 7.10. The Applicant's argument (including the references to the Pensions Act and the Human Rights Act) is that it is impermissible for the 2007 Determination to contain strict deadlines for the submission of information. In fact, it does not do so because there is provision in paragraph 4 for the extension of deadlines in certain circumstances. However, there is nothing impermissible about strict deadlines. The Applicant's argument amounts to saying that it does not like the 2007 Determination. This is not a legitimate argument for a review.
- 7.11. The Applicant has still not given any explanation for the failure to submit a Section 179 valuation at the proper time. In those circumstances, it is

inconceivable that it could be considered appropriate to exercise a discretion in the Scheme's favour; even if such a discretion existed.

CONCLUSIONS

8. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.
9. The reviewable matter in question is the amount of the risk-based levy required of the Scheme in the financial year 2007/08.
10. Under Section 175(5) of the Pensions Act 2004, the Board was required to determine the factors by reference to which the 2007/08 levies were assessed; those factors were set out in the Board's 2007 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.
11. The 2007 Determination (paragraph 10) provided for the Board to calculate the levies by reference to a scheme's MFR data, as submitted on the most recent scheme return, where a Section 179 valuation had not been submitted. The 2007 Determination provided for the MFR data to be adjusted in order to produce an equivalent to a Section 179 valuation and then "rolled forward" to 31 October 2006 (referred to as the "output date"). The formulae for adjusting the MFR data were contained in Appendix 2 to the 2007 Determination.
12. The PPF submit that, in the circumstances, the Board had no discretion to accept the information after the March 2007 deadline. I agree that paragraph 4 of the 2007 Determination is not relevant in the circumstances, since it specifically provided for information to be accepted after the deadline only where an attempt to submit it on time had been thwarted by communication problems outside a scheme's control.
13. Nor does Paragraph 5 offer any assistance, since it provided for those circumstances for which the Schedule to the 2007 Determination did not provide. The non-submission of a Section 179 valuation was provided for in paragraph 10 of the Schedule.
14. Paragraph 12 applies only where the Board has requested additional information and is, therefore, of no assistance to the Scheme. It specifically provided that there should be no obligation for the Board to seek further information where that information had not been

provided. Likewise, paragraph 13, which provided for the Board to use equivalent information but imposed no obligation for it to do so.

15. There remain the provisions of paragraph 6, which, to my mind, offer the Board the greatest degree of discretion. I have been offered two interpretations of the key phrase in paragraph 6, i.e. “incorrect in a material respect”. The Applicant favours an interpretation to include information which is, of itself, correct, but which does not accurately represent the situation at the required date. The PPF favour a, perhaps more straightforward, interpretation of information that is, of itself, incorrect.
16. Adopting the accepted approach of interpreting such documents in a “practical and purposive” way, I find that the interpretation suggested by (or on behalf of) the Applicant strains the language of the paragraph too far. Information does not become “incorrect” simply because there is other more up-to-date information which might replace it.
17. It has been submitted, on behalf of the Applicant, that the levy is akin to a tax and that, as such, any provisions for its collection should be interpreted in the payer’s favour. The PPF do not agree.
18. I am not wholly convinced by the argument that the correct interpretation must, as a matter of course, be that which avoids a shortfall. If the Scheme had submitted a Section 179 valuation, it is likely that its risk-based levy would have been lower than that calculated by the Board. This would have been a perfectly legitimate outcome even though it led to the PPF receiving less by way of levy from this scheme. I cannot accept that that in itself should be any basis for the PPF refusing to reduce a levy on review.
19. The fact remains that the Scheme did not submit a Section 179 valuation, despite being given the option to do so. The Board, therefore, used the most recent MFR valuation data, as it had said that it would. There is no suggestion that the information contained in the scheme return was incorrect; nor that the rolling forward formulae have been incorrectly applied.
20. I have however observed in previous decisions (R00724 in March 2008, 71786 in May 2008) that the result of the Board’s approach is that the levy may well not actually reflect in any particular case the true risk of a scheme being taken on by the PPF. And I can well understand that it is perceived to be unfair where it is clear that the Board’s calculation of the level of underfunding does not reflect the most up to date position at the relevant date.

I can also understand why it might be argued that, in such cases, as a matter of equity the Board should retain the ability to revisit levy calculations. Indeed, the concept of “equitable liability” is sometimes applied in fiscal regimes where the strict position is considered unfair. That, however, is a matter for the fiscal authority itself, and I do not think I can criticise the PPF for choosing not to adopt that approach in these circumstances. As I have also observed previously, if the true aim of the legislation is indeed to ensure, so far as possible and practicable, that the levy does reflect the likelihood of a scheme being taken on by the Board, the question of the extent to which that aim is or is not achieved is a matter for the legislature.

21. I find therefore that the Board has calculated the risk-based levy in accordance with the provisions of the 2007 Determination and is, therefore, not required to take any action.
22. The Applicant’s representatives have described the Scheme’s risk-based levy as “excessive”. It is not, however, incorrect for the purposes of paragraph 19 of Schedule 9 of the Pensions Act. The question of whether the outcome of applying the 2007 Determination correctly led to an “excessive” levy goes beyond the reviewable matter which has been referred to me.
23. I have noted the references to the Pensions Act and the Human Rights Act. Whilst I disagree with the PPF that this simply amounts to saying that the Applicant “does not like” the 2007 Determination, I am not persuaded that these statutes offer support for the Applicant’s request for a review.

CHARLIE GORDON

Deputy Pension Protection Fund Ombudsman

18 November 2008

APPENDIX 1

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 ...

...

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)."

APPENDIX 2

Determination under Section 175(5) of the Pensions Act 2004 in respect of the financial year 1 April 2007 – 31 March 2008

1. The Determination dated 1 March 2007 provided:

“2. The matters referred to in this Schedule shall be assessed, measured, quantified or estimated at such dates and in such manner as is provided for below. In the absence of such provision, it is intended that this Schedule shall be applied in accordance with the factual position as it existed at 30 March 2007.”

“4. Where this Schedule refers to certain information having been provided to the Board ... on or before a certain date, the information shall be treated as having been so provided if but only if the Board is satisfied that it has been received at the Board’s offices ... on or before the date in question ...

... Save where this Schedule specifically provides otherwise, the deadline for any information provided to the Board otherwise than pursuant to a specific request or requirement is 5.00 pm on 30 March 2007. Without prejudice to paragraph 6 and paragraph 12 below, the Board may at its discretion take account of information provided after any applicable deadline, but before the issue of notification of the amount of the levies in respect of the scheme concerned, in circumstances where it appears to the Board that:

- (a) The information was despatched at an appropriate time but was delayed in the course of post or otherwise;
- (b) The provider of the information 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, and the information was provided as soon as reasonably practicable thereafter; or
- (c) The information in question serves to correct a statement previously made to the Board (or to the Pensions Regulator) in the belief that it was correct, but which was in fact incorrect at the time when it was made.”

“5. It is intended that the provisions contained in this Schedule should in all cases permit the calculation of the amount of the levies in respect of a scheme. However, in the event that any situation arises for which the Schedule fails to make the provision required for a calculation to be performed, the Board hereby determines that the calculation of the levies shall be performed in such manner as, in the opinion of the Board, is reasonably practicable and best gives effect in that situation

to the general approach laid down by this Schedule. This paragraph shall also apply in any case where the Board is unable to obtain some item of information which would normally be required for the application of this Schedule in accordance with its terms.”

“6. Nothing in the Board’s determination or this Schedule shall prevent the Board from reviewing the amount of the levies calculated in respect of a scheme where it subsequently appears to the Board that the information upon which the calculation was based was incorrect in a material respect, or that a notification required by or under a certificate in relation to contingent assets has not been duly given, or that a certificate or declaration given for the purposes of this Schedule was improperly given or contained information which was incorrect in a material respect. Further, in calculating the levies in respect of a scheme the Board may disregard any such certificate or declaration if the Board believes that it has been improperly given, and may similarly disregard any information in the certificate or declaration, or in any notification or return, which is believed to be incorrect.”

“8. Where this Schedule indicates that the Board should use “relevant scheme data”, the Board will take account of –

- (a) The latest submitted scheme return for the scheme concerned which is provided to the Pensions Regulator ... at or before 5.00pm on 30 March 2007; and
- (b) Information contained in the latest submitted scheme return documentation provided to the Pensions Regulator or the Board on a voluntary basis or pursuant to Section 191 of the Pensions Act 2004 ... and which is received ... at or before 5.00pm on 30 March 2007; and
- (c) Information which supplements, corrects or updates information contained in a scheme return or equivalent ... where such information is provided ... on or before 5.00 pm on 30 March 2007, or where it is provided after that date but in response to a request or requirement of the Board or of the Pensions Regulator, and is received prior to the calculation of the levies ...”

“10. References in this Schedule to the value or amount of the assets or the protected liabilities of a scheme shall be understood as follows but subject to paragraph 27 below:

- (a) ...
- (b) Where there is no section 179 valuation, the reference is to the value or amount of the assets or liabilities of the scheme shown in the [MFR] valuation data supplied as relevant scheme return data, but adjusted in a manner which in the view of the Board gives

effect to the approach set out in Appendix 2 to this Schedule and results in the scheme's assets and its liabilities being consistently treated for these purposes.”

“12. The Board may, at any time prior to the calculation or any recalculation of the levy in respect of a scheme, take such steps as it thinks fit to obtain further or amended information for the purposes of that calculation or recalculation. But the Board is under no obligation to take such steps where information has not been provided to the Board on or before any applicable deadline prescribed in this Determination.”

“13. If, at the time of calculation or any recalculation of the levy in respect of a scheme, any information necessary for such calculation has not been provided in the manner or format or at the time anticipated by the Determination, then the Board may instead use equivalent information provided in a different manner or format or at a different time. But the Board is under no obligation to use such equivalent information.”