

PENSIONS ACT 2004, PART 2 CHAPTER 6

APPEAL TO PENSION PROTECTION FUND OMBUDSMAN

DETERMINATION BY THE DEPUTY PENSION PROTECTION FUND OMBUDSMAN

Applicant : Sonneborn & Rieck Ltd Pension Trustee Limited (the **Trustee**)
Scheme : Sonneborn & Rieck Ltd Employee Benefits Plan

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 13 May 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 100253654-000-08-01, dated 9 November 2007, for £21,608 (£2,626 scheme-based levy and £18,982 risk-based levy).
 - 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 Scheme had received a sum of around £1 million in respect of a bonus paid on the demutualisation of Standard Life;
 - (b) This sum had been received by the Scheme in July 2006 and was very significant in the context of its total assets (£13 million at the last valuation date);
 - (c) The receipt of this sum substantially reduced the Scheme's underfunding risk;
 - (d) Not including this sum in the 2007/08 levy calculation unfairly penalised the Scheme and its members;

(e) This payment had the same impact on the Scheme as a special employer contribution and the Scheme Actuary was willing to certify receipt.

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 multi-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 chronology for consultation on the 2007/08 risk-based levy was as follows:

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
30 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. The Committee responded to specific issues raised in the reconsideration application as follows:

- Paragraph 28 of the Schedule to the 2007 Determination provided that a certificate of deficit reduction contribution(s) made since the date of the most recent MFR or S179 valuation would be taken into account in valuing the assets of a scheme if it had been validly submitted in accordance with the relevant deadline;
- A “deficit-reduction contribution” was defined as “the whole or any part of a contribution made by or on behalf of the employer in relation to the scheme”;
- The payment from Standard Life could not be the subject of a deficit reduction certificate because it was not made by or on behalf of the employer;

- It would have been possible for the Scheme to submit a S179 valuation before 5.00 p.m. on 30 March 2007, taking account of the additional contribution, and the Applicant was aware of this;
 - Paragraph 8(c) of the Schedule to the 2007 Determination stated,

“Information (“valuation update data”) which purports to update valuation information previously provided to the Board or to the Pensions Regulator shall only be taken into account if (a) the valuation update data correspond to a more recent Minimum Funding Requirement of section 179 valuation (as referred to in paragraphs 9 and 10 below) which has been prepared and signed by the actuary in accordance with applicable legislation; and (b) all relevant valuation data previously provided are similarly updated to take account of that more recent valuation.”
 - The Applicant submitted that it would not have been feasible to submit a S179 valuation, which could have included the demutualisation bonus, but, other than changing the date at which the Scheme’s annual report and accounts are produced, he had not explained why;
 - The Scheme was in the same position as any other scheme which had an annual report date which did not coincide with the date at which data was collected for the purposes of the levy, i.e. it would have been necessary for the Scheme to commission a valuation at another date;
 - The position was the same for a scheme which had enjoyed exceptional investment returns since its last valuation;
 - The key reason behind allowing deficit reduction contributions to be taken into account was to encourage employers to make such contributions.
- 2.10. The Reconsideration Committee considered the discretions available to it under paragraphs 5, 6, 12 and 13 of the Schedule to the 2007 Determination, but, to the extent that these were applicable, decided it would not be appropriate to exercise any discretion in view of the clarity of paragraphs 8(c) and 28.
- 2.11. 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 demutualisation bonus should be treated in the same way as a deficit reduction contribution because:

- It will reduce the Scheme's underfunding risk;
- Under S175(2)(a)(i) of the Pensions Act 2004, the levy should be "assessed by reference to the difference between the value of a scheme's assets and the amount of its protected liabilities". By ignoring the bonus, the PPF are not satisfying the requirements of S175(2)(a)(i);
- A demutualisation bonus can be paid to a scheme at any time. The PPF should, therefore, allow these payments to be certified by the scheme actuary and for the information to be submitted at any time; in the same way as for a deficit reduction contribution;
- This would avoid the need for trustees to carry out unnecessary S179 valuations and to obtain scheme accounts at inconvenient dates; both of which would involve significant costs;
- It will not always be possible for a scheme to obtain a S179 valuation by the PPF's deadline, e.g. if the demutualisation bonus were to be paid in March;
- It is unfair that contributions from sources other than the employer should be ignored when the levy is meant to reflect the underfunding risk. All contributions which have the effect of reducing a scheme's deficit should be taken into account, regardless of their source.

WRITTEN REPRESENTATIONS

4. The PPFO has received written representations from the PPF, which 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 correctly and in compliance with the terms of the 2007 Determination.
- 5.2. The referral raises questions of policy as to whether an investment windfall received by a scheme should be treated in the same way as a deficit reduction contribution.
- 5.3. Whilst the Board's application of the 2007 Determination is a reviewable matter, the 2007 Determination itself is not.
- 5.4. 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.
- 5.5. 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.
- 5.6. The Board must publish details of its determination on the PPF website and, on request, in a paper format.
- 5.7. Section 176 and regulations made thereunder require the Board to consult before making its determination.
- 5.8. The consultation process undertaken between September 2006 and February 2007 exceeded the statutory requirements.
- 5.9. 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.
- 5.10. Paragraphs 9 and 10 of the Schedule to the 2007 Determination clarify the basis on which the Board will assess the value of a scheme's assets. If no S179 valuation was provided at or before 5.00 p.m. on 30 March 2007, the most recent MFR valuation information, adjusted in accordance with Appendix 2 to the 2007 Determination, was used.

5.11. Paragraph 28 of the Schedule to the 2007 Determination set out the circumstances in which the Board will recognise a deficit reduction contribution.

5.12. With reference to the particular points raised by the Applicant:

- S175(2)(a)(i)

It is true that the Board is required to assess the risk-based levy by reference to the difference between the value of the Scheme's assets and its protected liabilities, but the use of the most recent MFR valuation data satisfies this requirement.

The Board has to specify a valuation basis to be applied consistently between schemes, but allowed schemes to provide valuations on either the MFR or S179 basis. Schemes were not obliged to provide a S179 valuation if they did not wish to incur the cost of doing so.

The value of the demutualisation bonus was not included in the value of the Scheme's assets as produced by rolling forward the MFR valuation data, but it would have been possible for the Scheme to have submitted a S179 valuation by the deadline.

- Analogy with a deficit reduction contribution

The Trustee appears to accept that the 2007 Determination does not provide for the demutualisation bonus to be treated as a deficit reduction contribution. The Board cannot depart from the 2007 Determination unless one of the discretions provided for in the 2007 Determination applies. The Board considered its discretions and found that none of them applied. The argument is, therefore, one of policy and falls outside the Ombudsman's jurisdiction.

- Policy considerations

The Trustee feels that it is unfair that there is favourable treatment of contributions from employers, but not for improvements in funding from other sources. This is a question of policy and outside the scope of the review. It could be raised in one of the Board's consultation processes. The Board's position with regard to deficit reduction contributions reflects its concern to encourage employers to support their schemes.

- Discretions

The Reconsideration Committee considered the various discretions set out in the Schedule to the 2007 Determination and found that none of them were applicable.

The Ombudsman has previously considered the effect of paragraph 6 of the Schedule and has, in general, accepted the Board's argument that it only applies where (so far as is relevant) the information used to calculate the levy was incorrect in a material respect. Paragraph 6 cannot apply where the information used was that for which the 2007 Determination provided and was not itself false information.

The Ombudsman may only interfere with the decision of the Reconsideration Committee if it has been reached incorrectly, i.e. the Committee has misdirected itself or reached a conclusion not open to a reasonable decision-maker.

Here, even if the Ombudsman thought that there was a discretion under paragraph 6, it is plain that the Committee would have declined to exercise it and that this would have been a reasonable approach for it to take.

If the Ombudsman were to conclude that a discretion existed under paragraph 6 and that the Committee had not considered the exercise of that discretion correctly, the appropriate course of action would be for the matter to be remitted to the Committee for a fresh decision.

- 5.13. There is an obvious policy objective in the context of encouraging payments into scheme by employers, which is reflected in the DRC regime. There is no similar argument for encouraging schemes to receive windfalls, which by their very nature are beyond a scheme's control. In any event, windfall payments can be reflected in a further S179 valuation, if the trustees are advised that a cost benefit analysis recommends that approach.

CONCLUSIONS

6. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.
7. The reviewable matter in question is the amount of the risk-based levy required of the Scheme in the financial year 2007/08.
8. 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.
9. 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.
10. Paragraph 8 of the Schedule to the 2007 Determination clarified the data to be used by the Board. With regard to "information which supplements, corrects or updates information contained in a scheme return", the Board would use this information where it had been provided on or before 5.00 p.m. on 30 March 2007 or otherwise at the request of the Board. Such information would be treated as forming part of the scheme return concerned. However, information which purported to update valuation information previously provided to the Board or to the Pensions Regulator (which information about the demutualisation bonus would) would only be taken into account where it corresponded to a more recent MFR or S179 valuation and all relevant valuation data was similarly updated. So, in order to have the demutualisation bonus taken into account in the 2007/08 levy year, the Scheme needed to submit a S179 valuation.
11. The Scheme did not submit a Section 179 valuation and 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 used was incorrect; nor that the rolling forward formulae have been incorrectly applied.

12. I find 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.
13. As to whether it is unfair that a demutualisation bonus was not taken into account when other payments to reduce the risk of underfunding were, this is outside the scope of the referral to me. I fully accept that the PPF is keen to encourage employers to support schemes. However, employer support need not be at the expense of support from elsewhere and there can be no argument that, in this instance, the demutualisation bonus benefited the scheme in the same manner, and reduced the level of underfunding, and thus the risk of the scheme being taken on by the PPF, as an employer contribution. I do therefore sympathise with the view expressed by the Applicant that it does not seem equitable to treat favourably certain types of payment into a scheme. However, I am unable to conclude that the PPF have acted improperly, and that is not therefore a matter in respect of which I am able to go further in this Determination.

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.”

“28. Where there is provided to the Board, on or before 5.00pm on 5 April 2007, a certificate, given in the form attached to this Schedule ... by the actuary appointed in relation to the scheme for the purposes of section 47 of the Pensions Act 1995, that a deficit-reduction contribution or contributions has been made since the date to which the section 179 or, as the case may be, Minimum Funding Requirement valuation referred to in paragraph 10 above ... relates, then for the purposes of this Schedule the value of the assets of the scheme shall be increased by the aggregate amount of that contribution or contributions. For this purpose, a deficit-reduction contribution is the whole or any part of a contribution made by or on behalf of the employer in relation to the scheme (including by HM Revenue and Customs in respect of age-related National Insurance rebates) ...”