

**PENSIONS ACT 2004, PART 2 CHAPTER 6**

**APPEAL TO PENSION PROTECTION FUND OMBUDSMAN**

**DETERMINATION BY THE DEPUTY PENSION PROTECTION FUND OMBUDSMAN**

**Applicant** : Mr A J Dann, as trustee  
**Scheme** : Peermusic (UK) Limited Pension Fund

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 24 July 2008.

**Grounds for Referral**

- The failure score assigned to the relevant Employer, by Dun & Bradstreet (**D&B**), failed to take into account the nature of its business;
- The Company's balance sheet does not reflect its true financial strength because financial reporting standards prohibit it from carrying the value of the majority of its assets; namely, its intellectual property rights (music copyrights under ownership);
- The Scheme Trustees were unaware that they could appeal against the failure score;
- Had they been made aware of the appeal process, they would have made a "vigorous appeal" to D&B and would be happy to provide D&B with any information it requires;
- Peermusic UK Ltd is part of a multi-national entity, but has limited knowledge or expertise in the pensions field;
- Had the Trustees been made aware that a Type A Contingent Asset Certificate could have been submitted to the PPF Board, they would have done so, together with letters of support from the parent company and their bankers;
- The Reconsideration Committee effectively dismissed the points put forward in the appeal.

## Background

2. The levy in question amounts to £11,593.00 (£11,446.00 risk-based levy and £147.00 scheme-based levy) and was notified to the Scheme Trustees by invoice (10011137-000-08-01) dated 11 January 2008. The D&B failure score was 19, giving an insolvency probability of 0.029446.
3. The levy for the previous year had been £1,671.83 (£1,540.41 risk-based levy and £131.42 scheme-based levy). The D&B failure score had been 63.
4. Following receipt of the invoice for 2007/08, the Trustees contacted D&B to query the failure score. In response, D&B confirmed that the score of 19 was correct. They went on to explain,

“The score was at 63 when the 2004 accounts were added at the end of September 2005. The score stayed at 63 for the 2006 levy cut off and then decreased to 48 on 06/04/06 due to a decline in the Paydex\*. The score then lowered further to 15 on 10/07/06 due to the percentage of satisfactory trade and the Paydex variance. It then improved to 16 when the Paydex improved on 20/07/06. Since then, the score has fluctuated between 19 and 20 to the point of the PPF 07/08 Levy cut off at 30/03/07. After the 2006 accounts were received on 03/07/07, the score raised to 58.”

\*Paydex is a numerical score (0-100) assigned to a business, by D&B, to reflect its promptness in paying creditors.

5. D&B also mentioned that the Trustees had the option of formally appealing the failure score.

## Reconsideration Committee’s decision

6. The Reconsideration Committee’s decision is summarised as follows:
  - This calculation of the Scheme’s levy was a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004;
  - Certain matters, set out under the heading “Factual Matters” in the Review Decision dated 28 March 2008, were not thought to be in dispute. These were:
    - The Scheme was a single employer scheme;

- The employer was Peermusic (UK) Ltd;
- The latest scheme return was dated 5 January 2007; and
- No voluntary certificates were submitted by the relevant prescribed deadlines.
- The Scheme Trustees had not submitted a Section 179 valuation to the Board on or before 5 p.m. on 30 March 2007;
- The Board had consulted on the risk-based levy over the period from September 2006 to March 2007;
- Under Section 175(5) (of the Pensions Act 2004), the Board was required to determine the factors by reference to which the levies would be calculated, the time at which the factors were to be assessed, the rate of the levies and the time at which they became payable;
- The Board published its determination of these matters for the year in question (the **PPF Determination**) on 1 March 2007;
- Reconsideration of the amount of the Scheme's levies was a reconsideration of the amount of the levies in a particular case and not a reconsideration of the PPF Determination;
- Neither the Committee nor the Board had any discretion to depart from the PPF Determination;
- The risk-based levy was calculated by reference to the formula  $U \times P \times R \times c$  and subject to a cap (K) equal to 0.0125 multiplied by the Scheme's protected liabilities;

### *Specific Issues*

- D&B failure score
  - Paragraph 32 of the Schedule to the PPF Determination, provided that the failure scores were to be those which were or would have been assigned to the relevant employer by D&B in the ordinary course of its business;
  - D&B was obliged to provide the correct failure score in accordance with its standard procedures;

- Any questions as to whether the failure score was correct were for D&B to consider in determining whether it has correctly assigned the failure score to the employer on and as at 30 March 2007;
- Whilst the Applicant had said that he was not aware of D&B's appeal process, D&B had a record of being contacted by another of the Scheme's Trustees and of responding to a query concerning the factors which affected an employer's failure score;
- No further steps had been taken by the Scheme to query the Company's failure score with D&B;
- Where an appeal to D&B is successful, the Board will recalculate the levy using the amended failure score;
- An appeal had to be raised within 28 days of the levy invoice;
- The failure score did not fall within the ambit of the reviewable matter;
- Contingent Asset
  - It was not possible to notify a contingent asset arrangement retrospectively;
  - It would be unfair, to allow the Scheme to notify such an arrangement retrospectively, both to those levy payers who had complied with the deadline and to those who had missed the deadline and could not now benefit from a contingent asset for the year in question;
- Discretions

#### Paragraph 5

Where the Schedule to the PPF Determination had failed to make the provision necessary for a calculation to be performed, there was provision for the Board to take appropriate steps. In this case, the PPF Determination had made the necessary provision allowing a calculation to be performed.

#### Paragraph 6

The failure score used in calculating the Scheme's levy was the score prescribed by the PPF Determination. It was not incorrect in a material respect and paragraph 6 did not apply.

#### Paragraph 12

There was the discretion for the Board to take steps to obtain further or amended information for the purposes of calculating the levies. However, it was under no obligation to do so where information has not been provided on or before the applicable deadline. Nor did it require the Board to accept information from a scheme which it had not requested

The discretion was not a free-standing right. For paragraph 12 to apply, there would need to be circumstances which required a re-calculation. Where a scheme had not submitted a voluntary form on time, it would be unfair to seek further information from that scheme, but not from the other schemes which had not submitted the form. Schemes which had complied with the deadline would feel aggrieved that there was no benefit to submitting the form in time and the incentive for schemes to comply with the deadline would be lost. This would have a negative effect on the Board's data collection.

It would be inappropriate to amend the Scheme's levy invoice since to do so would substantially prejudice other levy payers who were in the same position. The deadlines for the submission of forms had been actively promoted and the purpose of paragraph 12 was not to allow schemes to circumvent the deadlines.

#### Paragraph 13

Where information necessary for the calculation of the levies had not been provided in the manner or format or by the time anticipated by the PPF Determination, the Board could use equivalent information provided in another manner or at another time. However, it was not under any obligation to do so. In this case, the Board had the necessary information in order to be able to calculate the levies.

- The Committee upheld the original calculation of the levies.

## Written representation from the PPF

7. In addition to the points made by the Reconsideration Committee, the PPF disagrees that the Reconsideration Committee dismissed the points made by the Applicant. It states,

“Far from dismissing the points raised, the Committee seems in its decision to have dealt with each of the issues put forward by the scheme. The decision explains ... the process by which [D&B] failure scores are assigned to an employer and used in the levy calculation, and ... the process by which contingent asset arrangements can be notified to the Board. The Board consults regularly on the Determination process and is concerned to ensure that the levy is calculated as fairly as possible across the universe of levy payers. It cannot however make an exception to the rules for a particular scheme, since to do so would be unfair to every other scheme in a similar position to which such a concession had not been applied.”

## 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 for 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 PPF 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. Under paragraph 32 of the PPF Determination for the year in question, the relevant failure score was that which D&B assigned to the employer “in the ordinary course of its business”. D&B have confirmed that the failure score of 19 was correct as at 30 March 2007, the date at which it was required to calculate the failure score for the PPF. The fluctuations in the failure score appear to be related to the company’s Paydex rating and to percentage of satisfactory trade, rather than to issues with the accounts.

12. The Applicant has argued that the Trustees were unaware that they could appeal against the failure score or that they could submit a contingent asset certificate. In view of the fact that this is not the first year of the PPF levy, it is surprising that the Trustees were unaware either of the appeal process or the process by which they could register contingent assets with the PPF. Certainly, their professional advisers would have been aware of these processes and I note that D&B referred to the formal appeal process in their e-mail.
13. I find that the Board has calculated the risk-based levy in accordance with the provisions of the PPF Determination and is not required to take any action.

**CHARLIE GORDON**

Deputy Pension Protection Fund Ombudsman

10 June 2009