

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

Applicant : The Trustees of the Linton Park Group Pension Scheme
Scheme : Linton Park Group 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 29 November 2010. The referral concerns the Scheme's risk based levy for the 2008/2009 levy year, which is a reviewable matter under paragraph 19 of Schedule 9 to the Pensions Act 2004.

Grounds for Referral

2. The trustees consider that the PPF Board and the PPF Reconsideration Committee misdirected themselves as to the exercise of discretionary powers available to the Board, and that as a result the Scheme's risk based levy was incorrectly calculated.

Background

3. The Scheme Return for 2008/2009 was prepared for the trustees by Jardine Lloyd Thompson (**JLT**). The return was submitted before the deadline, which was 31 March 2008. On 15 April 2008 JLT emailed Dun and Bradstreet (**D&B**) saying that the wrong company details were on the return. The Companies House and D&B reference numbers for a company called Associated Cold Stores and Transport (Tewkesbury) Limited had been entered, which was not an employer and was not trading. The company that should have been put on the return was Associated Cold Stores and Transport Limited. D&B responded on the same day, saying that its failure score was based on the details provided to it, and could not be amended unless the PPF authorised the use of different company reference numbers.
4. On 21 April 2008 JLT sent an email to the Pensions Regulator, saying that the incorrect Companies House and D&B reference numbers were on the return. JLT requested that the return be amended.

5. On 9 January 2009 the PPF issued the 2008/2009 levy invoice. The return had not been amended, and the levy was based on the incorrect company details that had been entered on the return.
6. On 15 January 2009 JLT appealed to D&B. D&B's appeal process had five stages. On 16 January D&B rejected JLT's first stage appeal, saying that it had provided the correct failure score based on the information given by JLT.
7. JLT's stage two appeal to D&B on 13 February 2009 was also unsuccessful. The original response appears to have been lost in transit and a copy was sent to JLT by D&B on 30 April 2009. D&B said that the PPF would not allow it to make any changes. D&B asked JLT to take the matter up with the PPF.
8. JLT did not proceed further with its appeal to D&B. Instead JLT commenced a protracted correspondence with the PPF, in which JLT tried to get the PPF to recalculate the levy based on the correct details, and the PPF refused to do so, saying that it was the responsibility of JLT and the trustees to supply the correct information.
9. JLT then made an appeal to the PPF's Reconsideration Committee. JLT said it had merely made an innocent mistake. JLT considered that the Board had discretion to recalculate the levy.

Statutory basis of the levy

10. Section 175(1) of the Pensions Act 2004 provides that the PPF Board must impose a risk based levy. Section 175(2)(a)(ii) provides that one of the factors by which the risk based levy is to be fixed is "...the likelihood of an insolvency event occurring in relation to the employer in relation to a scheme..." Section 175(5) provides that the Board must make a determination for each year relating to the assessment, rate, timing and payment of the levies for that year.

The Board's Determination

11. So far as is relevant to this referral, the Board's Determination said:
 - "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...For the avoidance of doubt,

information is not incorrect for this purpose where it is correct and legitimate in itself, but it would have been open to the person supplying it to supply some different or additional information which might have caused this Schedule to be applied differently, and the Board is in any case under no obligation to review the amount of the levies merely because a scheme has been disadvantaged by the failure of those acting on its behalf to supply correct information at the proper time.

NOTE – This note is provided for information as to the manner in which the Board is likely to exercise the power described in paragraph 6. The note does not form part of the Determination, but has been approved by the Board when considering the Determination. The Board does not anticipate that this power of review will normally be exercised as to correct validated data (as defined in paragraph 8(a) of the Schedule) held on the Scheme Maintenance system...However the Board may take such steps in appropriate cases, including (without limiting the exercise of the Board's discretion) any case in which a scheme would otherwise be disadvantaged by the submission by the submission of inaccurate information."

Reconsideration Committee's decision

12. The committee said that it had no discretion to depart from the Board's Determination so far as the calculation of the levy was concerned, and neither did the Board.
13. The committee accepted that the company information on the scheme return was incorrect according to the definition given in paragraph 6 of the Board's Determination. The committee said that it had considered whether the discretion allowed in that paragraph should be exercised. In doing so, the committee noted the Board's published policy, which was generally not to allow corrections, on the following grounds:
 - If corrections were allowed, there would be a higher risk of under collection against the levy estimate;

- Allowing for a margin of error in the levy scaling calculation to mitigate the risk of under collection against the levy estimate would inherently lead to all schemes being disadvantaged, which was thought to be inappropriate;
- It was reasonable to expect schemes to provide the correct data at the right time, in particular as this was the third year for which data was submitted for levy purposes.

14. The committee concluded:

“The Committee noted such a policy must not be applied inflexibly so as to fetter the Board’s discretion. Nonetheless, the Committee did not consider it appropriate in the particular circumstances of this case to depart from the general policy of not taking account of corrections to Scheme Maintenance System data requested after 31 March 2008. The Committee did not believe that there was anything sufficiently unusual in the circumstances of the case to justify such a departure. The Committee further noted that the Board was dependent on scheme advisers to provide correct information to enable it to charge and collect the levy fairly. The Committee concluded that, in all the circumstances, it was not minded to exercise the discretion in this case. Accordingly, the Committee upholds the Review Decision and the original calculation of the levies for the Scheme.”

Submission by JLT on behalf of the trustees

15. JLT says that it made identical appeals to the PPF in respect of the 2008/2009 and 2009/2010 levy years. The 2009/2010 was allowed and the levy recalculated, so refusing the 2008/2009 appeal does not make sense, as both appeals were on the same facts. The error cannot be material in one year and not in another.
16. JLT says that the PPF Board should use its discretionary power to ensure that the levy relates to the correct company, rather than one that is not connected to the scheme.
17. JLT says that there will be an overpayment of £160,000 if the 2008/2009 levy is not amended.

Submission by the PPF

18. The PPF says that the 2008/2009 levy was calculated in accordance with the information supplied on the scheme return. The PPF says that when it considered whether to exercise its discretion for 2009/2010, it took into account that the error affected two levy years, and decided to relieve the scheme of the consequences of the continued error for the second year. The PPF says there was scope for the two decisions to differ, without either being wrong.
19. The PPF says that it depends on those who complete scheme returns to do so accurately. When incorrect information is supplied, the PPF Board is not automatically required to accept corrections, as there is no statutory requirement for the levy to be based on data that is objectively correct.
20. Late in the consideration of this referral, the PPF sent the Scheme a revised invoice for the 2008/2009 levy year, based on D&B's failure score for Associated Cold Stores and Transport Limited. The PPF says that it did so because although the wrong reference numbers were entered on the Scheme Return, the correct company name was used, and a company should be principally recognised by its name.
21. The PPF says it is obvious that the Reconsideration Committee considered the financial impact on the Scheme when reaching its decision.

Conclusions

22. My role is to consider whether the Reconsideration Committee's decision was "not reached correctly" (*Regulation 16(2) of the Pension Protection Fund (Reference of reviewable matters to the PPF Ombudsman) Regulations 2005*). In the circumstances, this translates into determining whether the scheme's risk based levy for 2008/2009 was calculated in accordance with the Board's Determination.
23. JLT says that the 2008/2009 levy should have been amended because the 2009/2010 one was. But I am considering a referral of the 2008/2009 levy only. A consideration of the circumstances surrounding the calculation of the 2009/2010 levy would be beyond the scope of this referral.

24. Section 175(2)(a)(ii) of the Pensions Act 2004 requires the levy to be assessed by reference to “the likelihood of an insolvency event occurring in relation to *the employer in relation to a scheme*” (my emphasis). As relevant, the purpose of the Determination is to raise the levy assessed in that way. So the effect of applying the Determination should not be to produce an assessment of the likelihood of a different employer’s insolvency, if alternatives exist.
25. JLT should not have should have submitted an incorrectly completed return, and I accept that the Board depended on the information supplied to it, and that there is no requirement for the Board to investigate whether information supplied to it is objectively correct. But the result of JLT’s mistake was that the levy was calculated in relation to a company that was not an employer in relation to the scheme. Whatever details were entered incorrectly, if this led to the wrong company details being used, the effect was the same.
26. Paragraph 6 of the Board’s Determination allowed the Board to review a levy where it appeared that the information upon which the calculation was based was “incorrect in a material respect.” Paragraph 6 goes on to say that “information is not incorrect for this purpose where it is correct and legitimate in itself....” I do not think that on any reading of the phrases “incorrect in a material respect” or “correct and legitimate in itself” can a failure score that relates to a different entity be regarded as anything other than incorrect, as the PPF accepted. Having accepted that, the levy needed to be reviewed, so as to make it compliant with Section 175(2)(a)(ii). This was particularly so where the factor required to be taken into account by statute (the likelihood of an insolvency event occurring in relation to Associated Cold Stores and Transport Limited) had not been taken into account at all.
27. The PPF says it is obvious that the Reconsideration Committee considered whether the Scheme would be disadvantaged by having to overpay the levy by £160,000, but in the absence of any record of the Committee’s thinking on this point, I am unable to share the PPF’s confidence that it was properly considered.

28. I therefore determine that the Reconsideration Committee's decision dated 29 November 2010 was not reached correctly. Having done so, Regulation 16 of the Pension Protection Fund (Reference of reviewable matters to the PPF Ombudsman) Regulations 2005 makes it mandatory for me to determine what action the Board should take and remit the matter to the Board. Given that I have determined that the Reconsideration Committee was wrong to find that the Board had correctly decided not to exercise its discretion and review the levy, it follows that the Board must now reconsider the levy calculation on the basis that the company details to be used are those of Associated Cold Stores and Transport Limited.
29. However, as the PPF has issued a revised invoice, there is no need for me to formally remit the matter to the Board with directions.

JANE IRVINE

Deputy Pension Protection Fund Ombudsman

26 June 2012