

PENSIONS ACT 2004, PART 2 CHAPTER 6

APPEAL TO PENSION PROTECTION FUND OMBUDSMAN

DETERMINATION BY THE PENSION PROTECTION FUND OMBUDSMAN

Applicant : Mr C R Marshall, as trustee
Scheme : Marshall Holdings Limited Managed Pension Plan (the **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 17 September 2008.

Grounds for Referral

- The PPF have not taken into account the guarantee provided by the holding company, Marshall Holdings Limited;
- Since 2004, Marshall Holdings Limited have paid in excess of the ongoing regular payments into the Plan; a further payment of £200,000 was due in October 2008;
- A legal document has been entered into between Marshall Holdings Limited and the Plan, guaranteeing payments into the Plan in the future;
- Marshall Group Services Limited is a non profit making company. It is a service company for all the companies in the group;
- Dun & Bradstreet (**D&B**) have given Marshall Group Services Limited a poor rating;
- The PPF have not taken into account the financial strength of Marshall Holdings Limited.

Reconsideration Committee's decision

2. 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;

- The Plan is a multi-employer scheme;
- The relevant scheme return had a “received” date of 8 January 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

- The financial strength of Marshall Holdings Limited and the guarantee
 - The board may take into account a contingent asset, which benefits a scheme in accordance with paragraph 29 of the Schedule to the PPF Determination and Appendix 4 to the PPF Determination;
 - The relevant deadline for submitting contingent assets to the Board was on or before 5.00 p.m. on 30 March 2007;
 - A contingent asset was not submitted before the relevant deadline and, therefore, the guarantee cannot be taken into account for the 2007/08 levy invoice;

- It was not possible to notify the Board of such an arrangement retrospectively;
- It would be unfair to allow the Plan to do so, both to those schemes which had complied with the deadline and those which had missed the deadline, but could not benefit from a contingent asset.
- 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;
 - In calculating the levy, the Board had used the information provided by D&B and could not depart from the failure scores provided by D&B.

- Discretions

Paragraph 6

The Applicant did not contend that the data in respect of the participating employers used to calculate the weighted average probability of insolvency was incorrect.

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. Paragraph 12 was not relevant.

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 format or at a different 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 and, therefore, paragraph 13 was not relevant.

- The Committee upheld the original calculation of the levies.

Written representation from the PPF

3. In addition to the points made by the Reconsideration Committee, the PPF makes the following further statement with regard to paragraph 12,

“... There are at least three reasons why paragraph 12 was inapplicable here. First, under the Determination the assignment of the appropriate failure score was a matter for D&B, not for the Board, and therefore it was not for the Board to seek further information about the relevant employers. Paragraph 32(e) of the Schedule to the Determination provides a mechanism for a revised invoice to be issued where D&B confirms to the Board following representations made on behalf of the Scheme that the failure score provided for use in calculating the invoice was incorrect. The Board understands that no such representations were made in respect of the Scheme’s invoice and that the score provided and used in calculating the invoice was correct. Second, at the time of the application for review the levy had already been calculated, and there was no reason for it to be recalculated (paragraph 12 by itself does not mandate a recalculation). Third, there is not the slightest reason why the Board should have enquired whether further information might be available as to the relationships between the various employers. The terms of the Determination were well publicised in advance (and, so far as material to this case, were unchanged from the previous year). It cannot reasonably be suggested that the Board should have sought confirmation in relation to every scheme that all relevant information had been provided prior to the deadline, yet there is nothing to distinguish this case from any case in which a parent company guarantee might have been entered into but not yet certified to the Board in accordance with the relevant deadline.”

Further representation from the Applicant

4. The Applicant submits:
- It is not the case that the Trustees believe that the PPF should have carried out a special investigation of the circumstances of the Group;
 - Having received the levy invoice, the Trustees supplied the PPF with the necessary additional information;
 - The PPF, now in full knowledge of the circumstances, should apply its discretion to adapt the levy calculation and recognise the significance of the Marshall Holdings Limited;
 - The Trustees do not dispute that the PPF is under no obligation to recalculate the levy;

- The PPF has never considered its power to apply a discretion;
- It is understood that the levy was calculated at a level which anticipated a number of successful challenges. It is, therefore, clear that it is possible to recalculate the levy and it would be surprising if a claim could be turned down simply on the grounds that the invoice had been sent.

Further representation from the PPF

5. In response to the further submissions from the Applicant, the PPF submit:
- It appears that the Applicant accepts that the Board is not obliged to include the additional information supplied after the expiry of the relevant time limits, but believes that the PPF should exercise discretion to recalculate the levy;
 - Paragraph 12 does not confer a general discretion to recalculate a levy; it allows the Board to take into account additional information when it is obliged for some other reason to recalculate a levy;
 - The data used to calculate the levy was correct and legitimate in itself. Therefore, the discretion to review the levy under paragraph 6 does not arise;
 - The Applicant is correct to say that it is possible to recalculate a levy after the production of an invoice and this has never been in dispute. However, such a recalculation will not be performed unless there is a reason for it to occur.

Further comment from the Applicant

6. The Applicant submits that the Company has incurred considerable expense by way of fees from solicitors, accountants and pension fund advisers in agreeing the legal documentation in respect of the guarantee to the Scheme. In addition, the Applicant notes that a large amount of additional payments have been made to the Scheme in excess of the ongoing regular payments. He suggests that, in view of this, the Ombudsman should have the discretion to agree an ex gratia reduction of the levy.

CONCLUSIONS

7. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.

8. The reviewable matter in question is the amount of the risk-based levy required of the Plan for the financial year 2007/08.
9. 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.
10. The relevant employer (Marshall Group Services Limited) in respect of the Plan was assigned a poor failure score by D&B. The Applicant has explained that it is a service company for the rest of the group and not a profit making entity. It has not been suggested that the failure score was incorrect and it has not been challenged with D&B. The Applicant's argument is that the PPF should take into account the financial strength of the group's holding company and the existence of certain guarantees from the company in respect of the Plan.
11. There was provision for the Plan Trustees to submit a contingent asset certificate, which would have enabled the PPF to take account of a parent company guarantee in calculating the levies. However, they were required to do so on or before 5.00 p.m. on 30 March 2007. No such certificate was submitted before that deadline. The Applicant's position is that the PPF should consider exercising a discretion to accept a contingent asset certificate after the deadline.
12. The Schedule to the PPF Determination provides the Board with various opportunities to review a levy under certain circumstances. I am inclined to agree with the PPF, that those circumstances do not arise in this case. The information upon which the levy was based was not incorrect in a material respect. The failure to submit a contingent asset certificate before the relevant deadline does not, in itself, mean that the data used to calculate the levy was incorrect. Paragraph 12 allows the Board to obtain further or amended information, but it is not obliged to do so "where information has not been provided ... on or before any applicable deadline". Paragraph 12 does not itself give power to make a recalculation. It identifies what may be done before a recalculation triggered by some other provision. In the absence of such a recalculation being triggered, I agree that it was not relevant.

13. Paragraph 13 only applies if information “necessary for” the calculation of the levy has not been provided. A contingent asset certificate is not necessary for the calculation of the levy; although it may be desirable from the trustees’ or the employer’s point of view. As with paragraph 12, paragraph 13 does not trigger a recalculation.
14. In view of the above, I do not see that the Board has a discretion to allow the submission of a contingent asset certificate after the relevant deadline. However, even if it were the case that such a discretion existed, the Applicant has not offered any reason why it should be exercised in the Scheme’s favour, other than the fact that the failure to submit a contingent asset certificate before the relevant deadline led to a higher levy in respect of the Scheme. I am satisfied that it would not be perverse for discretion not to be exercised in those circumstances. It would not, therefore, be appropriate for the exercise of such discretion to be remitted to the Board for further consideration.
15. I find, therefore, 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.
16. With regard to the fees incurred by the Trustees in obtaining the parent company guarantee, that is a matter between them and their advisers. In any event, I do not have the discretion to waive part or all of the levy in the way they suggest.

TONY KING

Pension Protection Fund Ombudsman

13 July 2009