

PENSIONS ACT 2004, PART 2 CHAPTER 6

APPEAL TO PENSION PROTECTION FUND OMBUDSMAN

DETERMINATION BY THE PENSION PROTECTION FUND OMBUDSMAN

Applicant : Mr I M Clark, as trustee
Scheme : J A Clark & Co (Engineers) Limited 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 3 December 2008.

Grounds for Referral

- No account has been taken of the significant improvement in the financial health of the Scheme;
- No response was received in respect of the request for a definition of “significant contribution”;
- The variance in the failure scores assigned by Dun & Bradstreet (**D&B**) bears no relation to the financial health of the sponsoring employer, which has decreased in value while the failure score has improved;
- It was unfair to use 2005 figures to determine the 2008 risk.

Background

2. The Scheme is a single employer scheme. A Section 179 certificate with an effective date of 6 April 2006 was submitted in respect of the Scheme. No deficit reduction contribution certificate was submitted before 5 pm on 5 April 2007.
3. A valuation report dated 25 March 2008 indicated that the Scheme deficit as at 6 April 2007 was £90,000. In comparison, the levy invoice (10033637-000-08-01), dated 23 May 2008, showed the underfunding to be £1,056,763.51.
4. The Applicant has provided copies of the Company's accounts for 2004 through to 2007.

Reconsideration Committee's decision

5. The Reconsideration Committee's decision is summarised as follows:
 - The calculation of the Scheme's levy was a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004;
 - 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 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
 - The Applicant took issue with the way D&B assessed the failure score for J A Clark & Co (Engineers) Limited;
 - D&B had confirmed that the score had improved since the cut-off date for the 2007/08 levy invoice because of improvements in trade experience data and financial information provided;
 - The 2008/09 levy invoice would be based on the improved failure score;
 - The failure score to be provided to the Board by D&B were those which would have been assigned to the relevant employer in the ordinary course of its business as at 30 March 2007;
 - Neither D&B nor the Board were entitled to depart from the approach set out in the PPF Determination;
 - D&B had confirmed that the failure score for J A Clark & Co (Engineers) Limited as at 30 March 2007 was 21, as used in the levy calculation.
- Incorrect liability figure
 - The Applicant had claimed that the Scheme liability figure was incorrect and referred to an actuarial valuation as at 6 April 2008, which showed a Section 179 funding level of 103%;
 - Where a Section 179 valuation had been submitted at or before 5 p.m. on 30 March 2007, the information provided was rolled forward as provided in Appendix 1 to the Schedule to the PPF Determination;
 - The Board was able to take account of Section 179 valuation information certified prior to the March 2007 deadline, but not of the valuation prepared as

at 6 April 2007, which would not have been available to the Scheme for submission prior to the deadline;

- The levy had been calculated on the basis of the Section 179 valuation figures certified on 19 March 2007;
- The liability figure was that prepared as at 31 March 2006 and included in the 19 March 2007 certificate;
- The figure was rolled back, in accordance with Appendix 1, to give the relevant figure as at 31 October 2006;
- The liability figure was, therefore, the correct figure in accordance with the terms of the PPF Determination;
- The Board would take into account deficit reduction contributions made by the employer before the relevant date, i.e. 30 March 2007, and certified to it on or before 5 April 2007, in accordance with paragraph 28 of the Schedule to the PPF Determination.

- Discretions

Paragraph 6

Paragraph 6 provided that nothing should prevent the Board from reviewing the levies if it subsequently appeared that the information upon which the calculation had been based was incorrect in a material respect. The Applicant had submitted that the Section 179 mortality assumptions were inappropriate, but the valuation information provided in the Section 179 certificate, using the prescribed mortality assumptions, was not incorrect.

Paragraph 12

The Board could take such steps as it thought fit to obtain further or amended information prior to calculating or recalculating the levies. As the mortality assumptions upon which a Section 179 valuation was conducted are prescribed by guidance, which the Board was required by law to issue, whilst the assumptions underlay any reported Section 179 valuation results, they did not amount to information required to calculate the levy.

- The Committee upheld the original calculation of the levies.

Written representation from the PPF

6. The PPF have confirmed that the decision by the Reconsideration Committee reflects its position. In addition, the PPF submit:
 - The issue raised concerns the process by which D&B assess the appropriate failure score to be provided to the Board;
 - The PPF Determination provides for D&B to provide the Board with a corrected failure score when it becomes apparent that the failure score previously assigned to the relevant employer is incorrect;
 - D&B have not notified the Board that the failure score was incorrect and, therefore, the Scheme's levy invoice was correctly calculated;
 - With regard to the question concerning a "significant contribution", the Board accepts deficit reduction contributions certified to it in accordance with the PPF Determination and by the specified deadline. It will also take account of increased asset values certified to it via the scheme return system by the relevant deadline. The Scheme did not provide updated information by either route.

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 Scheme 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. Paragraph 32 of the Schedule to the PPF Determination provided that the applicable failure score should be that which D&B had assigned to the relevant employer "in the

ordinary course of its business on and as at 30 March 2007”. It follows, therefore, that information available after that deadline could not influence the failure score for the purpose of calculating the 2007/08 levy. D&B has confirmed to the Board that the failure score used in the calculation of the levy was correct inasmuch as it was the failure score it had assigned to the employer as at 30 March 2007. D&B is not required to notify the Board of subsequent changes/improvements in the employer’s failure score nor is the Board required to take such changes/improvements into account for the 2007/08 levy.

11. Unless responding to a specific request or requirement, the deadline for providing information to the Board was 5.00 p.m. on 30 March 2007. Under certain specific circumstances, the Board could accept data after this deadline. Those circumstances largely related to difficulties encountered in submitting data, such as an interruption in electronic communications, and do not apply in this case. The Board had the discretion to accept data after the 30 March 2007 deadline if the data used in the calculation of the levy proved to be incorrect in a material respect. This is not the case here. That more up to date information became available subsequently does not mean that the data used to calculate the levy was incorrect in a material respect.
12. The Schedule to the PPF Determination was quite clear in specifying that the “relevant scheme return data” was that provided in the latest submitted scheme return at or before the 30 March 2007 deadline. Any information intended to supplement, correct or update the scheme return data also had to be submitted before the 30 March 2007 deadline. The March 2008 valuation report could not, therefore, be taken into account for the 2007/08 levy calculation nor could that for 6 April 2008.
13. With regard to taking account of contributions to the Scheme, the Applicant has asked what the Board would consider a “significant contribution”. In response, the PPF has confirmed that it will adjust a levy to take account of a deficit reduction contribution made before the 30 March 2007 deadline and certified to it before 5.00 p.m. on 5 April 2007. The Schedule to the PPF Determination explained that a deficit reduction contribution was the whole or part of a contribution made by or on behalf of the employer, which was not a contribution relating to the accrual of benefits, scheme

expenses, the cost of augmentations or transfers out of the scheme. It seems to me that this is a perfectly adequate explanation.

14. What the Applicant appears to want the Board to do is revise the Scheme's levy in accordance with information which became available after the 30 March 2007 deadline. There is no basis upon which the Board can be required to do so.
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.

TONY KING
Pension Protection Fund Ombudsman

24 August 2009