

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

Applicant : Mr M Young, on behalf of the Trustees of the T-Mobile (UK) Pension Scheme (**the Trustees**)

Scheme : The T-Mobile (UK) Pension Scheme (**the Scheme**)

1. The Pension Protection Fund (**PPFO**) Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee of the Pension Protection Fund (**PPF**) dated 29 May 2009.

Grounds for referral by the Trustees

2. The Trustees of the Scheme claim that the PPF failed to consider the relevant factors in deciding not to review the Scheme's levy invoice.
3. They set out in particular that the PPF failed to consider the effect on the Scheme of the increase in the levy scaling factor (**LSF**) for 2008/09 from the indicative scaling factor;
4. In addition they say that the PPF Board's (**the Board's**) decision not to publish the actual LSF until 30 May 2008 meant that the Trustees could not calculate the Scheme's invoice until 2 months after the commencement of the 2008/09 levy year. They explain that this potentially made it impossible for the Trustee to predict the levy in advance and to consider what proportionate steps ought to be taken before 31 March 2008 to mitigate the amount of the estimated levy.
5. The Trustees explain that the Scheme's 2008/09 levy invoice amounts to £3,908,458 and the Scheme Actuary has calculated that the levy would have been £1.8m had the actual LSF been 1.6 as per the indicative LSF. They explain that whilst the Trustees recognised the possibility that the actual LSF might differ from the indicative LSF, the Board knew or ought to have known that the Trustees would seek to rely on the indicative LSF, and so the Board was under a duty to take reasonable care to ensure

that the indicative LSF was as accurate as possible. Indeed they say the Trustees highlight that they reasonably relied on the indicative LSF to estimate roughly what the 2008/09 levy would and to budget accordingly. Instead in making no provision for sponsors paying additional contributions into their schemes or putting in place contingent assets, the indicative LSF was not and could not have been indicative, but was always going to be misleading. They say the fact that the actual LSF was 2.5 times higher than the indicative LSF prima facie suggests that the Board did not exercise reasonable care in calculating the indicative LSF.

6. Further the system did not take into proper account the holding company nor value the assets appropriately.
7. Moreover the system was not transparent or fair.
8. The Trustees also state that the Reconsideration Committee was able, under paragraph 12 of the PPF Determination, to request further information to assess the impact of the increased LSF on the Scheme.
9. In addition the Trustees state that if the Reconsideration Committee had no express ability under the PPF Determination to review the amount of the levy, there exists an “overarching discretion” so that the Reconsideration Committee would not have been prevented from reviewing the levy. They highlight the view expressed by the previous Deputy Ombudsman at paragraph 29 of his Determination in the matter of *The GC Bateman Group of Companies Pensions and Life Assurance Scheme (Bateman)*. They say Bateman infers that whilst the discretion under paragraph 6 of the Schedule to the Determination did not arise, there was no reason why the Board could not review the levy.

Response by the Reconsideration Committee:

10. In respect of comments regarding the Reconsideration Committee’s decision the Committee responds that the Applicant had requested reconsideration of the Scheme levy for the period 1 April 2008 to 31 March 2009, as set out in an invoice dated 26 September 2008. They acknowledge this was a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.

11. However they explain that the Board had consulted on the risk-based levy over the period from August 2007 to January 2008. They say that under Section 175(5) (of the Pensions Act 2004), the Board were 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. They confirm the Board published the PPF Determination of these matters on 19 February 2008.
12. The Committee also explains that any 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 Reconsideration Committee nor the Board had any discretion to depart from the PPF Determination.
13. As regards the risk-based levy they explain this was calculated by reference to the fixed formula $U \times P \times R \times c$ and subject to a cap (K) equal to 0.01 multiplied by the Scheme's protected liabilities.
14. As regards the increase from indicative to actual LSF the Committee say the Board say they published an indicative LSF of 1.6 on 29 November 2007, but it was clear from the consultation document that the indicative LSF was not the actual LSF to be applied and the actual factor would not be 1.6. They say this was clearly stated at paragraph 3.6.8 of the November consultation document:

“When this formula is applied to the insolvency and underfunding information available for the known universe of eligible schemes and sponsoring employers at 31 October 2007, the indicative risk based scaling levy factor is 1.60. The actual scaling factor will be determined in accordance with the formula set out in the final Determination and is likely to differ from this indicative figure. Only the final calculated and published figure will be definitive.”
15. In addition the Committee say the Board gave a clear indication that the actual LSF would be calculated based on data at 31 March 2008 and indicated the factors that would impact on the final LSF. They say the Board indicated that there was a significant degree of uncertainty as to what the final LSF would be.
16. The Committee further explains that they have published a reconciliation of the difference between the indicative LSF of 1.6 and the actual LSF of 3.77. The final

LSF has been calculated in accordance with Part 5 of the Schedule to the PPF Determination. Data provided by the due date was taken into account.

17. Regarding exercise of discretion over application of the actual LSF the Committee explain that because the Scheme's levy was correctly calculated in accordance with the terms of PPF Determination, and on the basis of correct information, therefore no question of whether the calculation should be reviewed as a matter of discretion arose.

Written representation from the PPF Board:

18. In addition to the points made by the Reconsideration Committee, the PPF state that they relied upon data provided that the discretion available to the Reconsideration Committee was limited. They explain that Paragraph 12 of the PPF Determination gives the Board discretion to obtain further information prior to carrying out a calculation or recalculation of a levy. It does not allow a scheme to request a credit note and re-invoice without the Board being required for some other reason to issue a further invoice. Unless the Reconsideration Committee had been aware of an error in the original invoice (or is aware that the Scheme will be re-invoiced for some other reason) the Reconsideration Committee is unable to exercise the discretion under paragraph 12.
19. In addition the Board states that Paragraph 6 of the PPF Determination preserves the discretion of the Board to review the Scheme's levy invoice where the Board becomes aware that a data item in the calculation was either incorrect or improperly notified to the Board. However, they explain the application of paragraph 6 involves a determination of fact as to whether the invoice is based on incorrect information. They say that the issues raised by the Applicant are issues of policy of, and content underlying the Determination, rather than submissions as to the correctness of the data used to calculate the Scheme's invoice so the discretion is not available.
20. As regards the Bateman decision they distinguish this stating that the relevant parts of Bateman are concerned with whether paragraph 4 of the Schedule to the Determination serves to limit the application of paragraph 6, or whether paragraph 6, itself, preserves an over-arching discretion. They say Bateman does not suggest that there is an additional over-arching discretion, apart from those discretions set out in

the Determination. They reiterate that in this case there appears to be no issue as to whether the data underlying the calculation is correct, or incorrect, and therefore the discretion preserved by paragraph 6 would not apply, and there is no additional discretion to which the Board can revert.

21. As regards whether the Reconsideration Committee's decision failed to consider relevant factors the Board say they published the final LSF in accordance with the Determination. They highlight the Determination does not require the actual LSF to be published before the end of the levy year in question. They explain that at the time the actual LSF could only be published after the commencement of the 2008/09 levy year once the data deadline for schemes had passed and all data had been submitted.
22. The Board also state the indicative LSF is an irrelevant factor for schemes seeking to reduce their levy as the LSF is calculated by reference to the total amount of levy that the Board is seeking to collect. They explain the publication of the indicative LSF was an attempt by the Board to seek to address the potential procedural unfairness of the timing of the publication of the actual LSF. They say that this is not a matter that can be the subject of a review, or reconsideration or a referral to the Ombudsman as it relates to the policy underlying, or content of, the Determination, rather than to whether the Scheme's invoice has been correctly calculated.
23. The Board also say that it would not have been reasonable for trustees to rely on the indicative LSF in circumstances where the final LSF would only have been calculated once all schemes' data for 2008/09 was collected and that the Board was under no duty to schemes to ensure that the indicative LSF (calculated using data as at the end of September 2007) matched the final LSF as the indicative LSF was never intended to by the Board to form part of a scheme's financial planning for that levy year.
24. The Board further explains that the fact that the indicative LSF did not take account of contingent assets and deficit reduction contributions submitted after its calculation should have served as an indication to schemes that the indicative LSF could only be based on the data available and that it should not be relied on.
25. In addition, whilst not accepting that schemes should rely on the indicative LSF or on the LSF for previous levy years as a guide for future levy years, the Board accepts that the unexpected increase year on year in the LSF may have caused difficulty for

schemes' financial planning. The Board therefore explains that they have made changes for the levy year 2009/10 to publish the final LSF in advance (but which means that the amount of levy will be uncertain and adjustments may accordingly have to be made in future years).

26. As regards arguments that the process is not generally fair the Board state that fairness demands schemes are treated consistently and as a result it applies data deadlines strictly.

Further representation from the Trustees

27. The Trustees state that if the Board does not have an overarching discretion it does retain the ability to revisit a levy calculation, which would otherwise produce an unfair result, by applying the concept of "equitable liability". The concept of "equitable liability" would allow the invoice to remain the unchanged but with the Board deciding on the grounds of fairness not to pursue the full amount of the levy (i.e. the excess over and above the Scheme's "equitable liability").
28. HM Revenue and Customs (**HMRC**) applies the concept of "equitable liability" in the cases of tax payers in receipt of a determination of income or corporation tax, who were out of time to file their tax return, but can demonstrate that the sums charged are excessive. HMRC applies this concession notwithstanding that those taxpayers who are liable to file tax returns are all required to adhere to the same deadlines for filing tax returns.
29. The issue is not whether all schemes have been treated fairly but whether or not the Trustee has been treated so unfairly as a result of that equal treatment that it would now be unconscionable for the PPF to seek to recover the full amount of the levy.
30. They question why, if it was not reasonable for trustees to rely on the indicative LSF, for what purpose did the Board provide it? They suggest it can only have been to give schemes a fair indication of what their levies would be so that they could plan accordingly. If the Trustee could not reasonably rely on the indicative LSF when engaged in financial planning then it served no useful purpose.

The Board has not sought to provide any explanation for the significant increase between the indicative LSF and the final LSF.

CONCLUSIONS

31. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004. That is agreed by all parties.
32. The reviewable matter in question is the amount of the risk-based levy required of the Scheme for the financial year 2008/09.
33. Under Section 175(5) of the Pensions Act 2004, the Board was required to determine the factors by reference to which the 2008/09 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.
34. The Board calculated the actual (or final) LSF of 3.77 on the basis of data provided to it by the deadlines set out in the PPF Determination, for the levy year in question, and, there appears to be no dispute that this factor has not been calculated correctly.
35. I note the Applicant's contention that the Trustee ought reasonably to have been able to rely, to a degree, upon the indicative LSF for financial planning. I note they state that there would appear to be little purpose in publishing an indicative figure that bears little or no resemblance to the final figure. I have some sympathy with the argument that there is no purpose in producing an "estimate" if the information provided therein is not to be taken account of. That said, it is the extent to which the information provided should reasonably be relied upon that is at question here. In my view it was unsound of the Trustees to have relied completely on the indicative LSF when undertaking their financial planning, particularly as it was published with a clear indication that the final (or actual) LSF might be different. The Trustees knew, or ought to have known, the factors that are taken into account in the calculation of the final (or actual) LSF and they knew that the indicative LSF did not take account of contingent assets and deficit reduction contributions submitted after its calculation. That information alone should have alerted the Trustees to the fact that the indicative LSF could not be wholly relied upon. Equally I note that the Board have recognised that the manner in which the LSF is calculated may have caused difficulty for schemes' financial planning and have made changes to publish the final LSF in advance for the levy year 2009/10. This, together with all information provided

regarding approach to calculation of indicative and final levies, appears a reasonable and fair response to assist all those who contribute to the Levy.

36. I note the Applicant suggests that the Board has an over-arching discretion to review the levy. However as the same issue affected many who contribute to the Levy, I cannot see there is justification to assist the Trustees of the T-Mobile Scheme alone. I concur with the Board who infer fairness requires all schemes be treated equally.
37. I note the Applicant also suggests that the view expressed by my predecessor in Bateman should apply here. In Bateman, my predecessor concluded that whilst paragraph 4 of the Schedule to the PPF Determination gave the Board discretion to accept late information in specific circumstances paragraph 6 of the Schedule to the PPF Determination gave an over-arching discretion to allow the Board to, accept late information and, review the levy in circumstances not envisaged in paragraph 4. As there is no issue as to whether the data provided and used by the Board was correct or not the decision in Bateman clearly does not apply in this instance.
38. As to the Applicant's contention that if the Board does not have an over-arching discretion it does retain the ability to revisit a levy calculation, which would otherwise produce an unfair result, by applying the concept of "equitable liability", in my view this argument must also fail in circumstances of this case. Whilst, the concept of "equitable liability" is sometimes applied in fiscal regimes where the strict position is considered unfair I cannot see how the Trustees have been treated unfairly. The indicative LSF was published to all eligible schemes and sponsoring employers that the Trustees chose to rely on it, was their decision and is not grounds for setting aside the requirements of the PPF Determination. The Applicant was given information about how the final LSF might be calculated and the same deadlines as all other schemes. As the Board state information was given to all schemes, all were required to adhere to the same deadlines and equal treatment is a way of achieving fairness.
39. The Applicant suggests that consideration should be given as to whether or not the Trustee has been treated so unfairly as a result of that equal treatment afforded to all schemes such that to recover the full amount of the levy would be unconscionable. All eligible schemes were provided with the same indicative LSF and all eligible

schemes had their risk based levy calculated using the same final (or actual) LSF. I do not find, therefore, that the Trustee has been treated unfairly.

40. The Applicant submits that HMRC applies the concept of “equitable liability” in the cases of tax payers in receipt of a determination of income or corporation tax, who were out of time to file their tax return, but can demonstrate that the sums charged are excessive, notwithstanding that those taxpayers who are liable to file tax returns are all required to adhere to the same deadlines for filing tax returns. The manner in which the concession of “equitable liability” is applied is a matter for the individual organisation. However, it is notable that in the case of HMRC the concession of “equitable liability” was originally introduced to protect other creditors when HMRC’s claims in insolvency cases took precedence over the claims of other creditors. As the Scheme is liable to pay the PPF levy I presume the Scheme’s sponsoring employer does not find itself in such a position.
41. 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.

JANE IRVINE

Pension Protection Fund Deputy Ombudsman

3 February 2010

APPENDIX

Appendix 2

Determination under Section 175(5) of the Pensions Act 2004 in respect of the financial year 1 April 2008 - 31 March 2009

42. Paragraph 4 of the PPF Determination provides:

“Where this Schedule refers to certain information having been provided to the Board (or, as the case may be, to the Pensions Regulator) 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 office...

Without prejudice to paragraph 6 and 12 below the Board may at its discretion take account of any information provided after any applicable deadline...

- (a) The information was despatched on 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...
- (c) The information in question serves to correct a statement previously made to the Board”

43. Paragraph 6 of the PPF Determination provides that

“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 ...”