

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

Applicant : Mr D Baker
Scheme : Pearl Group Staff Pension Scheme (the **Scheme**)

The Pension Protection Fund (**PPF**) Ombudsman has received a referral of a reviewable matter, following a decision by the Committee of the PPF dated 15 April 2008.

APPLICANT'S GROUNDS FOR REFERRAL

1. Mr Baker, in his capacity as a Trustee of the Scheme, referred his complaint to me on the grounds that:
 - (i) The levy calculation has been based on a failure score that was incorrect in a material respect, resulting in an overstated risk based levy of £137,939, which represents an excess of £85,246.
 - (ii) The PPF adhered to a strict application of the Determination dated 1 March 2007, rather than an exercise of the discretions available, which if exercised, could have allowed more accurate information to have been provided.
 - (iii) The intention of the legislation is that the risk based levy should reflect "the likelihood of an insolvency event occurring in relation to the employer in relation to the scheme". The strict application of Paragraph 32 of the Determination in this particular case does not reflect the intention of the legislation.

RECONSIDERATION DECISION

2. Mr Baker, requested the Committee to reconsider the PPF Board's calculation of the pension protection levy for the Scheme, in respect of the period 2007/2008, as set out in the invoice to the Trustees of the Scheme (the **Trustees**), dated 16 November 2007. This calculation, is a reviewable matter, by virtue of paragraph 19, of Schedule 9, to the Pensions Act 2004 (**the Act**). (Extracts of the relevant legislation can be found at the Appendix.)

3. Mr Baker submitted that the information, upon which the calculation was based, was incorrect in a material respect, and the calculation should take into account the Scheme's 2006 accounts. Mr Baker requested the decision be reconsidered on the following basis:

- Although he acknowledges that the decision was in accordance with the procedures laid down in the Determination, dated 1 March 2007, the strict application of that Determination had resulted in the unreasonable and anomalous result of a risk based levy of £137,939, which represented an overpayment of £85,246.
- The intention of the legislation, was that the risk based levy should reflect "the likelihood of an insolvency event occurring in relation to the employer in relation to the scheme" and a strict application of paragraph 32 of the Determination does not reflect the intention of the legislation.
- The calculation had resulted in a windfall for the PPF, of £85,246 and operates as a penalty to the Scheme, as the annual levy is not refundable and the excess cannot be credited against the subsequent years' assessments. The purpose of section 175, was not to impose penalties, and the assessment was an unreasonable application of the strict terms of the Determination. The risk based levy should be calculated on the basis of the 2006 audited accounts.

4. The Committee met on 15 April 2008 and concluded that:

4.1 Under section 175(5), the Board must, before the beginning of each financial year, determine in respect of that year:

- The factors by reference to which the pension projection levies are to be assessed;
- The time, or times, by reference to which, those factors are to be assessed;
- The rate of the levies;
- The time at which the levies become payable.

4.2 Under the terms of the Determination, the Board had determined that the likelihood of an insolvency event is to be measured on and as at 30 March 2007, by reference to the failure score provided to the Board by Dun & Bradstreet. That failure score must be the normal failure score which would have been assigned to the

employer by Dun & Bradstreet in the ordinary course of its business on and as at 30 March 2007, based on data provided to them on or before 29 March 2007.

4.3 The Board had complied with the requirements of the legislation, in making its Determination under section 175(5). Whether the legislation achieves any particular intention, or objective, is a matter for Parliament to consider.

4.4 It was not unreasonable of the Board to apply the terms of the Determination to the circumstances of the Scheme, as it applied the terms of the Determination to all eligible schemes. It would be unreasonable of the Board to calculate any levy otherwise than in accordance with the Determination.

4.5 The levy has been calculated in accordance with the terms of the Determination, which was adopted in accordance with the legislation. The Determination sets a date on which information used for the purposes crystallises, which applies equally to all schemes. The application of such a crystallisation date, as required by the terms of the Determination, does not make the Board's calculation of the 2007/2008 levy, in respect of the Scheme, unfair.

Discretions

4.6 Paragraph 4 of the Schedule to the Determination, identifies three circumstances in which the Board may, at its discretion, take into account information provided after the applicable deadline, but before the notification of the amount of the levies to the Scheme. The applicant had requested that information provided after the deadline be accepted under paragraph 4(c), on the basis that it served to correct a statement previously made to the Board, in the belief that it was correct, but which was incorrect at the time it was made. As the scheme had already been notified of the amount of the levies, the discretion under paragraph 4(c) is not exercisable.

4.7 Paragraph 6 of the Schedule to the Determination states that nothing in the Determination shall prevent the Board from reviewing the amount of the levies calculated in respect of a scheme where, among other things, it subsequently appears to the Board that the information upon which the calculation was based was incorrect in a material respect. Although the Applicant contended that the Dun & Bradstreet failure score was materially incorrect, it was not, because it is the failure score as applied to the relevant company by Dun & Bradstreet in the ordinary course of its

business, on and as at 30 March 2007, based on the information available to them. Paragraph 6 was not, therefore relevant.

4.8 Paragraph 12 of the Determination provides that the Board may, at any time prior to the calculation, or recalculation, of the levy, in respect of a scheme, take such steps as it thinks fit, to obtain further information for the purposes of that calculation, or recalculation. The Board is under no obligation to take such steps where information has not been provided to the Board, on or before any applicable deadline prescribed in this Determination. Paragraph 12 was not, therefore, relevant.

4.9 Paragraph 13, of the Schedule to the Determination, provides that if, at any time of the calculation, or any recalculation, of the levy, any information necessary for such calculation has not been provided in the manner or format or at the time anticipated by the Determination, then the Board may instead use equivalent information, provided in a different manner, or format, or at a different time. The Board is under no obligation to use such equivalent information. The Board had such information as was necessary under the terms of the Determination to calculate the invoice. Paragraph 13 was not therefore relevant.

MATERIAL FACTS

5. Under section 175 of the Pensions Act 2004, the Board must impose a risk based pension protection levy and a scheme based pension protection levy, for each financial year falling after 31 March 2006. Under section 175(2), the risk based levy must be assessed by reference to the difference between the value of the scheme's assets and the amount of its protected liabilities, the likelihood of an employer insolvency event, and (if the Board considers it appropriate) certain other risk factors.
6. Under section 175(5), the Board must, before the beginning of each financial year, determine in respect of that year:
 - a) the factors by reference to which, the pension protection levies are to be assessed;
 - b) the time or times, by reference to which those factors are assessed;
 - c) the rate of the levies; and

- d) the time or times during the year when the levies or any instalment of levy become payable.
7. In calculating the amount of the levies in respect of a scheme under section 181(3)(b), the Board must apply the published Determination to the relevant facts pertaining to that scheme. The Board is not entitled, or obliged, to depart from the Determination in calculating the amount of the levies. It is the calculation under section 181(3)(b) which is a reviewable matter under paragraph 19 of Schedule 9 to the Act. The making of the Determination, under section 175(5), is not a reviewable matter.
8. The Determination provides, in summary, that the risk based levy shall be calculated using the formula $U \times P \times R \times c$, subject to a maximum equal to 1.25 per cent of the Scheme's protected liabilities (paragraph 14 and 15 of the schedule to the Determination). U is a factor broadly based upon the difference between the value of the Scheme's assets and the amount of its protected liabilities as at 30 March 2007. P is the Pension Protection Fund assumed probability of insolvency associated with the Failure Score which Dun & Bradstreet informs the Board that it has assigned to the employer as at 30 March 2007 (paragraphs 30 to 32 of the schedule to the Determination). R is the proportion of the levies intended to be risk based, i.e. 0.8 and c is the levy scaling factor, 2.47 for the 2007/08 levy year.
9. Paragraphs 9 and 10 of the schedule to the Determination clarify the basis on which the Board will assess the value of the Scheme's assets and protected liabilities for the purpose of the calculation of the levies. In short, the Board will use a valuation prepared on the section 179 Pensions Act 2004 prescribed basis, in calculation of a scheme's 2007/08 levies, if it was provided to the Board or to the Pensions Regulator at or before 5 pm on 30 March 2007. If no section 179 valuation was so provided, the calculation is based on a roll forward of the most recent MFR valuation information provided to the Board, adjusted in accordance with Appendix 2 to the Schedule to the Determination.
10. The Board issued its 2007/2008 Determination on 1 March 2007. On 16 November 2007, the PPF issued its invoice to the Scheme. The risk based levy was £137,939.
11. On 28 May 2008, the Reconsideration Committee gave notice of its decision of 11 February 2008. Its conclusions are set out at paragraph 4 above.

WRITTEN REPRESENTATIONS

12. Mr Baker

- Paragraph 6 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.”
- Paragraph 6 confers a wide discretion upon the PPF to review the amount of the levy, if it subsequently appears that the information upon which the calculation was based was incorrect in a material respect.
- Under Paragraph 6, the Board had discretion to review, on the grounds that the sponsoring employer’s audited accounts for the period to 31 December 2006 make it clear that the Failure Score assigned to the sponsoring employer was incorrect, since it did not reflect the actual likelihood, as at 30 March 2007, of an insolvency event occurring in relation to the sponsoring employer.
- On 25 September 2008, the Board issued for consultation a draft determination in respect of the financial year 1 April 2009 to 31 March 2010. Paragraph 6 to the Schedule has been revised to the extent: *“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.”* The inclusion of this qualification is an acknowledgement that Paragraph 6 of the Schedule to the Determination as originally drafted, conferred a wider discretion than the unduly narrow and restrictive interpretation adopted by the Board in this case.
- It is not accepted that it would be unfair to other schemes, and/or create uncertainty, to allow subsequent information to be taken into account. If such considerations are relevant, they are relevant only to the question of whether or not the discretion ought to be exercised in favour of the Scheme. Such considerations are not relevant to the question of whether or not the Paragraph 6 discretion arises in the first place, and do not justify adopting a narrow and limiting construction of the paragraph 6 discretion.

- It is acknowledged by the PPF, that the Committee failed to give any reasons for their decision that Paragraph 12 did not apply. This amounts to maladministration, as the Trustees submit that the discretion did apply, and so the matter ought to be referred back to the Committee, to reconsider and give full reasons for its decision.
- The sponsoring employer's accounts for the period ended 31 December 2006, were signed off on 28 March 2007 (one day before the deadline), but were not filed at Companies House until 25 June 2007. Had those accounts been made available to Dun & Bradstreet before the deadline, the Trustees believe that the sponsoring employer's failure score would have been 94 (rather than 80) with the result that the amount of the levy would have been £52,693 (rather than £137,939).
- The Paragraph 12 discretion specifically refers to obtaining further or amended information, prior to and for the purpose of "recalculation." The Board is seeking to apply an unduly narrow and restrictive interpretation to this widely drafted discretion. Once the sponsoring employer's audited accounts for the period ended 31 December 2006 had become available, the Board, although not obliged to do so, had a discretion to request Dun & Bradstreet to provide a revised failure score in order to enable the Board to recalculate the levy. The Committee failed to consider whether or not to exercise that discretion in favour of the Scheme. Such considerations are not relevant to the question of whether or not the Paragraph 12 discretion arises in the first place and do not justify adopting a narrow and limiting construction of the discretion.
- The note to Paragraph 12 of the Schedule to the draft determination for financial year 1 April 2009 to 31 March 2010 states "*the Board does not anticipate that this power to obtain information will normally be exercised so as to amend validated data...held on the Scheme maintenance system as at midnight on 31 March 2008 or other relevant deadlines.*" The note does not state that there is no discretion to amend data that is available; merely that it would be unusual for the discretion to be exercised in such circumstances.
- Paragraph 12 of the Schedule to the Determination states that the discretion applies "*at any time prior to the calculation or any recalculation of the levy in*

respect of a scheme.” Paragraph 12 does apply in this case, since the PPF had a discretion to obtain further information prior to and for the purpose of “recalculation”.

- Whilst it is accepted that the PPF is under no obligation to obtain further information prior to and for the purpose of recalculating the levy, since such an obligation would necessarily remove any discretion, it is nevertheless under an obligation in this particular case to consider whether or not to exercise the discretion. By proceeding on the basis that Paragraph 12 of the Schedule simply did not apply in this case, the PPF has failed to consider whether or not to exercise the discretion. It is submitted that the case ought to be referred back to the PPF to give proper consideration to the exercise of the discretion.
- There are a number of cases where, before the 29 March 2007 deadline, employers had successfully appealed their Dun & Bradstreet failure scores on the ground that the pension deficit on their balance sheets had adversely affected their insolvency risks. Levy invoices reflecting the improved failure scores were subsequently issued. In 2008, however, the Board directed Dun & Bradstreet to reverse its decision on the appeals so that the schemes could be re-invoiced on the basis of their lower failure scores. Therefore, the Board has sought to increase a scheme’s levy where the scheme employer’s insolvency risk could be shown to have increased on the basis of information obtained by Dun & Bradstreet after the date specified in the Determination, and the converse must therefore also hold good.
- Even if the Committee was right that it had no express power/discretion under the Schedule to the Determination to review the amount of the levy, this would not, and should not, have prevented the Committee from considering whether or not to review the amount of the levy.
- The overriding objective of the determination is to pitch the risk based levy at a level which reflects the true risk of a scheme being taken on by the PPF. That objective has clearly not been met in this case, and so the Committee ought to have considered whether or not to review the amount of the levy even in the absence of an express power to do so. Such an approach would have been entirely consistent with the view of the Deputy Pension Protection Fund

Ombudsman in case S00007 in which he took the view that although the information upon which the levy had been calculated was not ‘incorrect’ and was sufficient for them to calculate the levy, this did not prevent the Board from considering whether to review the levy upon receipt of further information.

13. The PPF

- The Pensions Act 2004 requires levies to be calculated in accordance with the Determination. Neither the Board in calculating the levy, nor the Board by way of review, or reconsideration, nor the Ombudsman on a referral, is entitled to depart from the Determination. Nor is the Determination, itself, subject to the review process.
- The Ombudsman may only interfere with the decision of the Reconsideration Committee, if it has been "reached incorrectly", which in the context of the exercise of a discretion, means that the Reconsideration Committee has misdirected itself, or reached a conclusion not open to a reasonable decision maker. It is the Board's position that questions as to fairness of the application of the rules set out in the levy Determination for each year are outside the scope of the referral and reconsideration processes. If a scheme's levy has been correctly calculated, in the manner called for by the Determination, then there is no proper basis for changing the amount of the levy on review.
- The Determination for 2007/08, required the calculation of the levy to be based on, amongst other matters, the failure score provided to the Board by Dun & Bradstreet; that "which...would have been applied to that employer in the ordinary course of its business on and as at 30 March 2007, based on data provided to them on or before 29 March 2007". The score so provided by them was used in the calculation of the levies for the Scheme.
- In the circumstances of this case, the Determination was applied to the calculation of the Scheme's levy in exactly the manner required by its terms and none of the information used was "incorrect".
- No discretion to review the Scheme's levy arose here. However, if the Board had had discretion to do so, this would not have been an appropriate case for

the favourable exercise of its discretion. Further, the points raised are points which, if applied generally across the Board of the PPF's universe of schemes, would require a subjective assessment of the levies to be made for each scheme, which could show that a lower levy invoice could be achieved by use of information which became available after the 30 March 2007 cut off point. Clearly such an approach would not be practical, and it would be unfair to the potentially significant number of schemes, which might have been able to make savings in this way, to make an exception in the case of the Scheme.

- The Committee concluded that paragraph 6 was not relevant because the Dun & Bradstreet failure score as applied to the relevant company in the ordinary course of its business as at 30 March 2007, was based on the information available to Dun & Bradstreet. The fact that a better failure score might have been achieved, had the information contained in the employer's audited accounts as at 31 December 2006 been available, and provided prior to the deadline, is not relevant for these purposes.
- The Trustees' argument is that the Dun & Bradstreet score, used by the PPF, does not accurately reflect the actual likelihood of an insolvency event. This is an untenable approach which the Ombudsman has rejected on previous occasions.
- Paragraph 32 of the Determination, does not call for the levy to be calculated by reference to the "actual likelihood of an insolvency event". It calls for the calculation to be based upon the Dun & Bradstreet score at a particular date, based on particular information. The Board, in complying with its obligations under the legislation, had to devise a system which could be applied fairly and consistently between schemes. For schemes to be able to request a review, in any case in which information later became available which might enable them to achieve a lower levy exposure, would create uncertainty and would also be unfair to those schemes which did not seek to have their levies reduced in such a way.
- There appears to be no suggestion that the failure score of 80 was not in fact the failure score which was or would have been assigned as at 30 March 2007, in the ordinary course of Dun & Bradstreet's business based on data provided to it on or before 29 March 2007. Since it was precisely what the

Determination required, it cannot have amounted to “incorrect” information for the purposes of paragraph 6 of the Schedule to the Determination.

- Paragraph 12 of the Schedule to the Determination, allows the Board to obtain further information needed for the purposes of the levies calculation "at any time prior to the calculation or any recalculation of the levies in respect of a scheme". Paragraph 12 goes on to provide: "But the Board is under no obligation to take any such steps where information has not been provided to the Board, on or before any applicable deadline". The referral suggests that the Committee found that paragraph 12 was "not relevant" but gave no reasons for that decision. The Committee's decision notice refers, at paragraph 28, to the discretion set out in paragraph 12 and states: "The Committee concluded that paragraph 12 was not relevant". It would seem clear that the paragraph 12 discretion did not arise since the levies for the Scheme had already been calculated, as evidenced by the invoice which is the subject of the review and reconsideration request and that, in any event, the Board would not be under any obligation to take such steps in relation to information not provided within the relevant deadlines. The Board went to considerable lengths to ensure that levy payers were made aware both of the structure of the levy calculation and the steps which might be taken to decrease a scheme's levy exposure, together with the applicable deadlines.
- The Board does not believe that the paragraph 12 discretion confers a free-standing right, which would 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.
- For paragraph 12 to be applicable in a case where the invoice has already been issued, there would need to be a circumstance that required the recalculation to take place i.e. for example an exercise of the Board's discretion under paragraph 6. Moreover, the discretion is for the Board to take steps to obtain information; it does not require the Board to accept information provided by a scheme without a request being made. The Board's approach aims to ensure fair and consistent treatment as between schemes. Where schemes had made no attempt to submit a voluntary form by the applicable deadline, and the Board had sufficient information to calculate the scheme's levies, it would be

unfair to seek further information from that scheme without seeking that information from all schemes that had similarly not submitted voluntary information prior to the deadline. Further, those schemes that had made the effort to submit on time would feel justifiably aggrieved that they obtained no benefit from submitting voluntary forms in a timely manner, and consequently the incentives for schemes to comply with the Board's deadlines would be lost. This would have a negative impact on the Board's subsequent attempts to collect data. Only where data was supplied before the relevant deadline that was unclear, or contained an error, have efforts been made to seek clarification of that data.

- Paragraph 12 allows the Board to obtain additional information, before calculating or recalculating the levy, but expressly stipulates that there is no obligation to do so, where such information has not been provided before an applicable deadline. 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 Dun & Bradstreet, not for the Board, and therefore it was not for the Board to seek further information about the state of the employer's accounts. Secondly, 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 obviously does not mandate a recalculation). Thirdly, there is not the slightest reason why the Board should have sought more up to date accounts in this case. The terms of the Determination were well publicised in advance (and so far as is material to this case, were unchanged from the previous year). If the Trustees or the employer wanted the failure score to be based on its accounts for the year ending 31 December 2006, it was up to them to ensure that the accounts were drawn up and supplied to Dun & Bradstreet by the deadline of 29 March 2007.
- The Board's approach to paragraph 12 has been applied consistently; its purpose is not to allow a scheme to circumvent the data deadlines, correcting information that was not in fact incorrect. The Committee, therefore, concluded properly in the view of the Board, that the discretion under paragraph 12 should not be exercised in this instance.

- The applicant takes issue with the Board's concern for consistent application of deadlines, in the interests of fairness to all schemes. It must be the case that fairness, consistency and administrative efficiency demand consistent cut-off dates for the provision of the information on which the assignment of a failure score is based. There was an opportunity for more up to date accounts to be filed and, as they were not, there is no reason why any discretion should now be exercised in the Scheme's favour, so leading to it being treated differently from other schemes. It would not be right for the Board to increase a scheme's levy, merely because the scheme employer's insolvency risk could be shown to have increased on the basis of information obtained by Dun & Bradstreet after the date specified in the Determination, and the converse must also hold good.
- Errors made in the Dun & Bradstreet score included in other schemes' invoices are not a relevant consideration on the review of the 2007/2008 levy calculation for the Scheme. The reversed Dun & Bradstreet appeals referred to, however, were not reversed with the benefit of information acquired by Dun & Bradstreet after the relevant deadline, but rather reflected the correct application of the terms of the Determination to the information held by Dun & Bradstreet prior to the deadline. The point in those cases was that for Dun & Bradstreet to allow those appeals in the first place was contrary to the terms of the Determination.

CONCLUSIONS

14. This is a reviewable matter, by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004. The reviewable matter in question, is the calculation of the risk-based levy required of the Scheme for the financial year 2007/2008.
15. 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 Board's 2007 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.
16. What the Trustees are seeking to argue, is that the Board has discretion, where the information they have used is subsequently revealed to be deficient, to recalculate the

levy based on the revised information. They say that the failure score assigned by Dun & Bradstreet and used by the PPF did not accurately reflect the employer's position as at 30 March 2007. They argue that, once the employer's accounts to 31 December 2006 became available, the PPF could have exercised its discretion under Paragraphs 6 and 12, and requested a revised failure score from Dun & Bradstreet. By proceeding on the basis that Schedule 12 did not apply, the PPF has failed to consider whether or not to exercise the discretion. Further, the failure of the Committee to provide no reasons for its decision that Paragraph 12 was 'not relevant' amounts to maladministration.

17. Paragraph 6 applies only where it subsequently appears to the Board that the information, upon which the calculation was based, was "incorrect" in a material respect. The Applicant favours an interpretation to include information which is, of itself, correct, but which does not accurately reflect the factual situation at the required date.
18. I find that the interpretation suggested by the Applicant strains the language of the paragraph too far. Information does not become "incorrect" simply because there is other more up-to-date information which might supplant it.
19. The fact is that the employer's accounts to 31 December 2006 were not submitted by the due date and the information held by Dun & Bradstreet at the deadline cannot be considered to be "incorrect". There is no dispute that Dun & Bradstreet correctly used information extracted from the set of accounts that had been made available by the due date, and the information the Board had to hand, therefore, was sufficient for them to calculate the levy payable in this case. Paragraph 6 only enables the Board to review a levy calculation where it appears that the information upon which the calculation was based, was "incorrect" in a material respect. As I accept the Board's argument that the information used was not "incorrect", it follows that I accept that a review under Paragraph 6 is inappropriate.
20. Paragraph 12 applies only where the Board has requested additional information in order to calculate the levy. Self evidently, the levy had already been calculated in this case and no recalculation was required. Paragraph 12 is, therefore, of no assistance to the Scheme. In any event, it specifically provided that there should be no obligation on the Board to seek further information, simply because certain information had not

been supplied by a deadline. Paragraph 12 simply did not apply in this case and there would have been no need for the Committee to have gone further than it did in reaching its decision.

21. It is also submitted that the Reconsideration Committee, itself, should have considered whether or not to review the amount of the levy, even in the absence of an express power to do so. Although the Committee had no express power to do so anyway, I cannot identify that there were any grounds that suggested it had reason to consider such an action.
22. Mr Baker's submissions also contain references to the PPF's treatment of other schemes. I cannot see that they have any bearing on the matters before me in relation to the Scheme. In so far as the question of the intention underlying the legislation has been raised, as I have observed in previous Determinations, it is indeed the case that the levy may well not actually reflect the true risk of a scheme being taken on by the PPF. However, if the aim of the legislation is indeed to ensure, so far as possible and practicable, that the levy does reflect the likelihood of a scheme being taken on by the Board, the question of the extent to which that aim is or is not achieved is a matter for the legislature.
23. I am unable to reach a conclusion that the Committee reached its decision incorrectly.
24. The complaint is not upheld.

CHARLIE GORDON

Deputy Pension Protection Fund Ombudsman

16 February 2009

APPENDIX**RELEVANT LEGISLATION****Pensions Act 2004**

The 2004 Act provides, so far as relevant to the reference to me:

“175 Pension protection levies

(1) For each financial year falling after the initial period, the Board must impose both of the following-

- (a) a risk-based pension protection levy in respect of all eligible schemes;
- (b) a scheme-based pension protection levy in respect of eligible schemes.

In this Chapter "pension protection levy" means a levy imposed in accordance with this section.

(2) For the purposes of this section-

(a) a risk-based pension protection levy is a levy assessed by reference to-

(i) the difference between the value of a scheme's assets (disregarding any assets representing the value of any rights in respect of money purchase benefits under the scheme rules) and the amount of its protected liabilities,

(ii) except in relation to any prescribed scheme or scheme of a prescribed description, the likelihood of an insolvency event occurring in relation to the employer in relation to a scheme, and

(iii) if the Board considers it appropriate, one or more other risk factors mentioned in subsection (3), and

(b) a scheme-based pension protection levy is a levy assessed by reference to-

(i) The amount of a scheme's liabilities to or in respect of members (other than liabilities in respect of money purchase benefits), and

(ii) if the Board considers it appropriate, one or more other scheme factors mentioned in subsection (4).

(3) The other risk factors referred to in subsection (2) (a) (iii) are factors which the Board considers indicate one or more of the following-

(a) the risks associated with the nature of a scheme's investments when compared with the nature of its liabilities;

(b) such other matters as may be prescribed.

(4) The other scheme factors referred to in subsection (2) (b) (ii) are-

description of member, of a scheme;

(b) The total annual amount of pensionable earnings of active members of a scheme;

(5) The Board must, before the beginning of each financial year, determine in respect of that year-

- (a) The factors by reference to which the pension protection levies are to be assessed,
- (b) The time or times by reference to which those factors are to be assessed,
- (c) The rate of the levies, and
- (d) The time or times during the year when the levies, or any instalment of levy, becomes payable.

(6) Different risk factors, scheme factors or rates may be determined in respect of different descriptions of scheme.

176 Supplementary provisions about pension protection levies

(1) The Board must consult such persons as it considers appropriate in the prescribed manner before making a determination under section 175(5) in respect of a financial year if—

- (a) That year is the first financial year for which the Board is required to impose levies under section 175,
- (b) any of the proposed levy factors or levy rates is different, or applies to a different description of scheme, from the levy factors and levy rates in respect of the pension protection levies imposed in the previous financial year, or
- (c) No consultation has been required under this subsection in relation to the pension protection levies imposed for either of the previous two financial years.

(2) The Board must publish details of any determination under section 175(5) in the prescribed manner.

181 Calculation, collection and recovery of levies

(1) This section applies in relation to-

- (a) The initial levy imposed under section 174 in respect of a scheme, and
- (b) Any pension protection levy imposed under section 175 in respect of a scheme.

(2) The levy is payable to the Board by or on behalf of-

- (a) The trustees or managers of the scheme, or
- (b) Any other prescribed person.

(3) The Board must in respect of the levy-

- (a) Determine the schemes, in respect of which it is imposed,
- (b) Calculate the amount of the levy in respect of each of those schemes, and
- (c) Notify any person liable to pay the levy in respect of the scheme of the amount of the levy in respect of the scheme and the date or dates on which it becomes payable.”

Reviewable matters are listed in Schedule 9 to the 2004 Act. From Schedule 9:

19 The amount of the initial levy or any pension protection levy payable in respect of an eligible scheme determined by the Board under section 181(3)(b).”

Relevant extracts from the Schedule to the Determination dated 1 March 2007

“4. 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 offices (or, as the case may be, the offices of the Pensions Regulator) on or before the date in question. For these purposes the only permissible means of delivery of information to the Board’s offices are:

(a) by email to the email address for the delivery of the relevant information as specified on the Board’s website at the following page:

http://www.pensionprotectionfund.org.uk/index/pension_protection_levy-2/levy_contacts.htm; or

(b) by post or hand delivery to: The Board of the Pension Protection Fund, Knollys House, 17 Addiscombe Road, Croydon, Surrey, CR0 6SR, marked for the attention of:

(i) “Director of Legal Re: Contingent Assets”, in the case of certificates or other documentation relating to contingent assets; or

(ii) “Director of Levy and Policy Re: 2007/08 Pension Protection Levies” in relation to all other documents. For the avoidance of doubt, delivery by fax is not permissible. Save where this Schedule specifically provides otherwise, the deadline for any information provided to the Board otherwise than pursuant to a specific request or requirement is 5.00 pm on 30 March 2007. Without prejudice to paragraph 6 and paragraph 12 below, the Board may at its discretion take account of information provided after any applicable deadline, but before the issue of notification of the amount of the levies in respect of the scheme concerned, in circumstances where it appears to the Board that:

(a) The information was despatched at an appropriate 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, or the interruption of electronic communications, or other like cause, and the information was provided as soon as reasonably practicable thereafter; or

(c) The information in question serves to correct a statement previously made to the Board (or to the Pensions Regulator) in the belief that it was correct, but which was in fact incorrect at the time when it was made.

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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, or that a notification required by or under a certificate in relation to contingent assets has not been duly given, or that a certificate or declaration given for the purposes of this Schedule was improperly given or contained information which was incorrect in a material respect. Further, in calculating the levies in respect of a scheme the Board may disregard any such certificate or declaration if the Board believes that it has been improperly given, and may similarly disregard any information in the certificate or declaration, or in any notification or return, which is believed to be correct.

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12. The Board may, at any time prior to the calculation or any recalculation of the levy in respect of a scheme, take such steps as it thinks fit to obtain further or amended information for the purposes of that calculation or recalculation. But the Board is under no obligation to take such steps where information has not been provided to the Board on or before any applicable deadline prescribed in this Determination.
13. If, at the time of calculation or any recalculation of the levy in respect of a scheme, any information necessary for such calculation has not been provided in the manner or format or at the time anticipated by this Determination, then the Board may instead use equivalent information provided in a different manner or format or at a different time. But the Board is under no obligation to use such equivalent information.

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32. The Failure Score which applies to an employer shall be the failure score which Dun & Bradstreet UK Ltd ("DBUK") informs the Board that it has assigned to that employer, after taking such steps to identify or obtain data relating to that employer as the Board has required. For the avoidance of doubt, the failure scores to be provided to the Board are to be the normal failure scores which were or would have been assigned to that employer by DBUK in the ordinary course of its business on and as at 30 March 2007, based on data provided to D&B on or before 29 March 2007, save only that –

- (a) The Board has instructed DBUK that the failure scores provided to the Board should be those which would be assigned to the employer if there were to be disregarded any rule or practice whereby DBUK normally limits the maximum failure score obtainable by any company which has a negative tangible net worth;
- (b) The Board has further instructed DBUK that the failure scores provided to the Board should be those which would be assigned to the employer if there were to be disregarded any rule or practice whereby DBUK normally limits the maximum failure score obtainable by a company where it is a subsidiary of another company and that parent company is regarded as being at severe risk of insolvency;
- (c) The Board has further instructed DBUK that the failure scores provided to the Board should be those which would be assigned to the employer if there were to be disregarded any rule or practice whereby DBUK normally limits the maximum failure score obtainable by any company which files its accounts in a currency other than sterling;

(d) The Board has further instructed DBUK that, in the case of an employer satisfying one or more of the conditions set out below, the failure score provided to the Board should be that which would be assigned to the employer if any effect on the failure score caused by the existence of county court judgments (“CCJs”) against the employer were to be reversed. The conditions, which shall be tested against the information held by DBUK at the time the failure score is determined, are:

- (i) The number of employees of the employer exceeds 500;
- (ii) The total sales of the employer exceeds £50 million;
- (iii) The total assets of the employer exceed £50 million;
- (iv) The number of employees of the employer is not less than 10 and the aggregate value of CCJs in the five years preceding the date on which the failure score is given is less than £750;
- or (v) The number of employees of the employer is less than 10 and the aggregate value of CCJs in the five years preceding the date on which the failure score is given is less than £100.

(e) This sub-paragraph applies in any case where DBUK informs the Board that it has decided, following representations made to it by or on behalf of the relevant trustees or managers or employer, that the failure score assigned to an employer on and as at 30 March 2007 was either too high or too low because it was based upon information which, on and as at 30 March 2007, was incorrect or incomplete by comparison with the information which should normally have been taken into account by DBUK in assigning a failure score at that date (whether because information which should normally have been available to DBUK at that date was not available to DBUK, or because such information was available to DBUK but was nonetheless not taken into account in assigning the failure score). In a case to which this sub-paragraph applies, the Failure Score shall be the higher or lower failure score which DBUK informs the Board ought to have been assigned to the employer on and as at 30 March 2007. For these purposes, the Board shall only be obliged to take into account a change to a failure score if it results from representations made to DBUK not later than 28 days after the date shown on the original notification. In a case to which this sub-paragraph applies the Board will where necessary issue a revised notification of the amount of the levies in respect of the scheme;

(f) In the case of employers which are not registered in the United Kingdom, the Board has, subject to sub-paragraph (g) below, instructed DBUK to provide it with the failure score or local equivalent (if any) assigned to such employers by DBUK’s relevant associated undertaking, or in the absence of such a failure score or equivalent, with the risk indicator assigned to the employer in question. In such cases the assumed probability of insolvency associated with that failure score or risk indicator will be such as the Board has been advised is appropriate for the purposes of achieving equivalence with Appendix 3 to this Schedule. Sub-paragraph (e) shall apply to such assumed probabilities of insolvency, for which purposes the Board shall only be obliged to take into account a change to an assumed probability of insolvency if it results from representations made to DBUK not later than 28 days after the date shown on the original notification.

(g) This sub-paragraph applies in the case of any employer for which DBUK or its relevant associated undertaking does not ordinarily provide a failure score or its equivalent or a risk indicator, because the employer is already the subject of an insolvency procedure, including without limitation administration or winding up in the United Kingdom or proceedings under Chapter 7 or 11 of the United States

Bankruptcy Code. In a case to which this sub-paragraph applies, the Board will use such insolvency probability as the Board has been advised would be appropriate for an undertaking with a failure score of 1 in the employer's jurisdiction of incorporation. If such a failure score is not available in that jurisdiction, the Board shall use

the insolvency probability set out in Appendix 3 to this schedule for a UK employer with a failure score of 1."