

**PENSIONS ACT 2004, PART 2 CHAPTER 6  
APPEAL TO PENSION PROTECTION FUND OMBUDSMAN**

**DETERMINATION BY THE PENSION PROTECTION FUND OMBUDSMAN**

**Applicant** : The Trustees  
**Scheme** : The People's Dispensary for Sick Animals Retirement Benefits Plan

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 1 October 2009. The referral concerns the Scheme's risk-based levies for the year 2008/09, which is a reviewable matter under paragraph 19 of Schedule 9 to the Pensions Act 2004.

In the following determination, "**Act**" refers to the Pensions Act 2004, "**Board**" refers to the Board of the PPF and "**PPF Determination**" refers to the determination published by the Board on 19 February 2008 in respect of the levy year 2008/09.

**Background**

- I. For the years 2006/07 and 2007/08, the failure score assigned to the People's Dispensary for Sick Animals (**PDSA**) by Dun & Bradstreet (**D&B**) was 100. For 2008/09, the failure score changed to 87. The PDSA appealed the failure score via D&B's five stage appeal process on the grounds that:
  - the failure score did not take into account the PDSA's most recently filed accounts, which were filed with the Charity Commission and available to the public;
  - D&B is not obliged to limit the number of sources from which it collects data;
  - paragraph 32(b) of the PPF Determination provides for D&B to alter the failure score and inform the PPF of the revised score for the purposes of calculating the levy;

2. D&B collected data from Companies House, but did not, at that time, collect data from the Charity Commission. It was, however, possible for charities to send their accounts to D&B for inclusion. The latest audited accounts D&B had for the PDSA were for the year ended 31 December 2004, which had been provided in February 2006. This information, together with information about the organisation's structure, had been provided with the aim of securing a recalculation of the failure score.
3. In March 2006, the PDSA informed D&B that an outstanding County Court Judgment had been set aside.
4. After three years D&B consider information to be obsolete and this can affect the failure score. The PDSA submitted its 2007 accounts to D&B and D&B adjusted the failure score from 87 (as at 31 March 2008) to 100. However, D&B informed the PDSA that, because the 2007 accounts had been submitted after the 31 March 2008 deadline, it would not be possible to use the new failure score for the 2008/09 levy calculation. The lower failure score resulted in a levy of approximately £174,000 compared to £9,000 previously.
5. D&B has provided the following clarification of its procedures:
  - if an entity is required to file accounts but fails to do so, it will use the data available in its standard sources (Companies House and the Stock Exchange for plc), but the failure to file will trigger a penalty in its scoring model;
  - for entities not required to file (such as charities) it would use only such information as has been provided directly to it;
  - if specifically asked by a client, it might do more investigation, but would only obtain accounts from the Charity Commission if specifically asked to do so;
  - specific investigations represent approximately 2-3% of its client transactions by volume;
  - the change in practice from the levy year 2001/12 onwards has been requested by the PPF; although the resulting information will be available across its product range.

6. The PDSA said that it had been monitoring the failure score. D&B said that the failure score had dropped on 17 January 2008 and that this had left plenty of time for the PDSA to submit up-to-date accounts. D&B also said that both it and the PPF had encouraged all organisations to check their failure scores and the data held by D&B in advance of the March 2008 deadline. PDSA say they believed that the failure score had dropped as a result of a county court judgment, which was cancelled on 20 March 2008. They say that they thought the failure score would then return to 100 and they were not aware that the failure score has dropped because D&B did not have their up to date accounts.
7. The PDSA asked for the levy to be reviewed by the PPF. At both review and reconsideration stages the levy has been upheld.

### **Reconsideration Decision**

8. The Reconsideration Committee decided:
  - under section 175(5) of the Act, the Board is required to determine the factors by reference to which the levies are to be assessed, the time(s) by reference to which the factors are to be assessed, the rate of the levies and the time at which the levies become payable;
  - the Board published its final determination of these matters for the year 2008/09 on 19 February 2008;
  - reconsideration of the amount of the levies is a reconsideration of the amount of the levies in a particular case and not a reconsideration of the PPF Determination under section 175(5);
  - the scope of the reconsideration is whether the levy calculation has been carried out in accordance with the PPF Determination;
  - neither the Board nor the Reconsideration Committee has any discretion to depart from the PPF Determination;
  - in calculating the amount of the levies in respect of a particular scheme under section 181(3)(b) of the Act, the Board must apply the published PPF Determination to the relevant facts relating to that scheme;

- it is the calculation of the levy under section 181(3)(b) in accordance with the terms of the PPF Determination which is a reviewable matter;
- under paragraph 32 of the Schedule to the PPF Determination, the failure scores to be provided to the Board by D&B are the normal failure scores which were or would have been assigned to the relevant employer in the ordinary course of D&B's business as at 31 March 2008;
- in order to ensure fairness and consistency, neither D&B nor the Board is entitled to depart from the approach prescribed in paragraph 32;
- the only circumstance in which the PPF Determination permits a departure from the normal failure score methodology is in relation to the particular matters set out in paragraph 32 and in the setting of a crystallisation date for the failure score;
- the Board has provided a route for schemes to appeal to D&B and for D&B to notify the Board that a failure score assigned to an employer as at 31 March 2008 is too high or too low;
- no such notification was received;
- the PPF website provides guidance for those organisations which do not file accounts at Companies House;
- there are certain powers and discretions within the Schedule to the PPF Determination:
  - paragraph 5 applies where the Schedule to the Determination has failed to make the provision required for the calculation to be performed, which is not relevant in this case;
  - paragraph 6 states that nothing in the PPF Determination shall prevent the Board from reviewing the amount of the levy where, amongst other things, it appears to the Board that the information upon which the calculation was based is incorrect in a material respect. The failure score assigned to the PDSA as at 31 March 2008

was correct taking into account the data which was available to D&B in accordance with its standard procedures on 30 March 2008. The discretion under paragraph 6 does not, therefore, arise;

- paragraph 12 allows the Board to take such steps as it thinks fit, prior to the calculation of the levy, to obtain further or amended data, but it is under no obligation to do so;
- paragraph 13 allows the Board to use equivalent data where any information necessary for the calculation has not been provided in the manner or format or at the time anticipated by the PPF Determination, but the Board is not obliged to use such information.

### **Reasons for referral**

9. The following reasons have been given for referring the reviewable matter:

- the failure score assigned to the PDSA for the levy year 2008/09 was arrived at following an unfair procedure;
- the Board is wrong to conclude that no discretion exists for it to review the levy in the circumstances;
- it is the only reasonable and rational course for the Board to take;
- the Board failed to consider the specific grounds for appeal raised by the PDSA and this is evidenced by its issuing of an identical and generic response on the day before the Reconsideration Committee issued its decision in response to the PDSA referral;
- the Board retains the discretion to review the levy where the amount had otherwise been calculated in accordance with the Determination under paragraph 6 of the Schedule to the Determination;
- as a public body, it would be ultra vires for the Board to have established a scheme for the calculation of the levy which fettered or removed its discretion to review the amount no matter how egregious the unfairness which might arise from the strict application of the terms of the scheme;

- any scheme must be construed in such a way as to render it lawful and, therefore, must be construed so as to include the discretion to prevent conspicuous unfairness;
- the PDSA does not contend that the PPF Determination is unlawful, rather it contends that the Determination confirms and/or preserves the Board's discretion to correct conspicuous unfairness;
- the Board's discretion is not restricted to its calculation of the levy, but extends to the use of the failure score assigned by D&B;
- the Board required D&B to calculate its normal failure scores, "after taking such steps to identify or obtain data relating to that employer as the Board has required" and subject to certain "overrides" (paragraph 32 of the Schedule);
- if the Board has required D&B to assign failure scores in such a way as to create unfairness, it would be responsible for that unfairness;
- if D&B's process for assigning a failure score is unfair in the particular circumstances of an individual case, it is the Board's responsibility to review the levy in order to ensure that the application of the scheme is fair;
- otherwise, the Board would be able to avoid responsibility for the fairness of its procedures by delegating any or all parts of it to non-public bodies;
- the Board has directed itself that it is under no obligation to review a levy simply because a scheme has been disadvantaged by a failure on the part of those acting for it to supply the correct information at the proper time (paragraph 6 of the Schedule), but it retains a "residual discretion" to do so;
- the Board must act reasonably in determining when and how to exercise this discretion and it would not be reasonable to decline to exercise this discretion where the process for calculating the levy has resulted in an unfair outcome on the individual facts of a particular case;

- the Board has applied too narrow a construction to the phrase “incorrect in a material respect”;
- something is “incorrect in a material respect” if it is not in accordance with fact, is erroneous or inaccurate (Oxford English Dictionary);
- the failure score assigned to the PDSA was incorrect in that it did not accurately reflect the actual risk of the Scheme’s failure;
- the Board’s approach would mean that paragraph 6 would only apply where the failure score contained a mathematical error and it is submitted that this cannot have been the intention;
- paragraph 6 should be construed in such a way as to reflect the wider discretion the Board must retain in order for the Determination to be lawful;
- even if paragraph 6 cannot be so construed, there remains a discretion for the Board to review the levy in respect of a scheme where the amount had been reached following an unfair procedure;
- even if the information upon which the calculation was based was not strictly incorrect in a material respect, the Board has the wider discretion to correct unfairness;
- if paragraph 6 had been intended to create a new discretion, it would have opened with the words “The Board may review the amount of the levies ...”, rather it confirms that nothing in the PPF Determination shall “prevent” the Board from exercising its discretion to review;
- the Reconsideration Committee did not address this issue, but confined its consideration of discretions to those expressly set out in the PPF Determination.

10. It is argued that the Board should have exercised its discretion in the PDSA’s favour because:

- the PDSA is under no obligation to file accounts at Companies House, but instead files accounts with the Charity Commission;

- it did not file its 2004 accounts at Companies House, so D&B either obtained the accounts from some other source or did not have a copy of the accounts, but nevertheless assigned a failure score of 100 to the PDSA\*;
- it forwarded a copy of the 2007 accounts to D&B, which resulted in an updated failure score (of 100), but D&B refused to backdate this score to March 2008 on the grounds that it had no obligation or discretion to do so because the Charity Commission was not a data source it used in the ordinary course of its business;
- the PPF Determination failed to adopt a consistent and objective approach between different categories of employer in that D&B takes steps to obtain relevant data from a third party for one set of employers, but not for another;
- D&B does not say what information it normally takes into account nor that it does not take into account audited accounts filed at Companies House more than three years previously;
- on the basis of the information available on D&B's website, the PDSA had no reason to believe that it was necessary for it to supply its most recent accounts; particularly since D&B had assigned a failure score of 100 for 2006/07 and 2007/08 when it had not filed previous accounts at Companies House;
- it had no reason to believe that the position would be any different in 2008/09;
- accordingly, the process by which the failure score for 2008/09 was reached was "conspicuously unfair" and the only reasonable and rational course would have been for the Board to review it so as to correct the failure score to 100;



- the information on the PPF website was insufficient to alert the PDSA to the fact that it ought to provide D&B directly with the accounts and provided no guidance as to the period of time for which accounts were considered by D&B to be relevant
- the PPF website merely says that D&B is “happy to receive” audited accounts, which “may or may not affect the D&B Failure Score”; this is insufficient to have put the PDSA on notice as to the potential importance of this information.

\*The Applicant now accepts that D&B was sent a copy of its 2004 accounts in February 2006.

11. On the matter of the Ombudsman’s jurisdiction, it is submitted that:

- the Ombudsman’s task is to adjudicate on the proper meaning of the scheme, following the proper approach to construing schemes which derive from statute;
- the PDSA is not inviting the Ombudsman to rule on the lawfulness of the scheme; rather, it is pointing out that, in interpreting the scheme, the Ombudsman must ensure that it is construed in such a way as to be lawful;
- under section 213(1)(b) of the Act and regulation 2 of the Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005, the Ombudsman’s powers are broad;
- the Ombudsman may direct the Board to backdate the 100 failure score.

### **Response by the PPF**

12. In addition to the points made by the Review and Reconsideration Committees, the PPF submits:

- the Ombudsman’s jurisdiction to consider the referral stems from section 213 of the Act;
- ‘reviewable matter’ is defined in section 206;

- the Board accepts that the Applicant is entitled to request a review by the Ombudsman;
- the Board's application of the PPF Determination is a reviewable matter, but the Determination itself is not;
- the levies were correctly calculated in accordance with the Determinations for the years in question and neither the Board nor the Ombudsman has the power to depart from the calculation on an application for review;
- this is the conclusion reached by the Ombudsman in previous referrals and it was supported by the Court of Session decision in *Lithgows* [2011] CISH 6 (in particular, see paragraph 19 of the judgment);
- the Ombudsman should not create uncertainty by departing from previous decisions unless there was some compelling reason to do so, for example, a subsequent judicial decision casting doubt on the approach previously taken;
- the only difference between this case and the *Lithgows* case lies in the subjective reasons why the employer or the scheme did not submit accounts to D&B, but this is immaterial to the Ombudsman's analysis;
- the Pensions Act 2004 is a statute which extends equally to Scotland as it does to England and Wales and its provisions apply in the same way in Scotland as in England and Wales; as does the Ombudsman's jurisdiction;
- it is to be expected that the same law will be applied in the same way regardless of which court is geographically relevant;
- the Board submits that the Ombudsman's powers are limited to remitting the matter back to the Reconsideration Committee to consider whether to exercise its discretions;

13. With regard to the exercise of discretion, the PPF submits:

- the conduct complained of relates to D&B's data gathering process rather than the calculation of the levy under the terms of the PPF Determination;

- the content of the scheme established by the Board for the calculation of levies is not a matter which can be addressed by a statutory review under section 207 of the Act;
- to the extent that the complaint relates to the fairness or otherwise of the PPF Determination itself, such submissions should have been raised at the consultation stage or via a judicial review;
- the Board takes the view that there is no “residual discretion” to which it can revert and the Reconsideration Committee was correct to confine itself to those discretions which were available to it;
- the existence of a residual discretion is inconsistent with the fact that the Determination contains express discretions limited to particular circumstances;
- save where the specific available discretions apply, the express language of the Determination is clear and mandatory and seeks to lay down a set of precise rules subject only to a number of limited express discretions whose intended scope is made clear;
- the power vested in the Board under Section 175(5) is an express duty to determine the factors, rates and times to be used in assessing the levy;
- once the Board has made the Determination, the Section 175(5) power is spent;
- the Board accepts that its function in making the Determination is subject the normal principles of public law and is subject to challenge by way of judicial review;
- any other approach would be a recipe for chaos because it would leave it open to any individual scheme to seek a review of its levy on the grounds that the system was unfair;
- there is a need for certainty about the amount of money the Board will collect and how much levy the schemes will have to pay;

- there is no fettering of discretion because the Board exercises the discretion once and for all in making the Determination;
- the Board's function under Section 181(3)(b) is limited to applying to individual schemes what it has determined under Section 175(5).

14. With regard to exercising discretion in this particular case, the PPF submits:

- D&B have confirmed that the 2004 accounts were supplied by the PDSA on 1 February 2006 and it had not taken any steps to obtain the accounts from another sources contrary to its usual practice;
- there is no suggestion that D&B failed to apply its own procedures properly;
- the available information should have been sufficient to alert the PDSA or its advisers to the desirability of checking its failure score with D&B and/or establishing how D&B would approach assigning a failure score to a charity;
- the FAQ on the PPF website should have been sufficient to indicate that accounts not filed at Companies House would not be taken into account unless provided directly to D&B;
- the Reconsideration Committee did consider whether any of the discretions available to it within the terms of the PPF Determination could apply and concluded that they could not;
- the Reconsideration Committee's decision was not merely generic but set out its analysis of the circumstances and how it applied to the facts of this case;
- the Board is not unsympathetic to the position of the Scheme, given the nature of the work carried out by the employer, but the Ombudsman may only interfere with the decision of the Reconsideration Committee if it has been reached incorrectly, which is not the case.

15. On the question of whether the approach taken was unfair to the Scheme, the PPF wishes to make the following observations:

- from the outset, it was necessary for the Board to have some means of assessing insolvency risk which was both consistent and economic;
- it was not practical for the Board to carry out its own in-house assessments;
- D&B was selected following a competitive procurement;
- the Board has always and necessarily used the failure scores produced by D&B in the ordinary course of its business (subject to a small number of specific modifications concerning the way data was analysed);
- the fact that D&B only automatically collected information from Companies House but would use information supplied to it on a voluntary basis was well publicised;
- this did mean that some employers had to take active steps to supply their accounts to D&B when others did not, but this was a function of D&B's normal commercial approach at the relevant time;
- sending a charity's accounts to D&B at the same time as they were submitted to the Charity Commission does not represent any undue burden;
- it is true that the Board could have required D&B to obtain more information than it would otherwise have done, but this would have had a cost and the Ombudsman has found that it is proper for the Board to be mindful of costs;
- the particular position of the not-for-profit/charity sector has been considered by the Board at various times and it has, hitherto, been satisfied that D&B's methodology was appropriate;
- following consultation, the Board has decided that, for the levy year 2011/12 onwards, it will require D&B to collect audited accounts from the Charity Commission;
- the Ombudsman has previously found that, merely because D&B's methodology evolves over time, does not mean it was previously unfair;

- in the 2009 consultation paper, it noted that 75% of charities had already provided accounts to D&B, which demonstrates that this was a straightforward and well-known precaution for charities;
- it is reasonable to assume that, by 2006/07, trustees and their advisors were acquainted with the system;
- there was no basis for the Scheme trustees and/or their advisors to assume that the failure score obtained in the past would continue into the future.

#### **Further submissions by the PDSA**

16. In addition to the reasons given for referring the reviewable matter, the following further submissions have been made:

- the Board's duty of fairness is absolute and non-delegable and precludes it from "hiding behind" D&B's ordinary course of business;
- the PDSA had no way of knowing that D&B 'secretly' operated a three year obsolescence practice in relation to accounts;
- the PDSA specifically asked D&B if they could collect future accounts from the Charity Commission or should they diarise to send the account to D&B at the same time as they were sent to the Charities Commission and did not receive an answer;
- D&B did not request the audited accounts for the year ending 31 December 2005;
- in the circumstances, it was reasonable to assume that D&B had done for charities what they did for companies, i.e. collected the publically available accounts;
- the PDSA's concern to address the issue of the CCJ in 2008 indicates that they were exercising vigilance in relation to the financial information they thought might adversely affect the failure score;
- the risk-based levy assessments for 2006/07 and 2007/08 are vitiated by illegality and wholly void;

- the Scheme is not obliged to pay the risk-based levies based on those assessments;
- on its true meaning, the PPF's Determination confers the discretion to treat the failure score as altered from 87 to 100;
- the Board is bound to exercise that discretion in order to address the unfairness in the procedure used to arrive at a score of 87;
- the Ombudsman has the power to direct the Board to treat the failure score as 100 and should do so;
- the argument that the Ombudsman may only remit the matter for the Board to exercise its discretion is not supported by the wording of the statutory provisions;
- insofar as previous determinations by the Ombudsman support the Board's stance, they are wrong and should not be followed;
- the proposition that, where express discretions in the PPF Determination do not apply, the calculation of the levy in accordance with the Determination must necessarily be upheld is unsound, wrong, contrary to principle and unjust;
- the decision by the Inner House of the Court of Session in *Lithgows* is distinguishable, not binding in England, not accepted as the law of England and wrong;
- the *Lithgows* decision was influenced by the absence of an obligation on the employer to file publicly available accounts and a lack of awareness on the part of the Court of Session that charities' accounts are publicly available;
- the unfairness lies in the reasonableness of assuming that D&B would look at publicly available accounts files with the Charity Commission as it does for those filed at Companies House;

- the Board has recognised this unfairness because, from the levy year 2011/12, it has asked D&B to collect accounts from the Charity Commission automatically;
- the combination of D&B's practice of not collecting accounts from the Charity Commission and treating them as obsolete after three years has resulted in an unnecessary and unmerited windfall for the PPF;
- the issue in the *Lithgows* case was whether there had been a breach of human rights legislation which does not apply here;
- the Inner House would not have made the statement to the effect that a challenge to the use of the normal failure score assigned to an employer is a challenge to an integral part of the PPF Determination had it been considering this case;
- it is open to the Ombudsman to refer the matter to the High Court under Section 215 of the Pensions Act 2004.

## Conclusions

17. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Act,
 

“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)”
18. Section 181(3)(b) of the Act is where the requirement for the Board to calculate the amount of the levy for each scheme is found. The Act is silent as to how the Board is to perform this calculation or how much discretion it has in doing so.
19. It is the Board's view that my role is confined determining whether the amount of the levy has been calculated in accordance with its determination for the year in question. It argues strongly that the terms of the determination itself are not a reviewable matter. I can understand why it argues thus, even though paragraph 19 itself is not quite so specific. Accepting for the moment that my role is simply to determine whether or not the levy has been calculated in accordance with the PPF Determination, I find that, in this case, it has been.



20. However, this case is really more about the procedure for calculating the levy. The PDSA argues that the procedure is unfair. I have to say that I find some of the arguments put forward on its behalf compelling. Indeed, despite the arguments put forward by the PPF (which are largely economic and/or administrative in nature), I can quite understand why it seems deeply unfair both that charities are in effect treated more harshly than Plcs and that they are penalised by what in reality is an incorrect scoring. However on balance, after very careful consideration I find the PDSA's case is largely undermined by two facts. Firstly, it has acknowledged over the course of this case that it did indeed initially provide accounts to D&B. Secondly, it claims to have been monitoring the failure score and should, therefore, have been aware of the drop (in January 2008) in plenty of time to take remedial action.
21. It is argued that it was reasonable to assume that D&B would do the same for charities as they did for companies and obtain up to date accounts (because they had not answered the PDSA's query about diarising to send them the accounts and had not requested the 2005 accounts). However, the fact that D&B did **not** obtain accounts from the Charity Commission had been widely publicised (and bemoaned by the charity sector). I cannot find that such an assumption was reasonable.
22. I am willing to accept that the PDSA may not have been aware that D&B would treat accounts as 'obsolete' after three years, but the evidence shows it knew that D&B needed accounts (having submitted them once) and knew that D&B did not have up to date accounts. It would not have been difficult to comprehend that the older information became, the less reliance D&B might place upon it and the greater the likelihood of an adverse failure score. The PDSA obviously recognised the importance of its failure score for it to have been monitoring it. I am surprised, therefore, that it took no steps to maintain it. They have explained that they thought that the failure score had dropped because of a county court judgment and that it would go back up when this was cleared. In view of the impact a drop in the failure score could have on the risk-based levy, it would have been an obvious step for the PDSA to check with D&B what the cause was rather than make their own assumptions. Thus the root of the problem and indeed unfairness is the PDSA's failure.

23. I mentioned that I found some of the arguments put forward on behalf of the PDSA compelling. I have in mind the arguments that D&B might have looked at the accounts publicly available as lodged with the Charity Commission. In addition the argument for there being more in the way of discretion for the Board to take action to review a levy than it appears to acknowledge currently.
24. D&B are clearly instructed by the PPF. It has been acknowledged during this case that if requested to do so they would obtain Charity Commission accounts. Therefore the question of what actions D&B took in this case are within my remit if controlled by the PPF. I have however concluded that the evidence shows D&B acted as they would in the normal course of their business, and not as instructed by the PPF.
25. As regards extent of discretion, the PPF publishes its determination for the year in question in order to comply with the requirements of section 175(5) of the Act. Section 175(5) requires the PPF to determine the factors by reference to which the pension protection levies are to be assessed, the time or times by reference to which those factors are to be assessed, the rate of the levies, and the time or times during the year when the levies, or any installment of levy, becomes payable. It gives no other guidance nor lays down any further requirements as to how the PPF will go about making this determination. The contents of the determination for the levy year in question are, therefore, a matter for the PPF to decide.
26. Section 175(5) (and indeed the rest of the Act) is silent as to the extent to which the PPF is then bound by its own determination. It is the PPF's view that Section 175(5) provides for it to exercise discretion once and once only when it decides the contents of its determination for the levy year in question. The wording of Section 175(5) is not as limiting as the PPF suggest since it does not prohibit the Board from including in its determination any level of discretion as to how the factors by which the levies are to be calculated are to be determined and/or applied. Otherwise there would not be scope for the Board to include the very specific discretions it allows the determination does contain.

27. Section 213 requires the regulations governing the Ombudsman to provide that (amongst other things) I should determine what (if any) is the appropriate action for the Board to take in relation to the reviewable matter and to remit it to the Board with directions to give effect to my determination. I see no conflict with section 213 if I were to determine that the PPF Determination on its own wording contained discretion for the Board to review a levy at a time subsequent to the exercise of its power under Section 175(5).
28. It is argued, on behalf of the PDSA, that there is an underlying or residual discretion within the terms of the PPF Determination arising out of the fact that the Board is a public body. I am sure that the Board would accept that it would not be a legitimate exercise of its powers to calculate a levy by unfair means (and that any interpretation of the Determination should be guided by this principle). There is a risk of this if the Board takes the view that it is, itself, strictly bound by the terms of the PPF Determination and to the information it receives from D&B. D&B is, after all, not a public body and is not responsible for any part of the levy calculation under the Act. Whilst D&B does offer an appeal process, the only independent appeal against a levy is to the Board and to the PPF Ombudsman. Any attempt to limit that appeal should be treated with caution. The PPF's argument for certainty is a fair one, but needs to be balanced against the need for fairness.
29. The PDSA argues that the Board failed to address the specific issues it raised. It points to the rather generic style of the responses it received from the Board. I disagree. The PDSA seeks to argue that the Board should set aside the failure score provided by D&B because:
- it was not obliged to provide up to date accounts; and
  - it was not aware of nor could it have been aware of the way in which D&B treated the data it did have.
30. I find that the Board considered both of these grounds for appeal; albeit whilst maintaining its rather narrow stance on the extent to which it has a discretion to review the levy. I do not find that this narrow view of its discretion, impeded the Board's review of the PDSA's appeal. Indeed it has the benefit of providing

consistency with earlier cases and I recognise the PPF'S arguments about the volume of its work.

31. In conclusion, whilst I find aspects of the way the PDSA has been treated uncomfortable, on balance I find that I cannot conclude there is a requirement for the Board to take any action.
32. I have been invited to consider if I will refer the case to the High Court under Section 215 of the Pensions Act 2004. I do not consider this aspect as I do not find that this is necessary since it has been possible for me to reach a determination on the facts of the case.

**JANE IRVINE**

Deputy Pension Protection Fund Ombudsman

13 December 2011