

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

Applicant : Southern Water Pension Trustees Limited (**the Trustee**)
Scheme : Southern Water Pension Scheme

In this determination, “Board” refers to the Board of the Pension Protection Fund (PPF) and “Act” refers to the Pensions Act 2004. The “PPF Determination” is the determination published by the PPF, under section 175(5) of the Act, for the 2009/10 levy year.

Background

1. The application concerns the use of data stored on the Pensions Regulator’s Exchange System to calculate the risk-based levy. The Exchange System was launched in December 2007 and allows pension scheme trustees and administrators to provide scheme return data online. The Exchange System was pre-populated with data taken from previous paper scheme returns and information provided by the PPF.
2. In particular, the case concerns the use of Company Registration Numbers (**CRN**) and Data Universal Numbering System (**DUNS**) numbers supplied by the PPF to Dun & Bradstreet (**D&B**). The DUNS number is allocated to companies by D&B for its own identification purposes.
3. The employer participating in the Scheme is Southern Water Services Limited. The CRN for Southern Water is 02366670 and its DUNS number is 236167748.
4. The risk-based levies for 2008/09 (though there is no referral to my office in relation to that year) and 2009/10 were calculated by reference to Southern Water Limited which has a CRN of 02366620 and a DUNS number of 237760350. Southern Water Limited is not a participating employer in the Scheme.

5. The Trustee states that the DUNS number for Southern Water Limited was not added to the Exchange System by the Scheme's administrators. It is the Trustee's understanding that the information was provided by D&B and used to populate the system. Prior to the introduction of the Exchange System by the PPF, the scheme return did not require the DUNS number.
6. D&B have confirmed that the correct employer's name was provided as at 28 February 2008.
7. In response to enquiries on behalf of the Scheme, D&B stated that the PPF had confirmed that a scheme return was submitted via the Pensions Return with the name Southern Water Services Limited, DUNS number 237760350 and CRN 02366620 for the 2008/09 and 2009/10 risk based levies. D&B said that, for the 2010/11 levy, the return was filled out in the name of Southern Water Services Limited, DUNS number 237760350 and CRN 02366670. D&B went on to say that, although the Scheme had filled in a change of CRN from one scheme return to the next, the incorrect company name and DUNS number had been filled in for the 2008/09 and 2009/10 risk-based levies.
8. D&B subsequently confirmed that, if the PPF do not provide a DUNS number, it matches by company name. It also confirmed that the data it held on its own system has always been correct and the issue has been with the DUNS number in the data supplied to it by the PPF.

The Statutory Basis of the levy

9. Section 175(1) of the Act provides that the Board must impose (under (a)) a risk based levy.
10. Section 175(2)(a)(ii) provides that one of the factors by reference to which the risk based levy is to be fixed is "...the likelihood of an insolvency event occurring in relation to the employer in relation to a scheme...".
11. Section 175(5) provides that the Board must make a determination for each year relating to the assessment, rate, timing and payment of the levies for that year.

The Board's Determination

12. As relevant, the Determination for the 2009/10 levy year says:

“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 ... 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, and the Board is in any case under no obligation to review the amount of the levies merely because a scheme has been disadvantaged by the failure of those acting on its behalf to supply correct information at the proper time¹.

¹ NOTE - This note is provided for information as to the manner in which the Board is likely to exercise the power described in paragraph 6. The note does not form part of the Determination, but has been approved by the Board when considering the Determination. The Board does not anticipate that this power of review will normally be exercised so as to correct validated data (as defined in paragraph 8(a) of the Schedule) held on the Scheme Maintenance system as at midnight on 31 March 2008. However, the Board may take such steps in appropriate cases, including (without limiting the exercise of the Board's discretion) any case in which a scheme would otherwise be advantaged by the submission of inaccurate information.”

“8 Where this Schedule indicates that the Board should use "relevant scheme return data", the Board will take account of the following information.

(a) Where the scheme concerned has either:

(i) no later than midnight on 31 March 2008, submitted a scheme return via the scheme maintenance system in accordance with sections 63-65 of the Act; ...

then the Board shall take into account the validated data held on the scheme maintenance system as at midnight on 31 March 2008. For these purposes validated data shall mean the data held on the system at the point of the most recent certification (whether by way of scheme return or scheme maintenance certification) through the system on behalf of the scheme or, where no such certification has ever been made on behalf of the scheme, the data with which the

system was pre-populated when it was first made available to the scheme.”

“11 For the purposes of this Schedule, the employer or employers in relation to a scheme shall be taken to be such undertaking or undertakings as have been notified as such in relevant scheme return data or pursuant to Section 191 of the Act.”

“31 The Pension Protection Fund assumed probability of insolvency for an employer shall be the assumed probability associated with the Failure Score which applies to that employer ...”

“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. 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 31 March 2008, based on data provided to DBUK on or before 30 March 2008 ...”

Review by the Board

13. Following receipt of the invoice for the 2008/09 levies, the Board was asked to review the risk-based levy on the grounds that it had been calculated by reference to Southern Water Limited. This review had not been concluded by the time the invoice for the 2009/10 levies was issued in November 2009. The risk-based levy amounted to £300,522. The Board was again asked to review the levy on the grounds that it had been calculated by reference to Southern Water Limited.
14. The Review Committee issued its decisions for both review requests on 8 February 2010. It stated that the scheme return submitted on 28 March 2008 named Southern Water Services Limited as the Scheme Employer. It also stated that the DUNS number and CRN were those for Southern Water Limited, a company unconnected with the Scheme, and that D&B calculated the failure score by reference to the DUNS number and CRN, i.e. for Southern Water Limited. The Review Committee stated that the Board had examined the scheme returns for 2007/08 and 2008/09 and both returns named Southern Water Services Limited as the employer, but contained the DUNS number 237760350 and CRN 02366620. The Review

Committee concluded that “it [was] clear that the inconsistency in the data originated from the Scheme’s data submissions”.

15. The Review Committee said it had asked D&B what approach it took where there was an inconsistency between the company name and the DUNS number and CRN. D&B said that, in such circumstances, it refers to the DUNS number.
16. The Review Committee found D&B had acted in the normal course of its business in referring to the DUNS number. The Committee noted that the PPF Determinations provided for the levy to be calculated by reference to the employer named on the Scheme Maintenance System as at midnight on 31 March 2008 and that the failure score would be that provided by D&B in the ordinary course of its business. The Review Committee concluded that the invoices had been calculated correctly.
17. The Review Committee then considered the various discretions contained within the PPF Determinations. In particular, it considered paragraph 6 of the Determinations, which provided for the Board to review a levy where it appeared to the Board that the information on which the invoice was based was “incorrect in a material respect”. A footnote to the PPF Determinations stated that the Board did not anticipate exercising its power of review so as to correct validated data held on the Scheme Maintenance System as at midnight on 31 March 2008. The Review Committee concluded that the information was not materially incorrect insofar as the levy had been calculated by reference to the Scheme’s employer information as set out in the Relevant Scheme Return.
18. The Committee went on to say that the reason the levy had been calculated by reference to Southern Water Limited was because the Scheme’s representatives had submitted a scheme return showing the DUNS number and CRN for that company. It also noted that the Scheme had not submitted any particular reasons as to how the error arose. The Committee concluded that the Scheme had not provided persuasive reasons for the Board to depart from the position set out in the PPF Determinations or the footnote to paragraph 6 because “there did not appear to be any external factors contributing to the information on the scheme return which indicated that it would be unfair to impose the levy on the Scheme”.

19. The Scheme asked for a reconsideration in respect of the 2009/10 risk-based levy. Copies of scheme return data entered on the Exchange System as at February 2009 and February 2010 were submitted with the reconsideration request to show that attempts to correct the DUNS number had been unsuccessful. The Scheme's submission stated that at no time had it submitted a return where only the DUNS had been incorrect and, therefore, the data held by D&B could not have originated from the Scheme. It argued that third party errors had affected the integrity of the Exchange System upon which the Board was relying. The Scheme also argued that D&B had been inconsistent in the information it had supplied about the approach it took in the ordinary course of its business.
20. The Reconsideration Committee issued a decision, on 12 July 2010, upholding the Review decision and the original calculation of the levy. The Reconsideration Committee said that the Scheme was seeking a review on the grounds that the information upon which the levy calculation was based was materially incorrect because:
- the Scheme had corrected the employer data on the Exchange System at the earliest opportunity, but the incorrect data had persisted for reasons that the Scheme cannot explain and which are outside its control;
 - the information provided by D&B as to how it matches employers is inconsistent and misleading; and
 - the Board had placed too much weight on the integrity of its own database.
21. The Committee referred to paragraph 11 of the PPF Determination, which provides that the employer in relation to a scheme shall be the undertaking notified as such in the "relevant scheme return data". It also referred to paragraph 8, which provides that the "relevant scheme return data" shall be the validated data held on the Scheme Maintenance System as at midnight on 31 March 2008. The Committee noted that the Scheme asserted that the data had been corrected for the 2008/09 scheme return, but the incorrect data had persisted. It noted, however, that the position as at 31 March 2009 could not be relevant for the calculation of the 2009/10 levy because the relevant scheme data was taken as at 31 March 2008. The

Committee referred to paragraph 32 and the requirement that the failure score be that which had been assigned to the employer by D&B in the ordinary course of its business. It noted that the levy had been calculated using the failure score provided by D&B. The Committee concluded that the use of data by D&B should not be the subject of a reconsideration application and should be presented to D&B as an appeal.

22. With regard to the various discretions within the PPF Determination, the Reconsideration Committee concluded that none applied. Paragraph 4 provides discretion for the Board to consider information which has been supplied late if there has been a problem with the post or access to the PPF website or the Scheme Maintenance System. The Committee concluded that this had not been the case here.
23. The Reconsideration Committee also considered paragraph 6 as the Review Committee had done. It noted that paragraph 6 stated,

“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.”
24. The Committee noted that the reconsideration application had not suggested any external factors which might have led to the information being incorrect as at 31 March 2008. It concluded that there did not appear to be any basis upon which it could find that third party errors had affected the Exchange database or that the relevant scheme return data had not been used. The Committee concluded that the information upon which the levy calculation had been based was not incorrect for the purposes of paragraph 6.
25. The Reconsideration Committee noted that paragraph 6 provided that the Board was under no obligation to review a levy simply because a scheme had been disadvantaged by the failure by those acting for it to supply the correct information at the proper time. It also noted that the Board had adopted a “no corrections policy” for the 2009/10 levy year, but that it could depart from that policy when discretion arose to be considered. The Committee concluded that the evidence

provided by the Scheme as to doubt about the origin of the incorrect data would not have provided sufficient reason for it to exercise its discretion. It noted that the Scheme asserted that the data had been corrected, but remained incorrect. However, the Committee concluded that the correction had taken place after 31 March 2008.

26. Late in the course of my investigation, when it knew the likely outcome, the Board notified me that it had carried out further investigations of its own and had come to the conclusion that it was probable the Scheme had not been responsible for entering an incorrect DUNS number on the Exchange System. (It is not clear why these further investigations should not have been carried out long before the matter reached me). The Board said it would, of its own motion, review the levy invoices for the years 2008/09 and 2009/10.

Grounds for referral

27. The Trustee submits:
- the PPF has misunderstood the basis for referral and has misdirected itself as to the grounds for reconsideration;
 - the Scheme wished to supply additional factual information in order to show that, on the balance of probabilities, errors had affected the Exchange database as of 31 March 2008, which resulted in the relevant scheme return data, as required by paragraph 8 of the Schedule to the PPF Determination, not being applied;
 - the Scheme submits that the Employer as at 28 March 2008 was Southern Water Services Limited; whereas Dun & Bradstreet (D&B) provided the PPF with a failure score for Southern Water Limited;
 - this is a material error based upon incorrect information which was not provided by the Scheme;
 - the Reconsideration Committee appears to have thought that the Scheme was appealing in respect of submitted data as at 31 March 2009;

- the Committee appears to have overlooked the fact that the Scheme's subsequent investigations indicated that the integrity of the Exchange database was in doubt as of 28 March 2008;
- the Scheme Employer name was corrected in the scheme return dated 28 February 2008;
- however, the DUNS number and CRN supplied by the PPF to D&B were those for Southern Water Limited;
- the DUNS number is assigned to an organisation by D&B and does not convey any information about the company;
- the Scheme did not supply or generate the DUNS number and had no control over the use of the incorrect numbers;

Conclusions

28. Notwithstanding that the Board has now said that it will review the levy for the year to which this referral relates (and the previous year), I consider that it is the interests of the Scheme (and, as any determination will be published, in the public interest too) for me to proceed to determine the matter. Even if I did not think that, the investigation and determination of a referable matter is mandatory under Regulation 6 of The Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005. And even where the PPF withdraws its opposition the regulation provides that I still have to determine the referral (though I may do so immediately).
29. I note in passing that the Board's eventual decision to review is said to be based on a discovery that it was probably not the Trustee's fault that the wrong DUNS number was on the Exchange database. But the issue is not fault, at least in the first instance. It is whether the information was materially incorrect and "correct and legitimate in itself".

30. My role is to consider whether the Reconsideration Committee's decision "was not reached correctly"¹. In the circumstances, this translates into determining whether the Scheme's risk-based levy has been calculated in accordance with the terms of the PPF Determination.
31. Section 175(2) calls for the risk-based levy to be assessed by reference to "the likelihood of an insolvency event occurring in relation to *the employer in relation to a scheme*" (my emphasis). As relevant, the purpose of the Determination is to raise the levy assessed in that way. So the effect of applying the Determination should not be to produce an assessment of the likelihood of a different employer's insolvency, if alternatives exist.
32. Paragraph 8 of the Schedule to the PPF Determination provides that, where the Schedule so requires, the Board shall use the "relevant scheme return data". This is then defined as the validated data held on the Scheme Maintenance System as at midnight on 31 March 2008. Paragraph 11 provides that, for the purposes of the Schedule, the employer in relation to a scheme shall be such undertaking as has been notified as such in the relevant scheme return data. On the Trustee's account, the only undertaking actively "notified" was Southern Water Services Ltd (to which an incorrect CRN and DUNS number were attached, but not by any active notification).
33. It is not clear exactly how the inconsistent name and numbers came to be on the Exchange System, but the evidence suggests that the error occurred when the Exchange System was pre-populated. The scheme return submitted prior to the launch of the Exchange System did not require a DUNS number. This alone supports the Trustee's assertion that the incorrect data did not come from the Scheme.
34. But even if the Trustee was the source of reference numbers that were incompatible with the named employer, the undertaking identified was Southern Water Services Ltd, not Southern Water Ltd. A legal entity is primarily identified by name, not a registration number (and even less so by a number allocated by D&B with no particular authority).

¹ Regulation 16(2) of the Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman)

35. However, paragraph 32 provides for the failure score used in the calculation to be that which D&B informs the Board it has assigned to the employer. In this case, D&B informed the Board of the failure score that related to Southern Water Limited. So did D&B inform the Board that the failure score assigned to Southern Water Services Ltd was the failure score it had in fact assigned to Southern Water Ltd? I do not think that is a logical way of assessing what happened. The failure score assigned to an employer exists independently of its notification by D&B to the Board. By a rational account, D&B informed the Board of the failure score it had assigned to Southern Water Ltd. It never informed the Board of the failure score it had assigned to Southern Water Services Ltd.
36. Paragraph 32 goes on to say that the scores to be provided by D&B are to be “the normal failure scores which were or would have been assigned to that employer by [D&B] in the ordinary course of its business on and as at 31 March 2008, based on data provided to [D&B] on or before 30 March 2008”. Consistently with the conclusion above, I do not think that D&B provided the failure score that would have been assigned to Southern Water Services Ltd in the normal course of its business as based on the data provided. The consequence of the inconsistent data provided to D&B was that D&B provided the failure score that was assigned to a different entity.
37. Paragraph 6 allows the Board to review a levy where it appears that the information upon which the calculation was based is “incorrect in a material respect”. Paragraph 6 goes further and explains that “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 Reconsideration Committee determined that the information upon which the 2009/10 levy had been calculated was not incorrect for the purposes of paragraph 6 despite the fact that the levy had been calculated on the basis of a failure score relating to a company with no connection to the Scheme.

38. I find that the Reconsideration Committee misdirected itself. I do not think that on any reading of the phrases “incorrect in a material respect” or “correct and legitimate in itself” can a failure score that relates to a different entity be regarded as anything other than incorrect. That is particularly so where the factor that is required to be taken into account by statute (the likelihood of an insolvency event occurring in relation to of Southern Water Services Ltd) has not been taken into account at all.
39. Accordingly, I determine that the Reconsideration Committee’s decision of 12 July 2010 was not reached correctly.
40. Having done so, Regulation 16 of The Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005 makes it mandatory for me to determine what action the Board should take and remit the matter to the Board. Given that I have determined that the Reconsideration Committee was wrong to find that the information was not incorrect in a material respect, it follows that the Board must now reconsider the calculation on the basis that the information was incorrect in a material respect.
41. I remit the matter to the Board with the direction that it should revoke and replace the Reconsideration Committee’s decision with a new decision on the basis that the information upon which the levy calculation was based was incorrect in a material respect and that the correct information should be used.

TONY KING

Pension Protection Fund Ombudsman

14 July 2011