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

Applicant	Mr R Leigh, on behalf of the Trustees of the UPS Pension and Life Assurance Plan
Scheme	The UPS Pension and Life Assurance Plan (the **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 20 May 2011. The referral concerns the Scheme's risk-based levy for the year 2010/11.

DETAILED DETERMINATION

Background

1. In 2006, the PPF accepted a contingent asset certificate in relation to the UPS Pension and Life Assurance Plan (the **Plan**) under reference PSR 10125231. The contingent asset takes the form of a guarantee (up to a maximum of £40 million) by United Parcel Service Inc (a Type A contingent asset). The contingent asset was re-certified in 2007, 2008 and 2009 via the Pensions Regulator's (**TPR**) Exchange system.

2. In April 2009, the Plan accepted a transfer from another scheme of the same employer and, at that point, became a sectionalised scheme (comprising the UPS Section and the Lynx Section). The Applicant states that, following a discovery in November 2009 that the PPF required the two sections to be treated as separate schemes, the Plan's administrators re-registered the sections and they were given new reference numbers (19011501/502). TPR subsequently disabled the Exchange pages relating to PSR 10125231 and it was no longer possible to recertify the contingent asset under this reference via Exchange.

3. There were a number of conversations between the Trustees' advisers and the PPF in late March 2010 concerning recertification of the contingent asset. In the course of these conversations, the PPF advised that, if a certificate was to be submitted via Exchange, they would recognise it as a new certificate and would be expecting documentation for a new scheme. The PPF also advised that the UPS Section would have to submit a new contingent asset certificate because it had been registered as a new scheme and would have to submit details under its new PSR. On 29 March 2010, the PPF confirmed that the UPS Section would be classed as a new scheme and a new contingent asset certificate would have to be submitted. They advised that the existing documentation could be used if it met the relevant requirements set out in the contingent asset appendix to the PPF Determination for 2010/11.

4. Recertification was submitted via Exchange under the PSR reference 19011501 (the UPS Section) on 26 March 2010 (Certificate Number 1991). (The Lynx Section has a separate guarantee.) The notes to the certificate stated that, if the contingent asset had been recognised by the PPF for the purposes of a previous levy year, hard copies of any amendments or any new legal opinion only must be submitted. If the contingent asset had not been recognised for the purposes of a previous levy year, a certified copy of the guarantee must be submitted.

5. Following further conversations with the Trustees' advisers, the PPF confirmed that, as certification had been completed via Exchange, they would now require the appropriate documentation to be submitted to them before 5 p.m. on 31 March 2010. The Applicant states that the required documentation was sent via courier but did not arrive until 1 April 2010 and was deemed to be out of time. The PPF notified the Applicant that the documentation had been received out of time and said they would consider exercising a discretion to accept it if it had been dispatched to them at an appropriate time but delayed in transit. They asked for evidence such as the collection receipt from the courier and the service level requested.

6. The Applicant states that the risk based levy for 2010/11 is approximately £240,000 higher than it would otherwise be.

7. The Trustees requested a review of the levy calculation on the following grounds:

- The UPS Section is not legally a separate scheme. It is accepted that, for the purposes of the Occupational Pension Schemes (Scheme Funding) Regulations 2005, Part 3 of the Pensions Act 2004 and Section 75 of the Pensions Act 1995, the UPS Section is treated as a separate scheme. For all other purposes, the UPS Plan, embracing both sections, is a single scheme. Otherwise, there would have been no reason to merge the two schemes.
- The treatment of the UPS Section as a separate scheme is a device designed to support the functions of the PPF.
- The contingent asset in question is a guarantee under which the guarantor is obliged to guarantee all present and future obligations and liabilities of each participating company to make payments to the Plan, which must include payments in respect of the UPS Section.
- When the administrators learned that the UPS Section would need to registered as a separate scheme, they anticipated that it would be treated as a sub-set of the original registration and not that the latter would cease to have effect.
- It was not made clear to the administrators that a fresh submission of the guarantee was required until 31 March 2010; by which time, it was too late to make the submission in time. Prior to this, they had been led to believe the opposite.
- They had been unable to find any reference, either in legislation or published guidance, that re-submission was a requirement in the circumstances.
- They had been invited to give reasons why the PPF should exercise discretion to review the levy. They had explained the circumstances, but the PPF had declined to exercise discretion to accept the submission out of time, which was unreasonable.

The review decision

8. The PPF's review committee determined:

- The fact that the contingent asset was certified for one levy year did not mean that it would automatically be accepted for later years. The PPF made a new determination for each levy year containing its own rules for contingent assets. Submissions for each levy year must comply with the rules of the determination for that year. The fact that the contingent asset was certified for 2006/07 did not assist the Applicant's argument that it should be recognised in 2010/11.
- Rule D2.5 dealt with the requirements for recertification of contingent assets which had been accepted in previous years.
- TPR had confirmed that, when a scheme is segregated, basic scheme data is migrated to the newly created sections, but this does not include any details of contingent assets. The UPS Section could not inherit the 2009/10 contingent asset submission from the Plan and there was nothing to recertify for 2010/11 in accordance with Rule D2.5(2)(iii).
- The UPS Section was ineligible for 2009/10 and was not invoiced for that levy year. Rule D2.5(2)(i) could not be satisfied because the PPF could not have given credit for the contingent asset in 2009/10.
- As the requirements for recertification were not satisfied, the March 2010 submission could only be treated as a new contingent asset. Paragraph 32(b) of the contingent asset appendix set out the documentation which had to be submitted for recognition of a Type A contingent asset. None of this documentation was supplied prior to 31 March 2010. The documentation which arrived on 1 April 2010 did not comply with the requirements for the levy year 2010/11.
- The treatment of schemes which became segregated before March 2010 was set out in Rule A1.2(10) of the 2010/11 Determination. This provided for the UPS Section to be treated as a separate scheme for the purposes of calculating the levy. Even if the contingent asset had been recertified for the Plan in 2010/11, the UPS Section must be treated as separate to the Plan.

There were no provisions in the Determination for contingent assets to be shared by multiple schemes if they had only been certified in respect of one.

9. The review committee also considered whether there was scope for the PPF to exercise a discretion to recognise the contingent asset. Under Rule B2, the PPF has the scope to correct the data by reference to which the levy has been calculated if it is incorrect in a material respect or if notification required by or under a certificate in relation to a contingent asset has not been duly given. Rule B2.2 makes it clear that the PPF is under no obligation to correct data "merely because the Scheme has been disadvantaged by the failure of the trustees or those acting on its or their behalf to supply correct information at the proper time". Rule B2.3 provides that data is not incorrect 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 these Rules to be applied differently".

10. The review committee took the view that, whilst there was a discretion to accept data corrections, this should not extend to taking into account a contingent asset which did not meet the criteria for acceptance. They also determined that Rule B2.1 was not applicable. The committee commented,

> "It should be noted that the contingent asset regime is an entirely voluntary one for schemes, and the Board has put the regime in place in order to provide a concession to schemes. In such circumstances it is not unreasonable for the Board to expect the requirements to be complied with. The reduction in levies achievable is a privilege awarded by the Board only on compliance with the strict criteria."

11. The review committee concluded that the 2010/11 levy had been correctly calculated.

12. The Trustees requested a reconsideration of the decision on the following grounds:

- The review committee had misinterpreted the PPF Determination (in particular, Rule D2.5) and the contingent asset was capable of recertification; and

- If the contingent asset was not capable of recertification, the PPF should exercise the discretion to recognise it; particularly because the PPF should accept some of the responsibility for non-compliance with the requirements for recognition.

13. The Applicant argued that the way in which Rule D2.5 was drafted presupposed that the scheme seeking to recertify a contingent asset was the same as the scheme in respect of which the contingent asset had been recognised in the previous year. The Applicant went on to argue that Rule D2.5 did not provide clear guidance as to what should be done if (as a result of Rule A1.2(10)) the scheme seeking recertification was a different scheme, even if it was, for all practical purposes, the same scheme. The Applicant argued that a difficult question of interpretation arose when the scheme had "undergone an external sectionalisation".

14. The Applicant then referred to the Contingent Asset Guidance and, in particular, to the note that the re-certification provisions were intended to minimise the administrative burden on trustees who had already provided full information to the PPF, whilst providing the PPF with adequate assurance that the contingent asset remained in place. The Applicant argued that this supported an approach that, where the Rules did not make it clear that recertification was not possible, it should be regarded as possible. Moreover, the Applicant argued that, where there had been no practical change to a scheme, the proportionate approach would be to allow recertification.

15. The Applicant argued that the PPF had discretion to recognise the contingent asset under Rules B2 and B3.

16. In addition to the points made by the review committee, the PPF's reconsideration committee determined:

- Rule B3 allowed the PPF to obtain missing information where required. There was no obligation for the PPF to use the power it had under Rule B3.
- The documents provided did not comply with the 2010/11 requirements for the recognition of a contingent asset. Rule B3.2 was not applicable.
- The PPF had all the required information to calculate the levy and, therefore, the discretion under Rule B3 did not arise.

17. The reconsideration committee upheld the review decision.

Reasons for referral

18. The Trustees' reasons for referral are essentially the same as the reasons put forward when they requested a review by the PPF. In addition, they argue:

- The reconsideration committee failed to take on board the point that, while the Rules make it clear that the UPS Section was to be treated as a separate scheme, they did not say anything about how recertification would be dealt with when a new scheme is introduced into or bolted onto a scheme. The Rules did not say whether or not it would be appropriate for one of the new sections to be treated as the same as the original scheme. This gave rise to uncertainty.
- The PPF had the discretion either to treat the contingent asset as duly certified or to seek information providing for certification and should have exercised this discretion. To the extent that the PPF (through the reconsideration committee) determined not to exercise discretion in favour of the Scheme because of the clarity of the Rules, this was based on a mistake; that is, that there is no such clarity.
- The fact that the contingent asset scheme is voluntary does not take the matter forward and simply confuses the position.
- There is no suggestion that the reconsideration committee took the following factors into account:
    - the Rules do not deal in a clear way with the issue;
    - it appeared from the Exchange system that is was possible to recertify the guarantee;
    - those acting on behalf of the Trustees did everything within their power to provide the hard copy documents required by the PPF;
    - documents referring expressly to the sectionalisation of the Plan might have been prepared with the leisure of time, there was in the circumstances no opportunity to prepare them within a timeframe acceptable to the PPF, which is why those acting for the Trustees

simply provided such relevant material as could be provided speedily;

- the guarantee is a substantial contingent asset and merits recognition.

- Just because there is no obligation under Rule B3 for the PPF to seek further information does not mean that there is no discretion to do so. Nor does it make sense to say that the power to seek information only applies where the PPF have requested additional information. The PPF have erred in proceeding on the basis that they had no discretion under Rule B3 and should have exercised that discretion if they were not going to accept the information provided as sufficient. In any event, the PPF had discretion under Rule B3.2 to accept the information provided as sufficient for them to recognise the contingent asset.
- The reconsideration committee's decision was incorrectly reached for the purposes of Regulation 16 of the PPFO Regulations. The Ombudsman has the discretion to order a payment of compensation and is asked to do so.

Additional submissions by the PPF

19. In addition to the findings of the review and reconsideration committees, the PPF submit:

- Rule B3.3 precludes the exercise of the discretion in Rule B3.1 in this case. Regardless of the tone of the wording, they are obliged to adhere to this as with any other Rule.
- The policy underlying the Rules is that, because contingent assets provide a reduction in levy, it would be unfair to other levy payers to allow those reductions in cases where the Board's criteria are not complied with.

Further submissions on behalf of the Applicant

20. The Applicant's further arguments are summarised below:

- It is accepted that the risk based levy for each section of a segregated scheme is to be calculated as if it were a separate scheme.

- Rule D2.5(1) is the portal to the application of the rest of the Rule and was satisfied in this case. The guarantee was recognised in relation to "a Scheme's RBL" in 2009/10 – the scheme in question being the UPS Plan. The subsequent reference to "that Scheme" in Rule D2.5(2) is evidently intended to refer back to the UPS Plan. Rule D2.5(1) requires the position in 2009/10 to be considered. Where a contingent asset was recognised in 2009/10 for an un-sectionalised scheme which becomes sectionalised for 2010/11, Rule D2.5(1) "expressly or by implication require[s]" (Rule A1.2(10)) that the provisions in D2.5 and D3 are applied by reference to the un-sectionalised scheme because this was the situation in 2009/10 and D2.5(1) refers to 2009/10. There is no warrant for reading down D2.5(1) by reference to the position in 2010/11 because, to do so, would deprive it of its effect.
- Where one is dealing with a scheme which becomes sectionalised for 2010/11, one is still dealing with the same scheme. The material questions are then: whether the formal requirements for recognition of the contingent asset in the remainder of Rule D2 and in D3 are satisfied; and which section(s) benefit from the contingent asset.
- There is discretion under Rule B2 to accept a contingent asset which has not been provided strictly in accordance with the Rules. Neither the review committee nor the reconsideration committee provided any reasons, other than that the contingent asset regime was a concession and that it was reasonable to expect schemes to comply with its requirements, for declining to exercise discretion in the Scheme's favour.
- There is nothing concessionary about giving credit for a Type A contingent asset. The risk based levy is required to be calculated by reference to the security of the scheme and any assessment of risk which does not recognise the existence of a Type A contingent asset is a flawed assessment. The PPF are not doing the Scheme a favour in recognising a Type A contingent asset, they are carrying out their statutorily imposed function.

- The review committee failed to consider the factors put forward in the Grounds for Review document which support an exercise of discretion in the Scheme's favour. The Ombudsman should specifically consider whether each factor is relevant and whether it was considered by the PPF.
- If the Ombudsman is of the opinion that a discretion for the PPF to seek further information exists under Rule B3, she is asked to consider the same factors as for the discretion under B2.
- The Ombudsman is asked to consider an award of compensation to mitigate the otherwise harsh results of adverse decisions in respect of the Applicant's reference. She should not feel that her hands are tied so as to prevent her from doing justice by providing an amount of compensation under Regulation 16(2)(b)(iii) of the PPFO Regulations.

Oral hearing

21. The Applicant has requested an oral hearing. I have considered the request and decided not to hold an oral hearing on the grounds that the written evidence is sufficient for me to determine the case and there is unlikely to be any evidence which could not adequately be provided in written form.

Conclusions

22. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004. The reviewable matter is the calculation of the Scheme's risk-based levy for the Levy Year 2010/11.

23. There are essentially two issues to be decided:

- Whether the contingent asset in question (the guarantee) could be recertified for the Levy Year 2010/11; and
- Whether the PPF could and/or should have exercised discretion to accept the documentation they received on 1 April 2010 and recognised the contingent asset in calculating the Scheme's risk-based levy.

24. The PPF had recognised a guarantee given by United Parcel Service Inc in respect of the Plan in previous years. However, in 2009, the Plan became, for the purposes of calculating the PPF levies, two separate schemes: the UPS Section and the Lynx Section. This is accepted, albeit reluctantly, by the Applicant. It is the case that the UPS Section, as such, did not exist in the 2009/10 Levy Year. The guarantee provided by United Parcel Service Inc applied to the Plan as it stood prior to the transfer. I note that the Lynx Section has a guarantee of its own. I also note that the Applicant has referred, on more than one occasion, to the way in which the Plan became segregated, that is, that the Lynx Section was 'bolted on'. I do not find that the method by which a scheme becomes segregated is relevant. The key point is that the Plan did not take the same form pre and post transfer.

25. Rule D2.5 applied "where one or more Contingent Assets was recognised by the Board for the purposes of calculating a Scheme's RBL for a Levy Year ending on or before 31 March 2010". Although it had been recognised in previous levy years, the guarantee had not been recognised for the purposes of calculating the UPS Section's risk-based levy. It could not have been because the UPS Section did not exist in previous levy years. I do not find, therefore, that Rule D2.5 could apply in respect of the UPS Section for the Levy Year 2010/11.

26. I find this position is further supported by Rule D2.5(2), which provided that the PPF "shall not give **that** Scheme credit for Contingent Assets for the 2010/11 Levy Year unless: (i) it gave credit for it in the 2009/10 Levy Year ..." (my emphasis). As noted above, the UPS Section had not been given credit for the guarantee in the 2009/10 Levy Year.

27. It is clear that both parts of Rule D2.5 apply to the same scheme; any other interpretation risks making a nonsense of the Rule. It is clear, therefore, that the UPS Section could only receive credit for the contingent asset under D2.5 if it had been given credit for it in 2009/10 (which was not possible).

28. I agree that the reference to "a Scheme" in D2.5(1) could apply to the UPS Plan, since it had been given credit for the contingent asset in 2009/10. However, D2.5(2) would also have to be read as applying to the UPS Plan; the reference to "that Scheme" is to the scheme referred to in D2.5(1). Hence, the PPF could have given credit for the contingent asset to the UPS Plan in 2010/11

had it still existed. It cannot give credit to the UPS Section because, for the purposes of calculating the 2010/11 risk-based levy, this is not the scheme referred to in D2.5(1).

29. The Applicant appears to be arguing that, because Rule D2.5 refers to the position before 2010/11, that the PPF can calculate the risk-based levy for the UPS Section by reference to the position which pertained prior to it coming into existence. In my view, this runs contrary to the purpose to the PPF's Determination for the levy year 2010/11, which is to calculate the levy by reference to security of the UPS Section in 2010/11 (not 2009/10). In essence, the Applicant does not accept that the UPS Plan and the UPS Section are viewed as different schemes by the PPF. I accept that, in most circumstances, the schemes are synonymous, but, **for the purposes of calculating the risk-based levy**, the PPF does not treat them as the same scheme.

30. I find, therefore, that the contingent asset in question could not be recertified for the Levy Year 2010/11.

31. I now move on to consider whether, in the circumstances, the PPF had discretion to accept the contingent asset documentation it received on 1 April 2010. The circumstances are that the documentation submitted on behalf of the UPS Section arrived late and did not fully meet the requirements set out in the Contingent Asset Appendix.

32. Rule B2.1 sets out the circumstances under which the data by reference to which the levy will be or has been calculated can be corrected. Briefly, these are where the information supplied for or used in the levy calculation is incorrect in a material respect, a notification in respect of a contingent asset has not been duly given or a certificate contains information which is incorrect in a material respect. The Rules make it clear that information will not be considered incorrect in a material respect if it is correct and legitimate in itself but alternative or additional information might have been supplied. Since the provision of a contingent asset certificate is not necessary for the calculation of a levy, the absence of such a certificate would not, of itself, be enough to render the information supplied for or used in the calculation of the levy incorrect in a material respect. Rule B2.1(1) does not apply

33. Where a certificate or declaration has not been properly given, the PPF may disregard such certificate or declaration or the information contained therein. Rule B2.3 does not require the PPF to disregard the certificate and/or the information in question. It is arguable, therefore, that there is a discretion (though no obligation) to accept a certificate which has not been given strictly in accordance with the Rules. The review committee (and subsequently the reconsideration committee) took the view that a discretion existed and I do not propose to disagree with that view. The committees determined that such discretion as there was should not be exercised in the circumstances. The reasons they gave were that the contingent asset regime was a concession and that it was not unreasonable to expect schemes to comply with the requirements of that regime.

34. I may only interfere with the exercise of a discretion where the decision maker has:

- taken irrelevant matters into account or failed to take relevant ones into account;
- asked the wrong questions;
- misdirected themselves as to the law or the relevant rules; or
- come to a perverse decision.

35. In this context, a perverse decision is one which no other decision maker, properly directing itself, would come to in the circumstances.

36. There is no evidence that the review committee took any irrelevant matters into account or ignored any relevant ones. They did not ask the wrong questions or misdirect themselves.

37. The Applicant argues that the recognition of a contingent asset is not a concession and, therefore, the reasons given by the committees were not valid reasons for declining to exercise their discretion in the Scheme's favour. It is argued that a risk based levy must be calculated by reference to the security of the scheme in question and that any assessment of risk which does not recognise the existence of a contingent asset is flawed. It is further argued that the PPF would simply be carrying out their statutorily imposed function in

recognising the contingent asset. There is, however, no statutory requirement for the PPF to recognise a contingent asset.

38. Under Section 175 of the Pensions Act 2004, the PPF is required to calculate a risk-based levy by reference to the difference between a scheme's assets and liabilities, the risk of employer insolvency, and certain other risks. The factors by which the levy is to be calculated are to be determined by the PPF and are set out in its determination for the levy year in question. It is under the PPF's determination that the option to have a contingent asset recognised arises. I do not find that the PPF's description of this option as a concession is inappropriate. Since this is a "concession", the PPF argue that it is not unreasonable to expect schemes to meet their requirements in order to take advantage of it. They declined to exercise discretion to recognise the contingent asset because the Scheme had not fulfilled these requirements. I do not agree that this is not a valid reason for declining to exercise discretion in the Scheme's favour.

39. The committees did not specifically list the "factors" put forward by the Applicant in their decisions, but the documents indicate that they did consider each of them.

40. A large part of the review/reconsideration decisions were taken up with a discussion of the Rules. The review committee had obtained clarification from the TPR regarding the migration of data and had been told that contingent asset data could not have been inherited by the UPS Section. There is reference to the contention that the Scheme acted promptly to provide the documentation and to the principle that disadvantage to the Scheme is not reason to accept corrected information.

41. I do not find that the committees failed to give due consideration to the arguments put forward on behalf of the Scheme.

42. I do not find that the decision could, in the circumstances, be described as perverse.

43. Under Rule B3, the PPF have powers to obtain further information or to fill in gaps in their information. Rule B3.1 allows the PPF to take steps to obtain further information prior to the calculation of a levy, but B3.3 makes it clear that they are not obliged to do so. The PPF argue that Rule B3.3 precludes them from exercising their discretion to seek further information in the circumstances; although the committees did in fact consider Rule B3.1. This may be overstating the situation. In tone, Rule B3.3 does not read like an outright prohibition on the PPF seeking further information in the circumstances. Either way, there would have to be some reason, other than the failure to supply the necessary information on time, for the PPF to exercise the discretion in B3.1 to obtain further information. The evidence does not indicate that such a reason existed. The Rules were not unclear (once it was accepted that the UPS Section would be treated as a different scheme to the UPS Plan) and TPR have confirmed that the Exchange system did not migrate contingent asset data across to the new scheme.

44. Rule B3.2 allows the PPF to fill in gaps in information where "any information **necessary** for such calculation has not been Submitted in the manner or format or at the time anticipated for these Rules" (my emphasis). Since the contingent asset certificate was not necessary for the calculation of the levy, Rule B3.2 did not apply.

45. In essence, the Applicant is arguing that the PPF should be required to assist in overcoming the failure to submit a contingent asset certificate in the appropriate form and at the appropriate time. I do not find that there is any reason for the PPF to take any action or for me to remit the decision for reconsideration. Regulation 16(2)(b)(iii) would only apply if I found that the reconsideration committee's decision had not been reached correctly.

JANE IRVINE
Deputy Pension Protection Fund Ombudsman

26 June 2012