

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

DETERMINATION BY THE DEPUTY PENSION PROTECTION FUND
OMBUDSMAN

Applicant : The Trustees of the West of England Ship Owners Insurance Services Limited Retirement Benefits Scheme
Scheme : West of England Ship Owners Insurance Services Limited Retirement Benefits Scheme

1. The Deputy Pension Protection Fund (**PPF**) Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee of the PPF dated 23 September 2011. The referral concerns the Scheme's risk based levy for the 2010/2011 levy year, which is a reviewable matter under paragraph 19 of Schedule 9 of the Pensions Act 2004.

Grounds for referral

2. The trustees say that they were not warned about Dun and Bradstreet's (**D&B**) data collection process in Luxembourg, and as a result D&B's failure score and the risk based levy were incorrectly calculated. The trustees also say that the PPF and D&B did not take account of the corporate structure of the employer, including guarantees provided by different companies in the group. The trustees consider that the PPF's Board and Reconsideration Committee misdirected themselves as to the exercise of discretionary powers available to them.

Background

3. West of England Ship Owners Insurance Services Limited is a subsidiary of West of England Insurance Services (Luxembourg) SA, which in turn is a subsidiary of West of England Ship Owners Mutual Insurance Association (Luxembourg). The Scheme employer is West of England Insurance Services (Luxembourg) SA.
4. West of England Ship Owners Mutual Insurance Association (Luxembourg) provided a guarantee to the trustees in respect of the obligations of West of England Insurance Services (Luxembourg) SA to the Scheme. For the 2006/2007, 2007/2008

and 2008/2009 levy years, West of England Ship Owners Insurance Services Limited certified a contingent asset to the PPF. This provided further financial recourse to the trustees (and the PPF) in the event of West of England Insurance Services (Luxembourg) SA failing to meet its financial obligations to the Scheme. There was also an agreement between West of England Insurance Services (Luxembourg) SA and West of England Ship Owners Insurance Services, whereby the latter company's expenditure related to Scheme liabilities was fully recoverable from the former.

5. For several years the PPF issued annual reminders to pension schemes about the requirement to re-certify contingent assets. The PPF stopped sending reminders with effect from the 2009/2010 levy year. On 20 November 2008 the PPF placed a notification on the "frequently asked questions" section of its website about this. A contingent asset certificate was not provided to the PPF in relation to the Scheme for the 2009/2010 and 2010/2011 levy years.
6. The trustees questioned the accuracy of D&B's failure score for West of England Insurance Services (Luxembourg) SA and D&B Luxembourg explained that unlike its UK operation, it did not automatically access publicly filed company accounts when calculating failure scores for the PPF. Instead, D&B Luxembourg only used financial statements that were sent to it by companies, although it had them for West of England Insurance Services (Luxembourg) SA up to and including 2007, and had used these when calculating the failure score. As the company had never sent financial statements to D&B Luxembourg, its failure score was much worse than it would have otherwise been.
7. D&B Luxembourg subsequently obtained the 2007-2010 financial statements for all three companies in the group and revised its current failure score for the Scheme, but was not prepared to retrospectively do so for the 2010/2011 levy year. D&B Luxembourg said that it operated in many countries, and it was impractical to provide general information regarding the system of data collection used in each one, unless it was specifically asked about the matter.

8. A note on the PPF website said, under the heading “How to reduce your pension protection levy”:

“We recommend that you contact D&B before the data measurement date to ensure they hold the correct information on your group structure and branch locations, so that your score can be calculated accurately.”

9. In an email to the trustees dated 8 December 2010, D&B said:

“I am sure that the PPF is aware of our data collection policies, both domestically and cross border, due to the transparency of our agreement with them.

...

Again, I reiterate that although your clients could not have been “reasonably expected to know” that our Luxembourg office does not collect financial data, the onus is and always has been on the Scheme to contact D&B before the data measurement date to ensure we have the most up to date information.”

10. D&B’s UK literature says that the D&B failure score is “a risk evaluation tool that classifies public and private companies into different risk categories in 24 European countries...data from thousands of sources is collected, aggregated, edited and verified through this unique process...Each country has a score based on the information available in that particular country.”

Statutory basis of the levy

11. Section 175(1) of the Pensions Act 2004 provides that the PPF Board must impose a risk based levy. Section 175(2)(a)(ii) provides that one of the factors by 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...” 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.

12. Paragraph 1 of Section 207 of the Pensions Act 2004 says that the Board may review matters mentioned in Schedule 9 of the Act. Paragraph 19 of Schedule 9 says:

“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).”

The Board’s Determination

13. The Board’s Determination said, so far as is relevant to this referral:

“A2.3 The Measurement Time and deadlines.

The Measurement Time for each item of information is the deadline for submission of that information. The Measurement Time shall be 5pm on 31 March 2009 except as shown below.

...

B2.1 When could data be corrected?

This rule B2.1 applies if it appears to the Board that either:

- (1) the information supplied for or used in the calculation of the Levies is incorrect in a material respect;
- (2) a notification required by or under a certificate in relation to Contingent Assets has not been duly given; or
- (3) a certificate or declaration given for the purposes of the Rules was improperly given or contained information which was incorrect in a material respect.

B2.2 Correction of the data

- (1) Where Rule B2.1 applies, the Board may calculate the Levies on the basis of information which appears to it to be correct for the purpose of these Rules. Where the Levies have already been calculated in respect of a Scheme, the Board may review and revise the amount of the Levies calculated in respect of a Scheme on the basis of information

which appears to it to be correct but it shall not be under an obligation so to act.

(2) The Board is under no obligation to take into account corrected information 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.

(3) For the purposes of Rule B2.1(1), information 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.

...

D2.5 Are Contingent Assets from previous years accepted?

(1) When one or more Contingent Assets was recognised by the Board for the purposes of calculating a Scheme's risk based pension protection levy for a Levy Year ending on or before 31 March 2010 this Rule D2.5 applies.

(2) The Board shall not give that Scheme credit for Contingent Assets for the 2010/2011 Levy Year unless:

- (i) it gave credit for it in the 2009/2010 Levy Year;
- (ii) the relevant requirements of Rules D2 and D3 are satisfied;
- (iii) the Contingent Asset is re-certified by a Contingent Asset Certificate being submitted by or on behalf of the trustees on or before the Measurement Time; and
- (iv) the requirements of the Contingent Asset Appendix which are relevant to Contingent Assets in a previous Levy Year are satisfied.

...

D3.1 No recognition of any Contingent Asset unless previous year's Contingent Assets still in place and not weakened.

(1) This Rule D3.1 shall apply if, in respect of a Scheme, the Board gave credit for one or more Contingent Assets (each referred to below as

the “Original Contingent Asset”) for the purposes of calculating the risk based pension protection levy for the 2009/2010 Levy Year.

(2) Where this Rule D3.1 applies then, notwithstanding any other provision of the Rules, the Board shall not take into account any Contingent Asset for the purposes of that Scheme’s Levies for the 2010/2011 Levy Year unless:

(i) that Scheme certifies to the Board that each Original Contingent Asset satisfies the requirements for recognition for the 2010/2011 Levy Year; and,

(ii) the condition specified in Rule D3.1(3) below is satisfied in relation to each Original Contingent Asset.

...”

Reconsideration Committee’s decision

14. The Reconsideration Committee said that the Board’s Determination obliged it to use D&B Luxembourg's failure score. The Committee said that “the question of whether D&B’s Luxembourg subsidiary should have automatically collected company financial reports from that country's company registry falls outside the scope of matters reviewable by the Board...The Determination provides that the Board will use the scores set by D&B in the ordinary course of its business...”
15. The Committee said that “it is for schemes and their advisers to assess how the rules in the Determination, including those relating to D&B failure scores, apply in their particular circumstances.”
16. The Committee noted that no contingent asset had been certified to the PPF for the 2010/2011 levy year, and therefore the strength of the parent company had not been taken into account. The Committee pointed out that the requirement to recertify contingent assets every year was made clear in the Board’s Determination and on the PPF website.
17. The Committee concluded that it could not exercise discretion to amend the levy.
18. The trustees’ solicitors pressed the PPF for a meeting to discuss their clients’ case. The PPF refused, saying that the matter could be dealt with by written submissions.

19. Following the trustees' referral to my office, the PPF told the trustees that the Pension Protection Fund (General and Miscellaneous) Regulations 2006 allowed it to charge interest on late payments, and the PPF's position was that interest might be charged if I did not uphold the referral. The trustees decided not to pay the invoice in full, and await my Determination.

Submission by the trustees

20. The trustees say they were unaware that D&B Luxembourg had a different data collection policy from its UK operation. They were never advised of this by the PPF or D&B Luxembourg. The only guidance offered by the PPF in respect of the provision of information to D&B related to UK employers filing financial statements with Companies House by the relevant deadline, therefore the trustees had a legitimate expectation that the filing of financial statements with the Luxembourg companies registry, which had been done, would be sufficient to enable D&B Luxembourg to calculate an accurate failure score. UK pension schemes do not have to provide information directly to D&B in the UK. The trustees had no reason to believe that the situation would be any different for employers based outside the UK. The trustees question how D&B Luxembourg had financial statements up to 2007, bearing in mind that the employer had never supplied anything to D&B Luxembourg.
21. The trustees say that the PPF failed to calculate the levy properly, taking into account all the relevant factors, and assessing the employer's true financial strength. They ask me to direct that the Scheme's 2010/2011 levy be revised based on an accurate D&B failure score, calculated using the correct financial information, including the relationship between parent and subsidiary.
22. The trustees also seek directions from me in respect of:
- The factors D&B should consider when calculating the failure score, or what range it should be in;
 - Guidance provided to pension schemes by the PPF, including wording to be used in the Board's Determinations;
 - D&B's conduct.

23. The trustees request that I conduct a review of the business relationship between the PPF and D&B, to ensure that it is transparent, consistent and fair.
24. The trustees consider that the PPF should have met with them and their solicitors.
25. The trustees request that I direct the PPF to pay their legal costs, which are in the region of £89,000. The trustees' solicitors say the D&B appeal and the referral to my office involved lengthy and detailed work on their part, and that the PPF made matters more difficult by refusing a meeting with them and the trustees.
26. The trustees say that it would be unfair for the PPF to charge interest, particularly bearing in mind the PPF's refusal to meet with them, and the length of time that my office has taken to deal with the referral.

Submission by the PPF

27. The PPF says that the Board has no power to require D&B Luxembourg to reassess its failure score. To comply with the Board's Determination, the PPF must use the failure score assigned by D&B Luxembourg in the ordinary course of its business, using its standard methodology.
28. The PPF says that the Board's Determination required pension schemes to re-certify their contingent assets for the 2010/2011 levy year.
29. The PPF says that D&B Luxembourg's method of calculating its failure score is not a matter reviewable by the Board under Section 207 of the Pensions Act 2004.
30. The PPF says that the Board has no discretion to amend the Scheme's 2010/2011 levy.
31. The PPF says that I would go beyond my jurisdiction if I were to make any directions for the use of a failure score other than the normal failure score assigned to the employer by D&B.

Conclusions

32. My role is to consider whether the Reconsideration Committees decision was "not reached correctly" (*Regulation 16 (2) of the Pension Protection Fund (Reference of reviewable matters to the PPF Ombudsman) Regulations 2005*). In the circumstances, this translates into determining whether the scheme's risk-based levy for 2010/2011 was calculated in accordance with the Board's Determination. Some of the matters raised by the trustees, such as the PPF's general practice regarding interest charged

on late payment, the guidance provided to pension schemes generally by the PPF and the wording of the Board's Determinations, are outside that narrow remit.

33. This referral concerns two issues.
34. The first centres on a lack of understanding by the trustees of D&B Luxembourg's particular requirements to have public company accounts submitted to them, in contrast to D&B in the UK who take account of public accounts. I acknowledge that responsibility lies with the trustees to submit correct data and I accept that the PPF depends on the information supplied to it. There is therefore a balance to be struck in assessing where responsibility for the critical error might lie. Essentially this involves a consideration of whether the trustees failed to comply with D&B Luxembourg's requirements, having been told what they were, or the PPF failed to explain to the trustees that D&B Luxembourg did not collect financial information for PPF failure scores, instead requiring it to be submitted to D&B Luxembourg each year.
35. D&B Luxembourg is clearly instructed by the PPF. D&B Luxembourg had obtained financial statements for previous years, apparently for a different client giving different instructions. Therefore the question of what actions D&B Luxembourg took, or did not take, are within my remit as controlled by the PPF.
36. I am sure that the PPF 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 Board's Determination should be guided by this principle). There is a risk of this if the PPF takes the view that it is, itself, strictly bound by the terms of the Determination and to the information it receives from D&B Luxembourg. Whilst D&B does offer an appeal process, the only independent appeal against the levy is to my office. Any attempt to limit the scope of such an appeal should be treated with caution.
37. The second issue concerns certification of a contingent asset. The Board's Determination said, essentially, that if a contingent asset was to be certified for the Scheme in respect of the 2010/2011 levy year, this had to be done afresh for that year. A contingent asset had not been certified for the previous levy year, and the trustees cannot find fault with the PPF for their own omission two years running.

The PPF said on its website that reminders would no longer be issued, and in any event it was for the trustees or their advisers to read the Board's Determination and see what needed to be done to comply with it. I have concluded that the Board is not required to take any further action regarding the absence of a contingent asset in the 2010/2011 levy year.

38. It is not unreasonable to assume that a credit rating firm such as D&B Luxembourg would base its assessment of a company's financial standing at least partly on current data. D&B's literature mentioned collection of data in 24 European countries; it did not say that companies had to provide the data to D&B Luxembourg themselves in order to ensure an up to date rating. In any event, D&B Luxembourg did have financial statements for the Scheme employer up to 2007, although the company says it had never provided anything to D&B Luxembourg.
39. D&B was sure that the PPF knew about its data collection policy in other countries. If this was so, it would have been helpful for the PPF to publicise the fact that D&B did not collect data from national registries in all countries.
40. The PPF and D&B say that trustees or their advisers should check that D&B holds correct information. That is good advice, but it does not necessarily follow that pension schemes should bear the cost if it is discovered that D&B holds incorrect information, or as in this exceptional case, no relevant information at all. Trustees are entitled to assume that D&B is doing its job properly, and should not have to bear the consequences of D&B's shortcomings, or the limitations placed on D&B by the PPF's instructions to it.
41. Put differently Trustees cannot reasonably be penalised because they failed to guess that D&B operates differently whilst working for the PPF in different countries when equally the PPF failed to advise about a critical variation.
42. D&B's position appears to me to be inconsistent with its statements in another referral (PPF000062) where it said that it obtained data from standard sources, such as Companies House and the Stock Exchange, and for entities not required to file data, such as charities, it only used information that had been provided directly to it. On that basis, a company required to file financial statements with a national registry could reasonably expect that D&B would access the information as a matter of

- course. It seems that D&B is unable to do so in Luxembourg for the PPF, but this important fact only emerged during the trustees' appeal to D&B.
43. The PPF's website says companies should ensure that their most recent accounts had been filed at Companies House, which had been done at the equivalent registry in Luxembourg. D&B Luxembourg's website does not explain that it only takes into account financial information submitted to it.
 44. D&B agreed that the trustees could not reasonably be expected to know about its data collection policy in Luxembourg, but considered that was for the trustees to find out. The PPF supported that view, but I cannot see how a public body, properly directing itself, can decide that a statutory levy can be imposed based partly on a procedure that the levy payer was unaware of.
 45. Section 175(2)(a)(ii) of the Pensions Act 2004 requires the levy to be assessed by reference to "the likelihood of an insolvency event occurring in relation to the employer in relation to a scheme." As relevant, the purpose of the Board's Determination is to raise the levy assessed in that way. So the effect of applying the Determination should not be to produce an incorrect assessment of the employer's insolvency, based on out of date financial statements, if alternatives exist.
 46. The Pensions Act 2004 allowed the Board to review the amount of the levy. In reviewing the amount of a levy, a number of factors may have to be considered, including D&B's failure score. Of course the PF cannot interfere in D&B's calculations, but they can and do interfere in the way D&B operate for them. It follows that I do not agree with the PPF's view that the Board was prevented by Section 207 of the Pensions Act 2004 from considering the particular circumstances surrounding D&B Luxembourg's failure score here.
 47. Rule B2 of the Board's Determination allowed it to correct data if it appeared to the Board that information supplied for or used in the calculation of the levy was incorrect in a material respect. D&B Luxembourg's failure score was incorrect in a material respect – it was based on out of date financial statements that were irrelevant to the 2010/2011 levy year – and so was not "correct and legitimate in itself".

48. D&B Luxembourg obtained the necessary financial statements and revised the Scheme employer's failure score, so it would have been a straightforward matter for the PPF to recalculate the levy. The Board's Determination allowed this and given the unusual circumstances, I have concluded that doing so is the only safe course of action. It is not for me to say what the failure score should be, or what range it should fall in. But as a matter of public policy, I cannot support the Board's insistence on using a failure score that it knows is not based on relevant data.
49. I therefore determine that the Reconsideration Committee's decision dated 23 September 2011 was not reached correctly. 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.
50. The PPF have also confirmed, in relation to a different levy referral made to my office, that if the information used to calculate the levy is materially incorrect, as is the case here, it will consider the totality of the circumstances surrounding the error including:
- the effect of the error on the scheme's levy;
 - the reason the wrong data was submitted;
 - where responsibility rests, that is, whether any professional indemnity insurance might be available to the trustees;
 - the speed of identification of the error;
 - the reason for the error.

Although I accept that some of these factors may in part have been considered by the PPF, there is not sufficient evidence for me to conclude with any degree of certainty that all relevant and no irrelevant matters were taken into account. The reasons given here do not evidence this. As the PPF says its usual practice is to consider this range of factors, I consider this to be a further reason why the matter should be remitted back to the PPF Board for reconsideration.

51. There is no free service, such as the Pensions Advisory Service or Citizen's Advice, available to assist trustees pursuing redress with the PPF. Therefore it is understandable that trustees may wish to obtain professional advice, and depending

on the circumstances of the case it may be appropriate for me to make directions in respect of the cost of this. I am persuaded that such a direction needs to be made for this referral. The matters to be put to D&B and the Reconsideration Committee were not straightforward, and legal analyses and research was required. Moreover, professional representation was not unreasonable for the PPF and D&B's appeal processes. D&B's process was somewhat tortuous, consisting of five stages, as I have noted PPF reasoning has not been full, and the amounts at stake justified using lawyers as representatives in the PPF appeal. Accordingly whilst I do not think the full legal costs claimed can be awarded, especially because part of the Trustees' arguments have failed or been made in the D&B process which is outside my jurisdiction; I consider the PPF should contribute £10,000 towards legal costs incurred.

Directions

52. The Board shall, forthwith, review and recalculate the Scheme's risk based levy for the 2010/2011 levy year, based on D&B Luxembourg's failure score for West of England Insurance Services (Luxembourg) SA for that levy year, calculated on the basis of the financial statements issued by the company up to the measurement date used by D&B Luxembourg in accordance with Rule A2.3 of the PPF Board's Determination, which was 5pm on 31 March 2009.
53. As I have remitted the matter to the Board, interest for late payment of the levy shall not be charged.
54. The PPF should contribute £10,000 to the Trustees' legal costs.

JANE IRVINE

Deputy Pensions Ombudsman

12 February 2013