

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

Applicant : Mr R Davies of Aviva Life Services UK Limited, on behalf of the Trustees of the D K Moriarty Limited Pension Scheme (**the Trustees**)
Scheme : D K Moriarty Limited Pension Scheme (**the Scheme**)

The Deputy Pension Protection Fund Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee (**the Committee**) of the Pension Protection Fund (**PPF**) dated 9 August 2010. The referral concerns the Scheme's risk-based levy for the year 2009/10.

Grounds for referral by the Trustees

1. The Scheme's levy has been calculated by reference to an incorrect Scheme asset value.
2. The calculation of the Scheme's levy was not in accordance with the Board of the PPF (**the Board**) 2009/10 Determination (**the PPF Determination**), or with other literature produced by the Board.
3. The Scheme's levy was calculated in levy years 2008/09 and 2009/10 by reference to the same incorrect asset values. It is unfair for the Trustees to be assessed for the PPF levy for two years on the basis of the lower Scheme asset value.

Background

4. On 27 December 2007, the Scheme's actuary submitted by way of a voluntary certificate information to the PPF stating that, as at 1 October 2006, the total Scheme assets for the purposes of the Section 179 valuation amounted to £1,143,000.

5. Later, on 3 March 2008, the Trustees submitted a scheme return via Exchange, the Scheme Maintenance System, which stated that as at 30 September 2006 the total Scheme assets for the purposes of the Section 179 valuation amounted to £2,188,000. The Scheme's actuary has confirmed that the correct figure is £2,188,000 on that date.
6. The levy invoice for the 2008/09 year was received by the Trustees on 27 October 2008 who, on the same day, sent an email to the PPF and said that an error had been made in calculating the Scheme's risk based levy. The email said that, as shown on the scheme return submitted on 3 March 2008, the Scheme asset value used to calculate the levy was not the asset value used for the purposes of the Section 179 valuation but instead was the asset value used for the purposes of the Scheme Specific Funding valuation.
7. The PPF responded saying that their records indicated that they had received two Section 179 valuations and that in accordance with the "Guide to the PPF Levy 2008/09" they had used the most recent valuation that being the one received on 27 December 2007 which was dated 1 October 2006.
8. The Trustees advised the PPF again that the figure used was not the asset value used for the purposes of the Section 179 valuation. The PPF maintained their stance that they had received two Section 179 valuations and had used the most recent valuation.
9. The Trustees requested that the Board review the Scheme's levy invoice and on 29 July 2009 the Board decided that the invoice was correct. The Trustees took the matter no further and settled the 2008/09 levy invoice in full.

Response by the Reconsideration Committee

10. In respect of comments regarding the Committee's decision the Committee responds that the Trustees had requested reconsideration of the Scheme levy for the period 1 April 2009 to 31 March 2010, as set out in an invoice dated 6 November 2009. They acknowledge this was a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.

11. However they note that 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) (of the Pensions Act 2004). The scope of the reconsideration is whether the calculation in respect of the Scheme's levy invoice was carried out in accordance with the published PPF Determination. Neither the Committee nor the Board had any discretion to depart from the PPF Determination.
12. The Committee say that the PPF Determination requires a scheme's assets to be determined for levy purposes by reference to its Section 179 valuation, whether that is derived from the Scheme Maintenance System or by a scheme return. Where, as here, there are multiple such sources of data as to the Scheme's assets for a levy year Paragraph 9 of the Schedule to the PPF Determination requires the Board to calculate a scheme's levy based on information with the latest effective date before the deadline for submission (i.e. 31 March 2008).
13. In this case the Scheme's levy was calculated based on the asset value of £1,143,000 because of the two sources of data, this valuation had the later effective date (that is 1 October 2006 as opposed to 30 September 2006). In invoicing the Scheme the Board has therefore used the correct data held on Exchange at midnight on 31 March 2008.
14. The Trustees say that the Board has derogated from both the PPF Determination and certain of its published explanatory statements. Wording on the levy invoice and a statement of general principle are cited specifically in this regard. The Committee noted that the key point is that the PPF Determination is the dominant document and must be followed. The Board's general policy statement is a statement of general principle and was not intended, nor can it reasonably be understood, as overriding the specifics of the PPF Determination or addressing every complex issue which could arise.

15. The Committee noted that the error in submitting the data occurred immediately before the filing deadline of 31 March 2008 and so has impacted on the levy for levy years 2008/09 and 2009/10. For 2009/10 only invoices have been calculated using the same data as was used in the previous levy year which may mean that errors made by a scheme in its 31 March 2008 data submission will be carried forward. The Board's decision intended to make the levy more predictable and easier to manage, allowing schemes to calculate their potential invoices with time to reduce them, which was requested by consultation respondents.
16. It is important that the data collected for the 2009/10 levy is not significantly altered. Deviations would undermine the integrity of the levy scaling factor and, therefore, make it more difficult to collect the levy estimate, which helps to fund compensation payments to members. The cost of under-collection is ultimately shared by all schemes, so the Board considers it unfair to accept corrections to data from some schemes at a cost to those who took care to provide correct data by the deadlines.

Discretions

17. The Committee considered the discretion available to it under paragraph 6 of the Schedule to the PPF Determination which states that nothing in the PPF Determination shall prevent the Board from reviewing the amount of the levies calculated in respect of a scheme, where among other things, it subsequently appears to the Board that the information upon which the calculation was based was incorrect in a material respect. The Committee found that the lower asset value could be described as being incorrect for these purposes which means that the discretion is available for exercise in this case, however, the Committee did not feel that this would be an appropriate case to exercise that discretion for the following reasons:
 - The risk of under collection of levy if corrections were permitted on a significant scale;

- This error was the consequence of the actions of a third party (an actuary acting on behalf of the Scheme), and the Committee, did not think it appropriate for the Board to bear the consequences of that other party's error;
- There was nothing sufficiently exceptional on the facts of this case to distinguish it from the general run of such cases which may be put to the Board.

Written representation from the PPF Board

18. In addition to the points made by the Reconsideration Committee, the Board state that their position remains that the Scheme's levy invoice was calculated correctly in accordance with the terms of the PPF Determination for 2009/10. The Board considered the discretions available to it under the PPF Determination and whilst the Committee found that the information provided was incorrect it decided after due consideration of all the circumstances not to exercise discretion in favour of the Scheme.
19. The Trustees include in their submission an email received from a member of the Board's Stakeholder support Team which they cite as evidence that the higher asset value was held on the Exchange system as at the data measurement date. Whilst the member of staff was able to see both submissions on the system nothing in the text of the email indicates that the higher asset value, provided by reference to an earlier effective date, should have been used in invoicing the Scheme, rather than the asset value with the latest effective date prior to the data deadline as required by the terms of the PPF Determination.

Further representation from the Trustees

20. The value of the assets was taken at 30 September 2006, which is the end of the Scheme year and ties in with the date of the audited Scheme accounts. The liabilities were valued as at 1 October 2006, one day later, which allows for salary increases in the Scheme year 2006/2007. The 30 September 2006

valuation should be used as submitted later to ensure correct data was provided to the PPF.

Conclusions

21. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004. The reviewable matter in question is the amount of the risk-based levy required of the Scheme for the financial year 2009/10.
22. Under Section 175(5) of the Pensions Act 2004, the Board was required to determine the factors by reference to which the 2009/10 levies were assessed; those factors were set out in the PPF Determination. The Board has correctly submitted that the PPF Determination, itself, is not a reviewable matter, nor is the Board able to amend the PPF Determination on an individual application for review or reconsideration.
22. 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.
23. Paragraph 9 of the Schedule to the PPF Determination provides that, for the purposes of the Schedule, references to a Section 179 valuation are to the results of an actuarial valuation of the scheme carried out in a manner in accordance with the Section 179 of the Pensions Act 2004. In turn Section 179 of the Pensions Act 2004 provides:

“... (2) For the purposes of this section, in relation to a scheme

“an actuarial valuation” means a written valuation of the scheme's assets and protected liabilities prepared and signed by the actuary...”

¹ Regulation 16(2) of the Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005

24. Paragraph 9 also provides that where there is more than one valuation the Board shall use the valuation with the latest effective date falling on or before the relevant deadline for submission of data for the purposes of calculating the levies.
25. There is no dispute that two sets of figures, both purportedly being Section 179 Valuations, were submitted to the PPF before the deadline date of 31 March 2008. The PPF maintain that as their records indicated that they had received two Section 179 valuations they had used the most recent valuation that being the one received on 27 December 2007 which was dated 1 October 2006.
26. That was the correct way to proceed at the time the levy was calculated.
27. By 27 October 2008 the PPF had been informed that the asset value used to calculate the levy was not the asset value used for the purposes of the Section 179 valuation but instead was the asset value used for the purposes of the Scheme Specific Funding valuation. The question is therefore whether the PPF should at this point have acknowledged that the levy had not been calculated in accordance with Paragraph 9 of the Schedule to the PPF Determination.
28. 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”. The Reconsideration Committee concluded that the information upon which the levy was based was incorrect, but decided that there was nothing sufficiently exceptional on the facts of this case to distinguish it from the general run of such cases to persuade them to exercise discretion in favour of the Scheme. They acknowledged that the data on which the levy was based was incorrect because the asset value used was that which related to the Scheme Specific Funding valuation. However, in their view, since submissions prior to the cut off date of 31 March 2008 indicated that there were two Section 179 valuations, and they had used the latest dated valuation, they had adhered to their published policy.

29. I accept that the asset value of the Scheme used to calculate the Scheme's risk-based levy should be described as "incorrect in a material respect" because it clearly does not relate to the value or the amount of assets or protected liabilities used in the Section 179 valuation.
30. I do not, however, find that the Reconsideration Committee misdirected itself. As they advise, it is difficult to distinguish this case from others where trustees or their advisors have made errors in submitting information. In particular as the valuation that the Trustees say should not have been taken into account was submitted by the Scheme Actuary and it appears to have been submitted to meet the PPF requirements for a Section 179 valuation, albeit wrongly. Put another way, as the Reconsideration Committee recognise, the error was not that of the PPF originally.
31. Accordingly, I determine that the Reconsideration Committee's decision of 9 August 2010 was reached correctly.

JANE IRVINE

Deputy Pension Protection Fund Ombudsman

22 July 2011