

## Ombudsman's Determination

Applicant	Mr S
Scheme	The Pension Protection Fund ( <b>PPF</b> )
Respondent	The Board of the PPF (the <b>Board</b> )

## Outcome

1. I do not uphold Mr S' referral of a reviewable matter and no further action is required by the Board.
2. My reasons for reaching this decision are explained in more detail below.

## Application summary

3. The PPFO has received a reference of a reviewable matter, following a decision by the Board's Reconsideration Committee dated 15 June 2016. The referral concerns:-
  - The allocation of all of Mr S' pensionable service to Metroplant Limited.
  - The assessment period start date for the Metroplant section.
  - Notification delays.
  - Biased procedures.

## Background information, including submissions from the parties

4. The sequence of events is not in dispute, so I have only set out the key points in my Opinion. I acknowledge there were other exchanges of information between the parties.
5. Mr S is a pensioner member of the Metroplant section. He reached his normal retirement date on 1 September 2007.
6. Prior to Metroplant Limited's insolvency it was a participating employer in the Brent Group Management and Life Assurance Scheme (**the Scheme**). Brent Group Limited (**Brent Group**) is the Principal Employer of the Scheme.
7. Metroplant Limited went into voluntary insolvency on 12 May 2005. The insolvency event was not notified to the PPF until late 2012.

8. When Metroplant Limited suffered its insolvency event, the part of the Scheme attributable to Metroplant Limited (the Metroplant section) entered a PPF assessment period by operation of the Pension Protection Fund (Multi-employer Schemes) (Modification) Regulations 2005.
9. In March 2013 the Board issued a Scheme Failure Notice (in accordance with section 124 of the Pensions Act 2004), as the insolvency practitioner had at that time ceased to act. No application was received from an 'interested person'\* to review the notice so it became binding the following month.

*\* in this matter an 'interested person' is defined in the Schedule to the PPF (Review and Reconsideration of Reviewable Matters) Regulations 2005 as "the trustees or managers of the scheme".*

10. As relevant, section 132 of the Pensions Act 2004 says:-

“...2) Where, in relation to an eligible scheme, a qualifying insolvency event occurs in relation to the employer, an assessment period-

(a) begins with the occurrence of that event, and

(b) ends when-

(i) the Board ceases to be involved with the scheme...”

11. The PPF assessment period for the Metroplant section of the Scheme started on 12 May 2005, the date of the insolvency event.
12. In January 2015 the Metroplant section transferred into the PPF.

### **Grounds for referral**

13. Mr S' grounds for referring the reviewable matter to the Ombudsman are summarised briefly below:-

- *The allocation of pensionable service to the Metroplant section of the Scheme.*

Mr S contends that at least part of his service should be allocated to Brent Group, which remains outside of the PPF. Mr S asked the Board to investigate the Trustees' decision to allocate all of his service to Metroplant Limited. As a Director he says his contract of employment was with Brent Group. He advised the Board to contact the Chief Accountant and Director of Brent Group, Mr T, for a copy, as he had destroyed his own copy in the summer of 2013, when he decided he no longer required it. Mr T informed the PPF that Brent Group had not retained a copy, but said it was clear that Mr S was working solely for Metroplant Limited and that his entitlements fell within the Metroplant section.

Mr S says the Board failed to challenge Mr T on his (Mr S') contention that all Directors had a contract of employment with Brent Group, rather than with any of its subsidiary companies.

- *The assessment period start date for the Metroplant section.*

Mr S says the decision to backdate the start of the assessment period to 2005 has had a severe financial effect on pensioners of the Metroplant section.

Mr S says during 2008, as a Director and Scheme Trustee, he attended meetings when the Metroplant Limited pension issue was discussed and it was unanimously agreed that Metroplant would not be transferred to the PPF.

Mr S says the Board has failed to properly investigate and challenge the Trustees/Brent Group as to why they chose, in 2008, to rescue the scheme. He says there is no justification for backdating the assessment period start date to 2005 when the Trustees/Brent Group clearly wanted to continue to rescue the scheme in 2008. He contends that the assessment start date should be backdated to the date of the application to the PPF in 2012, or at worst for the pensioners to 2008.

Mr S asks, if the Board has no discretion to alter the assessment start date, how a scheme rescue can ever be accepted if at any time after an insolvency date the Trustees can change their minds and refer the scheme to the PPF.

Mr S says Brent Group chose to punish the Metroplant pensioners for financial gain for the company and wants to know the level of settlement the PPF reached with the Trustees/Brent Group when accepting the application and how this related to the total overpayment made to pensioner members.

- *Notification delays.*

Mr S says the Trustees deliberately delayed notifying members that an application had been made to the PPF and subsequently of the PPF's acceptance of the application. This meant members were unable to have any input or effect on this before the Metroplant section was bound to the PPF. Mr S says the Board too readily accepted the Trustees excuse for both delays, that they simply forgot to do so. His suspicion is that both notification delays were deliberate. He says the Board has facilitated this deception by not fully investigating and challenging the Trustees.

- *Biased procedures*

Mr S says everything seems slanted in favour of the Trustees/Brent Group. He says the Board seems to have had no concern about the time they took to notify members of the application to the PPF and taking an inordinate time over virtually

everything. He says it seems the Board has been reluctant to challenge or reprimand the Insolvency Practitioner, who is blamed for the failure to deal with the pension issue at the time of the insolvency. Mr S says it is an insult to be told, as a section member, that he is irrelevant. He considers that he and the other members' submissions have not received a fair, unbiased and thorough consideration.

## **Representations from the Board**

14. The Board's written representation is summarised briefly below:-

- *The Allocation of Mr S' pensionable service to the Metroplant section.*

The Board looked into this issue to determine if Mr S' PPF compensation had been calculated correctly. While definitive records no longer exist it looked into the issues raised and took account of all the evidence and information available to it, including the Trustees consideration of the matter.

At the suggestion of Mr S, Mr T was contacted who advised that while a copy of Mr S' contract of employment was no longer held by Brent Group: "it is clear to us that he was working solely for Metroplant...and that his entitlements fall within that Section".

The Board concluded that the Trustees' decision was reasonable on the basis of the information available and that Mr S' PPF compensation had been correctly calculated and that no adjustments were due.

- *The assessment period start date for the Metroplant section.*

The Board's governing legislation does not give it any discretion to vary the start date of a scheme's assessment period.

The Board considered the 2008 meeting minutes provided by Mr S but concluded that there was insufficient evidence of Brent Group having assumed the legal responsibility for meeting Metroplant Limited's pension liabilities under the Scheme.

No 'interested person' sought a review of the Board's Scheme Failure Notice. Whilst regrettable that it was not recognised that the assessment period had started, by virtue of the insolvency event, and there were subsequent communication delays by the Trustees, the Board is unable to decline to assume responsibility for an underfunded scheme when there is a binding Scheme Failure Notice.

- *Notification delays.*

Mr S points out that the Trustees did not inform members within 28 days of the Board validating that the Metroplant section was in the PPF assessment period.

But their failure to do this did not impinge on the Board's obligation to assume responsibility for the Metroplant section in the circumstances provided for in the Pensions Act 2004. The presiding legislation imposes no penalty for the delay and gives members no standing to apply for a review of the Board's determination that a section or scheme is in an assessment period. Similarly the governing legislation does not provide for members to seek a review of a Scheme Failure Notice.

- *Biased procedures*

The Board can only exercise the powers that it is given. It has no discretion to reject a scheme on the basis of a failure to timely notify it (within the timescales set out under the Pensions Act 2004) of the occurrence of an insolvency event. The Board is only able to review a decision on the application of an 'interested person'.

## **Adjudicator's Opinion**

15. Mr S' application was considered by one of our Adjudicators who concluded that no further action was required by the Board. The Adjudicator's findings are summarised briefly below:-

- The PPFO can only look at reviewable matters and complaints of maladministration by the Board. Therefore, the issues that Mr S has raised concerning the Trustees, Brent Group and the Insolvency Practitioner are not within the PPFO's jurisdiction to consider.

### *The allocation of pensionable service to the Metroplant section*

- On the basis of the available evidence, it appears reasonable to conclude that Mr S' role was primarily concerned with Metroplant Limited. It is, therefore, reasonable that his service should be allocated to the Metroplant section.

### *The assessment period start date for the Metroplant section.*

- Section 132 (2)(a) of the Pensions Act 2004 states that an assessment period begins with the occurrence of a qualifying insolvency event in relation to the employer.
- Metroplant Limited went into voluntary liquidation on 12 May 2005, therefore, the start date of the assessment period is 12 May 2005. The Board has no discretionary power to change the date.
- As the Board's decision is in accord with section 132 (2)(a) of the Pensions Act 2004, there are no grounds for the PPFO to intervene in the matter.

*Notification delays.*

- The issues Mr S has raised concerning the Trustees are outside of the scope of the Board's remit to consider and investigate.

*Biased procedures*

- The Board can only exercise the powers that it has been given. It has no discretion to reject a section or scheme on the grounds of a failure by the Insolvency Practitioner to notify it of the insolvency event within the notification period (prescribed in the Pensions Act 2004). The Board can only review a decision on the application of an 'interested person', which under the presiding legislation does not include members of the scheme.
  - Mr S comments about members being considered irrelevant. While his annoyance is understandable, neither the Board nor the PPFO consider members to be irrelevant; it is simply that the legislation does not provide for them to challenge the Scheme Failure Notice.
16. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr S for completeness.

**Mr S' further comments**

17. Mr S says the failure of the insolvency practitioner to act properly, the notification delays of the Trustees and the failure of the PPF / the Trustees to give him a chance to have any input into the progress of the matter until the matter had been bound has caused him immense frustration and believes it has proved detrimental to his claims. Mr S says the PPF has failed to challenge the actions or submissions of the Trustees. He says the Trustees have been allowed to get away with ignoring timescales, with half-truths and generally have acted in an underhand and dishonest way.
18. Mr S says having been in receipt of his pension from 2007 to 2013 without any problems, and retired since 2002, he destroyed nearly all his papers pertaining to his employment with Brent Group in the summer of 2013. Among these was his contract of employment. As a consequence he is frustrated and believes he has not had a fair opportunity in proving his submissions.
19. Mr S says he is amazed that he is not considered an 'interested person' as defined in the regulations. He considers the regulations "unfair, biased and should be changed".
20. Mr S asks if the PPF asked Mr T if every Brent Group director had to have a contract of employment with Brent Group. He believes by asking that question the PPF would have learnt that he was a Brent Group Director. He says at least part of his pension

calculations should relate to his service for Brent Group, albeit he concedes that the majority of his work was for Metroplant Limited.

21. Referring to the start date of the assessment period, Mr S says he is surprised that the Adjudicator and / or the PPF chose to ignore the Minutes of meetings in 2008, which clearly show that Brent Group and the Trustees unanimously decided not to refer the Scheme to the PPF. Mr S says the Minutes provide sufficient evidence of Brent Group having assumed the legal responsibility for meeting Metroplant Limited's pension liabilities.
22. Mr S says the Trustees notification delays have been completely overlooked. He says if the presiding legislation imposes no penalties for delays by trustees and does not allow members a right to seek a review of the Scheme Failure Notice then both matters should be looked at to make the whole process more fair, open and less biased in favour of the trustees.
23. Mr S asked to be informed of the level of settlement between the PPF and the Trustees. He believes under the Freedom of Information Act he is entitled to learn this.

### **Ombudsman's decision**

24. As the Adjudicator said in his Opinion I can only look at reviewable matters and complaints of maladministration by the Board. Therefore, Mr S' comments against the insolvency practitioner, the Trustees of the Scheme and Brent Group are not within my jurisdiction to consider.
25. Mr S says the PPF has failed to properly challenge the Trustees and Brent Group. He maintains that he was a Brent Group Director, but concedes that the majority of his work was for Metroplant Limited. He says the PPF should have delved deeper with Brent Group about his contract of employment.
26. The Board looked into this issue to determine whether Mr S' PPF compensation had been calculated correctly and concluded that it had. While definitive records no longer exist it took account of all the evidence and information available to it and at the suggestion of Mr S contacted Mr T. I am satisfied that Board properly considered the matter and that its decision that Mr S' pensionable service should be allocated to the Metroplant section was reasonable based on the information that it had received / obtained.
27. Mr S says he is amazed that he is not an 'interested person' as defined in the Schedule to the PPF (Review and Reconsideration of Reviewable Matters) Regulations 2005. He considers the Regulations "unfair, biased and should be changed". But that is a matter for Ministers to decide. I can only consider Mr S' application in relation to the current regulations and legislation.

28. Referring to the start date of the assessment period, Mr S says the minutes of meetings in 2008 clearly show that Brent Group and the Trustees had unanimously decided not to refer Metroplant Limited to the PPF. Nevertheless, Section 132 (2)(a) of the Pensions Act 2004 states that an assessment period begins with the occurrence of a qualifying insolvency event in relation to the employer. That date was in May 2005. As the Board's decision is in accord with the legislation there are no grounds for me to intervene in the matter.
29. Mr S says the PPF has overlooked the Trustees' notification delays. But, as the Adjudicator said in his Opinion, the issue is outside of the scope of the Board's remit to consider and investigate.
30. Mr S says if the presiding legislation imposes no penalties for delays by trustees and does not allow members a right to seek a review of the Scheme Failure Notice then both matters should be looked at to make the whole process more fair, open and less biased in favour of trustees. Again that is a matter for Ministers to decide.
31. Mr S asks to be informed of the level of settlement between the PPF and the Trustees. While it is not clear what he means by 'settlement', he may submit his request to the PPF.
32. I am satisfied that the decision of the Boards Reconsideration Committee was properly reached.

**Anthony Arter**

Pension Protection Fund Ombudsman  
15 November 2017