

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

**DETERMINATION BY THE DEPUTY PENSION PROTECTION FUND
OMBUDSMAN**

Applicant : Mr J Cooper of Wragge & Co LLP, on behalf of the
Trustees of the TT Group (1993) Pension Scheme (**the Trustees**)
Scheme : TT Group (1993) Pension Scheme (**the Scheme**)

The Pension Protection Fund Ombudsman has received a reference of a reviewable matter, following a decision, dated 15 June 2012, by the Reconsideration Committee (**the Committee**) of the Board of the Pension Protection Fund (**the Board**). The referral concerns the Scheme's risk-based levy for the year 2011/12.

Grounds for Referral

The Scheme's risk based levy in respect of the period 1 April 2011 to 31 March 2012 should have been calculated on the basis that the Scheme benefited from a Type A Contingent Asset (group company guarantee), thereby altering the assessment of the underfunding risk U.

Background

1. In October 2010, TT Electronics plc, the Principal Employer in relation to the Scheme, together with the Trustees, entered into a Scheme Apportionment Arrangement (**SAA**) to apportion the pension liabilities of all the Scheme's participating employers solely to the Principal Employer.
2. The SAA was made too late to be taken into account for the purposes of calculating the 2011/12 levy and will therefore be taken into account in the 2012/13 levy calculation.
3. On 8 March 2011, the Trustees say its legal advisers spoke to a representative of the Board who confirmed that the levy in respect of the 2011/12 levy year would be set without reference to the SAA. The Trustees say the Board's representative advised its legal advisers that the only means by which the practical effect of the SAA could be reflected for the purposes of calculating the levy for 2011/12 was for the Trustees to put in place a Type A Contingent Asset.

4. On 30 March 2011, the Trustees submitted certification of a Type A Contingent Asset which included a Guarantee from TT Electronics plc dated 28 March 2011, a blackline document showing the differences from the Board's required form for such documentation and a legal opinion for the Guarantee. The Schedule to the Guarantee lists the Scheme's participating employers.
5. On 25 August 2011, the Board wrote to the Trustees and said that the Scheme had not satisfied the Board's requirements for recognition of the Contingent Asset because the Contingent Asset did not have any practical effect in reducing the risk of compensation being payable in the event of employer insolvency. TT Electronics plc, the guarantor, being the sole employer from October 2010.
6. The Scheme levies for the period 1 April 2011 to 31 March 2012 were set out in an invoice dated 27 September 2011.
7. On 18 October 2011, the Trustees submitted an application to the Board requesting a review of the levies. The Board reviewed their original decision but upheld the calculation of the levy and issued its Review Decision on 10 April 2012. On 15 June 2012 the Committee reached its Reconsideration Decision to uphold the Review Decision and the original calculation of the levy.

Response by the Committee

8. 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 2011 to 31 March 2012, as set out in an invoice dated 27 September 2011. They acknowledge this was a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004 (the Act).
9. The Board published its final determination of these matters for the financial year 2011/12 on 17 December 2010 (**the PPF Determination**).
10. The Board noted 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.

11. The risk based levy was calculated by reference to the formula $U \times P \times R \times c$, subject to a cap (K) equal to 0.0075, multiplied by the Scheme's protected liabilities, (Rule C3.1 of the PPF Determination).
12. The Contingent Asset in question was Type A (group company guarantee). The Committee noted that the Contingent Asset certificate had not been recognised on the grounds that it had been provided by the Scheme's sole employer and did not reduce the risk of compensation being payable to the Board in the event of an insolvency event occurring in relation to a scheme "Employer" as required by Rule D2.3(2) of the PPF Determination.
13. Rule A.1 of the PPF Determination defines "Employer" to be "as defined in section 318 of the Act, provided that the identity of the Employer in relation to a Member shall be assessed by the Board by reference to data which has been submitted in accordance with Rule A2.2".
14. Rule A2.2 sets out the methods of Submitting Information, and provides that information shall be treated as having been submitted if (in addition to the other requirements in A2.2) it is held on Exchange "at the relevant Measurement Time".
15. The Measurement Time is 5.00 pm on 31 March 2010 except, in relation to Contingent Assets, when it is 5.00 pm on 31 March 2011.
16. Rule D2.3(2) provides that in order for a Contingent Asset to be recognised "The Contingent Asset must appear to the Board to reduce the risk of compensation being payable from the Board in the event of an insolvency event occurring in respect of an employer in relation to the Scheme."
17. The Committee agreed that the PPF Determination contains a single definition of "Employer". However, Rule A3.2 requires the Board to apply that definition "at the relevant Measurement Time" which, for levy calculation purposes, was 31 March 2010 and, for Contingent Asset purposes, 31 March 2011.

18. The Board was therefore required to apply the “Employer” definition at two different points in time. This did not amount to giving the definition “two different meanings” but rather using that definition to assess who was an Employer at each of the relevant Measurement Times, under Rule A2.3. The committee therefore considered that this was a correct application of the timeframes laid down in the PPF Determination.
19. The Applicant submits that the Measurement Time for assessing who was a Scheme Employer should be 31 March 2010, as no other time is specified in the Rules for “that type of information”. The Committee noted that the Employer definition provides that the identities of scheme employers are to be assessed by reference to “data” which has been submitted under Rule A2.2 which refers to data submitted at the relevant Measurement Time and Rule A2.3 expressly states that the Measurement Time “for each item of information” in relation to Contingent Assets is the deadline for its submission which, for Contingent Assets, is 5.00pm on 31 March 2011.
20. The Applicant submits that “only the nature of the Contingent Asset itself is to be assessed by reference to a Measurement Time of 31 March 2011.” The Committee noted that paragraph 4(7)(c) of the Contingent Asset Appendix requires trustees, when certifying a Contingent Asset, to confirm that “the information contained within the certificate is complete and accurate”. In the Scheme’s case, the Contingent Asset attempted to guarantee the liabilities of employers who, as at the date of the Contingent Asset agreement were no longer participating. The employer data contained in the certificate was therefore inaccurate. This inaccuracy forms a fundamental part of the “nature” of the Contingent Asset.
21. Rule A2.3(1) required the Board to assess the identity of the employers as at 31 March 2011. At that time, only the Principal Employer remained in the Scheme. As the Principal Employer was also the guarantor, the Committee considered that it was effectively guaranteeing its own scheme liabilities, and concluded that this was not an effective risk reduction mechanism under Rule D2.3(2).

22. The Board gives effect to its duties under section 175(5) via its annual PPF Determination, which sets out the factors the Board takes into account when calculating a scheme's levy. These include information on the scheme's annual return together with information relating to a risk reduction measure which a scheme undertakes via the Board's concessionary Contingent Asset regime. The PPF Determination then specifies the times by reference to which the factors will be assessed. The Committee concluded that this is a correct application of the Board's duties under section 175(5).
23. The Committee considered that, in the Scheme's case, the Board rejected the Contingent Asset on the basis that it did not reduce the risk as required by Rule D2.3(2), not as the applicant submits, "because the risk had already been reduced". In respect of the SAA entered into by the Scheme in October 2010, the Committee noted that this took place after the Board's standard Measurement Time of 31 March 2010 (subject to the specific exceptions in rule A2.) and it was not therefore possible to take this arrangement into account when calculating the Scheme's 2011/12 risk based levy.
24. The Committee noted that the Board is entitled to set its own timeframes. The Committee noted that the reason the Board has specified a Measurement Time of 31 March 2011 in relation to Contingent Assets (rather than aligning them alongside the standard Measurement Time of 31 March 2010) was to give an immediate benefit of risk reduction to those schemes who had genuinely reduced risk in accordance with Rule D2.3(2).
25. The Committee concluded that the differing timeframes were not "irrational or discriminatory" as they were intended to confer a benefit on schemes with genuine risk reductions measures in place.
26. The Committee noted that as the PPF Determination clearly specified a Measurement Time of 31 March 2011 in relation to Contingent Asset submissions, there was no ambiguity or room for interpretation regarding this requirement, nor did the committee consider that any of its discretions contained in Part B of the PPF Determination were applicable in the Scheme's case.

27. The Committee noted that the Board had considered the representations raised by the Trustees and concluded that the Board had not dismissed those representations but had confirmed that the Contingent Asset did not fulfil the requirements.
28. The review decision reflected the fact that Contingent Assets cannot be put in place by reference to a retrospective position as at the date of the Contingent Asset certificate: they are required to contain complete and accurate information which the Scheme's Contingent Asset, in guaranteeing the liabilities of employers who no longer participated, did not. A company cannot guarantee its own liabilities as, for practical and legal purposes, no benefit would result from this.
29. The Committee concluded that the Scheme had attempted to use the Contingent Asset regime as a mechanism for achieving recognition of its SAA after the applicable Measurement Time of 31 March 2010 had passed by guaranteeing the liabilities of employers who were no longer participating in the Scheme at the time the Contingent Asset was entered into.
30. The Committee therefore concluded that the Scheme's actions represented an abuse of the Contingent Asset regime, which is intended to give credit for genuine risk reduction measures rather than serve as a means for updating employer data outside of the parameters laid down in the PPF Determination.
31. The Committee concluded that the Scheme's Contingent Asset would, if recognised, have achieved a levy reduction without any corresponding benefit to the Scheme via a risk reduction, an outcome which the requirement in Rule D2.3(2) was designed expressly to prevent.

Written representation from the PPF

32. 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 2011/12.
33. The Trustees Contingent Asset submission amounts to an attempt to circumvent the fact that the scheme data was (for the 2011/12 levy) measured a year in advance of the levy year, rather than a genuine attempt to provide the additional layer of risk reduction that the Contingent Asset regime recognises in the levy.

34. The Trustees take issue with the Board's decision on the basis that the Scheme's risk based levy ought to have reflected two "events" in relation to the Scheme: a SAA whereby all liabilities were transferred to TT Electronics plc, and the certification of a Type A Contingent Asset for the 2011/12 levy year.
35. The Trustees conceded that the SAA was too late to be included in the Scheme's data submitted for the 2011/12 levy year. For such an event taking place after the data measurement time for 2011/12, the correct and appropriate operation of the levy rules is that the event in question is not reflected in the levy for 2011/12.
36. However, the term 'Employer' is defined, the fundamental issue is that the guarantee entered into by the Scheme did not, at any point "reduce the risk of an insolvency event occurring in respect of an Employer in relation to the Scheme".
37. To recognise a Contingent Asset that did not represent a real risk reduction would be unfair to schemes that did comply with the Board's rules.

Further representations from the Trustees

38. The implication that the Trustees have acted inappropriately appears to have distracted the Board from its duty to correctly interpret and apply the levy rules and led it to seek an outcome that is not properly grounded in those rules.
39. The Trustees followed the advice given by the Board's representative on 8 March 2011. Moreover, that advice was correct. The Contingent Asset was submitted in accordance with the levy rules and on a correct interpretation of them and it does reduce the risk of compensation being payable in exactly the manner envisaged by the rules.
40. It is not the Trustee's position that the calculation of the risk based levy ought to have reflected both of the events. The Trustee states only that the Type A Contingent Asset should be reflected. It is the Board's decision that has taken into account the SAA and has done so improperly (because as the Board rightly notes it was not included in the Scheme's data submitted on 31 March 2010). The decision of the Committee can only have been arrived at by taking into account the effect of the SAA in considering whether the Contingent Asset met the requirements of Rule D2.3(2) and that it was incorrect to do so.

41. The Board has incorrectly treated the Contingent Asset as updating the Scheme data (i.e. the identity of Employers). That is not the purpose of the Contingent Asset and it is not what the submission of the Asset did. The scheme data (for which the Measurement Time is 31 March 2010) remains unchanged.
42. The Board states that the definition of employer is not relevant to the question of whether the Scheme's Contingent Asset should be recognised. Recognition of a Contingent Asset is predicated on an assessment of its ability to reduce the risk of compensation being payable by the Board in the event of "an insolvency event occurring in respect of an Employer in relation to that Scheme." Since that assessment cannot be conducted without first identifying the relevant Employer, and since that identification must take place with reference to the definition of Employer in the levy Rules it is absolutely relevant.
43. The Board agrees that the term Employer, as defined in the PPF Determination, has a single meaning. It is not clear whether this is a departure from the Committee's assertion that "Rule A2.3 requires the Board to apply that definition [of the term employer] at the relevant Measurement Time which, for levy calculation purposes, was 31 March 2010 and, for Contingent Asset purposes, 31 March 2011."
44. Despite agreeing that there is a single meaning of the term 'Employer' and that the meaning is to be applied at 31 March 2010 the Board has effectively attributed to the word 'Employer' two different meanings. As demonstrated by its statement "The guarantee certified by the Scheme as a Type A Contingent Asset did not meet the Board's criteria and is in any event incapable of reducing risk, since by the time it was put in place, the Scheme's sponsoring employer was the guarantor. The employer was therefore guaranteeing its own obligations..." Given that the term "Employer" has a single meaning and is applied at a single point in time the conclusion drawn above is inherently flawed.
45. The Board could in effect only draw the conclusion that it has by either (i) updating the identity of the Employer on the basis of the SAA (a course of action that it identifies as impermissible under the PPF Determination) or by incorrectly applying the definition of Employer at two different Measurement Times.

46. The correct interpretation of the PPF Determination requires the Board to assess the effect of the Contingent Asset as at 31 March 2011 in reducing the insolvency risk of the Employers as they stood at 31 March 2010. The effect of the interpretation advocated by the Board would be that it is required to consider reducing the amount of levy calculated on the basis of the insolvency risk of one employer with reference to a Contingent Asset assessed on the basis of the insolvency risk of a different employer. Such a course defies logic and cannot be correct.
47. The Board's statement that "the determination requires that Contingent Assets must reduce the risk of compensation being payable" does not reflect the requirements of Rule D2.3(2) which states that "the Contingent Asset must appear to the Board to reduce the risk of compensation..." which means that the Board only has to determine whether the Contingent Asset submitted meets the requirements for being an instrument that appears to provide for the liabilities of any Employer (as determined at 31 March 2010) should that Employer become insolvent. The Contingent Asset submitted was not 'purporting' to guarantee the liabilities of employers no longer participating in the Scheme. It was guaranteeing those liabilities and the Contingent Asset submission met the criterion. Nor, was TT Electronics plc seeking to guarantee its own liabilities. It was, on a proper interpretation of the word "Employer", putting in place a guarantee that met the requirement of Rule D2.3(2).
48. The schedule to the guarantee lists the companies in respect of which the guarantee is provided. All of this is accurate information. The guarantee, from the parent company, guarantees that any liabilities that may attach to those companies in respect of the Scheme will be met by the guarantor. This is an accurate statement of the effect of the legal instrument.

49. The Board's decision is perverse because:

- it has the effect that where Employer information is properly updated for the purposes of a forthcoming levy year – as by means of submitting information about the SAA – that updating of Employer information is applied in respect of the current levy year. Any such approach must render the PPF Determination unworkable;
- it has the effect that the updating of the information should be taken account of in an inconsistent manner. On the basis of the Board's decision, it is not permissible to have regard to the effect of the SAA when considering the calculation of the risk based levy but it is permissible to do so when considering the status of a Contingent Asset.
- it interprets the PPF Determination as having the effect that a scheme is prohibited from taking the steps necessary to reduce both (i) the risk of compensation being payable in future levy years, and (ii) the risk of compensation being payable in the current levy year. The decision provides that two actions cannot be taken in the same levy year.

Conclusions

50. 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 2011/12.
51. Under Section 175(5) of the Pensions Act 2004, the Board was required to determine the factors by reference to which the 2011/12 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.
52. My role is to consider whether the Committee's decision "was not reached correctly". 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.

53. The dispute that has arisen is whether the Type A Contingent Asset, submitted by the Trustees on 31 March 2011, can be taken into consideration against the risk based levy which has been calculated on the data held on Exchange at 31 March 2010.
54. It is common ground that at 31 March 2010 the “Employer” in relation to the Scheme consisted of the Scheme’s participating employers and that the position changed in October 2010 when TT Electronics plc became the sole “Employer” by way of a scheme apportionment arrangement.
55. 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.”
56. The Committee submits that the Board was required to apply the “Employer” definition at two different points in time, at 31 March 2010 for the purposes of calculating the levy, and again at 31 March 2011 in relation to the Contingent Asset. They argue that Rule A2.3(1) requires the Board to assess the identity of the employers as at 31 March 2011. That is incorrect. Rule A2.3 places no such requirement on the Board. The Rule states that “The Measurement Time for each item of information is the deadline for submission of that information...” which makes quite clear that the Measurement Time, in this instance, is simply the date for submission of various pieces of information.
57. Rule A.1 of the PPF Determination provides that “the identity of the Employer in relation to a member shall be assessed by the Board by reference to data which has been submitted in accordance with Rule A2.2.” Rule A2.2 provides that information shall be treated as having been submitted if it is held on the Pensions Regulator’s (TPR) Scheme Maintenance System (**Exchange**) at the relevant Measurement Time.
58. Trustees and managers of pension schemes have a legal obligation to supply TPR with information about their scheme which includes the details of the sponsoring employer. The information is used to ensure that TPR’s register of pension schemes is up to date and is also used to calculate levies. The information held on Exchange

at the relevant Measurement Time (which in this case was 31 March 2010) is then shared with the Board and other regulatory bodies. The PPF Determination requires the Board to then calculate the risk based levy based on the validated data held on Exchange at the relevant Measurement Time (31 March 2010).

59. Adopting the accepted approach of interpreting such documents in a "practical and purposive" way, I find that the Board are required to identify the Employer in relation to the Scheme, based on the validated data held on Exchange at the relevant Measurement Time (in this case 31 March 2010). There is no mechanism in the PPF Determination to accommodate a change of employer at any point during the levy year. Therefore, the Employer identified at that relevant Measurement Time must, for the purposes of the risk based levy, remain as the Employer for the entire year.
60. Once that Employer is so identified the Board must then decide whether any Contingent Asset submissions, made before the deadline for the submission of Contingent Assets (in this case 31 March 2011), appear to have the effect of reducing the risk of compensation payable by the Board in respect of the Employer first identified.
61. Thus, in the case of the Scheme, the Employer consisted of the participating employers as identified on Exchange at 31 March 2010 and the Board needed to assess whether the insolvency risk of those participating employers, and thus the risk of compensation being payable by the Board, would have been reduced by the Contingent Asset submission made on 28 March 2011.
62. The Board submit that Contingent Assets cannot be put in place by reference to a retrospective position as at the date of the Contingent Asset certificate. I agree. Section 30(b) of the Contingent Asset Appendix to the PPF Determination, which is headed "What are the certification and documentary requirements for a Type A Contingent Asset", states "The certificate must contain the following information...Date on which the guarantee came, or will come into effect, which must be no later than 1 April 2011." The Guarantee was entered into on 28 March 2011 and this is confirmed as the effective date on the Contingent Asset certificate. As I have stated above it is common ground that in October 2010 TT Electronics plc

became the sole employer, in relation to the Scheme, by way of a scheme apportionment arrangement. Thus TT Electronics plc was purporting to guarantee the liabilities of employers who no longer participated in the Scheme at the time the guarantee was given and so, as submitted by the Board, the guarantee had no effect because TT Electronics was effectively guaranteeing its own liabilities. The Trustees contend that the employer information was properly updated for the purposes of a forthcoming levy year, by the submission of the scheme apportionment arrangement, but that the Board's decision has the effect of applying the updated information in respect of the current levy year. The Trustees also submit that the updating of the employer information has been taken into account in an inconsistent manner. Because it is not permissible to have regard to the effect of the scheme apportionment arrangement when considering the calculation of the risk based levy but it is when considering the status of the Contingent Asset.

63. In my judgment the Trustees' arguments about the effect of the scheme apportionment arrangement are misguided. As I have stated above there is no mechanism to in the PPF Determination to accommodate a change of employer at any point during the levy year. Therefore, the employer identified on 31 March each year must, for the purposes of the risk based levy, remain as the employer for the entire year. Equally an Employer cannot be changed, mid way through the year, to render a guarantee effective.
64. I cannot criticise a published policy of the Board, I may only check it is applied fairly and that the individual circumstances of the case have been considered both in terms of the stated policy and whether there are any reasons to depart from the policy. Established case law indicates that I may only interfere with the exercise of a discretion where the decision-maker has not acted as it should do.
65. For the reasons given above it follows that I can see nothing that justifies my coming to a conclusion that I should remit this matter back to the Board for reconsideration.

66. 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. Accordingly, I determine that the Committee's decision of 15 June 2012 was reached correctly.

JANE IRVINE

Deputy Pension Protection Fund Ombudsman

5 June 2013