

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

**Applicant** : The Trustees of the Ibstock Pension Scheme  
**Scheme** : The Ibstock Pension Scheme

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 7 March 2013. The referral concerns the Scheme's risk-based levies for the year 2011/12, which is a reviewable matter under paragraph 19 of Schedule 9 to the Pensions Act 2004.

**Background**

1. The calculation of the 2011/12 risk-based levy was the subject of a previous referral to the PPF Ombudsman (PPFO). I issued my determination on 18 January 2013. I directed the Board of the PPF (the **Board**) to reconsider the Scheme's 2011/12 risk-based levy calculation taking into account (a) the contents of the Levy Practice Guidance and (b) only the relevant policy reasons for not exercising discretion.
2. Following my determination, the Board referred the matter to its Reconsideration Committee. The Committee issued its decision on 7 March 2013 and the key points of it are summarised below:
  - In coming to its decision, the Committee considered the 2011/12 PPF Determination, the PPFO's Determination and other information supplied to the Board previously.
  - The DRC certificate submitted on 6 April 2011 had been rejected on the basis that the Section 179 valuation date referred to on the certificate related to an earlier valuation rather than the most recent valuation, which had been used by the Board to calculate the 2011/12 risk-based levy.

[The PPF later explained that the original rejection was an automated process. Its system contains validation rules and automatically rejects a DRC certificate if the dates are 'incorrect'. It has explained that no discretion is exercised at the bulk invoicing stage.]

- The DRC certificate had been submitted within the prescribed deadline, but referred to the March 2008 S179 valuation. A subsequent S179 valuation had been available at the time, with an effective date of March 2009. The DRC certificate did not, therefore, relate to the same S179 valuation which was used to calculate the Scheme's 2011/12 risk-based levy. It could not be taken into account by virtue of Rule D1.3 of the PPF's Determination.
- The Applicant was, therefore, reliant on the Board exercising a discretion if the DRC certificate was to be taken into account.
- Under Rule B2:
  - data could be corrected where the information supplied for or used in the calculation of the levy was incorrect in a material respect or a certificate or declaration had been improperly given or contained data which was incorrect in a material respect;
  - the Board could review and revise a levy which had already been calculated on the basis of information which appeared to it to be correct, but was not obliged to do so;
  - the Board was under no obligation to take corrected data into account merely because a scheme had been disadvantaged by a failure by the trustees or those acting for them to supply the correct data;
  - data was not incorrect in a material respect if it was correct and legitimate in itself but it would have been open to the party supplying it to supply different or additional information which might have caused the levy to be calculated differently.
- On balance, it was accepted that the Scheme intended to refer to the 2009 S179 valuation in the DRC certificate, particularly since this was the valuation used to calculate the Scheme's 2011/12 levy. In addition, the DRC certificate itself required the Scheme to include the effective date of the "last" S179 valuation.

- The DRC certificate, therefore, contained information which was materially incorrect and the Board's discretion under Rule B2 arose.
- The Committee noted that, in exercising discretion, it must act fairly, taking into account all relevant factors (including the Levy Practice Guide) and discounting irrelevant factors.
- The Board's published policy was generally not to accept corrections for the 2011/12 levy year.
- The provision of incorrect information in the DRC certificate did not, in this case, present a risk of under-collection against the levy estimate. However, it was possible for the Board to adhere to its policy, if it was minded to do so, on the basis that it was reasonable to expect schemes to provide the correct data (the third rationale for the policy).
- The front sheet of the 2011/12 PPF Determination reminded schemes and their advisers of the "importance of ensuring that complete, accurate and up to date information is submitted ... by the relevant deadlines". Paragraph B2(a) of the Levy Practice Guidance also stated that "schemes should not rely on [the PPF's plausibility tests] to pick up their errors".
- A scheme actuary or a duly appointed substitute was required to submit the DRC certificate. This requirement was intended to protect the Board against the incorrect data being submitted, such as an incorrect valuation date which had a financial impact on the calculation of a scheme's levy. The Board was dependent upon scheme advisers to provide the correct information and, therefore, had a legitimate expectation for this requirement to be followed in all cases.
- No explanation had been offered by the Trustees as to why the Scheme Actuary had not submitted the DRC certificate or whether the person submitting it was authorised to do so.
- The Board's policy should not be applied inflexibly so as to fetter its discretion.

- The Committee considered the Levy Practice Guidance and, in particular,
  - The effect of the error on the calculation of the levies;
  - The reason the erroneous data was submitted;
  - Responsibility for the erroneous data, including whether any professional indemnity insurance might compensate the Scheme;
  - The speed with which the error was identified; and
  - The reason for the error.
- Taking the DRC certificate into account would reduce the Scheme's levy by 26% (£150,000). Had the correct valuation date been used, a higher deficit reduction contribution figure would have been certified (£56.5 million instead of £54.1 million).

3. The Committee concluded,

“Notwithstanding the financial advantage which would be received by the Board were the Committee to uphold the original review decision, and the fact that accepting the correction would not result in under collection of the levy estimate in this instance, the Committee concluded that this was outweighed by other factors; in particular, the fundamental importance of Scheme's (*sic*) providing complete, accurate and up to date information in a timely manner.

Little to no information had been provided as to why the date of the earlier valuation had been entered instead of the most recent valuation available as at the deadline for the 2011/12 levy year.

Equally, ... no explanation had been provided by the Applicant during the review and reconsideration stages as to why the DRC Certificate was not submitted by the Scheme Actuary or that the person who submitted it was authorised to do so. The Board had a legitimate expectation that the requirements of the DRC Appendix would be followed by the Scheme to avoid incorrect information being submitted. The fact that a Scheme representative submitted the DRC Certificate so as to preclude the availability of professional indemnity insurance\* for the Scheme should not absolve the Scheme of its responsibility to provide correct information.

The Committee did however accept that the Scheme had acted promptly in identifying the error, but highlighted that this was only once the Scheme's invoice for the 2011/12 levy year had been issued."

\*The PPF have said that they were not advised whether indemnity cover was in place for this scheme.

4. The final two paragraphs of Committee's decision said,

**"29. Accordingly, the Committee decided on balance to uphold the Review Decision and the original calculation of the levies for the Scheme.**

**30. *In compliance with paragraph 32 of the PPFO Determination, this decision revokes, and having taken all relevant matters into account, replaces the Original Reconsideration Decision. This decision does not revoke, replace, vary or substitute the Review Decision (which has been upheld).*"**

### Reasons for referral

5. The Trustees submit:

- The Committee has not reached its decision correctly. In particular, it has:
  - taken irrelevant matters into account or failed to take relevant ones into account;
  - asked the wrong questions or failed to ask the right questions;
  - misdirected itself as to the relevant rules; and
  - came to a decision which could not have been reached by a reasonable decision maker.
- The Committee's decision is "unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker"<sup>1</sup>.
- The Committee adopted a mindset to the effect that discretion could be exercised or withheld for punitive purposes. The Courts have sought to remind decision making parties, on more than one occasion, that a power was not conferred for punitive purposes. There is nothing in the relevant

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<sup>1</sup> *R v Ministry of Defence, ex parte Smith* [1996] QB 517 per Lord Bingham MR at 554

legislation to suggest that the appeal process is intended to be used for punitive purposes.

- The Committee gave “manifestly disproportionate weight to certain considerations”<sup>2</sup>
- The Committee’s decision stated that it did not revoke, replace, vary or substitute the review decision. There was no evidence that the Committee made enquiries of the review decision makers as to their consideration of potentially relevant matters. The decision to uphold the review decision cannot stand because there was no evidence on which such a decision could properly be made due to the lack of clarity in the review decision.
- The PPFO had not directed the Board to consider whether the review decision could be upheld.
- The Committee has focused, almost entirely, on the importance of schemes providing complete, accurate and up to date data. It says that this alone is sufficient to justify upholding the original levy calculation.
- The Committee has failed to take account of the fact that the PPF stands to benefit by £140,000 if it does not recalculate the levy, and of the speed with which the error was corrected.
- The Committee did not balance the advantage to the PPF against the unfairness to the Scheme and its members, through imposing a financial burden on them as a penalty. Nor did it consider the extent to which it should recognise the good behaviour of the employer in paying the DRC in the first instance.
- The error was notified to the PPF a matter of days after the levy invoice was issued. It is submitted that errors with DRC certificates are most likely to be notified after the invoice is issued because they are unlikely to come to light until the PPF has issued an invoice which does not take the DRC into account.

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<sup>2</sup> *R (on the application of Gallagher) v Basildon DC* [2010] EWHC 2824 (Admin) at 41

- The Committee noted that the Scheme Actuary had not submitted the DRC certificate and that no explanation for this had been given or whether the person who did submit it was a duly authorised substitute. However, the Committee did not seek an explanation, which would have been the correct step given its quasi-judicial function.
- The DRC appendix (to the PPF's Determination) does not indicate that any criticism will arise if it is not the Scheme Actuary who enters the data. There is no guidance as to who can carry out this role. The submission process is purely a mechanical one. In the Scheme's case, it was the pensions manager who entered the data. The incorrect data was submitted as a result of human error.
- To the extent that any punishment is required, the Scheme has already suffered by not having certified as much DRC as it could have done and, to that extent, the PPF has benefitted accordingly. They do not, however, accept that punishment is required. They do not believe that a disproportionate punishment is consistent with the proper exercise of judgment. The correct measure of a penalty ought not to be "more than is necessary to accomplish the objective"<sup>3</sup>
- Whilst it is desirable that the correct information is supplied in all cases, it is not a legitimate expectation. If it were, there would not be a published policy allowing for corrections. The Board's discretion to accept correction recognises that there will be times when errors occur.

### **Response by the PPF**

6. In addition to the points made by the Reconsideration Committee, the PPF submits:
- The Board has the discretion, under Rule B2.1, to review and revise a levy, but is under no obligation to do so.

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<sup>3</sup> *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80

- The Board had a legitimate expectation that the DRC certificate would contain the correct information and that it would be submitted by the Scheme Actuary or a duly authorised person. The Board was not satisfied that steps had been taken by the Scheme to ensure that the correct information had been provided because it had not been submitted by the Scheme Actuary and no explanation had been given for this.
- Prior to the referral to the PPFO, the Scheme had not informed the Board that the data had been submitted by the pensions manager, despite having numerous opportunities to do so.
- It does not accept that the Reconsideration Committee failed to consider the relevant issues afresh. The Committee's decision referred to the PPFO's direction and confirmed that it had considered anew whether it should exercise discretion under Rule B2.1.
- The importance of submitting correct data was emphasised to stakeholders in both the 2011/12 Determination and the Levy Guidance. This approach reflects the statutory position that trustees should not knowingly or recklessly provide the Pensions Regulator with false or misleading information (Section 80 of the Pensions Act 2004). In 2006/07 and 2007/08, the PPF allowed corrections to data. However, in 2008/09, following recognition that schemes and their advisers had had a number of years to get used to the system, a widely publicised 'no corrections' policy was adopted and this continued to apply in 2009/10, 2010/11 and 2011/12. This is a general policy that does not fetter the Board's discretion to exercise its discretionary power of correction on a case by case basis under Rule B2 of the Determination (as in this matter).
- It does not make examples of schemes because it does not publish details of those schemes which have made errors in the submission of data. Nor is its policy intended to operate as a form of penalty. The policy is intended to ensure that the scheme in question learns from its error and to be fair to other schemes by seeking to ensure high levels of data quality without an associated burden on the Board of having to deal with corrections requests.

Such requests might be numerous if the Board did not take a strict approach. A more forgiving approach might lead to larger amounts of time and resources being taken up in correcting data at the expense of the level of service provided for other schemes or, potentially, an increased cost to all levy payers.

- The failure to explain why the error had occurred made it harder for the Board to see if the Scheme's data submission practices would be tightened up.

## **Conclusions**

*Did the Reconsideration Committee consider the issues afresh?*

7. The direction in my January 2013 determination was for the Board to reconsider the 2011/2012 levy calculation for the Scheme. The direction was addressed to the Board – and not a particular committee or by any particular process – because that is what is required by Regulation 16 of the Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations.
8. As relevant to a levy calculation, there is a three step process for decision making by the Board: an initial decision (in this case to disregard the DRC Certificate), the Review Decision and the Reconsideration Decision.
9. The matter was dealt with by the Board as a Reconsideration Decision under section 207 of the Pensions Act 2004. Expressly under the legislation Reconsideration Decisions follow Review Decisions. The Reconsideration Committee evidently thought of the process as a remaking of the initial Reconsideration Decision, since they concluded the new decision with statements that the original Review Decision was upheld and stood without variation.
10. The Trustees say that this suggests that the Reconsideration Committee did not truly consider the matter afresh.
11. The closing paragraphs referred to in paragraph 4 seem to have been substitutes for different, possibly standard, closing paragraphs. The original February 2012 decision said,

**“23. Accordingly, the Committee upholds the Review Decision and the original calculation of the levies for the Scheme.**

**24. This decision does not vary or revoke any determination, direction or other decision already made by the Board in respect of the reviewable matter, does not substitute a different determination, direction or decision, and does not vary or substitute any notice issued or given by the Board.”**

12. As I have noted, my direction was for the Board to reconsider the Calculation, and not for any particular manifestation of the Board to do so. However, I can see why the Reconsideration Committee was chosen - the decision that was referred to me in the first place being theirs.
13. The second reconsideration has had to be shoe-horned into a process not expressly designed to accommodate such a decision. I agree with the Trustees that it looks unsatisfactory, but I think that is an impression caused by the context and reinforced by the final two paragraphs. In fact the Reconsideration Committee *did* make a new decision, which could, and probably should, have been described as replacing the Review Decision, since the reasoning was substantially added to – even if the outcome was the same.

*The decision*

14. It is not at issue that the Board has the discretion to accept the DRC certificate and so to review and revise the Scheme’s 2011/12 levy. It is also not at issue that to do so would not result in an under collection of the levy for that levy year. The PPF has acknowledged that there is, in fact, a financial advantage to it in not accepting the DRC certificate.
15. The Reconsideration Committee gave the following reasons for not exercising discretion to accept the DRC certificate and revise the Scheme’s levy:
  - It was reasonable to expect schemes to provide the correct data.
  - The PPF’s Determination reminded schemes of the importance of providing the correct data.

- A scheme actuary or a duly appointed substitute was required to submit a DRC certificate, which was intended to protect the PPF against the submission of incorrect data.
  - The PPF was dependent upon scheme advisers for the correct data and, therefore, it had a legitimate expectation that the requirement for a scheme actuary or duly appointed substitute to submit the DRC certificate would be followed in all cases.
  - The Scheme had offered no explanation for the incorrect data being submitted nor had it confirmed that, since the Scheme Actuary had not submitted the data, that a duly appointed substitute had.
16. The Committee also said that it had considered the effect the error had had on the levy calculation, the reason the incorrect data had been submitted and the speed with which the error had been identified (that is, the considerations listed in the Levy Practice Guidance).
17. In essence, the reason given by the Committee for not exercising discretion to accept the DRC certificate is the third of those listed in the Levy Practice Guidance; that the Board believes it is reasonable to expect the correct data to be submitted and it wishes to “incentivise appropriate behaviour”.
18. The Board wishes to protect the PPF against carelessness on the part of the schemes and their advisers, which is a perfectly legitimate desire. It does so by saying that the circumstances in which it may allow the correction of data will be exceptional. In other words, it puts schemes on alert that they may well be penalised if they provide incorrect data.
19. The Committee accepted that the Scheme intended to refer to the 2009 S179 valuation in the DRC certificate. At the time of the decision the Committee did not know why the incorrect data had been input. Nor did it know who had supplied the data or whether he or she was an appointed substitute of the Scheme Actuary. The Trustees submit that the Board should have asked. The Board says that the Trustees were aware from the earlier decisions that the Board did not know – but still did not provide the information.

20. In addition, the Trustees have pointed out that no guidance was provided as to who would be considered a suitable substitute for the Scheme Actuary or whether any significance attached to the Actuary not being the one to input the data.
21. The Committee might understandably have been surprised not to have had any voluntary explanation of the error. I agree that they could have expected one if the Trustees thought it would advance their case. But I note that the strongest deduction the Committee could take from the absence of an explanation was that there had been incompetence on the part of an unqualified person, and thus that the Trustees had not taken proper steps to limit the risk of the data containing an error.
22. The Committee said (in substance) that the fact the decision not to correct was to the PPF's financial advantage was outweighed by the need to encourage the provision of accurate data.
23. The Board might say, particularly in the absence of an explanation of what happened, that this was exactly the kind of error that it wished to discourage. But in deciding whether to exercise discretion, it seems to me it would have been helpful to have some evidence of the potential risk to the PPF of departing from or not departing from the policy. The non-correction is, in effect, a penalty designed (to translate Voltaire) "to encourage the others". Only the most unforgiving of approaches could be adopted without considering in any detail how many errors there might be and what the order of cost to the PPF in lost levy or administrative expense could be. My office asked the Board if it had undertaken a detailed assessment of the likely percentage error rate, the comparative risks of under or over collection, or the extra cost of correcting errors. It said it had not.
24. The PPF draws an analogy with the civil and criminal penalties set out in the Pensions Act 2004. I do not find the analogy particularly helpful. In this case, the Scheme is being penalised to a far greater extent for an administrative error than the Trustees or their advisers would be for a deliberate attempt to avoid providing data or for providing false data; the cost to the Scheme is three times the statutory maximum fine set out in the Pensions Act 2004 (Section 314). In addition, the PPF is both judge and the beneficiary of its own judgment, which, though not a unique

arrangement, implies an obligation to take care to make a balanced, just and properly reasoned decision.

25. However, there are only very limited circumstances in which I can interfere with the exercise of a discretion such as this. Briefly, these are if the decision maker has:
  - failed to take into account only and all relevant matters;
  - failed to ask the correct questions;
  - misdirected itself as to the law or the relevant rules; and
  - come to a perverse decision, being one which no other decision maker, properly directing itself, could come to in the same circumstances.
26. The particular circumstances here are that there is no financial risk to the PPF (of under collection against the levy estimate) and that the reason put forward for not exercising discretion to accept the DRC certificate is (at its bluntest) to penalise the Scheme for the error and make an example of it. The PPF argues that it does not publicise schemes which have made errors in data submission and so its policy should not be seen as operating as a form of penalty and that the purpose was to discourage the scheme itself from making such errors. But that not altogether consistent with the Committee's observation about "the fundamental importance of **Schemes** providing complete, accurate and up to date information in a timely manner". Nor, in my view would it help the PPF if it was the motive. The narrow purpose of ensuring that the Scheme itself learned from the experience would be a lesser justification of a relatively disproportionate penalty than setting an example to the wider pensions industry. But anyway, even if the individual decision was not publicised, the PPF must have had in mind that taking a strong policy stance not backed up by action would weaken the policy in the eyes of the industry, and increase the risk of error.
27. I accept that the PPF is entitled to take a robust approach to an unexplained error. I also accept, notwithstanding my observations above, that it was open to it to take an unforgiving stance based on an unscientific assumption that errors are likely to undermine the efficacy of the PPF and are to be discouraged by pursuing the policy where there are offending schemes, with only rare exceptions.

28. I might accept that the Committee's decision could be said to lie quite close to the tipping point between reasonableness and perversity, but I do not find that it is possible to say that it is a decision which no other reasonable decision-maker would have come to in the circumstances.
29. It is also argued that the Committee gave disproportionate weight to certain considerations. In general, it is for the decision-maker to determine the weight it attaches to any of the relevant considerations. In *Gallagher*, the judge found that the authority concerned had given disproportionate weight to certain considerations. However, this was not the only reason why he decided to quash its decision; he also found that it had failed to take into account all relevant matters, had taken account of irrelevant matters and had not shown the rational quality of response which was required. I do not find that the Committee failed to take into account any relevant matters or that it took irrelevant matters into account. As I have said, the decision lies within the range of possible responses from a reasonable decision-maker. It is true to say that the Committee gave greater weight to the Board's policy of no corrections, but it is not, in my view, possible to say that this weight was disproportionate.
30. It is also argued that the Committee's decision lacks proportionality. It is easy to see why the Trustees feel this to be the case when the consequences of a deliberate attempt to defraud the PPF would have resulted in a less swingeing penalty. To the extent that they are referring to proportionality in a legal sense, I do not think the challenge can succeed. The concept of proportionality is the standard test used by the European Union (EU) Court of Justice to determine the legality of a member state's interference with rights which are protected under EU law. Put simply, an official measure must not have a greater effect on private interests than is necessary for the attainment of its objectives. It has not replaced the reasonableness test for cases which do not involve EU or human rights issues.
31. In summary, the PPF knew what it was doing. It knew the facts of the case and that it was taking a robust stance which it had publicised. It has made it sufficiently clear why it has not departed from its policy. It knew how much the decision would cost the Scheme and so the amount of the effective penalty that it was levying.

32. In the circumstances, I cannot see that that its decision meets any of the criteria set out in paragraph 25 that would otherwise justify my interfering with it.
33. I find, therefore, that the Reconsideration Committee's decision of 7 March 2013 was reached correctly.

**Tony King**

Pension Protection Fund Ombudsman

31 March 2014