

**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 Lincolnshire Co-operative Pension Scheme  
**Scheme** : Lincolnshire Co-operative 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 Board dated 7 November 2013. The referral concerns the Scheme's risk-based levy for the year 2012/2013, which is a reviewable matter under paragraph 19 of Schedule 9 to the Pensions Act 2004.

**Grounds for Referral**

1. The Scheme's trustees consider that the levy was incorrectly calculated in respect of the period of 1 April 2012 to 31 March 2013, as Lincolnshire Co-operative Limited's most recent accounts were not included.

**Background**

2. Lincolnshire Co-operative Limited (**Lincolnshire**), the Scheme's sponsoring employer, is an Industrial and Provident Society. So accounts were filed with the Financial Conduct Authority (**FCA**) rather than Companies House and consequently were not taken into account by Dun and Bradstreet Limited (**D&B**) when it assessed the Lincolnshire's failure score used for the purposes of the pension levy calculation.

**PPF's position**

3. The PPF rejected the Scheme trustees' reference and upheld the calculation of the amount due under the invoice. The PPF concluded that there was inaction by Lincolnshire to supply the accounts to D&B, because D&B do not take financial information from the FCA in the ordinary course of its business. The accounts filed with FCA were not therefore normally available. D&B's policy for the calculation of failure scores sets out that it does not automatically collect financial information from the FCA in its ordinary course of business. The electronic feed that D&B have

to the FCA is limited to verifying that an entity is appropriately registered and, in D&B's ordinary course of business, it does not extend to automatically collecting information from FCA. The PPF has no responsibility for setting the factors which D&B considers in its assessment and cannot require it to take a particular set of circumstances into account where it would not ordinarily do so. The PPF Board has no interaction with D&B in relation to the setting of failure scores – it is the responsibility of Lincolnshire to confirm with D&B the procedure to follow.

4. The PPF considered rule 39(5) of the Industrial and Provident Societies Act 1965 which says “Every registered society shall supply free of charge to every member or person interested in the funds of the society who applies for it a copy of the latest return of the society under this section.” It concluded that the rule merely provided for the supply of information and placed no legislative obligation on D&B to collect that information.
5. Lincolnshire's assertion that not collecting accounts from FCA puts an additional burden on Lincolnshire goes to policy issues underlying the PPF Board's levy Determination. D&B's data collection procedures and whether D&B should have taken into account Lincolnshire's accounts at FCA is not a reviewable matter under the Pensions Act 2004. And it has no impact on the correctness of the levy calculation.
6. The PPF is required to use the normal UK Failure Score provided by D&B in the ordinary course of its business and any discretion it has does not apply in this case. Under Rule B2 of the PPF Determination (Appendix 2) the PPF found that the information on which the invoice was based could not be considered incorrect in a material respect i.e. the PPF did not consider it could exercise discretion as the information was correct and legitimate of itself. The PPF is under no obligation to review the levy amount merely because a scheme may be disadvantaged by others who fail to supply the proper information on time.
7. The High Court, in *West of England Ship Owners Insurance Services Retirement Benefits Scheme* 2014 EWHC 20 (Ch), (**West of England case**), paragraph 130 and 131, held that “The fact that more up to date accounts than were used to access the Failure

Score does not render incorrect or illegitimate the information supplied or used by D&B Luxembourg”; and the existence of more up to date information which could have been used “cannot affect the question of the correctness of the information actually used in the calculation of the Levy for the purposes of Rule B2.1 (1)”.

8. The PPF consider that the power under Rule B3.1 of the PPF Determination (Appendix 2) to obtain further information arises by discretion. But the PPF did not consider that discretion arose in this case because the PPF did not have the power to recalculate the Scheme’s invoice. Rule B3.2 provides that the PPF may use any information necessary for the levy calculation after the relevant time. But the PPF did not consider that the discretion arose because the PPF had all the information necessary for the calculation.
9. The PPF considered that Rule B4 of the PPF Determination (Appendix 2) was not relevant in this case.
10. As regards Rule E4.5 of the PPF Determination (Appendix 2) the PPF considered that the fact that D&B did not take the accounts into consideration did not of itself render incorrect or incomplete the information D&B calculated the failure score. It was the Scheme’s failure to supply the accounts to D&B which meant they were not taken into consideration.
11. The Scheme trustees’ complaint that the PPF may have looked at Lincolnshire’s accounts for the purposes of assessing it as a guarantor, cannot alter the PPF’s conclusion that the PPF cannot instruct D&B to have regard to accounts that were not provided to it in advance of the relevant measurement time in order to calculate a score in a manner outside its ordinary course of business.
12. Finally, arguments about Lincolnshire’s eligibility to enter into PPF also has no relevance because where a scheme meets the definition of eligible scheme under s126 of the Pensions Act 2004 then it must pay the levy.

### **Scheme trustees’ position**

13. The Scheme trustees say in calculating the failure score for the levy invoice, D&B failed to take account of the Lincolnshire’s annual accounts data for 2012/13.

14. Lincolnshire has never submitted accounting information to D&B, its accounts have never been taken into account but previous scores awarded were always 100. It was reasonable for the Scheme trustees, having always received 100 score, not to unilaterally volunteer its accounting information to ensure that the score was maintained.
15. The PPF Board is required to take into account “*the normal UK failure score which was assigned to that Employer by DBUK in the ordinary course of its business*”. Lincolnshire as an Industrial and Provident Society files its accounts with the FCA. So just like D&B accesses Companies House in its “*ordinary course of its business*” to obtain data for limited companies, it should do the same where there is another equivalent national depository, especially bearing in mind that in relation to charities, D&B routinely obtain accounts from another source, i.e. the England and Wales Charities’ Commission. The literature available from D&B for calculating failure scores makes no reference to any policy or otherwise that information from the FCA is expressly excluded or indeed what information they do take into account.
16. The PPF Board’s failure to use any of the discretions available to it to alter the levy invoice under Rules B2, B3.1, B3.2 and B4 of the PPF levy Determination is not justified especially bearing in mind that the PPF Board had actual knowledge of Lincolnshire’s sound financial standing when the PPF Board had assessed it to be a successful Guarantor.
17. D&B’s approach is flawed and inconsistent. It is incorrect and contrary to public policy for the PPF Board to ignore an erroneous score and maintain that the invoice is payable in full.
18. The Scheme has net assets of £272 m and does not pose a risk to the PPF. Furthermore, Lincolnshire, as an IPS, cannot suffer a qualifying event, which makes it an ineligible scheme, so the PPF would not assume responsibility for the Scheme in any event.

## Conclusions

19. Bearing in mind the Scheme trustees' observations that accounts had never been provided to D&B, my investigator made enquiries directly to D&B, i.e. the scoring specialist within the PPF team. D&B say that a Caroline Higgins of Lincolnshire had previously queried Lincolnshire's rating score which had declined. D&B explained that the then accounts had aged out. Subsequently on 23 October 2007, D&B received updated accounts for Lincolnshire. The D&B scoring methodology meant that those accounts were used for 36 months after which they aged out again. The same fixed measurement time of 31 March 2008 was used for the years 2008/9 and 2009/10. For year 2010/11 the fixed measurement time was 31 March 2009 and for year 2011/12 the fixed measurement time was 31 March 2010. So the accounts were used by D&B for the scoring calculations for years 2008/9, 2009/10, 2010/11 and 2011/12. Although they aged out after 36 months i.e. on 23 October 2010, because this was after the fixed measurement date of 31 March 2010, this had no impact on the score for the levy year 2011/2012. However, by the year 2012/13 (and the measurement time was also no longer fixed at a fixed date in time) the accounts had aged out.
20. I turn next to the trustees' submissions that the PPF failed to properly exercise its powers under various provisions of the PPF Determination Rules.
21. In the West of England case, the court decisively held that public law considerations of fairness, rationality and procedural propriety apply only at stage 1 (Appendix 1) of the levy-setting process, including in relation to D&B's actions i.e. any form of value judgment about the appropriateness of the practice adopted by D&B in the ordinary course of business. Where they are not successfully challenged on judicial review, then at stage 2, (Appendix 1) the PPF Determination Rules can be applied strictly even if this seems to produce an unfair result.
22. It is a simple factual assessment of whether or not D&B was applying its ordinary course of business in generating the Scheme's failure score. This means that if I find that D&B in the ordinary course of its business, did not take into consideration

accounts filed with the FCA, it is not within my remit to go on and consider whether it ought to have done so in the interests of fairness.

23. No evidence has been presented establishing that the practice of D&B of not sourcing accounts from FCA was not its standard practice. This is because it was normal practice not to obtain them. On the PPF website, the information explains that in order to calculate the failure score in the UK, D&B collects data from a wide variety of public and unique data sources, which includes Companies House, London and Edinburgh Gazettes, County Courts Electoral Roll etc. But the FCA is not so listed. The website goes on to explain that if a company is not legally obliged to file accounts at Companies House, companies are encouraged to provide to D&B directly their accounts and that more recent the balance sheets indicates lower risk. But that very old financials, or financials delayed for companies obliged to file their accounts, are seen differently. Under Frequent Questions and Answers, the website says that D&B's ordinary business practice is that it is willing to receive via post or email audited accounts from entities that are not legally obliged to file accounts at Companies House.
24. The Scheme trustees say that the calculation of the failure score has produced an unfair result which the PPF Board has discretion under Rule E1.4 (Appendix 2) to intervene.
25. The court in the West of England case was clear that D&B does not owe the PPF Board a contractual duty so that it must read into Rule E2.2(3) (for my purposes Rule E1.4) a power on the part of the PPF Board to enquire into the process by which D&B produced the failure score. The PPF Board would not necessarily know, prior to the calculation of the levy, what accounts D&B had used. That the PPF Board had accounts for one purpose does not lead to a result that it should be passing the accounts to D&B for the use of another purpose. D&B are not in breach of the contractual duty owed to the PPF Board which required it to exercise the skill and care to be expected from 'a skilled and experienced person carrying out the same function'. So for the reasons explained Rule E1.4 gives the PPF Board no such discretion.

26. I will now consider Rule B.2 (Appendix 2). The court in the West of England case found that what is 'incorrect' for the purposes of Rule B2.1(1) is to be interpreted in the light of what is required to be done by D&B in the ordinary course of its business (i.e. Rule E1.4). So discretion under Rule B2.2 is only engaged if a failure score is 'incorrect' in the sense that it is not based upon the information that would normally be used by D&B in the ordinary course of its business; but not where that information contains an inaccuracy e.g. accounts drawn up inaccurately. Lincolnshire's failure score was "correct and legitimate" because it was arrived at in a manner and on the basis of the information which D&B would normally use in the ordinary course of its business. Although more recent accounts were available but not used (and had they been, a different failure score would have been produced) the court was clear that this does not render incorrect or illegitimate the information supplied to or used by D&B. Information is either factually correct or it is not. If it is correct in itself, as I have found, but not as up to date as other available information, the question of who might be responsible that the more up to date information was not used, is not only outside of my jurisdiction but cannot in any event affect the question of the correctness of the information actually used. So I find that the discretion under Rule B2.2 was not engaged.
27. Warnings were given to scheme trustees over the years, and in Lincolnshire's case specifically, so it was reasonable to expect the Scheme trustees to have stayed in touch with D&B to establish the practice for assessing the Lincolnshire's failure score.
28. I next consider Rule 3 (Appendix 2). The Scheme trustees say that the PPF Board had Lincolnshire's accounts for the purposes of the ascertaining Lincolnshire's strength as a guarantor whilst at the same time disregarding those accounts for the purposes of the failure score.
29. The PPF guidance note explains that a Type A contingent asset is a guarantee given by a group company or other entity (the guarantor) directly to the trustees of the pension scheme. Where a Type A guarantee is in place the risk based levy may be based wholly or partly on the insolvency risk of the guarantor rather than on that of the participating employer(s). For levy calculation purposes, the insolvency risk of

the sponsoring employer(s) will be adjusted to include some credit for the insolvency risk of the guarantor, recognising that it may be the guarantor's insolvency that would lead to a call on the Pension Protection Fund. A Type A guarantee can only result in a risk switch in the levy calculation.

30. The Scheme submitted a Type A contingent asset on Exchange (a communication system) before the applicable measurement time of 5 pm on 30 March 2012. The PPF Board initially concluded that it had insufficient financial information to determine whether or not the Type A contingent asset satisfied Lincolnshire's strength requirements for recognition of a Type A contingent assets. So the Scheme was invited to provide further information and this was done by 29 October 2013.
31. That the PPF Board had Lincolnshire's accounts, because of the contingent asset assessment, did not mean that it was for the PPF Board to pass that information to D&B (see paragraph 25 above) even if it had wanted to because the PPF had to apply the failure score assigned by D&B (see paragraph 21 above). Rule B3.1 would not apply because the measurement time had lapsed and Rule B.3.3 is clear that the PPF is under no obligation to use its powers under Rule 3.1 merely because a scheme has been disadvantaged by the failure of the trustees to submit information by the deadline. As regards Rule B3.2, the PPF Board had all the information necessary for the calculation of the Scheme's levy within the terms of the PPF Determination and in all the appropriate formats and so the Rule is not engaged.
32. It is clear that the circumstances under Rule B4 (Appendix 2) do not arise in this case.
33. I find that the scope of the challenge available to a failure score on appeal to D&B under Rule E3 (Appendix 2) is the same as the PPF Board's - the key word used in each of Rules B2.1(1) and Rule E3.5 is the same, namely 'incorrect'. I have already set out my reasons why the information used by D&B was not incorrect and that D&B applied the procedures it normally applies when assessing Lincolnshire's failure score.



34. Finally, I turn to the trustees' comments that the Scheme cannot suffer a qualifying event. The trustees accept that the Scheme is an eligible scheme under s126 Pensions Act 2004 (Appendix I). Section 175(1) Pensions Act 2004, is clear that eligible schemes must pay the protection pension levies. Whilst it is acknowledged by the parties that there is a lacuna in the legislation in that a scheme can meet all the requirements to be levied but may also find it difficult to actually trigger an assessment period, I consider that this is a matter for Parliament and not a reviewable matter under my remit.
35. To conclude, I find that the PPF Board has calculated the risk-based levy in accordance with the provisions of the PPF Determination and is, therefore, not required to take any action.

**Jane Irvine**

Deputy Pension Protection Fund Ombudsman

4 December 2014



## Appendix I

### Legislation

#### Pensions Act 2004

##### Section 175 Pension protection levies

(1) For each financial year falling after the initial period, the Board must impose both of the following-

- (a) a risk-based pension protection levy in respect of all eligible schemes;
- (b) a scheme-based pension protection levy in respect of eligible schemes.

##### Section 126 Eligible schemes

(1) Subject to the following provisions of this section, in this Part references to an "eligible scheme" are to an occupational pension scheme which-

- (a) is not a money purchase scheme, and
- (b) is not a prescribed scheme or a scheme of a prescribed description.

There are **two distinct stages** to the process by which a Levy is determined each year.

The **first stage**, section 175(5) PA2004, which has to be preceded by consultation if there are proposed changes and must be published, states:

(5) The Board must, before the beginning of each financial year, determine in respect of that year-

- (a) the factors by reference to which the pension protection levies are to be assessed,
- (b) the time or times by reference to which those factors are to be assessed,
- (c) the rate of the levies, and
- (d) the time or times during the year when the levies, or any instalment of levy, becomes payable.

The **second stage**, section 181(3) PA2004, states:

(3) The Board must in respect of the levy

- (a) determine the schemes in respect of which it is imposed,

- (b) calculate the amount of the levy in respect of each of those schemes, and
- (c) notify any person liable to pay the levy in respect of the scheme of the amount of the levy in respect of the scheme and the date or dates on which it becomes payable.

## **Appendix 2**

### **PPF Levy Determination dated 13 December 2011**

Material provisions of the 2012/13 PPF Levy Determination for the purposes of this reference are:

#### **Part B – Use of alternative information in exceptional circumstances**

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#### **B2. Correction by the Board**

##### **B2.1 When could data be corrected?**

This Rule B2 applies if it appears to the Board that either:

- (1) the information supplied for or used in the calculation of the Levies (including information contained in any data submitted, if that information was incorrect at the time when it was submitted) 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 these 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(1) applies, the Board may calculate the Levies on the basis of information which appears to it to be correct for the purposes 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.

### **B2.3 What if a certificate or declaration is incorrect?**

(1) Where Rule B2.1(2) or (3) applies, in calculating the Levies in respect of the relevant Scheme the Board may disregard the relevant certificate or declaration if it believes that it has been improperly given.

(2) Where Rule B2.1(2) or (3) applies, in calculating the Levies in respect of the relevant Scheme the Board may disregard any information in the certificate or declaration which is believed to be incorrect.

(3) 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 set out in (1) or (2) above but it shall not be under an obligation so to act.

## **B3. Reliance on information**

### **B3.1 The Board may obtain further information**

The Board may, at any time prior to the calculation of the Levies in respect of a Scheme, take such steps as it thinks fit to obtain further or amended information for the purposes of that calculation.

### **B3.2 The Board may fill in gaps in its information**

If, at the time of any calculation of the Levies in respect of a Scheme, any information necessary for such calculation has not been submitted in the manner or format or at the time anticipated by these Rules, then the Board may instead use equivalent information Submitted or provided in a different manner or format or at a different time.

**B3.3 The Board's powers in this Rule B3 are discretionary**

The Board is under no obligation to use the powers in Rules B3.1 and/or B3.2 where the relevant information has not been Submitted on or before the relevant Measurement Time and will not do so merely because a Scheme has been disadvantaged by the failure of the trustees or those acting on its or their behalf to Submit information by the relevant deadline.

**B4. Disruption in the delivery of information**

B4.1 Without prejudice to Rule B3, the Board may at its discretion take account of information Submitted after any applicable deadline but only in circumstances where it appears to the Board that:

- (1) The information was despatched at an appropriate time, but was delayed or lost in transit; or
- (2) Both:
  - (a) the provider of the information was prevented from meeting the deadline by the temporary inaccessibility of the PPF website or Exchange, or the interruption of electronic communications, or other (in the opinion of the Board) comparable cause; and
  - (b) the information was Submitted as soon as reasonably practicable thereafter.

## **Part E – Measuring Employer insolvency risk**

### **E1.4 How will DBUK calculate a Failure Score or Risk Indicator**

(1) A UK Failure Score for an Employer in respect of a Scheme is, subject to Part 3 of the Insolvency Risk Appendix (“DBUK’s methodology”), the normal UK failure score which was assigned to that Employer by DBUK in the ordinary course of its business as at any Failure Score Measurement Date specified in these Rules or, if different, the score which would have been assigned if account had been taken of all data that was received by DBUK at least one calendar month prior to the Failure Score Measurement Date in question.

## **E4. DBUK appeals**

### **E4.5 The reasons applicable for Rule E4.3 and E4.4**

(1) DBUK may only act if it decides that its original decision was based upon information which, as at one or more Failure Score Measurement Dates, was incorrect or which was incomplete by comparison with the information which should normally have been taken into account by DBUK in assigning a Failure Score or other measure at that date and this occurred for one of the following reasons:

(ii) because DBUK did not have access to information which would normally have been available to, and would normally have been taken into account by, DBUK and, in a case where representations were made on behalf of the Scheme trustees or Employer, that lack of access was not related to any action or inaction of the relevant Employer; or

(ii) because DBUK did not apply the procedures for assigning an Employer Failure Score or Non-Employer Score or other measure as they should normally have been applied.

(2) The appeal procedures set out in this Rule E4 shall only be available in respect of DBUK’s decision in producing as at the Measurement Time a Levy Rate, Employer Failure Score or a Non-Employer Score. For the avoidance of doubt, the

right to appeal under this Rule E4 does not arise in respect of each Monthly Failure Score or equivalent as at each Failure Score Measurement Date.