

## Ombudsman's Determination

<b>Applicant</b>	The Trustee of the Northern Ireland Water Limited Pension Scheme ( <b>The Trustee</b> )
<b>Scheme</b>	Northern Ireland Water Limited Pension Scheme
<b>Respondent</b>	The Pension Protection Fund

### Summary of the application

The Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee of the Pension Protection Fund (**PPF**) dated 18 November 2013. The referral concerns the calculation of the risk-based levy for the year 2008/09, which is a reviewable matter under paragraph 19 of Schedule 8 of the Pensions (Northern Ireland) Order 2005 (the **Order**).

## Background

1. With effect from 1 April 2007, responsibility for the provision of water services in Northern Ireland passed from Water Service (an agency of the Northern Ireland Department for Regional Development) to Northern Ireland Water Limited (**NIWL**). This is a Government owned company whose sole shareholder is the Department for Regional Development. The Scheme was established as a mirror-image of the Principal Civil Service Pension Scheme (Northern Ireland) (**PCSPS(NI)**). Employees of Northern Ireland Water Limited began to accrue benefits in the Scheme from 1 April 2007. They were also given the option to transfer accrued benefits from the PCSPS(NI) into the Scheme on a year for year basis. The options exercise ran from 3 November 2008 to 2 February 2009. The main bulk transfer payment (£46,282,000) was received on 20 August 2010. The Trustee has explained that two further payments were received (£276,285 on 6 September 2011 and £526,800 on 20 December 2013) as a result of errors made by the PCSPS(NI). The Trustee says it was notified of further errors in 2014 but no further adjustment has been made as yet.
2. On 21 February 2008, the Trustee's advisers, Mercer Ltd (**Mercer**), wrote to the PPF. They said that they were writing on behalf of the Trustee and described the Scheme as "a newly established Scheme commencing on 1 April 2007". Mercer said that they had some queries on the initial application of the PPF eligibility criteria, benefit levels and levy requirements. They set out the background to the Scheme and explained that payment of a bulk transfer between the PCSPS(NI) and the Scheme was expected by 1 October 2008. Mercer explained that NIWL was a fully Government owned company and that the shareholder was the Department for Regional Development.
3. Under the heading "Queries", Mercer asked for assistance on the following queries: Section 179 valuation requirements<sup>1</sup>, initial levy payments and a Crown Guarantee. With regard to the Section 179 valuation, Mercer said that the relevant legislation allowed schemes to align their Section 179 valuation with their triennial funding valuation. They explained that the Scheme's first funding valuation would have an effective date of 31 March 2008 and the valuation had to be completed by 30 June 2009. Mercer then referred to an overriding requirement for schemes which became registrable before 6 April 2007 to submit a Section 179 valuation by 31 March 2008. Mercer acknowledged that the Scheme was technically caught by the overriding

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<sup>1</sup> This is a reference to Section 179 of the Pensions Act 2004 which applies in England and Wales. Both parties have referred to both the relevant articles in the Order and their equivalent sections in the Pensions Act 2004. I have followed them in generally using the Pensions Act 2004 sections, even though strictly the Order applies.

requirement because it became registrable on 1 April 2007. However, they suggested that submitting a Section 179 valuation by 31 March 2008 would be a pointless exercise because the bulk transfer would not have been received and there would be little in the way of assets or liabilities in the Scheme. Mercer said that the effective date of the valuation could be any time during the 15 months preceding the date of submission. They suggested that the Scheme could submit a zero valuation with an effective date of 1 April 2007 showing no assets or liabilities. Mercer then explained that this option would still have some associated costs relating to auditing and an actuarial certificate. They said they were writing to the PPF, and the Pensions Regulator, to ask if any action would be taken if the Scheme did not comply and the Section 179 valuation was deferred until after the bulk transfer had been received.

4. With regard to the initial levy payments, Mercers said that, once the block transfer had been received, the Scheme would be required to provide information to the PPF. They asked about completing a Block Transfer Certificate. Mercer noted that the PPF had discretion over the approach they took when a transfer occurred part way through a levy year. They said that they presumed that no levy would be required in respect of the transferred liabilities until the Scheme members had decided whether or not to transfer and the transfer had taken place. Mercer asked the PPF to confirm that they would apply a pro-rated levy for the year in which the transfer was received, commencing from the date of the transfer.
5. In an e-mail dated 17 March 2008, the PPF said,

“In answer to your questions:

  1. We would not be minded to take any action in this case in relation to the non-submission of the s179 valuation.
  2. Please arrange for the submission of part B of the block transfer form (the receiving scheme’s part) only.
  3. The Board does have some discretion to charge a nil levy for some new schemes. See paragraph 40 et seq of the schedule to the Determination made under s175(5) of the Pensions Act 2004. Whilst we cannot fetter our discretion in advance, I understand that it is likely that this discretion would be exercised in this case for 08/09.
  4. The above responses are based on the assumption that the transferring scheme is ineligible.”
6. The **Board** is a reference to the Board of the PPF. The **Determination** is a reference to the Board’s Determination for the levy year 2008/09 as required by Article 158 of the Order and published on 19 February 2008.

7. The Scheme did not submit a Section 179 valuation report by 31 March 2008. The subsequent Section 179 valuation report showed that, at the effective date (31 March 2008), the Scheme had assets of £10,688,381 and liabilities of £13,035,071, including £10,323,757 in respect of active members, £165,772 in respect of deferred members and £1,958,213 in respect of pensioner members.
8. In April 2012, the PPF issued an invoice for £77,177, which consisted of a scheme-based levy of £1,990 and a risk-based levy of £75,187 for the levy year 2008/09. The levy calculation was based on a Dun & Bradstreet (**D&B**) Failure Score of 57 for NIWL. The Scheme's assets were estimated to be £11,177,485.33 as at 31 October 2007 and its liabilities were estimated to be £12,059,904.05. These figures were derived using the Board's methodology for transforming Section 179 data as at dates other than 31 October 2007 (referred to as the output date). The methodology was set out in Appendix 1 to the Determination.
9. In contrast, levies for the years 2009/10, 2010/11 and 2011/12 were £2,112, £2,377 and £5,868 respectively. These were based on D&B failure scores of 98 for the respective levy years. The failure score was amended when D&B obtained up to date financial information for NIWL. The 2006/07 Water Service Annual Report was laid before the Northern Ireland Assembly on 6 July 2007. The Applicant has explained that it was intended that it should be published in the September but is unable to confirm when this actually happened. The 2007/08 NIWL Annual Report was laid before the Northern Ireland Assembly on 4 July 2008 and was published on 22 September 2008.

## **The PPF Reconsideration Committee's Decision**

10. The Reconsideration Committee issued a decision on 18 November 2013. The Committee noted that the Trustee had submitted the following grounds for reconsideration:
  - that it had relied on the 17 March 2008 e-mail, and
  - that the invoice dated 26 April 2012 was invalid because it had been issued after the conclusion of the 2008/09 levy year.
11. With regard to the 17 March 2008 e-mail, the Committee said that, on any reasonable reading of the e-mail, it was clear that the writer had assessed the position of the Scheme in the mistaken belief that it was a "new scheme" and paragraphs 40(c) and 41 of the Determination applied, that the Scheme did not have a statutory duty to complete a scheme return by 31 March 2008, and that the Board of the PPF had the discretion to impose a nil levy. The Committee considered that references in the e-mail to the Scheme being a "new scheme" should have put

Mercer on notice and prompted them to either check the definition of “new scheme” or seek clarification from the PPF. They said that there was no evidence that Mercer had taken either of these steps. The Committee also considered that the writer of the e-mail had made it clear that she was expressing a personal understanding of how the Determination applied and how she thought the Board was likely to deal with the Scheme for the 2008/09 levy year.

12. The Committee concluded that the statements made in the 17 March 2008 e-mail did not amount to a representation by or on behalf of the Board. They did not agree that the Trustee was entitled to rely on them. In addition, the Committee said that no employee of the Board had the capacity to alter or override the duty of the Board, under Section 175(1)/Article 158(1), to impose a levy for each year on eligible schemes or to fetter the Board’s discretion.
13. The Committee referred to the Trustee’s submission that the levy invoice was invalid. The Trustee had argued that Section 175(5)/Article 158(5) prevented the Board from imposing the 2008/09 levy on the Scheme after the conclusion of the 2008/09 levy year. The Trustee also referred to paragraph (2) of the Determination in support of this view.
14. The Committee referred to the Board’s obligation, under Section 175(1)/Article 158(1), to impose both a risk-based levy and a scheme-based levy on all eligible schemes. The Committee also referred to Section 175(5)(d)/Article 158(5)(d) which required the Board to determine the time or times during the year when the levies became payable. The Committee concluded that these provisions were intended to enable the Board to require eligible schemes to pay their levy invoices by imposing a payment deadline of the Board’s choosing. They said that the purpose of the statutory provisions was to facilitate the Board’s collection of the levies in the normal course of events, not to limit or restrict it. The Committee noted that the Trustee had not submitted that the Scheme was not an eligible scheme in the 2008/09 levy year. The Committee decided that the Scheme was, therefore, subject to a statutory requirement to pay the levies for the 2008/09 levy year. They concluded that this obligation was not affected by the lack of information from the Scheme on which the Board could calculate and invoice the levies.
15. With regard to paragraph (2) of the Determination, the Committee did not consider that this placed any temporal limitation on the Board’s powers either to impose levies in general or for the 2008/09 levy year in particular. They said that, if Parliament had intended that such a restriction should apply, the relevant legislation would have provided for it in clear and unambiguous terms. The Committee argued that, otherwise, a scheme could refuse or otherwise fail to provide the information needed for the calculation of the levy until after the end of the levy year and the Board would be prevented from imposing or collecting the levy for that year. They argued that

such a construction of the legislation would effectively prevent the Board from discharging its primary duty to calculate and collect the levies. The Committee said that this was not the intention of the Order or the Determination. They concluded that the Board's calculation and invoicing of the Scheme for the 2008/09 levies in the amount and at the time it did were correct and within the terms of the Determination and in accordance with the Order.

## **Grounds for referral**

16. The Applicant's grounds for referring the reviewable matter are:

- The Reconsideration Committee failed to take proper account of the reliance placed by the Trustee on the 17 March 2008 e-mail. It would be unjust for the PPF to enforce its strict rights to impose a substantial levy on the Scheme over four years later.
- The Committee has not followed the express terms of the 2008/09 Determination and the levy invoice is not legally effective.

17. The Applicant's submissions on each ground are summarised below.

### **Ground 1**

18. The PPF is subject to equitable principles arising out of general law. It can be estopped from enforcing a strict legal right if it has led a party by representation to act or not to act in a particular way, where that party reasonably relied on the PPF's representations and where it would be inequitable or unconscionable for the PPF to go back on those representations.
19. The imposition of the risk-based levy of £75,187 is inequitable and estoppel is a complete defence to the levy which has been invoiced.
20. Had the Applicant not relied on the 17 March 2008 e-mail, financial reports and accounts would have been submitted to D&B before 31 March 2008. These would have materially affected the failure score and hence the risk-based levy for 2008/09.
21. The failure score (57) was low because NIWL was created in April 2005 and existed as a dormant shelf company until 1 April 2007. As at 31 March 2008, no up-to-date financial information had been published for NIWL following the transfer of undertakings. Water Service published accounts as at 31 March 2007 setting out detailed financial information about the assets and liabilities transferred to NIWL on 1 April 2007. When D&B obtained the 31 March 2008 accounts for NIWL, the failure score was put at 98.

22. The Applicant did not file a Section 179 valuation report as at the Scheme's commencement date in reliance on the 17 March 2008 e-mail. Had such a Section 179 valuation report been prepared, it would have shown nil assets and nil liabilities and the level of underfunding would have been zero.
23. There was no risk of a call on the PPF in 2008/09 because the bulk transfer from the Principal Civil Service Pension Scheme (Northern Ireland) did not take place until well after the end of 2008/09.
24. The Board's core principles are fairness and proportionality. The Applicant refers to a statement by the Board in the document "Response to the August 2007 Pension Protection Levy Consultation" published in November 2007. This was to the effect that the Board intended to charge a fair levy which accurately reflected the risk posed by a particular scheme.
25. Section 111 of the Pensions Act 2004 enables the Board to do,  
"anything which –  
(a) is calculated to facilitate the exercise of its functions, or  
(b) is incidental or conducive to their exercise."
26. This power gives the Board authority to put into practice the principles and policies underlying the risk-based levies where strict adherence to the Determination would lead to disproportionate or unreasonable results.
27. As a matter of fairness/equity, the PPF is not entitled to claim payment in respect of the invoice in the light of its representation to the Trustee and the injustice caused. The injustice is the fact that the PPF is now claiming a material sum (£77,177) which the Scheme would not have had to pay had the Trustee taken certain steps in March 2008.

## **Ground 2**

28. The invoice is invalid under the relevant legislation and under the Determination. Section 175(5) of the Pensions Act 2004 and, in particular, Section 175(5)(d) requires the Board to determine,  
"the time or times during the year when the levies, or any instalment of levy, becomes payable."
29. The Determination is the means by which the Board complies with its statutory obligations under Section 175(5). Paragraph (2) of the Determination states,  
"That the levies in respect of a scheme are to become payable on the earliest of the following dates: the date upon which the person liable to pay the levies

in respect of the scheme is sent notification of the amount of the levies in respect of the scheme ...; the date on which the scheme ceases to be an eligible scheme; or 31st March 2009.”

30. For the levy year 2008/09, the latest date by which the levy could have been invoiced is 31 March 2009. The invoice dated 12 April 2012 is a nullity because it could not and did not become payable on 31 March 2008. The statutory purpose of the legislation and the Determination is that, as a matter of fairness, levies should become payable promptly; that is, either when the specified events referred to in the Determination occur or by 31 March 2009. Levies invoiced several years after the levy year in question are not provided for in the Determination and are therefore void.

### **Response to the Reconsideration Committee’s decision**

31. With regard to the Reconsideration Committee’s decision, the Applicant makes the following points:
32. A generic reference to “some new schemes” does not indicate an obvious mistaken assumption. For example, the e-mail did not say that its contents only applied if the Scheme was a new scheme. In addition, Mercer’s letter made it clear that the Scheme was not a new scheme.
33. The reference to “paragraphs 40 et seq” does not relate solely to new schemes; paragraph 41 expressly covered schemes which were not new schemes and did apply to the Scheme.
34. The last sentence referred to the likely exercise of discretion “in this case” which can only reasonably be construed as the case Mercer had put to the PPF in their letter of 21 February 2008.
35. It is not reasonable, in light of the Scheme’s background and Mercer’s letter, to expect the Trustee to have sought clarification.
36. Whilst the author did refer to her understanding, it was not unreasonable for the Trustee to have relied on the statements made. In circumstances where the Board must exercise its functions through its staff, it was practicable for the Trustee to rely on the response to Mercer’s letter.
37. The alleged mistaken assumption has no bearing on the reasonableness of the Trustee’s reliance or the injustice caused. The Trustee did not know nor ought to have known of the alleged mistake. As a matter of law, it is not correct to say that the alleged mistaken assumption means that it was not reasonable to rely of the representation made.



38. The Board has to rely on its staff when carrying out its functions. It is accepted that it cannot fetter its discretion but the provisions of Section 111 mean that it was reasonable for the Trustee to believe that the response was given in order to facilitate the exercise of those functions and/or was incidental of conducive to their exercise.
39. The response should be considered objectively and in the circumstances in which and at the time it was sent. In that light, it was reasonable for the Trustee to believe that the steps it would otherwise have taken were not necessary. It was reasonable for it to believe that not taking those steps would not lead to a “manifestly unfair and disproportionate” levy being invoiced over four years later.
40. The Ombudsman has previously held that it would not be a legitimate exercise of the Board’s powers to calculate a levy by unfair means. It is submitted that this is what the Board has sought to do in this case.
41. The Board has and should exercise discretion under paragraph 13 of Part 1 of the Schedule to the Determination.
42. The Determination is what is published under the relevant legislation and what levy payers have to rely upon. The Ombudsman has to decide whether the Determination has been determined and/or applied correctly as a matter of law and not to speculate on what was intended by the legislation or the Board.
43. If the Board had intended to address the situations referred to by the Committee, it should have made express reference in the Determination.
44. The Board has stated on many occasions that it must follow the determinations it publishes strictly and in accordance with the terms contained therein. In other words, the Board must construe the provisions of the legislation and the Determination as they appear and not as it considers they were intended.
45. Section 175 refers to the time or times during the year when the levy “becomes payable”. It does not refer to “the times when the obligation to pay arises” or words to such effect. The Determination states that the levies are “to become payable on the earliest of the following dates”. In this case, the relevant date is 31 March 2009. The levy is payable “on” 31 March 2009 and not “as at” 31 March 2009. An invoice dated 26 April 2012 is void and legally ineffective because it had to become payable on or before 31 March 2009.
46. The Board would not be powerless to act where a scheme had not provided necessary information. For example, its power under paragraph 5 of Part 1 of the Schedule to the Determination.

## **Costs**

47. The Applicant says that it has incurred actuarial and legal costs in the region of £17,875 plus VAT. It asks that the PPF be directed to meet these costs in full or to pay a material contribution towards them.

## **Representations from the PPF**

48. By 31 March 2009 (the end of the 2008/09 levy year), the Scheme had not provided the Board with sufficient information in order for it to calculate the 2008/09 risk-based levy correctly.
49. The Scheme did submit a Section 179 valuation certificate on 31 March 2009 with an effective date of 31 March 2008. This showed that the Scheme had substantial liabilities of more than £13 million at that time. This was submitted too late for the Board to calculate the risk-based levy and issue an invoice during the 2008/09 levy year.
50. The Scheme administrator's letter of 22 October 2009 indicated that the Scheme expected to receive an invoice for a 2008/09 risk-based levy.
51. The underfunding figure used in calculating the 2008/09 risk-based levy was calculated by using the 31 March 2008 Section 179 valuation and "rolling back" to estimate the Scheme's net liabilities as at 31 October 2007. This was permitted by paragraph 5 of, and Appendix 1 to, the Schedule to the 2008/09 Determination.
52. Article 158(1) of the Order provides that the Board must impose a risk-based levy on all eligible schemes. It also requires the Board to make an annual determination.
53. Article 164(3) sets out the Board's duty to determine the schemes upon which the levy is imposed, to calculate the amount of the levy, and to notify any person liable to pay the levy of the amount and the date on which it becomes payable. It does not set any time limit for calculation and notification.
54. With regard to Section 111, the power contained therein must be exercised consistently with the Board's duties to impose a levy (Section 175(1)) and to set the levy in accordance with its own determinations (Section 175(5)). The levy must be calculated in accordance with the determination and Section 111 does not permit a departure from this<sup>2</sup>.

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<sup>2</sup> *The Board of the Pension Protection Fund v The Trustees of the West of England Ship Owners Insurance Services Limited Retirement Benefits Scheme* [2014] EWHC 20 (Ch).

55. The doctrine of promissory estoppel is inapplicable where a public body is exercising its statutory function. The proper approach is to ask whether a legitimate expectation has arisen and whether it is unlawful for that expectation to be frustrated<sup>3</sup>.
56. There are three key principles to consider:
- It will be exceptional for a legitimate expectation to arise from a promise which is not clear and unambiguous<sup>4</sup>.
  - Where a public body makes a representation which it has no power to honour, that representation will not generate an enforceable legitimate expectation, unless there is a human rights element to it<sup>5</sup>.
  - It will be lawful for a public body to resile from a legitimate expectation if to do so is justified<sup>6</sup>.
57. The Trustee's case fails on all of these principles:
- The 17 March 2008 e-mail did not contain a clear and unambiguous promise. For example, it warned that "we cannot fetter our discretion in advance" and stated "I understand that it is likely". Nor did the Trustee interpret it as a guarantee that the levy would be set at nil. It has said that it considered the likelihood of receiving an invoice for 2008/09 to be very low. It therefore recognised that there was still a possibility that an invoice would be raised.
  - The Board had no power to exercise discretion under paragraphs 40 and 41 of the Determination. The Scheme was not a 'new scheme' for the purposes of paragraph 40. Paragraph 41 did not apply because the Scheme was required to submit a Section 179 valuation by 31 March 2008.
  - The Board was justified in resiling from any legitimate expectation because the e-mail had been sent on the erroneous assumption that paragraphs 40 and 41 applied and, by 31 March 2008, the Scheme had substantial liabilities.
58. The Trustee's second argument should be rejected for the following reasons:
- Article 164(3)/Section 181(3) does not contain any express time limit for invoicing.

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<sup>3</sup> *Thrasivoulou v Secretary of State for the Environment* [1990] 2 AC 273; *South Bucks DC v Flanagan* [2002] 1 WLR 2601

<sup>4</sup> *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397

<sup>5</sup> *Rowland v Environment Agency* [2005] Ch 1 CA

<sup>6</sup> *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213

- The Trustee seeks to imply a time limit for invoicing, but Part III of the Order/Part 2 of the Act is a detailed statutory scheme. Where it intends to impose a requirement for a particular step to be taken by a particular date, it does so in express terms; see Sections 175(5), 176(1) and 178(1).
- Even if there was an implicit obligation on the Board to issue invoices before the end of the levy year, a failure to do so should not render an invoice null. Not all breaches of procedural requirements in legislation are fatal to the validity of a decision. The correct question to ask is what did Parliament intend should be the consequences of failure. Neither the legislation nor the Determination provide that failure to meet the deadline will render the invoice invalid. If that had been Parliament's intention, the language used would have been more explicit.
- The Board has a duty to raise levies for eligible schemes. There is nothing in the legislation to indicate that this duty falls away if an invoice is not issued before 31 March.
- There will inevitably be some cases where it is not possible to issue an invoice before the end of the levy year. For example, a scheme might become eligible very late in the levy year. It cannot have been the intention of the legislation or the Determination to make it impossible to raise a levy in such circumstances.
- The Trustee has referred to paragraph 5 of the Determination but there are two problems with their argument. First, in some cases it will not be possible for the Board to perform the calculation on the basis of the information held. For example, in this case, the Board had no reliable information about the Scheme's assets and liabilities. Second, where information is known to be incomplete or inaccurate, any amount notified during the levy year would have to be reviewed later. This is wasteful of the Board's resources.
- If a scheme were to refuse or otherwise fail to provide information, the Board would be prevented from imposing or collecting a levy from that scheme for that year. Such a construction of the legislation and the Determination would produce an "absurd and unfair" result. It would allow schemes to avoid paying the levy, prevent the Board from discharging its primary duty, and require other schemes to bear the insolvency risk for schemes which failed to provide information.
- Section 175(5) states that levies should "become payable" during the year to which they relate. Paragraph 2 of the Determination states that the latest time at which the levy should "become payable" is the end of the year. "Become

payable” merely refers to the obligation to pay arising. The obligation to pay can arise before the Board has fixed the amount by issuing an invoice.

## **Supplementary Statement by the Applicant**

59. Following the response from the PPF, the Trustee submitted the following supplementary points:
60. The 2008/09 levy was over 30 times the levies which had been determined for the levy years 2009/10 and 2010/11.
61. There had been a very long passage of time since the 2008/09 levy year during which levies had been invoiced for three subsequent years at much more modest levels.
62. The facts of the case are unique. They arise specifically out of the particular circumstances of the Scheme in early 2008, Mercer’s letter of 21 February 2008 and the PPF’s e-mail of 17 March 2008.
63. The Trustee engaged proactively with the PPF and TPR in early 2008 to inform them of the reasons for its request and to obtain confirmation that what was being proposed was a sensible and legitimate way forward. It has been unduly let down and penalised by the subsequent levy which has been charged against it.
64. Mercer’s letter made it clear that the Scheme was willing to submit a valuation showing zero assets and liabilities if that was required. The Trustee did not submit such a valuation based on the assurance received from the PPF. This was a reasonable and justified position to take in the circumstances.
65. The valuation submitted on 31 March 2009, which showed liabilities of £13 million, was not “late”; it was submitted for the purposes of the 2009/10 levy and not the 2008/09 levy. Had a valuation been submitted by 31 March 2008, the effective date would have been earlier and the liabilities would have been shown as nil. It would have been impossible to have completed and signed off a valuation “as at” 31 March 2008 for submission by 31 March 2008.
66. The Trustee had not suggested that there would be no liabilities in advance of the bulk transfer, since there would have been some element of liability arising out of future benefit accrual. These accruing liabilities were funded by ongoing contributions. It is one-sided for the PPF to refer to these liabilities without reference to the corresponding assets. The value of accumulated contributions as at 31 March 2008 was £10.7 million. On this basis, the net shortfall was only £2.3 million. This shortfall was fully funded by a lump sum payment of £3.7 million made on 5 March 2009. This was certified to the PPF as a Deficit Reduction Contribution following its

payment. Therefore, any shortfall as at 31 March 2008 had been fully cleared long before the PPF began its levy calculation for the levy year 2008/09.

67. If the Trustee had submitted a nil valuation as at 31 March 2007, the normal PPF model for assessing underfunding risk would have ignored the accruing liabilities because it assumes that liabilities accruing between valuations are fully funded by contributions made in the same period.
68. The letter of 22 October 2009 stated “as a matter of fact” that the PPF had not issued an invoice for 2008/09. It did not indicate an expectation that there would be a levy and certainly not an expectation that it would take a further two and a half years for the PPF to issue an invoice. If anything, it should have served as a reminder to the PPF to take steps to explain its position. It failed to do so, leaving the Scheme with the legitimate expectation that no levy would be raised.
69. The Trustee cannot discern any difference in the substantive matters that arise for the determination of this case whether its first ground is characterised as estoppel or legitimate expectation. It submits:
  - The case is exceptional.
  - The PPF did have the power to make the representation it did in its e-mail under both Section 111 and the Determination.
  - Mercer sent a copy of its letter to TPR. TPR replied on 6 March 2008 acknowledging the letter and confirming that its contents had been noted. In the circumstances, for the purposes of paragraph 41 of the Determination, the Trustee was not required by TPR to submit the valuation which would otherwise have been submitted as a zero valuation.
  - It would be unconscionable/improper for the PPF to resile from the representation made
  - and the expectation which was engendered.
70. The legislation states that the PPF must determine in respect of each financial year the time or times during the year when the levies, or any instalment of levy, becomes payable. So it is within the terms of the Determination that the time a levy is to become payable is found (paragraph (2)). The PPF argues that the Determination must be strictly followed and cannot be departed from. The Trustee argues that the Determination makes adequate provision for the circumstances raised by the PPF but does not provide for a levy to become payable after 31 March 2009.

71. Whether or not there was any deficiency in paragraph (2) of the Determination, the Trustee should be entitled to rely on its terms. In particular, that the 2008/09 levy has to become payable, at the latest, by 31 March 2009.
72. What becomes payable and when it becomes payable is, pursuant to Section 181(3), the amount of the 2008/09 levy determined in accordance with the Determination. This is deemed to be a debt under Section 181(6). Here, there was no valid debt under Section 181(6) on 31 March 2009. It is neither legitimate nor reasonable for the debt in respect of 2008/09 to become payable on 26 April 2012.
73. It is instructive to compare Section 175(5) with Section 174 and the provisions for the initial levy. Section 174(c) provides for the time or times during the initial period when the levy becomes payable. This is prescribed in The Occupational Pension Schemes (Levies) Regulations 2005 rather than in a PPF determination. Under Regulation 9(2), the initial levy is payable on 6 April 2005. However, because it was expected that levy payers would not receive invoices until after that date, Regulation 9(2) was made subject to Regulation 9(4). This provided that, if the amount of the initial levy was not notified under Section 181(3)(c) to the person liable to pay it before the day on which it would be payable, the levy was payable within the period of 28 days beginning on the date of notification or 31 March 2006, whichever was the earliest.
74. Parliament expressly indicated that there should be a date (31 March 2006) by which the initial levy became payable. If it had intended that the initial levy could become payable several years later, it would have made such provision. Stale claims should be avoided and Parliament did not intend such claims to be permitted under the legislation.
75. The Trustee also submitted the following further points:
76. The issue turns on the correct construction of the correspondence between the Trustee and the PPF in February and March 2008.
77. It is not the Trustee's case that a promise was made by the PPF. Rather it is the case that a clear and unambiguous representation was made.
78. The Trustee accepts that it is necessary to consider the correspondence as a whole and that the PPF's e-mail was a response to Mercer's letter of 21 February 2008. The question posed by Mercer related to what happens when a bulk transfer occurs part way through a levy year. The PPF were asked to confirm that they intended to apply a pro-rated levy for the year in which the bulk transfer occurred. The Trustee makes the following points:
  - It was implicit in Mercer's request and the PPF's response that, if the bulk transfer did not take place in 2008/09, the request for confirmation would

relate to the whole of that year; hence the reference to “the year in which the bulk transfer is received”.

- The reference to paragraph 40 et seq was made in direction reference to the discretion to charge a nil levy. It is clear that the PPF were referring to a nil levy in the context of the prospective levy prior to the transfer taking place. This is supported by the fact that the only reference in the Determination to a nil levy is in paragraph 40 and, by reference back, paragraph 41. Since the PPF were aware that the Scheme was not a new scheme, they could only have been referring to paragraph 41 (with the cross reference back to 40(c)).
- The comment “I understand that it likely that this discretion would be exercised” means the discretion under paragraph 40(c) as it applies pursuant to the cross reference in paragraph 41. Preceding this comment with the words “whilst we cannot fetter our discretion in advance” does not make any difference nor does it qualify the representation.

79. The Trustee considers that the legal consequence of the PPF’s failure to comply with paragraph (2) of the Determination is that the Scheme’s liability for the 2008/09 levy lapsed.
80. The legislation imposes a mandatory requirement under Section 175(5) on the Board of the PPF and the Board has a legal obligation to comply with the Determination. It was not the Scheme’s fault that the Board failed to comply and it cannot now be legally obliged to pay an out of time levy invoice.

### **Further Representations from the PPF**

81. The PPF submitted further representations following the Applicant’s Supplementary Statement. Additional points are summarised below:
82. The size of the 2008/09 risk-based levy was a function of the failure score assigned to NIWL by D&B. The Board is obliged to take account of the failure score under the terms of the Determination.
83. The e-mail of 17 March 2008 did not give an “assurance” that no levy would be raised and the Trustee’s decision not to submit a valuation was taken at its own risk.
84. The Trustee missed the statutory deadline for submitting a Section 179 valuation by 31 March 2008. It is a moot point whether the March 2009 valuation was submitted late or the Trustee failed to submit a Section 179 valuation during the 2008/09 levy year.



85. The reference to the lump sum contribution paid in March 2009 is irrelevant; the relevant date for assessing the Scheme's net liabilities for 2008/09 was October 2007 (Appendix 1 to the Determination).
86. It is irrelevant to hypothesise what should have happened if a nil valuation had been submitted.
87. The absence of explanation is not the same as a clear and unambiguous promise.
88. In order for paragraph 41 to apply, it was necessary that the Scheme "has not by midnight on 31 March 2008 been required by legislation or by the Pensions Regulator to complete a scheme return or to file valuation information". The Scheme was required by legislation to file a Section 179 valuation by 31 March 2008. Therefore paragraph 41 did apply.
89. The Trustee's reliance on The Occupational Pension Schemes (Levies) Regulations 2005 is misplaced. It is unclear how a statutory instrument made on 17 March 2005 would cast light on Parliament's intentions when enacting Section 175(5) in 2004.
90. Regulation 9(4) supports the PPF's analysis. The Regulation states that the levy "is payable within the period of 28 days beginning with the date on which the notification is given or, if earlier, on 31st March 2006." These words envisage a situation where the levy becomes "payable" on 31 March 2006 but the notification which fixes the amount due is not given until sometime later.
91. The PPF do not consider that the failure to issue an invoice before 31 March 2009 was a breach of the Determination. As previously stated, they say that neither the Determination nor Section 181 of the Pensions Act 2004 impose a timeframe within which they are required to issue a levy invoice. They say that the wording of paragraph (2) is intended to reflect the fact that eligible schemes are liable to pay the levies by providing that the levies become payable on the earliest of the specified events taking place. If paragraph (2) was interpreted as imposing a time limit for issuing an invoice, a scheme which refused to provide data or a complex scheme could escape paying the levies.

## Conclusions

92. The Applicant seeks a review of the Scheme's risk-based levy for 2008/09 on the basis that:
  - had the Trustees not relied on the e-mail from the PPF dated 17 March 2008, a Section 179 valuation showing nil assets and liabilities would have been submitted; and

- the invoice dated 26 April 2012 is invalid because it was issued after the end of the 2008/09 levy year.

93. With regard to the first point, the Applicant argues that the PPF is estopped from enforcing a strict legal right if it has led a party by representation to act or not to act in a particular way, where that party reasonably relied on the PPF's representations and where it would be inequitable or unconscionable for the PPF to go back on those representations. The PPF argues that the doctrine of estoppel is inapplicable where a public body is exercising a statutory function. It argues that the concept of legitimate expectation is more appropriate in the circumstances.
94. Essentially, the concept of legitimate expectation holds that a public authority which has, by a promise or practice, conferred on a person a legitimate expectation of a procedural or substantive benefit may not frustrate that expectation if to do so would be so unfair as to amount to an abuse of power.
95. Both estoppel by representation and legitimate expectation start from the point that there has been a representation or promise. (A promise, if non-contractual, is merely a firm representation as to future conduct.) Therefore, regardless of which doctrine applies, I need first determine whether the contents of the 17 March 2008 e-mail amounted to a representation that the PPF would act in a particular way.
96. Estoppel by representation requires the representation in question to be clear and unambiguous. It had been thought that such clarity was not a necessity for legitimate expectation to arise. However, the Appeal Court recently found that before a statement or representation can be relied upon as giving rise to a legitimate expectation it must be "clear, unambiguous and devoid of relevant qualification".<sup>7</sup> There may still be exceptional circumstances where this does not apply.
97. The author of the e-mail opened by referring to Mercer's letter of 21 February 2008. The information she provided was stated to be in answer to their questions. This is important because it gives context to what followed. The author stated that the PPF was not minded to take any action in this case in relation to the non-submission of the Section 179 valuation. Mercer's letter had explained that they were aware that the Scheme was technically required to submit a Section 179 valuation by 31 March 2008 but that this seemed pointless given that there would be little in the way of assets and liabilities before the bulk transfer. Mercers had said that one solution would be to submit a valuation showing nil assets and liabilities as at 1 April 2007. They said that there would be costs involved in doing so and that they were enquiring whether any action would be taken if the Section 179 valuation was deferred.

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<sup>7</sup> *Patel, R (on the application of) v General Medical Council* [2013] EWCA Civ 327

98. The e-mail's author went on to request submission of part B of the block transfer form only. This is clearly a response to Mercer's query about the Block Transfer Certificate.
99. The e-mail's author then went on to say that the Board had some discretion to charge a nil levy for some new schemes and referred Mercer to paragraph 40 et seq. of the Schedule to the Determination. The author concluded,
- "Whilst we cannot fetter our discretion in advance, I understand that it is likely that this discretion would be exercised in this case for 08/09."
100. It is this part of the e-mail which the Applicant relies on as a representation/promise from the PPF that the Scheme's levy for 2008/09 would be nil. However, reading the e-mail in the context of the preceding letter from Mercer, it is difficult to see that this is the case. The query raised by Mercer related to the approach taken by the PPF when a transfer occurred part way through a levy year. They had said that they presumed that no levy would be required in respect of the transferred liabilities until the members had decided to transfer and the liabilities had actually transferred. Nowhere in Mercer's letter did they ask if the PPF would exercise discretion to charge a nil levy for the levy year 2008/09 as a whole. The Applicant suggests that it was implicit in Mercer's request that, if the bulk transfer did not happen, their question would concern the whole year. I do not think that is what was meant, nor is it implicit. But in any event, if it is necessary to imply something into Mercer's question, this, in itself, argues against finding a clear and unambiguous representation/promise in the answer.
101. The e-mail's author acknowledged that there was discretion to charge a nil levy "for some new schemes". The Reconsideration Committee took the view that the e-mail's author was under the mistaken impression that the Scheme was a "new scheme". In view of the fact that Mercer's letter clearly stated that the Scheme had commenced on 1 April 2007, that seems unlikely. The author then referred to paragraphs 40 et seq. which was the part of the Determination which dealt with (amongst other things) scheme transfers. It could just as easily be read as directing Mercer to that part of the Determination which dealt with their query about the block transfer. The Applicant seeks to argue that the author could only have meant paragraph 41 with a back-reference to paragraph 40. Paragraph 41 applied where a scheme had not been required to file a scheme return. Mercer stated that they were expecting to file a scheme return imminently. This casts doubt on the idea that the author was referring to paragraph 41.
102. In any event, the author went on to say that the PPF could not fetter its discretion in advance. This is akin to saying 'I make no promises but ...'. She continued by saying that she understood that it was likely that "this discretion" would be exercised in this

case for 2008/09. I do not find that it was clear which discretion the author was referring to.

103. I do not find, therefore, that the 17 March 2008 e-mail amounted to a clear and unambiguous representation/promise on the part of the PPF to exercise a discretion to charge a nil levy for 2008/09. It does not satisfy the requirements of either estoppel by representation or legitimate expectation. Ground 1 of the Applicant's case fails at this point and I need go no further into consideration of the other points raised concerning whether or not the PPF had a discretion to charge a nil levy and/or whether it would have been justified in resiling from any promise to do so.
104. I move now to consider Ground 2.
105. The Applicant seeks to argue that the 2012 invoice is not valid because it was issued after the end of the 2008/09 levy year. The Applicant relies on Section 175(5) of the Pensions Act 2004 and paragraph (2) of the Determination and argues that the latest date at which the levy could have been invoiced was 31 March 2009. The PPF argue that neither Section 175 nor Section 181 impose a time limit on when it can issue an invoice.
106. The arguments boil down to what is meant by the phrase "becomes payable". In the absence of a specific definition, the words should be given their ordinary everyday meanings. The Oxford English Dictionary (online version) defines 'payable' as required to be paid or due. The date at which the levy becomes payable is, therefore, the date from which the Scheme is required to pay it or it becomes due.
107. It is accepted that the Scheme is an "eligible scheme" as defined in the Pensions Act 2004. As such it is liable for the pension protection levies. Liability arises under Article 158(1)/Section 175(1). Paragraph (2) of the Determination then says when the levy is payable, which is on the first of the three dates: the date of an invoice, the date of cessation to be an eligible scheme, and 31 March 2009. If no invoice is levied by 31 March 2009, the levy is still payable then. It may not be possible to pay it without an invoice, but it remains technically payable until such time as it is can be, and is, paid.
108. The Applicant has argued that it is unfair that the Scheme should be invoiced some years later. Questions of fairness are not within my remit but I note that no interest has been charged in respect of the 2008/09 levy. Equally, on the question of whether the levy has been fairly calculated, I note that the PPF methodology rolled back the Scheme's assets and liabilities as at 31 March 2008 to arrive at figures for October 2007. Whilst it is the case that, had a Section 179 valuation as at 1 April 2007 been submitted, the figures used would have resulted in a nil levy, this is no more a true reflection of the Scheme's position in 2008/09 than the figures actually used by the PPF. In fact the major contributing factor to the 2008/09 levy being so much more

than those for subsequent years was the D&B failure score for NIWL. There was little that could have been done about this because the first NIWL annual report and accounts were not published until 22 September 2008.

109. I find that the Board of the PPF is not required to take any action.

**Tony King**  
Pensions Ombudsman

7 May 2015