

PPFO-6880

Ombudsman's Determination

Applicant	TTG Pension Trustees Limited
Scheme	TT Group (1993) Pensions Scheme
Respondent(s)	Pension Protection Fund

Summary of 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 15 October 2014. The referral concerns the decision, by the PPF, to charge interest after late payment of the Scheme's risk-based levy for the levy year 2011/12.

Summary of the Ombudsman's determination and reasons

The Board is not required to take any action because it has reached its decision with regard to waiving interest for late payment of the Scheme's risk-based levy in a proper manner.

Detailed Determination

Background

1. On 30 March 2011, the Trustee submitted a Type A Contingent Asset certificate, including a guarantee from TT Electronic plc (the Principal Employer) dated 28 March 2011. The Board of the PPF (the **Board**) notified the Trustee, on 25 August 2011, that the contingent asset would not be recognised. This decision was the subject of a previous referral to the PPF Ombudsman (PPFO-1552). On 27 September 2011, the Board issued an invoice of £1,636,943.00 in respect of the Scheme's levies for the levy year 2011/12.
2. The Trustee applied for a review of the risk-based levy calculation on 18 October 2011. It paid £50,302.00 in respect of the scheme-levy on 28 October 2011, and a further £96,844.80 on 17 November 2011. A review decision was issued, on 10 April 2012, upholding the calculation of the levy.
3. The Trustee applied for a reconsideration of the review decision on 8 May 2012. A reconsideration decision was issued, on 15 June 2012, upholding the review decision. The Trustee referred the matter to the PPF Ombudsman on 12 July 2012. The then Deputy PPF Ombudsman issued a final decision on 5 June 2013. She determined that the Board had not erred in upholding the review decision.
4. The Trustee appealed to the High Court on 26 June 2013. The appeal was dismissed on 16 January 2014. The Trustee paid the balance of £1,489,796.20 on 5 February 2014.
5. The PPF considered waiving the interest which was then due as a result of the late payment of the risk-based levy. The recommendation prepared for the PPF's Chief Executive noted that the relevant legislation asked the Board to consider whether it was reasonable not to charge interest. It noted that the Board was required to take account of any ongoing litigation in respect of the levy. The recommendation referred to the High Court appeal and noted that the judge had been critical of the Deputy Ombudsman's decision. The author said he thought, on that basis, it had been reasonable for the Scheme to appeal the Deputy Ombudsman's decision. He also noted that the Scheme had paid the scheme-based levy within time and had made an on account payment in respect of the risk-based levy in November 2011. He recommended interest be waived from the date of the Deputy Ombudsman's decision. This recommendation was authorised by the PPF's Chief Executive on 26 February 2014.
6. The Board then wrote to the Trustee with an invoice for £132,097.15 in respect of late payment interest. The Board said interest began to accrue daily from 28 days after the invoice for the levy. It said interest had been waived from the date of the Deputy Ombudsman's determination and the calculation also took account of the two interim payments (see above).

7. The Trustee applied for a review of the decision to charge interest on the grounds that the Board had failed to take account of delays in its determination of the application for a review of the levy and in the Deputy Ombudsman's determination of the referral. Nor had it given appropriate weight to the Trustee's entitlement to make the legitimate arguments upon which its application for review, reconsideration and referral were based.
8. A review decision was issued on 7 May 2014 upholding the decision to charge interest. The Review Committee took the view that, of the possible grounds for waiving interest (see below), the ground which applied in this case was "it is reasonable not to charge interest". It also considers the matters set out in regulation 19A(9) of the Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006 (see below). The Committee noted that the Scheme had paid the 2001/12 levy in three parts. It also noted that, in previous years, the Scheme had paid on time and had responded to correspondence in good time. It noted that the Scheme had paid the final part of the 2011/12 levy promptly on the conclusion of the High Court appeal.
9. With regard to the delay in issuing the previous review decision, the Review Committee said it agreed with the Trustee's submissions up to a point. It concluded that interest should be waived from the date on which the Scheme had been led to expect a decision to the date it received a decision (three months). The PFF have explained that the delay in making the earlier review decision was due to the volume of reviews being dealt with at that time.
10. With regard to the time taken for the Deputy Ombudsman to issue a determination, the Review Committee said the Board and the Ombudsman are independent of each other and the Board could not take responsibility for the time taken by the Ombudsman to issue a determination. The Committee also noted that schemes were warned that reviews/referrals could take some time to complete and encouraged to pay the levy on time. If a review/referral was successful, the scheme would be issued with a credit note for sums already paid.
11. The Review Committee noted that, whilst the Trustee's appeal to the High Court had not been successful, interest had been waived for the period after the Deputy Ombudsman's determination.
12. The Trustee applied for a reconsideration on 3 June 2014.

Relevant legislation

13. Section 181A of the Pensions Act 2004, provides for regulations to make provision for interest to be charged in cases of late payment of a pension protection levy.
14. Regulation 19A of the Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006 (SI2006/580) (as amended), states that interest is to be charged in cases of late payment of a pension protection fund levy unless there is a waiver in whole or in part. Late payment is defined as when the levy has not been paid within 28 days of the date on which the Boards sends notification. The interest

rate to be used is specified and it is to be calculated: (a) on a daily basis, (b) on the amount of the levy which has not been paid, and (c) “from the first day on which there is a late payment of the pension protection fund levy until the day on which that levy is paid”.

15. Regulation 19A states that interest may be waived: if the Board is satisfied that any of the circumstances set out in regulation 4 of the Pension Protection Fund (Waiver of Pension Protection Levy and Consequential Amendments) Regulations 2007 (SI2007/771) apply (see below), or “charging interest would not be conducive to the prudent management of the Board’s financial affairs”, or it is reasonable not to charge interest.
16. Regulation 19A(9) states that, for the purposes of considering whether it is reasonable to charge interest, the Board must have regard to such matters as it considers relevant. It then lists a number of matters for the Board to consider (where relevant) as follows:
 - the dates on which any payments of the pension protection levy are made,
 - the dates on which any payments of the pension protection levy were made in previous years,
 - any failure to respond to correspondence from the Board concerning interest or the levy,
 - any failure to provide the Board with information relating to interest or the levy,
 - any review, reconsideration or reference to the PPF Ombudsman or appeal against a determination by the Ombudsman
17. Regulation 4 of the Pension Protection Fund (Waiver of Pension Protection Levy and Consequential Amendments) Regulations 2007 sets out the circumstances in which a pension protection levy may be waived. These include the scheme being authorised to continue as a closed scheme, having no active members, a liquidator being appointed in respect of the employer. None of the specified circumstances apply to the Scheme.
18. Regulation 10 of the Pension Protection Fund (Review and Reconsideration of Reviewable Matters) Regulations 2005 (SI2005/669) (as amended) concerns the time for giving a review decision. Regulation 10(1) provides that, “subject to paragraph (2)”, the Board must give a review decision before the end of 28 days following the date it receives an application for review or the date it receives any documents or information it requires. Regulation 10(2) provides that, if the Board is not able to give a decision in the time specified, it must send an interim reply. The interim reply must give the reasons for the delay and the expected date for issuing a decision.

The reconsideration decision

19. The Board's Reconsideration Committee referred to the Trustee's submissions relating to delays by the Board and the PPF Ombudsman. It referred to a submission by the Trustee that the Board had misdirected itself as to the effect of the Pension Protection Fund (Review and Reconsideration of Reviewable Matters) Regulations 2005 (SI2005/669) (as amended). The Trustee had argued that regulation 10 imposed an absolute deadline on the Board to respond within 28 days of a review application.
20. The Reconsideration Committee referred to regulation 10(2) which provides for the Board to send an interim reply setting out the reasons for the delay and giving an expected date for issue of a review decision. The Committee noted that an interim reply had been issued setting out an expected date for a decision. It also noted that the fact that the Board had been unable to meet the expected date for decision had been taken into account in determining the period for which interest had been waived.
21. With regard to submissions by the Trustee relating to delays on the part of the PPF Ombudsman, the Committee noted that a referral to the Ombudsman was a factor to be taken into account under regulation 19A(9). The Committee decided the Trustee would have been aware that referrals to the Ombudsman could take some time to be concluded and it had been made aware of this during the appeal process. The Committee concluded that this was something the Trustee should have taken into account. It noted that schemes were encouraged to pay their levies in full during an appeal. The Committee concluded it was not the Board's intention to disadvantage schemes for the length of time an appeal could take, but it was concerned to ensure that the same requirement to settle levy invoices applied consistently across all schemes.
22. With regard to submissions relating to the legitimacy of the Trustee's levy review application, the Committee considered this to be contrary to regulation 19A(9). It concluded that the current review should not be an opportunity to reopen the original dispute. The Committee acknowledged that the fact that a levy invoice had been appealed was a factor in deciding whether or not to waive interest, but said it did not automatically follow that interest would be waived. It referred to a frequently asked question (**FAQ**) published on the Board's website which, it said, made it clear that interest would accrue for the duration of any appeal.
23. The Committee noted the Trustee's assertion that the Scheme should not be penalised for exercising the right to refer the matter to the PPF Ombudsman. It noted that the Scheme had had the use of the monies for an extended period and retained the benefit of any investment returns. The Committee expressed the view that the charging of interest for late payment was not a penalty but a recognition that there was a value attributable to the period for which payment was not made. It again referred to the FAQ on the Board's website relating to the accrual of interest during the appeal period.

24. The Committee referred to the matters set out in regulation 19A(9). It said these matters had been taken into account in coming to the decision to charge interest and had been considered again at review. With regard to a reference in the review decision to “consistency”, the Committee said this meant equal treatment for all schemes in determining whether or not to charge interest. The Committee concluded, having regard to these matters, that charging interest would be conducive to the prudent management of the Board’s financial affairs and it was reasonable not to charge interest only to the extent set out in the review decision.

Grounds for Referral

25. The Trustee submits:

- The reconsideration decision failed to engage with the arguments put forward in its application and thereby repeated many of the errors in the review decision.
- The reconsideration decision was not reached correctly and does not constitute a lawful exercise of the Board’s discretion to waive interest.
- Regulations 10(1) and 10(2) cannot be read together to the effect that the Board must give a review decision within 28 days except where it is unable to do so. Regulation 10(1) is not drafted in such a way as to make it subject to 10(2).
- Regulation 10(2) provides for steps the Board must take where it fails to meet the obligation in 10(1); it does not lessen or lift that obligation. Such an interpretation would render the obligation in 10(1) obsolete.
- Even if regulation 10(2) were read as lifting the obligation in 10(1), this does not answer the point that to charge interest for any period outside the stipulated 28 days is a breach of the principle of fairness; to which the exercise of discretion is subject.
- As the PPF is funded by monies recovered by the Board, including interest, such an approach would incentivise the Board to delay its decision making.
- No reasonable decision maker in the Board’s position could consider it reasonable to benefit from, or penalise the Trustee for, a failure to comply with a statutory deadline.
- The reconsideration decision did not answer the points raised concerning delays by the PPF Ombudsman. It seemed to imply that the Committee would not take into account the length of time taken by the Ombudsman to make a decision on the basis that it is known that referrals can take an extended period of time.

- The Board is required to have regard to any reference to the Ombudsman. The term “where relevant” in regulation 19A(9) means that, where there is a reference to the Ombudsman, it is always necessary for the Board to have regard to this.
- The effect of the position taken by the Reconsideration Committee is that the Board will never have regard to any reference to the PPF Ombudsman because applicants should be aware of the time taken by the Ombudsman.
- It has not asked for the original grounds for disputing the levy invoice to be reopened. The point it is making is that, under regulation 19A(9), regard must be had to the nature of the matters raised in the dispute. The matters it had raised were novel and constituted a legitimate question of interpretation.
- Neither the review nor the reconsideration decision referred to its requests for details of the Board’s policy on waiving interest. The Courts have found that policies are an essential element in securing coherent and consistent performance of administrative functions, particularly exercise of discretion, by public bodies¹. They have also found that an individual has a right to have his/her case considered under whichever policy has been adopted, provided that it is a lawful exercise of the discretion². There is a correlative right to know what the policy is.
- In its response to the Government’s consultation on amendments to the 2006 regulations, the Board said it would not expect to waive interest in all appeal cases and referred to vexatious appeals or those brought on grounds previously rejected by the PPF Ombudsman or the Courts.
- It agrees that the Board has not said that interest will be waived automatically in cases where a levy invoice has been disputed. However, it has said that interest is unlikely to be waived where the challenge to the levy is frivolous or hopeless.
- Neither the Board nor the Reconsideration Committee has provided any indication of an alternative policy.
- The position taken by the Reconsideration Committee is a fettering of its discretion.
- The high rate at which interest is charged cannot simply be intended to reflect the value which a company would derive from retaining the levy until the appeal process had run its course.

¹ *R (Alconbury Developments Ltd) v Secretary of State for Communities and Local Government* [2003] 2 AC 295

² *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245

- Paying the levy during an appeal passes the value of the funds to the Board during what it has accepted can be a lengthy process.
- The Reconsideration Committee says that reference to “consistency” means equal treatment of schemes in the decision to charge interest. However, this does not make sense unless the Board is able to articulate the policy which it purports to apply consistently.

Representations from the PPF

26. The PPF submits:

- The Board has exercised its discretion to waive interest for two periods. The additional liability for the Trustee would have been £74,103.83.
- At all material times, its website has contained a FAQ which states that it will start calculating interest from the 29th day after the levy invoice date and encourages schemes to pay levies which are subject to appeals.
- It is clear, from the interest determination, and the review and reconsideration decisions, that the Board did have regard to the matters referred to in regulation 19A(9). In particular, the Board had regard to:
 - (a) the date on which the levy payments were made,
 - (b) the date on which previous years’ levy payments were made, and
 - (c) the review application, reconsideration application, referral to the Ombudsman and appeal.
- In light of this, the Trustee’s application must relate to the manner in which the Board exercised its discretion.
- Regulation 10(1) is subject to 10(2).
- The meaning of regulation 10 is clear. The Board is required to give a review decision within 28 days, but, if it cannot do so, it can send an interim reply. Regulation 10(1) does not provide for an immutable obligation to give a review decision within 28 days. If that were so, regulation 10(2) would be meaningless. The Board is given a target of 28 days to issue a review decision, but it is not in breach of a statutory obligation if it cannot meet that target, so long as it gives an explanation and a new date.
- Interest made up a small percentage of the PPF’s funding. A larger percentage is derived from investment return. In 2011/12, the Board earned a return on investments of 25.5%. In 2012/13, it earned a return of 11.1%. This is greater than the level of interest payable by the Trustee (5.5%). The Board has every incentive to issue a review decision quickly in order to add the levy to its investment funds.

- A decision to delay a review decision to accrue interest would be irrational and/or procedurally unfair and susceptible to judicial review.
- It has accepted that it would not be reasonable to charge interest for the period from the date on which it anticipated providing the review decision and the date on which it was actually issued. However, it considers it was entitled to conclude it would be reasonable to charge interest for the period from the date the levy became payable to the date on which it anticipated issuing a review decision.
- The Board did have regard to the fact and nature of the Trustee's application to the Ombudsman. This is self-evident from the terms of the interest determination, review and reconsideration decisions.
- The Board was entitled to conclude that interest should not be waived for the period from referral to the Ombudsman to the date of the Deputy Ombudsman's determination on the grounds that:
 - (i) the Board was not responsible for the timing of the Ombudsman's determination,
 - (ii) the Board had encouraged the Trustee to pay the levy pending the outcome of the levy challenge,
 - (iii) the Board was disadvantaged by the timescales for the Ombudsman's determination and the Trustee's failure to pay the levy because it lost the opportunity to invest the funds,
 - (iv) this disadvantage was greater than the disadvantage to the Trustee of having to pay interest because the investment return would have been greater than the interest charged,
 - (v) the level of interest charged is not punitive,
 - (vi) the Trustee could easily have earned the same level of return or more over the period in question,
 - (vii) the review and reconsideration applications, the referral to the Ombudsman and the appeal were all unsuccessful,
 - (viii) the Board has exercised its discretion to waive part of the interest.
- The Board's policy is to consider whether it is reasonable to waive some or all interest on a case by case basis, having consideration for the matters specified in regulation 19A. It has provided a copy of its internal guidance.
- So far as the impact of a levy challenge is concerned, the Board's policy is to consider the subject matter and circumstances of the challenge. This is

consistent with its response to the Government consultation. There will be cases where:

- (i) the challenge is frivolous or vexatious, in which case it would not be reasonable to waive any of the interest charge,
 - (ii) there is some merit in the challenge but it does not succeed, in which case it would be reasonable to waive some of the interest, and
 - (iii) the challenge is successful, in which case it would be reasonable to waive all of the interest.
- The Board took the view, and was entitled to do so, that this case fell into the second category. Hence it took the decision to waive 40% of the interest otherwise payable by the Trustee.

Supplementary Statement by the Applicant

27. The Trustee further submits:

- Its position is that the Board should not have charged any interest for the period during which it was in breach of its obligation to give a review decision.
- The use of the word “must” in regulation 10(1) means that the Board is under an obligation to give a decision within 28 days. The use of the phrase “is not able to” in regulation 10(2) means the Board may extend this period in circumstances where it cannot give its review decision within the timescale. The Board has an obligation to give a decision within 28 days except where, despite its reasonable endeavours, it is wholly impracticable to do so. For example, in an exceptionally complex case or in the unexpected absence of key members of staff.
- The interim reply issued by the Board illustrates the unacceptable approach it takes and which flows from its erroneous interpretation of regulation 10(1).
- The interim reply indicates that the Board made no effort to meet the statutory deadline. As at the date of the interim reply, the Board could not have considered when the 28 days might run from since it did not know if it needed additional information. Nor could it have given any consideration to the complexity of the case.
- Because the Board does not take its obligation to meet the statutory timeframe seriously, it failed to direct adequate resources towards meeting it. A lack of willingness to make resources available to meet a statutory obligation is not the same as an inability to meet it.
- It is clear that this is the Board’s approach in every case because the Trustee received an identical interim reply on submitting the application for review of

the decision to charge interest. This shows that the failure to take the statutory obligation seriously is longstanding.

- The Board has failed to apply its policy properly. It agrees with the PPF that its case falls into the second category referred to above. However, it is clear from the amounts waived, that the Board's policy has not been properly applied. The first amount waived does not relate to the merits of the levy challenge. The second amount waived only relates to the merits of the appeal from the Deputy Ombudsman's determination. The Board's policy should have been applied to each of the Trustee's applications; not just its challenge to the Deputy Ombudsman's determination.
- Had the Board had regard to the nature of the other applications, the fact that these had merit would have resulted in a further reduction in interest charged.
- The fact that the referral to the Ombudsman had merit increases the force of the argument that the Trustee should not be penalised for the delay before the Deputy Ombudsman issued a determination; particularly when that determination was later found by the High Court to be flawed.

Conclusions

28. This referral concerns the decision, by the PPF, not to waive the interest due in respect of late payment of the Scheme's levy for the levy year 2011/12. This is a reviewable matter under paragraph 19B of Schedule 9 of the Pensions Act 2004.
29. The decision whether or not to waive the interest payable in respect of late payment of a levy is the exercise of a discretion. This is clear from the wording of regulation 19A which provides that interest "may" be waived. There are by now well-established principles which a decision maker can be expected to follow in exercising a discretion. Neither the Courts nor the Ombudsman are likely to interfere in the exercise of a discretion if these principles have been followed. Briefly, the decision maker must:
 - take all relevant matters into account and no irrelevant ones,
 - ask the right questions,
 - interpret the law and any relevant regulations correctly, and
 - not come to a perverse decision.

By perverse, I mean a decision which no other decision maker, faced with the same circumstances and properly advising himself, could come to.

30. The Board has exercised its discretion to waive interest for two periods: the three months from the date it said a review decision would be issued (17 January 2012) to the date the decision was issued (10 April 2012); and the period after the Deputy PPF Ombudsman issued a final decision (5 June 2013 to 16 January 2014).

31. The initial decision to waive interest from the date of the Deputy Ombudsman's decision is documented in the recommendation submitted to the PPF's Chief Executive. The author said the relevant legislation asked the Board to consider whether it was reasonable to charge interest. There are three circumstances set out in regulation 19A in which interest may be waived. The two which might have applied in this case are: (b) charging interest is not conducive to the prudent management of the Board's financial affairs, and (c) it is reasonable not to charge interest. The recommendation did not refer to the former and concentrated on the latter. However, neither party has suggested that the former would apply in this case and it is difficult to see that it would. Asking the question whether it was reasonable not to charge interest was the appropriate approach in this case.
32. The recommendation then said the Board was required to take account of any ongoing litigation relating to the levy. There are a number of factors which the Board must have regard to under regulation 19A, including a review, reconsideration or referral to the PPF Ombudsman or appeal to the High Court. The other factors are the dates on which levy payments have been made and any failure to respond to correspondence, or requests for information. The recommendation subsequently referred to the fact that the Scheme had paid the scheme-based levy within time and had made an on account payment for the risk-based levy. There was no specific reference to responses to correspondence, or requests for information. However, there has been no suggestion that the Trustee has at any time failed to provide information, or respond to correspondence.
33. The recommendation specifically referred to the Trustee's referral to the PPF Ombudsman and the High Court appeal. The author expressed the view that it had been reasonable for the Trustee to appeal and recommended waiving interest from the date of the Deputy Ombudsman's decision on this basis. There was no reference to the earlier stages of the Trustee's appeal; the review, reconsideration, or referral. However, this was addressed by the review committee, which decided to further waive interest for the three months relating to delay in providing the earlier review decision. The review committee declined to waive interest for the period of the Deputy Ombudsman's investigation on the grounds that the two bodies are independent of each other.
34. I find that the Board considered waiving the interest due in respect of the late payment of the Scheme's risk-based levy in accordance with regulation 19A.
35. The Trustee argues there is a statutory obligation for the Board to issue a decision within 28 days of receipt of an application for a review. Regulation 10(1) does say the Board "must" give a review decision within 28 days of receiving an application for review. However, regulation 10(2) then sets out what the Board should do if it is unable to give a decision within the specified period. It is clearly envisaged that there will be circumstances in which the Board is unable to give a decision within 28 days.

36. The Trustee argues that the Board was only unable to comply with the statutory deadline of 28 days because it had not allocated sufficient resource to dealing with review applications. This may well be the case (although I make no finding to that effect), but it is irrelevant. Regulation 10(2) allows the Board to issue an interim response if, for whatever reason, it is unable to meet the 28 days deadline.
37. Whilst regulation 19A(9) requires the Board to have regard to a review, neither it nor regulation 10 require the Board to waive interest where a decision has not been given within 28 days. It is a factor to be taken into account when the Board considers exercising discretion to waive interest. The Board did consider it and decided to waive interest for the period between the date on which it had said a decision would be issued and the date a decision was issued. Its decision not to waive interest for the who
38. le period for which a review decision was outstanding cannot be described as perverse; that is, it is within the range of possible outcomes a reasonable decision maker could choose.
39. The Trustee has suggested that this approach incentivises the Board to delay issuing review decisions. This suggestion is not supported by the evidence. It is true that, for the period of any appeal, interest is accruing, but it is equally true that the Board is not able to invest the funds it would otherwise have received by way of levy. The evidence indicates that the loss of investment return far outweighs the gain in interest payments.
40. I also cannot agree that charging interest for the period of an appeal penalises the Scheme. For the whole of the appeal period, the Scheme had use of the funds and was free to invest them. For the reason given above, it is more likely than not that this would have been to the Scheme's advantage.
41. Regulation 19A requires the Board to "have regard to" a reference to the PPF Ombudsman. However, having regard to is not the same as being required to waive interest 'because' there has been a reference to the Ombudsman. The Board had regard to the fact that the Trustee had referred the matter of the Scheme's risk-based levy to the Ombudsman, but concluded that it would not waive the interest accrued for the period of that investigation. It did so on the grounds that the two bodies are independent of each other and that the Trustee was aware that the investigation could take some time. Neither of these grounds could be said to be irrelevant.
42. It is possible that another decision maker may have decided to waive interest for the period of the Deputy Ombudsman's investigation. However, this does not mean that the Board's decision not to do so can be described as perverse.
43. The Trustee has referred to the need for the Board to have a policy in relation to the exercise of its discretion to waive interest. The judge in *Alconbury* did refer to policies as an "essential element in securing the coherent and consistent performance of administrative functions". However, the relevant legislation does not specifically

require the Board to have a policy in place. It has provided a copy of its internal guidance and has referred to its response to government consultation. It summarises its 'policy' as being to consider whether it is reasonable to waive some or all interest on a case by case basis, having consideration for the matters specified in regulation 19A.

44. The same judge went on to note that "there are limits to be observed in the way policies are applied". A policy could not serve to fetter the Board's discretion. It may assist schemes to assess the likely outcome of their case if the Board were to publish such a policy, but each case would have to be determined on its own merits. In any event, the evidence indicates that the Board has considered the case in accordance with its policy; that is, it has considered whether it is reasonable to waive interest and has had regard to the requirements of regulation 19A.
45. The Trustee argues that an individual has a right to know what policy will apply. The case to which it refers relates to the Secretary of State's policy on the detention of immigrants. It is not clear that this is directly relevant to the circumstances before me; this referral does not relate to an individual's rights but to a scheme. However, I note that the Board made it clear (by use of FAQ) that interest would be accruing and from when. As such I find that the Trustee would have been, or should have been alert to the fact that there was a possibility that it would be required to pay interest for late payment for at least part, if not all of the period in question. It was, therefore, in a position to take suitable steps to mitigate its exposure to the consequences of late payment.
46. In its response to government consultation, the Board identified three possible scenarios and it is agreed that this case falls into the second of these; that its appeal had some merit but did not succeed. The Trustee argues that the Board has not considered its case in accordance with this categorisation because the first waiver does not relate to the merits of its case and the second only relates to the merits of its High Court appeal. It argues that, had the Board done so, it would have waived more of the interest.
47. The categories are not part of the relevant legislation; they were part of the Board's response to government consultation. As such, they cannot be said to have any force in determining how the Board should exercise its discretion to waive interest. In essence, the Trustee's argument is that, because the Board agrees that there was some merit in its appeal, it should have waived the interest accruing over the period of the Deputy Ombudsman's investigation and possibly earlier. This simply returns us to the earlier arguments – the Board is required to have regard to the fact that the case was referred to the Ombudsman but this does not mean it must waive the interest accruing for this period. It is a question of whether the decision the Board took could be said to be perverse. As I have said, I do not find that it can be said to be perverse.

PPFO-6880

48. I am required to investigate the referral of a reviewable matter and to determine what, if any, action the Board should take. Having investigated the Trustee's referral, I have determined there is no action the Board should take.

Anthony Arter

Pension Protection Fund Ombudsman

3 November 2015