

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

Applicant	Mr G H Hampshire
Scheme	The T&N Retirement Benefits Scheme (1989)

1. The PPF Ombudsman has received a referral of a reviewable matter following a decision by the Reconsideration Committee of the Board of the PPF dated 2 May 2012. The reviewable matter concerns the decision by the Board to approve a valuation of the Scheme undertaken pursuant to Section 143 of the Pensions Act 2004.

Grounds for Referral

2. The Board of the Pension Protection Fund (**PPF**) should not have approved a Section 143 valuation based on benefit levels which are in breach of Article 8 of European Council Directive 80/987/EEC (the **Insolvency Directive**).
3. Because of the impact of the compensation cap and non-indexation of pre-April 1997 benefit, PPF benefits represent less than 50% of original entitlement for some members. This is a breach of European law (Article 8 of the Insolvency Directive) (see *Robins v Secretary of State for Work and Pensions* [2007] All ER (EC) 648).

Background

4. Mr Hampshire took early retirement in December 1998 with an immediate pension. The Scheme entered the PPF assessment period on 10 July 2006, at which time Mr Hampshire was below the normal pension age (**NPA**). His pension was reduced to the PPF compensation level.

Application for Review

5. In his application for a review of the decision by the PPF Board to approve a Section 143 valuation, Mr Hampshire made the following points:
 - Although in absolute terms there was a large surplus (£49.9 million), the Scheme's funding level was only 104%. Given the long term assumptions and the compounding involved, this was a very narrow margin. Whilst this was not,

in itself, a reason to object to the approval of the valuation, it informed many of his subsequent objections.

- The Board should not have approved a valuation which reflects a level of compensation which is in breach of European law; inasmuch as it results in benefits being reduced to less than 50% of their former value.
- Revaluation on the PPF basis, together with the 90% level of compensation, will result in more members receiving benefits at less than 50% of their original value.

Review decision

6. The PPF Review Committee issued its decision on 2 February 2012. The Committee found:

- Under Section 144(2) of the Act, the PPF Board is required to approve a Section 143 valuation “where the Board is satisfied that the valuation has been prepared in accordance with [Section 143]”. It does not have discretion not to approve a valuation if it is satisfied that it has been prepared in accordance with Section 143.
- It had considered whether the points raised indicated that the valuation had not been prepared in accordance with Section 143, the Pension Protection Fund (Valuation) Regulations 2005 (SI 2005/672) (the **Valuation Regulations**), and guidance issued by the PPF under Section 143 (version H4 and version B2 of the assumptions guidance).
- It determined that the valuation had been prepared in accordance with the above and it upheld the original approval.

7. The Committee responded in detail on the following points:

- There is room for debate about the extent to which benefits must be protected in order to comply with Article 8 of the Insolvency Directive. It is not clear that a system under which any single individual receives less than 50% of the value of his original benefits does not comply.
- For the purposes of the review, this was not a question which it was necessary to resolve. The Board had a duty, under Section 144, to approve a valuation which had been prepared in accordance with Section 143. Under Section 143,

the purpose of the valuation was to ascertain whether the value of a scheme's assets immediately before the relevant insolvency event was less than the value of its protected liabilities at that time (Section 127(2)(a)). Protected liabilities are defined in Section 131, which makes it clear that the benefits by which liability is to be assessed are equivalent to PPF compensation payable under Schedule 7 (see also regulation 6 of the Valuation Regulations).

- The approach taken by the actuary in preparing the valuation and by the Board in approving it is dictated by the governing legislation.
- This was not a case where the relevant statutory provisions should be overridden by Article 8 because Article 8 does not have the necessary qualities of being unconditional and sufficiently precise to be directly effective. The ECJ has held on a number of occasions that the Insolvency Directive is not directly effective.
- The remedy suggested in the Counsel's opinion obtained by Mr Hampshire was not a direct claim against the PPF for a higher level of compensation than was provided for under statute, but rather a possible claim against the UK Government. The PPF Board is a statutory body whose powers are limited to those conferred upon it by the statute. It does not have the power to pay higher benefits than those provided for in the statute nor can it withhold approval of a Section 143 valuation other than on the statutory basis.

8. Mr Hampshire requested a reconsideration on the following grounds:

- The Section 143 valuation was deficient and should not have been approved.
- Regulation 7(4) implied that the valuation adjustment should be made on a basis which was consistent with the rest of the valuation. The Section 143 valuation had to be carried out at a particular date and basic actuarial principles required future liabilities and receipts to be discounted back to the valuation date on a consistent basis.

The Reconsideration Committee's decision

9. The Reconsideration Committee issued its decision on 2 May 2012. It upheld the decision to approve the Section 143 valuation.

10. In addition to referring to Section 144 of the Act, the Committee said it had authority to issue guidance prescribing how, subject to any statutory regulations, the value of the assets and protected liabilities of the scheme were to be calculated.
11. The Committee accepted that, if a provision of a Directive intended to confer rights upon an individual is directly effective, an individual may rely upon the Directive as against an emanation of a state (which would include the PPF) and any conflicting provisions of national legislation should be dis-applied. A provision will only have direct effect if it is “unconditional and sufficiently precise” in defining the rights which the individual may assert against the state. Article 8 is not sufficiently precise; it does not require full protection, but does not identify a minimum level of protection.
12. The Committee did not accept that *Robins* had established that the protection offered by national law had to extend to at least 50% of the benefits to which the individual would otherwise be entitled to. Even if it had, this would not make Article 8 directly effective. To be directly effective, the right must be capable of being determined with sufficient precision on the basis of the Directive alone. The *Robins* judgment confirmed that Article 8 is not sufficiently precise by finding that the Directive merely prescribes in general terms the adoption of measures necessary to protect the interests of the persons concerned and gives member states considerable latitude in determining the level of protection (paragraph 56). The CJEU found that the UK’s system of protection, as it stood then, could not be said to protect the relevant interests, but did not identify a minimum level of protection.
13. It is far from clear that *Robins* should be interpreted as meaning that there is a breach of an individual’s Article 8 rights whenever that individual will receive less than 50% of the value of his original benefits by way of PPF compensation. Paragraphs 58 and 61 suggest that the Court also had regard to the overall consequences of the system for the totality of affected individuals. In addition, the House of Lords has previously held, in relation to other provisions of the Directive, that a capping provision was lawful because it was necessary to have regard to the absolute level of protection provided as well as to the proportion of a individual’s benefits which were protected.
14. The PPF is not entitled to disregard the relevant domestic legislative provisions. It acted properly in approving the Section 143 valuation.

Conclusions

15. I have been invited by Mr Hampshire and the PPF Board to refer the question of whether there has been a breach of Article 8 of the Insolvency Directive to the High Court under Section 215 of the Pensions Act 2004. However, I take the view that this is not necessary.
16. If Article 8 is directly effective, then Mr Hampshire may rely upon it in bringing a case against the PPF Board as an emanation of a state and UK legislation may be dis-applied. However, if Article 8 is not directly effective, then I may proceed to determine his case on the basis of the existing UK legislation and referral to the High Court would not be warranted. I do not consider that it is directly effective.
17. For Article 8 to be directly effective, it must:
- be clear and precise
 - be unconditional
 - not give the member state substantial discretion in its application.
18. In the *Robins* case, the CJEU said,
- “The wording of Article 8 of the Directive, inasmuch as it states in a general manner that the Member States “shall ensure that the necessary measures are taken”, does not oblige those States themselves to fund the rights to benefits that must be protected ...
- The words used leave the Member States some latitude as to the means to be adopted ...” (paragraphs 35 &36)
- And
- “... in so far as it does no more than prescribe in general terms the adoption of the measures necessary to “protect the interests” of the persons concerned, Article 8 of the Directive gives the Member States ... considerable latitude ...” (paragraph 45)
- And
- “The discretion enjoyed by the Member State ... is broadly dependent on the degree of clarity and precision of the rule infringed.
- It is apparent ... that, on account of the general nature of the wording of Article 8 of the Directive, that provision allows the Member States considerable discretion ...” (paragraphs 72-74)

19. It seems clear therefore that Article 8 lacks the necessary characteristics to be directly effective so as to override the legislation that applies in this case. In particular, the requirement for direct application is not met that the state should not have substantial discretion.
20. I may, therefore, proceed to determine Mr Hampshire's case in the light of the existing legislation.
21. Mr Hampshire argues that the PPF Board should not have approved a Section 143 valuation based on liabilities calculated by reference to PPF compensation levels. Section 144(2) states that, where the Board has obtained a Section 143 valuation and it is "satisfied that it has been calculated in accordance with that section", it must approve it. Section 143(4) provides for regulations to prescribe how "protected liabilities" were to be determined and calculated. The regulations in question are the Valuation Regulations. Section 143(6) provides for the protected liabilities to be determined and calculated in accordance with guidance issued by the Board. Provided that the protected liabilities have been calculated in accordance with the Valuation Regulations and its own guidance, the Board must approve the valuation.
22. "Protected liabilities" are defined in Section 131 and include "the cost of securing benefits for and in respect of members of the scheme which correspond to the *compensation which would be payable, in relation to the scheme, in accordance with the pension compensation provisions (see section 162) if the Board assumed responsibility for the scheme in accordance with this Chapter*" (my emphasis).
23. Thus, a Section 143 valuation must be prepared by the reference to the compensation which would be payable to the members of the Scheme under the PPF valued in accordance with the Valuation Regulations and guidance issued by the PPF Board.
24. I do not find that the Board of the Pension Protection Fund is required to take any action.

Tony King
Pension Protection Fund Ombudsman

19 February 2014