

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

**Applicant** : Pinsent Masons LLP, on behalf of the Trustees of the Austin Company of UK Limited Pension & Life Assurance Scheme (**the Trustees**)  
**Scheme** : Austin Company of UK Limited Pension & Life Assurance Scheme (**the Scheme**)

The Pension Protection Fund Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee (**the Committee**) of the Pension Protection Fund (**PPF**) dated 30 September 2009. The referral concerns the Scheme's risk-based levy for the year 2008/09.

**Grounds for referral by the Trustees**

1. The failure score assigned by Dun & Bradstreet (**D&B**) has been calculated using accounts which have been superseded and so fails to properly reflect the financial position of Austin Company of UK Limited (**the Company**) and the risk that the Company poses.
3. The application of the failure score for two levy years' further increases the disproportionate effect of using a failure score based upon accounts which have been superseded. It will impact on the Company's covenant and weaken the bargaining position of the Trustees in relation to the funding of the Scheme.
4. The Committee should have considered the financial impact on the Scheme when considering its discretion to determine the calculation of the failure score, and hence the levy payable.
5. It would be a fair and equitable exercise of the Committee's discretion to have substituted that failure score allocated by D&B with the failure score which would have been applicable to the Scheme if the Company's 2007 accounts were used.

6. It is the Board of the PPF's (**the Board**) responsibility to review the levy amount (including the process by which the failure score is assigned) to ensure that the application of the Scheme has been fair, and to do otherwise would allow the Board to evade all responsibility.
7. The Committee's conclusion that neither the Board, nor D&B, is entitled to depart from the approach prescribed in paragraph 32 is a misdirection, as the amount of any pension protection levy is a reviewable matter. A discretion must be preserved within the PPF Determination because the Board, as a public body, would be acting ultra vires if it fettered or removed its discretion to review the amount of the levy.

### **Response by the Reconsideration Committee**

8. In respect of comments regarding the Committee's decision the Committee responds that the Trustees had requested reconsideration of the Scheme levy for the period 1 April 2008 to 31 March 2009, as set out in an invoice dated 7 November 2008. They acknowledge this was a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.
9. However they note that reconsideration of the amount of the levies is a reconsideration of the amount of the levies in a particular case and not a reconsideration of the Board's Determination (**the PPF Determination**) under Section 175(5) (of the Pensions Act 2004). The scope of the reconsideration is whether the calculation in respect of the Scheme's levy invoice was carried out in accordance with the published PPF Determination. Neither the Committee nor the Board had any discretion to depart from the PPF Determination.
10. The Committee say that prior to the making of the PPF Determination for the 2008/2009 levy year, the Board consulted on its proposals for the levy year. The Board published its first consultation under section 176 of the Pensions Act 2004 in August 2007. In November 2007 the Board published "The 2008/09 Pension Protection Levy Estimate Consultation Document", covering among other factors, changes to the levy scaling factor. It then published a consultation response document, together with the PPF Determination in February 2008.

These documents are all available on the PPF's website. All schemes and their advisers had access to this information.

11. Paragraph 32 of the Schedule to the PPF Determination provides that, save for certain scenarios as set out in paragraph a) to c) of paragraph 32, the failure score to be provided to the Board by D&B are the normal failure scores which were or would have been assigned to the relevant employer by D&B in the ordinary course of its business and as at 31 March 2008 based on data provided to D&B on or before 31 March 2008.
12. The levies for the Scheme were calculated using the failure score allocated by D&B to the Company. D&B have confirmed that the failure score allocation to the Company was correct.
13. The Committee say that the Board has provided a route for schemes to appeal to D&B with any issues they may have regarding the application of the scoring methodology to the employer, and for D&B to notify the Board that a failure score assigned to an employer on and as at 31 March 2008 was too high or too low. No such notification has been received in the case of the Scheme.
14. The Board cannot issue the final levy scaling factor until the data, on which the year's levy estimate is to be allocated to the schemes, has been provided to it. In the interests of stability and allowing schemes to plan further ahead for their levy exposure, data provided to the Board by 31 March 2008 will be used by the Board for both 2008/09 and 2009/10 levy invoicing, with data provided by 31 March 2009 being used for the 2010/11 levy year.
15. The Trustees refer to the impact of the levy on the Company covenant and on the cost to the Company of funding the Scheme. Payment of the levies is a statutory duty on pension trustees. The Board has taken account of the impact of levies on scheme funding in setting a cap on levies as a proportion of a scheme's protected liabilities, which for the 2008/09 levy year is 0.01 of protected liabilities.

**Discretions**

16. The Committee considered all the discretions available to it under the PPF Determination in particular paragraphs 5, 6, 12 and 13 of the Schedule to the PPF Determination, and concluded:

- Paragraph 5 applies where the Schedule to the PPF Determination has failed to make the provision required for a calculation to be performed and enables the Board to take appropriate steps to enable such a calculation to be performed. In this case the Schedule to the PPF Determination has made provision to enable a calculation to be performed in respect of the Scheme.
- Paragraph 6 of the Schedule to the PPF Determination states that nothing in the PPF Determination shall prevent the Board from reviewing the amount of the levies calculated in respect of a scheme, where among other things, it subsequently appears to the Board that the information upon which the calculation was based was incorrect in a material respect. The failure score assigned to the Company on and as at 31 March 2008 was correct taking into account the data that was available to D&B in accordance with its standard procedure on 30 March 2008. The further information the Trustees seek to include for consideration was not available on 30 March 2008 so cannot be taken into account. The Committee concluded that the failure score was not incorrect as set out in paragraph 6 and therefore that the discretion in paragraph 6 did not arise.
- Paragraph 12 of the Schedule to the PPF Determination provides that the Board may at any time prior to the calculation or any recalculation of the levy in respect of a scheme, take such steps as it thinks fit to obtain further or amended information for the purposes of the calculation or recalculation. The Committee concluded that Paragraph 12 was not relevant.

- Paragraph 13 of the Schedule to the PPF Determination provides that if, at the time of the calculation or recalculation of the levy in respect of a scheme, any information necessary for such calculation has not been provided in the manner or format or at the time anticipated by the PPF Determination, then the Board may instead use the equivalent information provided in a different manner or format or at a different time. The Committee noted that the Board had such information as was necessary under the terms of the PPF Determination to calculate the invoice in this case and concluded that paragraph 13 was not relevant.

**Written representation from the PPF Board:**

17. In addition to the points made by the Reconsideration Committee, the Board state that the fact that the amount of a levy is a “reviewable matter” does not mean that the Board has the ability to conclude in all circumstances that the amount of the levy should be recalculated on some basis other than that set out in the PPF Determination. There are many instances where the amount of a levy is a reviewable matter, but where the grounds for review do not permit or enable the Board to conclude that the levy has not been calculated correctly.
18. Once the Board has made its determination there is no provision for it to be altered. The Board has, though, preserved for itself certain discretions within the PPF Determination, but these are only exercisable in certain circumstances. These discretions were considered at reconsideration stage and the Committee held that none of these apply in the present case.
19. The Board’s position remains that the conduct complained of relates to D&B’s processes in gathering information, rather than the calculation of a levy invoice under the terms of the PPF Determination.

20. To the extent that the Trustee's complaint relates to fairness or otherwise of the PPF Determination itself, such submissions should have been raised at the consultation stage or as an application for judicial review of the PPF Determination itself.
21. The Board's position is that the fairness or proportionality of the levy is not a ground that can result in a successful review of an invoice. As to whether the Board should exercise any discretion (if one existed) in favour of the Scheme the Board notes that the failure score was calculated based on the information available to D&B at the relevant cut-off date. There have been no submissions as to any exceptional circumstances on behalf of the Scheme as to why the more recent accounts were not filed at Companies House before the deadline date.
22. The general perceived unfairness of a failure score would not in itself provide sufficient grounds for any available discretion to be exercised in the Scheme's favour. The use of a failure score as at 31 March 2008 for two levy years was the subject of a consultation, so schemes and their advisers were made aware of the fact that failing to submit accurate or timely data would affect their levy calculation for the two year transitional period.
23. There is no discretion for the Board to overturn a failure score properly calculated and provided by D&B. The accounts used in the calculation were not "superseded" they were the only accounts available to D&B at the deadline date of 31 March 2008.
24. To the extent that the failure score does not reflect the employer's position, this is because of the Scheme's failure to submit the relevant data in time.

**Further representation from the Trustees**

25. The Company accounts for the year ended 30 November 2007 were audited on 18 March 2008 and were filed with Companies House on 2 April 2008. The information contained within the 2007 accounts reveals that the financial position of the Company has significantly improved from the position detailed in the accounts for the year ended 30 November 2006.

26. It would be unlawful for the PPF Determination to have removed the Board's discretion to correct an obviously unfair result. The discretion is recognised by the former Deputy Pension Protection Fund Ombudsman in his Determination (PPF000002). The Trustees interpret paragraph 20 of that decision to be that there was a discretion but that, in those particular circumstances, he did not criticise the Board for not choosing to adopt that approach. Paragraph 6 of the PPF Determination can be interpreted in such a way as to incorporate a discretion to correct any obvious unfairness, but even if paragraph 6 is not sufficiently wide an overriding discretion remains within the PPF Determination which would allow the Board to review the levies calculated through an unfair procedure.
27. The lawfulness of the PPF Determination is not in question, or the general application of the 31 March 2008 for calculating the levy for 2009/10, but the Board should take into account, as a relevant consideration, the circumstances whereby the Scheme suffers a "double hit" in relation to the failure score.
28. The Board and the Committee failed to weigh the competing demands of the Board's wish for certainty and the application of its normal procedure against the prejudice to the Scheme occasioned by application of that policy in the individual case.
29. The Pension Protection Fund Ombudsman is entitled and bound to look beyond any conventional judicial review doctrines and must consider the unfairness of an individual decision.
30. Regulation 16(2) of the Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005 allows the Ombudsman a range of remedies which includes the power to impose a decision on the PPF Board.
31. The Trustees would not have been in a position to assess the impact, or otherwise, of submitting accounts on time as the methodology that D&B use in determining a failure score is not available to them. The levy at the rate it has been set, places a considerable financial burden on the Company and consequently on the Scheme.

## Conclusions

29. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004. The reviewable matter in question is the amount of the risk-based levy required of the Scheme for the financial year 2008/09.
30. Under Section 175(5) of the Pensions Act 2004, the Board was required to determine the factors by reference to which the 2008/09 levies were assessed; those factors were set out in the PPF Determination. The Board has correctly submitted that the PPF Determination, itself, is not a reviewable matter, nor is the Board able to amend the PPF Determination on an individual application for review or reconsideration.
31. My role, in very simple terms, is to determine if the Board has acted correctly here. Established case law indicates that I may only interfere with the exercise of discretion, where the decision-maker (in this case the Board) has failed to follow one or more of the following principles:
  - it must ask itself the correct questions;
  - it must direct itself correctly in law;
  - it must not arrive at a perverse decision, taking into account all relevant matters and no irrelevant matters.
32. In this context, perverse is taken to mean a decision which no reasonable decision-maker, properly advising itself could arrive at.
33. I note the Trustees contention that the Board should take into account, as a relevant consideration, circumstances whereby a Scheme suffers a “double hit” in relation to the failure score. The Trustees suggest that in such circumstances the Board has an over-arching discretion to review the amount of the levy. The decision to use the failure score as at 31 March 2008 for two levy years has been applied to all schemes, it is true that for some schemes the failure score will be too high, for at least one year, and for others it will be too low. However, as all schemes have been treated equally I can see no justification for treating the Trustees of the Scheme differently.



34. The Trustees also suggest that the view expressed by the former Deputy Pension Protection Fund Ombudsman at paragraph 20 in his Determination in the matter of the *Righton Pension Scheme* (Righton) applies in this case. The Trustees say that paragraph 20 of that decision can be interpreted such that there was discretion but that, in those particular circumstances, the Ombudsman did not criticise the Board for not choosing to adopt that approach. As pointed out in Righton the concept of “equitable liability” is sometimes applied in fiscal regimes where the strict position is considered unfair. However, I cannot see how the Trustees have been treated unfairly. The decision to use the failure score as at 31 March 2008 for two levy years was the subject of a consultation document that all schemes and sponsoring employers had the opportunity to comment on. Further, the deadline date for submitting the data used in the calculation of the D&B score, and ultimately the levy, is the same for all schemes and is well publicised information which was given to all schemes. That the Company failed to file up to date accounts with Companies House before the deadline date is not grounds for setting aside the requirements of the PPF Determination.
35. In considering the adequacy of the Board’s reasoning I take into account that the Board have a need for certainty in the levies they collect and they set a clear timetable for submission of data to give them that certainty. I bear in mind as a result that the decision taken by the Committee has significant implications for all eligible schemes.
36. The reasoning provided by the Board is simple. The Board says that the data on which the D&B score was based is not incorrect but more recent information had not been filed at Companies House and was therefore unavailable to D&B. They say that in considering whether to exercise its discretion they took into account that the D&B score had been calculated correctly using the data available to D&B at 31 March 2008 and also considered whether the Scheme had been treated unfairly.

37. The application for review has been considered. Clear reasons have been given following published practice and policy. These reasons show the Committee have also looked at the particular circumstances of this case and decided that the facts indicate that the levy has been calculated correctly given the available data.
38. Therefore the reasoning is clear and there is nothing to suggest it is incorrect or unfair. I cannot criticise a published policy of the PPF, only check it is applied fairly and that the individual circumstances of the case have been considered both in terms of the stated policy and whether there are any reasons to depart from the policy. As I have stated, established case law indicates that I may only interfere with the exercise of discretion where the decision-maker has not acted as it should do.
39. The Trustees submit that I am entitled and bound to look beyond any conventional judicial review doctrines and must consider the unfairness of an individual decision. My powers as Deputy Pension Protection Fund Ombudsman are prescribed by statute, not by a more general view of what ombudsmen are for. My specific power in relation to the review of levy calculations might be regarded as unusually constraining for an ombudsman, but I am nonetheless limited to acting within my powers.
40. It follows that I can see nothing that justifies my coming to a conclusion that I should either impose a decision on the Board or remit this matter back to the Board for reconsideration.

**JANE IRVINE**

Deputy Pension Protection Fund Ombudsman

11 February 2011