

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

Applicant : The trustees of the Ibstock Pension Scheme
Scheme : Ibstock Pension Scheme

1. The Pension Protection Fund (**PPF**) Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee of the PPF dated 28 February 2012. The referral concerns the Scheme's risk-based levy for the 2011/2012 levy year, which is a reviewable matter under paragraph 19 of Schedule 9 of the Pensions Act 2004.

Grounds for Referral

2. The trustees consider that the levy was incorrectly calculated, as the PPF disregarded a deficit reduction certificate (DRC).

Background

3. On 6 April 2011 the trustees supplied the PPF with a DRC which referred to an effective date of the last s179 valuation as 31 March 2008. In fact the valuation applying to the 2011/12 levy year was that effective on 31 March 2009. The DRC certified a contribution of £54.1m. The PPF disregarded the DRC when calculating the Scheme's levy, on the grounds that the DRC had to relate to the current Scheme valuation. The Scheme's levy was £140,000 higher than it would have been had the DRC been taken into account.
4. The trustees asked the PPF to review the decision to reject the DRC. The Scheme's actuary certified that although the DRC related to an earlier valuation, and a different one to that used by the Scheme in the rest of the data submitted for the 2011/2012 levy year, the amount stated in the DRC of £54.1m was a "legitimate, prudent statement of the deficit reduction contributions based on the valuation date used by the PPF."

5. The PPF issued a formal Review Decision on 1 December 2011. That decision referred to the PPF's Levy Practice Guidance in place for the 2011/12 levy year. In particular it referred to that part of the guidance which set out matters the PPF would take account of in considering whether to exercise discretion to allow corrections. They were:
 - (a) The effect of the error on the calculation of the levies.
 - (b) The reason that erroneous data was submitted.
 - (c) Responsibility for the erroneous data, including whether any professional indemnity insurance may compensate the scheme.
 - (d) The speed with which the error was identified.
 - (e) The reason for the error.
6. The PPF declined to exercise discretion noting:
 - the stated policy that corrections would not generally be allowed and that exercise of discretion to do so would be exceptional;
 - trustees and their advisers were on notice of the need to submit correct data before the deadlines to ensure it could be taken into account;
 - it was a reasonable expectation of an actuary adviser that calculations should be carried out in relation to the correct valuation.
7. The trustees therefore applied for the matter to go before the Board's Reconsideration Committee. In doing so they set out their case, noting, amongst other things, that there was no disadvantage to the PPF in allowing the correction – indeed that it would receive a windfall of £140,000 if it did not.
8. The Committee's decision is described below. I deal first with the statutory provisions.

Statutory basis of the levy

9. Section 175(1) of the Pensions Act 2004 provides that the PPF Board (the Board) must impose a risk based levy. Section 175(5) provides that the Board must make a determination for each year relating to the assessment, rate, timing and payment of the levies for that year.

The Board's Determination

10. Following consultation, the Board's Determination for the 2011/12 financial year was published on 17 December 2010, based on scheme data provided on or before 31 March 2010 and Dun & Bradstreet failure scores as at 31 March 2010 and information about "Qualifying Transfers" provided on or before 30 June 2010. The levy scaling factor was set at 2.7.

11. On the matter of accuracy of information, the Board's Determination said:

"Important note: The attention of trustees and advisers is specifically drawn to Rule A2, and the consequent importance of ensuring that complete, accurate and up-to-date information is submitted through the Pension Regulator's Exchange system by the relevant deadlines...The importance of accuracy in all information supplied to the Regulator or the Board is underlined by the criminal sanctions which may apply...Schemes should note that the Board does not anticipate that the discretionary powers set out in the Determination will normally be exercise so as to correct data submitted on Exchange at the relevant measurement time.

...

B2.1 When could data be corrected?

This Rule B2.1 applies if it appears to the Board that either:

- (1) the information supplied for or used in the calculation of the Levies is incorrect in a material respect;
- (2) a notification required by or under a certificate in relation to Contingent Assets has not been duly given; or
- (3) a certificate or declaration given for the purpose of these Rules was improperly given or contained information which was incorrect in a material respect.

B2.2 Correction of the data.

- (1) Where Rule B2.1 applies, the Board may calculate the Levies on the basis of information which appears to it to be correct for the purposes of these Rules. Where the Levies have already been calculated in respect of a Scheme, the Board may review and revise the amount of the levies calculated in respect of a Scheme on the basis of information which appears to it to be correct but it shall not be under an obligation so to act.
- (2) The Board is under no obligation to take into account corrected information merely because the Scheme has been disadvantaged by the failure of the trustees or those acting on its or their behalf to supply correct information at the proper time.
- (3) For the purposes of Rule B2.1(1), information is not incorrect where it is correct and legitimate in itself, but it would have been open to the person supplying it to supply some different or additional information which might have caused these Rules to be applied differently.

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

- (1) Where Rule B2.1(2) or (3) applies, in calculating the Levies in respect of the relevant Scheme the Board may disregard the relevant certificate or declaration if it believes that it has been improperly given.
- (2) Where Rule B2.1(2) or (3) applies, in calculating the Levies in respect of the relevant Scheme the Board may disregard any information in the certificate or declaration, which is believed to be incorrect.
- (3) Where the Levies have already been calculated in respect of a Scheme, the Board may review and revise the amount of the Levies calculated in respect of a Scheme on the basis set out in (1) or (2) above but it shall not be under an obligation so to act.

...

D1.2 What must the certificate of Deficit Reduction Contributions contain?

The certificate must contain the information specified in the Deficit Reduction Contributions Appendix, which must be calculated in accordance with the rules set out in that Appendix.

D1.3 Which certificates can be taken into account?

A certificate shall not be taken into account unless it refers to, and the information contained within it has been calculated by reference to, the same Section 179 Valuation or MFR Valuation of the Scheme as is used under Rule A6.1, or in the case to which Part F of these Rules applies, to the relevant Post Transfer Valuation.

...

12. So far as is relevant to this referral, the Deficit Reduction Contributions Appendix to the Board's Determination said:

“Summary

This is the Deficit Reduction Contributions Appendix to the Board's determination under Section 175(5) of the Pensions Act 2004 in respect of the 2011/12 Levy Year. It sets out how actuaries must calculate the amount to be certified, and how that amount should be communicated to the Board, in respect of Deficit Reduction Contributions under Rule D1 for the 2011/12 Levy Year.

...

1. For the purposes of Rule D1.2 the certificate to be submitted for Rule D1 must contain:

The effective date of the Section 179 Valuation... The effective date of the certificate; and a statement that the amount certified has been calculated in line with this Appendix.

Note that some of these contents will be generated automatically by Exchange and the remainder must be entered by the Scheme Actuary or a duly appointed substitute.

2. The certificate should relate to the valuation that will be transformed by the Board to a section 179 position as at 31 March 2010 (using the Appendices where appropriate).

...

4. The information provided in the certificate must be consistent with the value of the Deficit Reduction Contributions most recently calculated in accordance with this Appendix and

such advice (if any) given to the trustees by the Scheme Actuary.”

The Reconsideration Committee’s decision

13. In paragraph 12 of the decision, in a section of the decision headed “Legal matters and the Levy Determination” the Reconsideration Committee referred to the submission that the PPF would receive a windfall. The Reconsideration Committee disposed of the point by referring to the documented requirement to submit accurate and up to date information, It said that the Board considered that it was the responsibility of schemes to comply “to ensure that their scheme’s levy calculation reflects the appropriate level of risk”.,
14. The Committee decided that the information provided was materially incorrect and it therefore had to consider whether to exercise discretion under Rule B.2.
15. It said that

“In making its decision [by which it meant the reconsideration decision as a whole] the Committee had regard, among other factors, to the reason that the erroneous data was submitted, and responsibility for the erroneous data. In particular the Committee noted that the Applicant had not provided an explanation of why the erroneous valuation data was entered on Exchange. The Committee also noted that the DRC Appendix made it clear that DRC certificates must be entered on Exchange by a scheme actuary or duly appointed substitute, but that in this case no explanation was provided as to why the scheme actuary had not submitted the DRC Certificate, or whether the scheme representative who did so was a duly appointed substitute for the purposes of the DRC Appendix.”
16. The Committee said that the Board's published policy was not generally to accept corrections for the 2011/2012 levy year. There were three main reasons for this:
 - “• If the Board allowed corrections to be accepted then there was a higher risk that the Board would under collect against the levy estimate, given that the levy

scaling calculation could only be based on the information provided to the Board by the relevant deadline.

- Building in a margin of error to the levy scaling factor to mitigate the risk of under collection against the levy estimate would inherently lead to all schemes being disadvantaged, which was felt to be inappropriate.
- It was reasonable to expect schemes to provide the correct data at the right time, bearing in mind that this was the sixth year for which data was being submitted for pension protection levies.”

17. The Committee said that such a policy must not be applied inflexibly so as to fetter the Board's discretion. The Committee said that it had considered, amongst other factors, the reason that the incorrect data was submitted, and responsibility for the error. The Committee concluded that there was not anything sufficiently unusual in the circumstances of the case to justify a departure from the published policy. The Committee said that the Board was dependent on pension scheme advisers to provide correct information to enable it to charge and collect the levy fairly.
18. The Committee said that it had taken into account that the levy was higher than it would have been if the DRC had been accepted by the PPF. On this point, the Committee said that the Board's Determination made clear what was required, and the Determination emphasised the importance of supplying accurate information.

Submission by the trustees

19. The trustees say that the Committee provided insufficient reasons for its decision. The trustees say that although the DRC bore an incorrect date, the rest of the data in the DRC comprised a legitimate contribution amount, which was actually less than what could have been certified, so there would be no detrimental impact to the PPF if the DRC was accepted. However, by excluding the DRC the risk represented by the Scheme had been significantly overstated. The trustees say that the PPF has not set out the grounds on which it is entitled to receive a £140,000 “windfall”, and knowingly enforce an incorrect levy.

20. The trustees say that the overpayment of £140,000 will have a detrimental effect on the security of Scheme members' benefits, given that the amount certified in the DRC represented over 15% of the value of Scheme assets that should have been used in calculating the levy.

Submission by the PPF

21. The PPF says that the Reconsideration Committee considered the discretion available to the Board under the Determination, having regard to the circumstances described by the trustees. The Committee took the Scheme's individual circumstances into account, and decided not to exercise discretion in favour of the Scheme.
22. The PPF considers that there was a reasonable expectation that the DRC would, at the very least, be checked by an actuary before it was submitted.

Conclusions

23. The "reviewable matter" which is before me is the calculation of the Scheme's risk based levy for 2011/2012. Determining the correctness of the calculation of the levy amounts to determining whether it was calculated in accordance with the Board's Determination, including the proper exercise of any discretions given to the Board under the Determination. In this case the discretion at issue is that corrections to information may be accepted.
24. The Reconsideration Committee accepted that the information on which the levy was based was materially incorrect and that it was not "correct and legitimate in itself" (Rule B2.2 (3)) as the DRC did not relate to the current valuation. In considering the trustees' appeal, the Committee took into account that the trustees had not provided explanations for the error and the apparent failure of the Scheme's actuary to submit the DRC, or certify an authorised substitute. The Committee also considered the fact that the levy was higher than it would otherwise have been. Both were potentially relevant considerations.
25. However, of the policy reasons for not accepting corrections that the Reconsideration Committee recited (see paragraph 16), the first two were irrelevant to the case in hand. Corrections in relation to DRCs could not result in under collection, because DRCs had not been taken into account in setting the

levy scaling factor. The Reconsideration Committee said there was nothing sufficiently unusual to justify departing from the policy. But it seems to me that if two of the reasons justifying the policy were inapplicable, that fact should have been clearly taken into account so as to be clear that they had been excluded. On the face of it the Reconsideration Decision is based on irrelevant factors.

26. The third, potentially relevant, policy reason is "...that it was reasonable to expect schemes to provide the correct data..." The PPF's main instrument for encouraging the presentation of accurate data is the effective penalty (and example to others) of not allowing corrections that would reduce a scheme's levy. The penalty falls directly on the scheme concerned and, where there is no under collection risk, its impact is not connected to the consequence of the inaccuracy for the PPF. It is, in this case, an unusually blunt instrument, therefore. If the Reconsideration Committee recognised that, then its reasons do not make it clear.
27. Among the Reconsideration Committee's reasons for not departing from general practice was that there had been no explanation for the erroneous valuation being entered or of whether the person who entered it was authorised to do so. The Reconsideration Committee did not say whether it thought that the mere failure to offer explanation in either case was sufficient to justify adhering to the normal policy as a penalty for the failure, or whether it had presumed from the absence of an explanation that there must be no acceptable explanation. If the Reconsideration Committee declined to allow a correction as a penalty for the failure to explain, then, for the same reasons as above, it was applying a blunt – and perhaps disproportionate – punishment.
28. The Reconsideration did not respond to the point about there being a windfall to the PPF. It said that it was the Scheme's responsibility to ensure that information was provided so that the levy reflected the relevant risk level; but that was only to consider one side of the balance, usually levelled out by an under collection risk – though not in this case.
29. I have taken into account that the Reconsideration Committee's decision was, in its outcome, the same as the Review Decision and that the Review Decision referred to the different, more detailed, matters to be taken into account that were set out in the Levy Practice Guidance. But the Reconsideration

Committee's decision does not rely for its reasoning on the review decision. It stands alone.

30. If the Reconsideration Committee had relied on the Review Decision reasoning, it would have come under scrutiny in the context of this application. The Review Decision, having recited the list of potentially relevant matters set out in the Levy Practice Guidance, was not clear as to which of them were regarded as relevant or how much weight was or was not given to those that were relevant. For example, the "speed with which the error was identified" was 18 working days (from the invoice of 27 September 2011 to the review request of 21 October). That might have been in the trustees' favour yet it was not expressly taken account of.
31. I have therefore concluded that the Reconsideration Committee's decision dated 28 February 2012 was not reached correctly. Having done so, Regulation 16 of the Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman)) Regulations 2005 makes it mandatory for me to determine what action the Board should take and remit the matter to the Board.

Directions

32. I direct that the Board must now reconsider the Scheme's 2011/2012 levy calculation expressly taking into account (a) the contents of the Levy Practice Guidance and (b) only the relevant policy reasons for not exercising discretion, in particular noting that providing incorrect information did not in this case present a risk of under collection against the estimate, but did result in financial advantage to the PPF.

TONY KING

Pension Protection Fund Ombudsman

17 January 2013