

## Ombudsman's Determination

Applicant	Mr Y
Scheme	The Pension Protection Fund ( <b>the PPF</b> )
Respondent	The Board of the Pension Protection Fund ( <b>the Board</b> )

## Outcome

1. I do not uphold Mr Y's complaint and no further action is required by the Board.

## Complaint summary

2. Mr Y's complaint is that the Board failed to consider section 993<sup>1</sup> of the Companies Act 2006 (**CA 2006**) when it did not object to the Halcrow Regulated Apportionment Agreement (**the RAA**) that was put in place in respect of the Halcrow Pension Scheme (**the Scheme**).
3. Mr Y considers he has suffered injustice arising from the Board's maladministration because, as a result of the Scheme's transfer to the PPF, the inflationary increases on his PPF compensation in respect of his post-1997 service are capped at a lower rate. He also does not receive inflationary increases on his PPF compensation in respect of his pre-1997 service.

## Background information, including submissions from the parties

4. Mr Y is a former pensioner member of the Scheme. The sponsoring employer of the Scheme was originally Halcrow Group Limited (**HGL**).
5. In 2011, HGL's parent company, Halcrow Holdings Limited, was acquired by CH2M HILL (**CH2M**). Both HGL and Halcrow Holdings Limited were loss making when the acquisition took place. CH2M provided significant financial support to HGL.

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<sup>1</sup> Section 993 concerns the offence of fraudulent trading.

6. In 2012, it became apparent that HGL could not fund the Scheme sufficiently. CH2M ensured that contributions were paid, despite having no legal obligation to fund the Scheme.
7. In 2014, the Scheme trustees received a proposal from CH2M and HGL which involved the bulk transfer of all members to a new scheme with reduced benefits. This was considered preferable to the insolvency of HGL and the Scheme entering the PPF assessment period.
8. The trustees referred the proposal to the High Court. The High Court ruled that the benefit redesign could not go ahead without member consent.
9. A new proposal was negotiated between the parties involving similar changes to members' benefits but with member consent. This comprised:-
  - Offering members the option of either transferring to a new scheme (**HPS2**) that provided benefits above PPF compensation but lower than the benefits under the Scheme, or remaining in the Scheme and transferring to the PPF.
  - A cash payment to the Scheme from CH2M, together with an equity stake in HGL, for the loss of the sponsoring employer's support through the use of the RAA.
10. Mr Y chose to remain with the Scheme and transfer to the PPF. The members who opted to transfer to HPS2 were transferred on 6 October 2016.
11. The statutory conditions for a RAA are set out in Regulation 7A of The Occupational Pension Schemes (Employer Debt) Regulations 2005 (**the Employer Debt Regulations 2005**) (see Appendix 1). For a RAA to be implemented, Regulation 7A requires that, amongst other conditions, the RAA is approved by The Pensions Regulator (**TPR**) and the Board does not object to the RAA.
12. Following discussions between the relevant parties concerned with the RAA including TPR and the PPF, the PPF provided its non-objection to the RAA and in May 2016, TPR approved the RAA<sup>2</sup>.
13. Under the RAA, HGL's liabilities to the Scheme were apportioned to a newly incorporated company, Project Magnolia Limited (**PML**). PML was then immediately made to suffer an insolvency event, and the Scheme entered the PPF assessment period on 7 October 2016.
14. The Scheme transferred to the PPF on 6 July 2018.
15. In April 2021, Mr Y complained to the Board that the change of the sponsoring employer from HGL to PML was to defraud HGL's creditors and was in breach of section 993 of the CA 2006.

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<sup>2</sup> <https://www.thepensionsregulator.gov.uk/-/media/thepensionsregulator/files/import/pdf/regulatory-intervention-section-89-halcrow.ashx>

16. The Board's Resolutions Team did not uphold Mr Y's complaint. The Resolutions Team explained that:-
- Prior to the Scheme entering the PPF assessment period, it was concluded that HGL's insolvency would be inevitable considering the liabilities of the Scheme.
  - TPR determined that the RAA was the best outcome in the circumstances.
  - As part of the restructuring transaction, the sponsoring employer changed from HGL to PML. This was lawful and was not a ploy to defraud HGL's creditors.
17. Mr Y appealed to the Board. Mr Y maintained that the change of the Scheme's sponsoring employer was to defraud creditors. Mr Y said he believed the RAA was in breach of section 993 of the CA 2006, as PML did not have the resource to support the Scheme and was used solely to facilitate the Scheme's transfer to the PPF. This meant his pension benefits would be paid at PPF compensation levels. Mr Y said that the purpose of removing the Scheme, and its deficit, was to make a sale more attractive, in order for CH2M to finance the retirement of large stakeholders.
18. The Board did not uphold Mr Y's appeal. The Board decided that:-
- A RAA allowed a financially troubled employer to detach itself from its liabilities in respect of a defined benefit pension scheme. This was permitted within pensions law. It involved a change of the employer (from HGL to PML), to allow the employer (HGL) to continue to trade, and the Scheme to transfer to the PPF.
  - The change of employer was not in breach of the CA 2006.
  - The employer (PML) filed for insolvency and therefore ceased trading, so no fraudulent trading could occur.
  - The provision for a RAA was there to support underfunded schemes and their employers, allowing jobs to be saved and ensuring members could still receive pension benefits at PPF levels. The PPF was dedicated to providing a support to pension scheme members, and paying the benefits they were entitled to under the Pensions Act 2004 (**PA 2004**)<sup>3</sup>.
  - The correspondence issued to Scheme members in 2016 described the benefits under the new scheme in full and it was explicit that they were better than those provided by the PPF.
  - He chose to remain in the Scheme on the understanding that it would transfer to the PPF.
19. Mr Y appealed to the Reconsideration Committee (the Committee).

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<sup>3</sup> Relevant extracts from PA 2004 are provided in Appendix 2.

20. The Committee did not uphold the appeal. The Committee decided that:-

- None of the points raised by Mr Y suggested that there had been maladministration by the Board.
- TPR had approved several RAAs before the Halcrow RAA. The RAA mechanism, and the conditions that must be met, are set out in Regulation 7A of the Employer Debt Regulations 2005. In addition, TPR and the PPF each had their own published criteria which must be met. Among other conditions, a RAA had to be approved by TPR and the PPF had to confirm that it did not object to the proposed RAA. However, there was no requirement for a Court to consent to a RAA. So, the fact that the RAA process had not been considered by the Courts, did not undermine its legitimacy.
- Whether the newly incorporated company, PML (which assumed responsibility for HGL's liabilities to the Scheme via the RAA) was or was not in breach of section 993 of the CA 2006 was irrelevant to whether there had been maladministration by the Board which had caused Mr Y to sustain injustice. The PPF was satisfied that the statutory conditions for a RAA were met as well as the PPF's own conditions set out in its published guidance. TPR were similarly satisfied and approved the RAA.
- Decisions reached by TPR were not relevant to whether there had been maladministration by the Board. However, TPR's section 89 Regulatory intervention report on Halcrow<sup>4</sup> confirmed that TPR considered whether a better outcome could be achieved by other means, such as by use of its powers to require another member of the corporate group to provide financial support to the Scheme. TPR concluded that the RAA was the best outcome in the circumstances, and it would not be reasonable to use its other powers.
- Mr Y decided to remain in the Scheme after being informed of the benefits that the new scheme would provide, knowing that members who chose to remain in the Scheme would transfer to the PPF and receive PPF compensation.

### **Mr Y's position**

21. Commenting on the Board's position (see paragraph 26 below), Mr Y submits:-

- The RAA should have been court approved.
- The Board's submission that "the statutory conditions for a RAA were met" must include the implicit requirement that all statutes are complied with. Clearly, the failure to consider the requirements of the CA 2006, in particular section 993, can only be maladministration by the Board, resulting in a significant permanent reduction to his pension in payment.

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<sup>4</sup> See reference 1 of paragraph 15 above for link to the report.

- The RAA would not have been possible if the Board had applied the requirements of section 993. The alleged fraudulent trading by PML was in breach of section 993.
- The PPF's inappropriate approval of the RAA was undoubtedly influenced by TPR's inappropriate approval of the RAA.

22. Mr Y says he chose the default option of entry to the PPF because he immediately saw that transferring to HPS2 meant relinquishing all his pension rights for a pittance.

### **The Board's position**

23. The Board submits:-

- If a RAA is agreed, the intention is that the sponsoring employer will be released from its liabilities to the scheme, and the scheme will then enter a PPF assessment period. In return, the scheme will receive mitigation (usually in the form of a cash payment and an equity stake in the sponsoring employer) which is better than the returns the scheme would have received, if the sponsoring employer had been allowed to become insolvent. To achieve this objective, it is necessary to establish a shell company, whose sole purpose is to assume responsibility for the sponsoring employer's liabilities to the scheme, and then immediately become insolvent so that the scheme enters a PPF assessment period. The introduction of this new company is a standard step in the RAA process and does not infringe any applicable laws. Therefore, the use of PML for this purpose was not a breach of any applicable laws.
- It has seen no evidence that there has been any fraudulent trading on the part of PML. But, even if there had been, that would be a matter for the directors of PML. The Board was not involved in the establishment or operation of PML, and so could not have committed the offence. Furthermore, the Board does not have any powers to prosecute someone for such an offence.
- It was reasonable for it to not object to the RAA, given that the statutory conditions for a RAA were met as well as the PPF's own conditions set out in its published guidance. TPR was similarly satisfied and approved the RAA.
- There is nothing in Mr Y's complaint that would suggest maladministration by the Board.

### **Adjudicator's Opinion**

24. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Board. The Adjudicator's findings are set out below in paragraphs 25 to 37.

25. The specific conditions which apply to a RAA were set out in Regulation 7A of the Employer Debt Regulations 2005. Regulation 7A required TPR to issue a notice of approval of the RAA and required that the Board of the PPF did not object to the arrangement. There is no requirement under Regulation 7A for court approval of a RAA.
26. Regulation 7A provided an exhaustive list of the conditions required for a RAA. The Adjudicator's view was that the PPF had shown due consideration of these conditions and its principles for not objecting to the RAA.
27. The RAA was only possible because the Scheme was expected to enter a PPF assessment period.
28. One of the statutory conditions for a RAA under Regulation 7A was that a PPF assessment period had already commenced in relation to an eligible pension scheme; or in the opinion of the trustees, there was a reasonable likelihood that the commencement of an assessment period would occur within the following 12 months and the persons specified in Regulation 7A agreed to the arrangement.
29. In relation to the Scheme, TPR confirmed, in its Regulatory intervention report dated July 2016 (page 6), that the RAA test was met, including the insolvency test of "whether insolvency of the employer would be inevitable or whether other solutions would prevent this"<sup>5</sup>.
30. The RAA put the Scheme in a better position than it would have been in if the sponsoring employer (HGL) had been allowed to become insolvent<sup>6</sup>; and it gave members of the Scheme (including Mr Y) the choice of either transferring to the new arrangement (HPS2) or remaining with the Scheme and transferring to the PPF and receiving PPF compensation. Mr Y chose to remain with the Scheme and transfer to the PPF.
31. Mr Y said that fraudulent trading by PML was needed to allow the RAA to be implemented.
32. The Board said it had seen no evidence that there had been any fraudulent trading on the part of PML. Further, that even if there had been fraudulent trading, that would be a matter for the directors of PML and would not be relevant to the question of whether there had been maladministration by it. The Board was not involved in the establishment or operation of PML, and so it could not have committed the offence. Further, the Board did not have any powers to prosecute someone for such an offence.

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<sup>5</sup> Note, the definition of "assessment period" in section 132 of the PA 2004 includes the occurrence of a qualifying insolvency event in relation to the scheme employer.

<sup>6</sup> In its Regulatory intervention report, TPR confirmed that the negotiation was more than the Scheme would have received in an insolvency.

33. The Adjudicator considered that the Board's stance was reasonable. Section 993 of the CA 2006 was not a statutory condition for a RAA, it was not relevant to the statutory conditions for a RAA and the PPF's own conditions which were the factors the PPF needed to consider. There was nothing to indicate that the PPF's view that there was no evidence of fraudulent trading by PML was unreasonable.
34. Because the Scheme's assets were insufficient to secure the PPF levels of compensation, the Scheme transferred to the PPF on 5 February 2020. At that point, the Scheme, effectively, ceased to exist and the PPF became responsible for the members.
35. The PPF is a statutory compensation scheme. It pays members compensation when their pension scheme cannot pay the benefits promised, and the amount and the terms and conditions under which it was paid were set out in the PA 2004<sup>7</sup> and The Pensions Protection Fund (Compensation) Regulations 2005 (the **Compensation Regulations**).
36. The PPF has no discretion in the payment of compensation. Paragraph 28 of Schedule 7 of the PA 2004, details the rate of indexation for pensions in payment. Namely, in line with inflation up to 2.5% in respect of post-5 April 1997 pensionable service. There was no requirement to pay indexation in respect of pre-6 April 1997 pensionable service.
37. Effectively, Mr S was in receipt of compensation from the PPF, which replaced the pension he would otherwise have lost when the Scheme was wound-up in deficit.
38. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y has provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mr Y.

### **Mr Y's further comments**

39. Mr Y submits:-
  - The Board must comply with all UK legislation and in this case section 993 of the CA06. Its failure to do so amounts to maladministration. Compliance with Regulation 7A is irrelevant to his claim and does not relieve the Board of its duties under other UK legislation.
  - He finds the Board's statement that it has seen no evidence of fraudulent trading by PML incredulous. He has suffered a permanent loss to his pension in payment without his agreement. Clearly fraud must have taken place; allegedly fraudulent trading by PML in accepting, without adequate means of support, a part of the Scheme and transferring it to the PPF. The only reason for PML's involvement and existence was to defraud, by fraudulent trading.

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<sup>7</sup> See Appendix 2.

- The specific wording of section 993 is quite clear and unambiguous "... any business of a company... and ...every person who is knowingly a party to the carrying on of the business in that manner commits an offence..." The Board was an equal partner in the only 'business' of PML, the transfer of part of the Scheme. The Board accepted the transfer when it could and should have been refused based on a failure to comply with section 993. The Board's statement that the PPF was not involved in the establishment or operation of PML, and so could not have committed the offence, is irrelevant.
- He strongly disagrees that no further action is required by the Board.

## **Ombudsman's decision**

40. My jurisdiction in relation to this complaint is to consider whether the Committee reached its decision correctly. This jurisdiction is provided for under The Pension Protection Fund (Investigation by PPF Ombudsman of complaints of maladministration) Regulations 2005 SI 2005/2025. For the reasons set out in paragraphs 41 to 45 below, I find that the Committee reached its decision correctly and no further action is required by the Board.
41. With regard to the Board's decision in respect of the RAA, I find that there is no indication that the Board did not comply with UK laws when it reached its decision in 2016 not object to the RAA. I have seen no evidence that the Board did not comply with the relevant laws for the implementation of a RAA, in particular Regulation 7A of the Employer Debt Regulations, which sets out the statutory conditions for a RAA. In its response to Mr Y's complaint, the Board has explained how it reached its decision not object to the RAA. The Board has explained that it considered whether the statutory conditions for a RAA were met and it considered its own conditions as set out in its published guidance. I find that that the Board's decision, not object to the RAA, was reached correctly. The Board identified the correct legislation applicable to the RAA and it considered the relevant factors set out in Regulation 7A and its own guidance.
42. Mr Y believes that the Board ought to have considered section 993 of the CA 2006, and that if it had done so, it would not have provided its non-objection to the RAA. However, as the Adjudicator stated, section 993 is not a statutory condition for a RAA and there is no indication that the Board's view, that there was no evidence of fraudulent trading by PML, was unreasonable.
43. The Board has explained the reasons why the RAA was agreed in respect of the Scheme and the purpose the RAA served in the circumstances. The Board has stated that to achieve the objective of the RAA, it was necessary to establish a shell company, whose sole purpose was to assume HGL's responsibilities to the Scheme, and then immediately become insolvent so that the Scheme enters a PPF assessment period. Further, the introduction of PML was a standard step in the RAA process and does not infringe any applicable laws. While Mr Y alleges fraudulent



trading in the change of the Scheme employer, he has not submitted evidence to support his allegation. I find that the conclusions the Board reached were reasonable on the evidence and there is no evidence of maladministration by the Board or any person exercising functions on its behalf.

44. Mr Y says he has incurred a permanent loss to his pension. There is no indication that Mr Y's benefits were reduced as a result of fraud. It is simply that the Scheme employer could not sufficiently fund the Scheme and on transfer to the PPF, Mr Y is paid PPF compensation in accordance with the governing legislation of the PPF. As the Board has stated, the RAA secured a better return for the Scheme than the return the Scheme would have received if HGL had become insolvent.
45. In its response to Mr Y's complaint, the Committee upheld the Board's decision to not object to the RAA and the Board's conclusions regarding the relevance of section 993. The Committee considered the background giving rise to the RAA, it considered the conditions for a RAA, and it considered the matters that Mr Y raised in his appeal. I find that the Committee reached its decision correctly, having considered the relevant factors and reached a reasonable conclusion.
46. I do not uphold Mr Y's complaint.

**Anthony Arter CBE**

Deputy Pension Protection Fund Ombudsman  
23 March 2023

## Appendix 1

### The Occupational Pension Schemes (Employer Debt) Regulations 2005 (as amended)

47. Regulation 7A, 'Regulated apportionment arrangements' provides:

“(1) The conditions which apply to a regulated apportionment arrangement are as follows—

(a) the arrangement applies to a trust scheme where—

(i) the trustees are of the opinion that there is a reasonable likelihood of an assessment period commencing in relation to the scheme within the following twelve months; or

(ii) an assessment period has already commenced in relation to the scheme and has not come to an end;

(b) where an assessment period has not already commenced, each of the following persons agrees to the arrangement—

(i) the trustees of the scheme, and either

(ii) where the employer's liability share is increased, the employer, or

(iii) where the employer's liability share is reduced, any remaining employer to whom all or part of the amount that would have been the employer's liability share is being apportioned;

(c) the arrangement and any amendments to the arrangement are approved by the Authority by a notice of approval; and

(d) the Board of the PPF do not object to the arrangement.

(2) A notice of approval is a confirmation, issued by the Authority, that in their opinion in the circumstances described in the application it would be reasonable to issue a notice of approval.”

48. The Authority referred to in Regulation 7A is TPR. Section 2(5) of the Employer Debt Regulations effectively adopts the definitions in the Pensions Act 1995 (**PA 1995**) by virtue of the statement that “expressions used in these Regulations have the same meaning as in Part 1 of the 1995 Act (see section 124)”. Section 124 of PA 1995 states that “the Authority” means TPR.

## Appendix 2

### Pensions Act 2004

49. As relevant paragraph 3 of Schedule 7, 'Pensions in payment at assessment date', provides:

"(1) Compensation is payable in accordance with this paragraph where, immediately before the assessment date, a person is entitled to present payment of a pension under the admissible rules of the scheme.

(2) That person ( "the pensioner" ) is entitled to periodic compensation in respect of that pension ( "the pension" ) commencing at the assessment date and continuing for life or, in a case to which sub-paragraph (8) applies, until such time as entitlement to the pension would have ceased under the admissible rules.

(3) The annual rate of the periodic compensation is the appropriate percentage of the aggregate of—

(a) the protected pension rate, and

(b) any increases under paragraph 28 (annual increases in periodic compensation).

(4) In sub-paragraph (3) "the appropriate percentage" means—

(a) in a case to which sub-paragraph (7) applies, 90%, and

(b) in any other case, 100%.

(5) In sub-paragraph (3) "the protected pension rate" means the annual rate of the pension, under the admissible rules, immediately before the assessment date.

(6) In determining for the purposes of sub-paragraph (5) the annual rate of the pension immediately before the assessment date, any recent discretionary increase is to be disregarded if paragraph 35(3A) applies to the scheme.

(7) This sub-paragraph applies where the pensioner has not attained normal pension age in respect of the pension before the assessment date and his entitlement to the pension—

(a) is attributable to his pensionable service, and

(b) did not arise by virtue of any provision of the admissible rules of the scheme making special provision as to early payment of pension on grounds of ill health."

50. As relevant paragraph 28, 'Annual increase in periodic compensation', states:

“(1) This paragraph provides for the increases mentioned in sub-paragraph (3)(b)<sup>[8]</sup> of paragraphs 3<sup>[9]</sup>...

(2) Where a person is entitled to periodic compensation..., he is entitled, on the indexation date, to an increase under this paragraph of—

(a) the appropriate percentage of the amount of the underlying rate immediately before that date, ...

(3) In sub-paragraph (2)—

- “appropriate percentage” means the lesser of—
  - (a) the percentage increase in the general level of prices in Great Britain for the period of 12 months ending with the 31st May last falling before the indexation date, and
  - (b) 2.5%;
- “indexation date” means—
  - (a) the 1st January next falling after a person first becomes entitled to the periodic compensation, and
  - (b) each subsequent 1st January during his lifetime;
- “underlying rate” means, in the case of periodic compensation under paragraph 3..., the aggregate of—
  - (a) so much of the amount mentioned in sub-paragraph (3)(a) of the paragraph in question as is attributable to post-1997 service, and
  - (b) the amount within sub-paragraph (3)(b) of that paragraph immediately before the indexation date.

...

(3A) For the purposes of paragraph (a) of the definition of “appropriate percentage” in sub-paragraph (3), the Secretary of State may (from time to time) decide, as the Secretary of State thinks fit, the manner in which percentage increases in the general level of prices in Great Britain are to be determined.

(3B) The Secretary of State must publish any decision made under sub-paragraph (3A).

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<sup>8</sup> Sub-paragraph 3(b) states: “any increases under paragraph 28 (annual increases in periodic compensation).”

<sup>9</sup> Pensions in payment.

