

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

Applicant : Mr R A Kerslake, on behalf of the Trustees of the Iveco Limited Pension Fund for Senior Staff
Scheme : The Iveco Limited Pension Fund for Senior Staff

1. The Pension Protection Fund (**PPF**) Deputy Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee of the PPF dated 4 August 2008.

Grounds for Referral

- Iveco Limited (the **Company**) paid £17 million into its main pension scheme in December 2005. The Company claims a multi-employer exemption, under FRS17, in its accounts in respect of its pension schemes. As a result, there was nothing to offset the payment against and it appeared to create a negative cash flow. This led Dun & Bradstreet (**D&B**) to down-rate the company, which in turn meant a higher risk-based levy. The Scheme's risk-based levy for 2007/08 is £33,597.
- The Trustees requested a review of the levy on the grounds that the method of calculating the levy, as set out in the PPF Determination, is "unsupportable" in that it leads to an "absurd" result.
- The Applicant submits that the statutory objective cannot have been such that a sponsoring employer of a defined benefit pension scheme is penalised for paying cash into the scheme.
- The Applicant concedes that there may be occasions when such a payment might weaken the financial position of a company and, therefore, justify an increased levy, but submits that this was not the case here. He asserts that Iveco Limited was in a position to make the cash injection without in any way jeopardising its business or, when "analysed on a global basis", creating any

negative effect on its balance sheet. By “global”, he means moving up the chain to the parent company, rather than taking the Company and pension scheme balance sheets together.

- The result is that the Company will be heavily penalised for following precisely the course of conduct that the Pensions Regulator is promoting.
- Paragraph 32 of the Schedule to the PPF Board’s Determination for the year in question (the **PPF Determination**) should have allowed D&B to adjust the score where its usual methodology produces a perverse result.

Reconsideration Committee’s decision

2. The Reconsideration Committee’s decision is summarised as follows:

- The Applicant had requested a reconsideration in respect of the Scheme levies for the period 1 April 2007 to 31 March 2008, as set out in an invoice dated 11 January 2008;
- This was a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004;
- The Board had consulted on the risk-based levy over the period from September 2006 to March 2007;
- Under Section 175(5) (of the Pensions Act 2004), the Board was required to determine the factors by reference to which the levies would be calculated, the time at which the factors were to be assessed, the rate of the levies and the time at which they became payable;
- The Board published its determination of these matters (the **PPF Determination**) on 1 March 2007;
- Reconsideration of the amount of the Scheme’s levies was a reconsideration of the amount of the levies in a particular case and not a reconsideration of the PPF Determination;
- Neither the Committee nor the Board had any discretion to depart from the PPF Determination;

- The risk-based levy was calculated by reference to the formula $U \times P \times R \times c$ and subject to a cap (K) equal to 0.0125 multiplied by the Scheme's protected liabilities;

Specific Issues

- Effect of lump sum payment on employer's failure score
 - The Applicant appeared to accept that the levy had been calculated in accordance with the PPF Determination for the year in question;
 - The Applicant wanted the levy recalculated on the basis that the methodology of the PPF Determination reached a conclusion which was perverse and/or such that could not be reached by a reasonable body established to fulfil a statutory function;
 - Paragraph 32 (of the Schedule to the PPF Determination) provided for the failure scores provided by D&B to be those it assigned to the employer in the ordinary course of its business on 30 March 2007 (except for certain exceptions, which did not apply);
 - There was provision for an employer to appeal the failure score to D&B and for D&B to advise the Board if the failure score it had previously given was too high or too low;
 - D&B could revise a failure score if the information upon which it had been based (as at 30 March 2007) was incorrect or incomplete when compared with the information D&B would normally take into account;
 - The Applicant wanted the employer's failure score to be amended to remove the effect of the payment of a lump sum into its main pension scheme;
 - The employer's failure score had been reduced because of the negative effect of the payment on the Company's balance sheet;
 - The Applicant had suggested that taking such payments into account is contrary to the objective of encouraging employers to make payments to pension schemes;

- No appeal had been raised with D&B and D&B had confirmed that the correct failure score had been provided;
- A Frequently Asked Question (**FAQ**) on the Board's website had confirmed that any deficit in a pension scheme would not be counted twice, i.e. from the balance sheet in D&B's insolvency risk calculation and from a Section 179 valuation in the underfunding risk calculation;
- Discretions

Paragraph 5

Where the Schedule to the PPF Determination had failed to make the provision necessary for a calculation to be performed, there was provision for the Board to take appropriate steps. In this case, the PPF Determination had made the necessary provision allowing a calculation to be performed.

Paragraph 6

The failure score used in calculating the Scheme's levy was the score prescribed by the PPF Determination. It was not incorrect in a material respect and paragraph 6 did not apply.

Paragraph 12

There was the discretion for the Board to take steps to obtain further or amended information for the purposes of calculating the levies. However, it was under no obligation to do so where information has not been provided on or before the applicable deadline.

Paragraph 13

Where information necessary for the calculation of the levies had not been provided in the manner or format or by the time anticipated by the PPF Determination, the Board could use equivalent information provided in another manner or at another time. However, it was not under any obligation to do so. In this case, the Board had the necessary information in order to be able to calculate the levies.

- The Committee upheld the original calculation of the levies.

Background

3. The Applicant contacted D&B to ask if there was anything the Company could do to uplift its failure score. D&B responded,

“FRS17 implementation starts from the assumption that the assets and liabilities of a pension plan are essentially assets and liabilities of the sponsoring employer, and as such should be recognised at fair value on the company balance sheet. There are a number of factors which influence the D&B Failure Score, and these fall into four main categories: Demographic, Principals, Trade and audited financial data. Any changes to the assets and liabilities on the file and audited financial statement will be considered in the D&B Failure Score. D&B are currently reviewing the changes to company’s balance sheets across the UK business universe as a result of FRS17 implementation, and if statistically significant in predicting insolvency (over and above current models), D&B will modify the existing algorithms to take this into account.”

Written representation from the PPF

4. In addition to the points made by the Reconsideration Committee, the PPF state,

“The issues raised are issues of general fairness and policy and not questions as to the correct calculation of the levy invoice in accordance with the terms of the Determination ... the Board’s position is that the Scheme’s levies were calculated correctly in accordance with the terms of the Determination.”

5. The PPF have also explained,

“... A change in a scheme’s deficit which appears on the employer’s balance sheet would be taken into account in the entry into the D&B failure score algorithm for company financial information. There is no provision for D&B to take account of scheme funding where an employer does not include the scheme’s deficit in its balance sheet. I understand that scheme accounts would not be used in calculating the failure score even if provided to D&B directly.

In terms of what was considered by the Board when deciding what information it wanted from D&B, it is important to appreciate that in deciding, by way of the Determination, to use information from D&B to calculate failure scores, the Board is making use of a pre-existing commercially available set of information. It has never

been feasible for the Board to commission a universe of failure scores created especially for its own purposes. Subject to the very few defined modifications identified in the Determination, the Board must therefore take D&B's system as it finds it. The Board's decision to appoint D&B as its insolvency risk provider was made following a competitive, OJEU compliant tender process following a comprehensive consultation, the conclusion of which was that the use of D&B was the best option in seeking a standard, market-based approach to the assessment of insolvency risk, because of factors including the extent of coverage that D&B could offer."

Further representation from the Applicant

6. The Applicant states that the Trustees are not disputing that the Scheme's levies were calculated correctly in accordance with the terms of the PPF Determination; they consider that the methodology is, in itself, flawed.

CONCLUSIONS

7. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.
8. The reviewable matter in question is the amount of the risk-based levy required of the Scheme for the financial year 2007/08.
9. Under Section 175(5) of the Pensions Act 2004, the Board was required to determine the factors by reference to which the 2007/08 levies were assessed; those factors were set out in the PPF Determination. The PPF has correctly submitted that the Determination, itself, is not a reviewable matter, nor is the Board able to amend the Determination on an individual application for review or reconsideration.
10. FRS17 would usually require a company to account for defined benefit pension scheme liabilities, to the extent that any deficit reflects the employer's legal or constructive obligation, on its balance sheet. There are circumstances, however, where more than one employer participates in a scheme, when a company can account for its contributions to its defined benefit scheme as if that scheme were a defined contribution arrangement, i.e. the liability is equal to its contribution. In the Company's case, because the defined benefit liability did not appear on its balance sheet, it could not be offset when the £17 million contribution was paid. In effect, the

Applicant is suggesting that D&B should go beyond the Company's balance sheet in collecting the financial data it enters into its algorithm to produce the failure score.

11. The PPF Determination, for the levy year in question, provides that the failure score which applies is the score which D&B would assign to the relevant employer "in the ordinary course of its business". D&B would not normally consider off balance sheet items in gathering financial data for the calculation of the failure score. It has confirmed that the failure score it provided for the Board is correct, within the terms of the PPF Determination, and, therefore, paragraph 32(e) does not apply.
12. I can understand why the Company feels aggrieved that, in acting responsibly towards its scheme, it has been "penalised" because D&B scored it down on the evidence of its balance sheet. That is a feature of the way this particular group of companies reflect their pension scheme in their accounts. I find, however, that the Board has calculated the risk-based levy in accordance with the provisions of the PPF Determination and is not required to take any action.

CHARLIE GORDON
Deputy Pension Protection Fund Ombudsman

10 June 2009