

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

Applicant : The Trustees of the Tokheim Limited Retirement Benefits Scheme (the **Trustees**)

Scheme : The Tokheim Limited Retirement Benefits 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 29 July 2008.

Grounds for referral

- The PPF have ignored the fact that the Scheme did not have an actuary at the time a Section 179 valuation had to be submitted;
- The Actuary had resigned just before the Section 179 valuation was due and the Trustees were in the process of selecting another;
- The Trustees wanted to consider other actuarial firms instead of simply replacing the actuary with another from the same firm and this took longer;
- It was not possible for them to submit a Section 179 valuation by the 30 March 2007 deadline;
- The new Actuary's report shows that the assumptions used in calculating the 2007/08 levy were inappropriate, i.e. the PPF based the levy on Scheme's liabilities of £9.3 million, whereas they were in fact £4.3 million.

Reconsideration Committee's Decision

2. The Reconsideration Committee's decision is summarised below:
 - The PPF's calculation of the 2007/08 levy is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004;
 - The PPF had consulted on the matter of the levies over the period from September 2006 to March 2007, when the PPF Determination was published;

- The Trustees had not submitted a Section 179 valuation to the PPF on or before 5 p.m. on 30 March 2007;
- The scope of the reconsideration should be whether the levy calculation had been carried out in accordance with the published PPF Determination;
- There was no discretion to depart from the terms of the PPF Determination;
- Paragraph 9 of the Schedule to the PPF Determination provided for the use of Section 179 valuation results where they had been provided to the PPF on or before 5 p.m. on 30 March 2007;
- Paragraph 10 provided for the PPF to use any MFR valuation data (adjusted as provided for in the PPF Determination) it had if no Section 179 valuation had been submitted by the above deadline;
- In the case of the Scheme, the PPF used the valuation data given in the scheme return dated 30 March 2007, i.e. the MFR valuation data as at 1 October 2003;
- A Section 179 valuation was not submitted until December 2007;
- The Reconsideration Committee was sympathetic to the position of the Trustees, but noted that the appointment of an actuary was a matter for the Trustees, in accordance with their duties under Section 47 of the Pensions Act 1995 and could not be taken into account in applying the terms of the PPF Determination to the calculation of the levies;
- The roll-forward mechanism was prescribed in the PPF Determination and it was not open to the PPF to use a different method;
- Inevitably, the value derived using the roll-forward procedure was an approximation, but the approach was adopted by the PPF in accordance with its statutory functions and duties and was designed to ensure fairness and consistency across the universe of schemes;
- The Committee considered the discretions available to it under the PPF Determination and, in particular, paragraphs 6, 12 and 13:

Paragraph 6

The Trustees have not sought to argue that the MFR valuation data used in the calculation of the levies was incorrect and, therefore, paragraph 6 was not relevant.

Paragraph 12

There is the discretion for the PPF 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. For paragraph 12 to apply, there would have to be a circumstance which required the levy to be recalculated, e.g. the exercise of a discretion under paragraph 6. Nor does paragraph 12 require the PPF to accept information which has not been requested by it.

Where a scheme has not submitted information by the applicable deadline, it would be unfair to seek further information from that scheme alone. Further, schemes which had submitted information on time might feel aggrieved at receiving no benefit and this would have a negative impact on subsequent attempts to collect data.

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 PPF 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 PPF had the necessary information in order to be able to calculate the levies.

- The Committee upheld the levy calculation.

Written representation from the PPF

3. In addition to the points made by the Reconsideration Committee, the PPF have responded to the referral to the PPFO. The PPF refer to the requirement, under Section 47 Pensions Act 1995, for the Trustees to appoint an actuary and go on to say,

“It is certainly good practice for trustees to consider actuaries from other firms in seeking to replace a scheme actuary, but making preparations to appoint a replacement actuary should not prevent trustees from complying with statutory and other regulatory obligations. In this case, for example, another actuary from the scheme actuary’s firm could have been asked to advise the trustees until a replacement could be found, if the scheme actuary was not able to continue in his role for such a period.”

Further representations from the Trustees

4. The Trustees’ representative has made the following further submissions:
- The initial invoice issued by the PPF was for £100,581. Investigation revealed that the PPF had used a figure for ‘ongoing liability’ due to an error on the scheme return;
 - The correct information was provided on 26 November 2007 and a Section 179 valuation was submitted on 21 December 2007;
 - A revised invoice, for £47,287, was issued on 11 January 2008, but did not take into account the Section 179 valuation data;
 - Using the Section 179 data produces a levy of £1,245;
 - There is therefore an “error” of 3,700% in the PPF’s estimation;
 - They do not see the logic behind ignoring data the PPF was in receipt of when it had cause to review the levy;
 - The PPF Ombudsman should examine the method by which the PPF estimates liabilities because any method which produces a figure which is 3,700% inaccurate cannot be judged as fair;
 - Choosing the Scheme Actuary was not a straightforward matter because of long-standing concerns the Trustees had about the accuracy of information held and the advice given by the Actuary and Administrators over a number of years. At the time that the Actuary resigned, giving no notice, the Trustees had no confidence in the firm concerned.

Subsequent Representations

The Trustees

5. The Trustees' representative further submits:
 - There has never been any dispute about the facts provided by themselves or the PPF;
 - The appeal is based upon:
 - the unfairness of the levy calculation;
 - the PPF opting to calculate the levy on out of date information, despite being in receipt of accurate Scheme information; and
 - the Scheme not having an actuary and the complicated circumstances surrounding that situation.
 - It appears that they are left with the legislation, fair or unfair, which they have to accept.

CONCLUSIONS

6. This is a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.
7. The reviewable matter in question is the amount of the risk-based levy required of the Scheme for the financial year 2007/08.
8. 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.
9. Paragraph 9 of the PPF Determination specifies that any references to a Section 179 valuation are to “the results of an actuarial valuation ... carried out in a manner which is in accordance with section 179 of the Pensions Act 2004 and regulations and guidance made and issued under that section, and the results of which have (*at or before 5.00pm on 30 March 2007*) been provided ... to the Board or to the Pensions Regulator ...” (my emphasis).

10. Where a Section 179 valuation had not been submitted, paragraph 10 of the PPF Determination provided for the Board to calculate the levies by reference to a scheme's MFR data, as submitted on the most recent scheme return. Paragraph 10 also provided for the MFR data to be adjusted in order to produce an equivalent to a Section 179 valuation. The formulae for adjusting the MFR data were contained in Appendix 2 to the PPF Determination.
11. The PPF submit that, in the circumstances, the Board had no discretion to accept the information after the March 2007 deadline.
12. Paragraph 4 of the PPF Determination specifically provided for information to be accepted after the deadline only where an attempt to submit it on time had been thwarted by communication problems outside a scheme's control.
13. Paragraph 5 concerned those circumstances for which the Schedule to the PPF Determination did not provide. The non-submission of a Section 179 valuation had been provided for in paragraph 10.
14. Paragraph 12 applied only where the Board had requested additional information. It specifically provided that there should be no obligation on the Board to seek further information where that information had not been provided. Likewise, paragraph 13 provided for the Board to use equivalent information, but imposed no obligation for it to do so.
15. There remain the provisions of paragraph 6, which, to my mind, offered the Board the greatest degree of discretion. However, the Board's discretion fell to be exercised when it appeared that the information upon which the levy calculation had been based "was incorrect in a material respect". It has not been suggested that the information upon which the revised levy had been based was incorrect; information does not become "incorrect" simply because there is other more up-to-date information which might replace it.
16. The fact remains that the Scheme did not submit a Section 179 valuation by the March 2007 deadline. The Board, therefore, used the most recent MFR valuation data, as it had said that it would.
17. It is unfortunate that the Trustees found themselves without an Actuary at such a crucial time. However, there were options available to them which would have

avoided missing the March 2007 deadline, such as engaging another actuary from the same firm on a temporary basis. That the Trustees chose not to take this route, was their decision and was not grounds for setting aside the requirements of the PPF Determination.

18. I have, however, observed in previous decisions (R00724 in March 2008, 71786 in May 2008) that the result of the Board's approach is that the levy may well not actually reflect in any particular case the true risk of a scheme being taken on by the PPF. I can well understand that it is perceived to be unfair where it is clear that the Board's calculation of the level of underfunding does not reflect the most up to date position at the relevant date. I can also understand why it might be argued that, in such cases, as a matter of equity the Board should retain the ability to revisit levy calculations. Indeed, the concept of "equitable liability" is sometimes applied in fiscal regimes where the strict position is considered unfair. That, however, is a matter for the fiscal authority itself, and I do not think I can criticise the PPF for choosing not to adopt that approach in these circumstances. As I have also observed previously, if the true aim of the legislation is indeed to ensure, so far as possible and practicable, that the levy does reflect the likelihood of a scheme being taken on by the Board, the question of the extent to which that aim is or is not achieved is a matter for the legislature.
19. I find therefore that the Board has calculated the risk-based levy in accordance with the provisions of the PPF Determination and is, therefore, not required to take any action.

CHARLIE GORDON
Deputy Pension Protection Fund Ombudsman

16 January 2009