

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

Applicant : Mrs G Gilbey, on behalf of the Trustees of the Calor Group Retirement Benefits Plan (**the Trustees**)
Scheme : Calor Group Retirement Benefits Plan (**the Scheme**)

1. 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 19 June 2009. The referral concerns the Scheme's risk-based levy for the year 2007/08.

Grounds for referral by the Trustees

2. The data used by the Board to calculate the levy was out of date. The Trustees say they believed they had submitted a scheme return to the Pensions Regulator (**TPR**) on 18 January 2007 which would be taken into account in the calculation of the 2007/08 levy.
3. TPR have no record of the scheme return being submitted on 18 January 2007 and say that the submission process was not fully completed in 2007. The process did not provide an acknowledgement and therefore they have no evidence that the submission was completed correctly.
4. TPR did not chase them to submit the scheme return because they confused the Scheme with another pension scheme with the same sponsoring employer which, because it is based in the Isle of Man, is outside TPR's remit.
5. The PPF knew before the invoice was issued on 27 June 2008 that the data was incorrect.

Background

6. On 22 May 2008, the PPF's data cleansing team wrote to the Trustees asking for clarification of some of the data. In their email the PPF said:

“Our records show that you completed the most recent version of the Scheme Return for this scheme. I am writing to seek clarification in this information that was submitted to the Pensions Regulators/the Pension Protection Fund. **This information is critical to the accurate calculation of the 2007/2008 pension protection levies.**

...Please do not send any additional information bar that requested above. In the 2007/08 levy calculation, the Board of the Pension Protection Fund is not able to take account of information which is submitted after 30 March 2007, which updates that already provided.”

7. The Trustee’s advisers responded on 27 May 2008 saying that the figures quoted in PPF’s email of 22 May 2008 were different to those stated in the 2006/07 scheme return which had been submitted on 18 January 2008. The Trustees say this did not generate a response from the PPF as would be expected if the PPF had not received the scheme return.

Response by the Reconsideration Committee

10. In respect of comments regarding the Committee’s decision the Committee responds that the Applicant had requested reconsideration of the Scheme levy for the period 1 April 2007 to 31 March 2008, as set out in an invoice dated 27 June 2008. They acknowledge this was a reviewable matter by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004.
11. 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.
12. The Committee say that according to the Pensions Regulator the facts surrounding this issue are consistent with the Trustees having filled in all the necessary details but failing to click “submit” in order to submit the scheme return to the Pensions Regulator’s exchange system.

15. Under the PPF Determination, paragraph 8 provides that the relevant scheme return data used by the Board should, in most circumstances, be the information submitted to the Pensions Regulator **by 5pm on 30 March 2007**. The only circumstances where other information is envisaged is where the Pensions Regulator or the Board specifically request data after that date. In these circumstances, the request must be made **before the levies are calculated**.

Discretions

16. The committee considered all the discretions available to it under the Determination in particular paragraphs 5, 6, 12 and 13 of the Schedule to the 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 Board's position is that data is correctable where that data was incorrect on the basis on which it was provided on the date to which the data is referable. Data is not incorrect where it has been open to the Trustees to have provided different data but where they have not done so.
 - The Committee considered whether any information was incorrect and concluded that neither the failure score nor the scheme return information was incorrect on the basis upon which it was provided and that therefore the discretion under paragraph 6 was not exercisable. The D&B score used was the correct score as provided and the scheme return data which the applicant wishes to provide as corrected data is the data that could have been provided but, in fact was not so provided. The Committee considered

that it would have been open to the Scheme or its advisers to have checked whether the scheme return had, in fact, been submitted before the relevant deadline.

- Paragraph 12 of the Schedule to the 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. Given the points previously raised the Committee did not consider it appropriate to exercise their discretion in this case.
- Paragraph 13 of the Schedule to the 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 PPF state that the information on which the invoice is based is not incorrect but more recent information, which was available prior to the relevant deadline, had not been provided to the Board. In the circumstances, the Committee did not consider it could exercise the discretion reserved to it.
18. The fact that there was some confusion as between the Scheme and the Isle of Man scheme and that the Scheme did not apparently receive a reminder to submit a Scheme Return prior to 30 March 2007 was a matter before the Committee when deciding whether to exercise its discretion under paragraph 6 of the 2007/08 PPF Determination.

19. The data cleansing team is made up of administrative staff responsible for reviewing data provided by schemes which fails to meet what are known as “gate tests” for accuracy or plausibility to enable the Board to invoice pension protection levies. The data cleansing team achieves this by asking for further information.

Further representation from the Trustees

20. It may be that the Trustees did not complete the scheme return submission process properly; it cannot be proved that they did. However, the PPF have said that many schemes failed to successfully submit the returns and that they were prompted to do so by a third party contracted by the Pensions Regulator. Due to the Pension Regulator’s confusion between the Scheme and the Calor Isle of Man scheme, the Trustees were not contacted by the third party and a note was placed on the Pension Regulator’s files saying that the Scheme was outside the Pension Regulator’s remit.

Conclusions

21. 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 2007/08.
22. 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.
23. 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 a 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.
24. In this context, perverse is taken to mean a decision which no reasonable decision-maker, properly advising itself, could arrive at.
25. In considering the adequacy of the Board's reasoning I take into account that the Trustees were not prompted by the Pensions Regulator that a scheme return had not been received and that there was no obvious way for the Trustees to check the submission had been properly made. I note also the confusion between the Scheme and the Calor Isle of Man Scheme. I would say here, though, that the PPF are reliant on data provided to them from the Pensions Regulator and cannot be held responsible for any errors or omissions either by the Pensions Regulator, or their third party contractors, in the handling of that data. As the Pensions Regulator does not fall within my remit I cannot consider their part in this matter.
26. I also 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.
27. The reasoning provided by the Board is simple. The Board says that the data on which the invoice is based is not incorrect but more recent information, which was available prior to the relevant deadline, had not been provided to the Board. They say it has followed policy not to take account of data submitted after 31 March 2007 and in considering whether to exercise its discretion took into account that there was some confusion between the Scheme and the Isle of Man scheme and that the Scheme did not receive a reminder to submit a Scheme Return prior to 30 March 2007.
28. 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 Trustees having filled in all the necessary details then failed to complete the submission in order to submit the scheme return to the Pensions Regulator's exchange system.

29. 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 a discretion where the decision-maker has not acted as it should do.
30. It follows that I can see nothing that justifies my coming to a conclusion that I should remit this matter back to the PPF for reconsideration.
31. I recognise this will appear harsh to the Trustees and I note that the Trustee's advisers referred to the submission of the scheme return during the PPF's data cleansing phase and that they say that they did not receive a response. I also note that the email from the data cleansing team is particularly misleading in that it states "*This information is critical to the accurate calculation of the 2007/2008 pension protection levies*". This implies that any further information submitted can be taken into account, which is simply not the case, as to do so would be in contravention of both the PPF Determination and their published policy. Whilst the statement made is clearly misleading I recognise that even had the statement not have been made it would not have altered the outcome. I understand that the PPF's data cleansing processes are currently under review and I trust that in future greater care and a proper explanation will be given to schemes when they are asked to provide further information for this purpose.

JANE IRVINE

Deputy Pension Protection Fund Ombudsman

22 September 2010