PENSIONS ACT 2004, PART 2 CHAPTER 6

APPEAL TO PENSION PROTECTION FUND OMBUDSMAN

DETERMINATION BY THE PENSION PROTECTION FUND OMBUDSMAN

Applicant	:	Michelin Pensions Trust Limited (the **Trustee**)
PPF	:	Pension Protection Fund (the **PPF**)
Board	:	The Board of the Pension Protection Fund (the **Board**)
Scheme	:	The Michelin Pension and Life Assurance Scheme (the **Scheme**)

Reviewable Matter

1. The Board's calculation of the pension protection levy (**the levy)** for the Scheme:
   - in respect of the period 1 April 2008 to 31 March 2009, as set out in the invoice to the Trustee dated 26 September 2008; and
   - in respect of the period 1 April 2009 to 31 March 2010, as set out in the invoice to the Trustee dated 16 October 2009.
2. These are reviewable matters by virtue of paragraph 19 of Schedule 9 to the Pensions Act 2004 (the **2004 Act**).

The Background to these Applications

3. The Scheme has four participating employers. In multi-employer schemes, the insolvency risk taken for the calculation of the risk-based levy is based on a weighted average of the employers' insolvency probabilities. The weighting given to each employer depends on the proportion of members attributable to the employer.

4. Most employee members of the Scheme work for two of the employers. There is no issue about the allocation of employee members, members who have left (deferred members) or members who have retired from employment or deferment. The issue in this case concerns the allocation of those who are paid pensions following the death of an employee or former employees (**Dependant Members**). There are some 2,300 of them out of a total membership of about 25,000.

5. It seems that for actuarial purposes the Scheme's actuary has historically allocated the Dependant Members to the largest employer, an approach which has been acceptable to the Trustee and the employers.

6. The Scheme's return to the Pensions Regulator submitted on 14 January 2008 included the same allocation of the Dependant Members to the largest employer. (This had also been done in previous years, but there is no issue arising because the employers had similar solvency scores.)

7. In February 2008 (following the required consultation) the Board published its statutory determination of how the levy was to be calculated for all schemes. As relevant to allocation of members in multi-employer schemes the determination said (in Part 4, paragraph 35):

> "Where reference is made to the number of members of a scheme of whom a person is the employer, that is to be determined by reference to the total number of active, deferred, pensioner and pension credit defined benefit members of that scheme and in relation to whom that person is (or is deemed to be) the employer in relation to the scheme, as notified to the Board or the Pensions Regulator in relevant scheme return data."

8. At the relevant time (although it had been in place for some time beforehand and, in the form set out below, since September 2006), a "Frequently Asked Question" (**FAQ**) on the PPF website said:

> **"When completing the annual Scheme Return issued by the Pensions Regulator in respect of a multi-employer scheme, how should I apportion orphan members, and members who cannot be assigned, to the remaining participating employers?**
>
> Orphan members and members who cannot be assigned to the current participating employers, for whatever reason, should be allocated between the remaining participating employers of the scheme in proportion to the number of non-orphan scheme members belonging to each participating employer.
>
> For example, assume a scheme has 120 members in total and 60 of these cannot be apportioned. There are 3 remaining participating employers with the following number of members:
>
> Employer A - 10 members
>
> Employer B - 20 members
>
> Employer C - 30 members

> The remaining 60 members should then be allocated in the same proportions i.e. 10 members to Employer A, 20 members to Employer B and 30 members to Employer C giving the following totals to be entered on the Participating Employers form:
>
> Employer A - 20 members
>
> Employer B - 40 members
>
> Employer C - 60 members"

9. The levy calculation was to be based on data as recorded on the Pensions Regulator's system on 31 March 2008.

10. On 26 September 2008 PPF submitted to the Scheme a levy invoice for something over £4.5m, of which just over £4.3m related to the risk-based levy.

11. The Trustee seems then to have realised that for this year, had the Dependant Members been allocated differently, the risk-based levy would have been considerably less. (The solvency scores for the employers were no longer closely aligned.) It has been said by the Trustee that it would have been about £660,000 less if the Dependant Members had been allocated across employers in the same ratio as each employer's other members bore to the total of members who were not Dependant Members.

12. Having emailed the Board on 14 October, on 24 October the Trustee applied for a review of the levy calculation. It also submitted a revision of the allocation of members to the Pensions Regulator. I deal later the with submissions that have been made since that time and the responses to them. The Trustee has not succeeded in obtaining a recalculation of the risk-based levy – hence this application to me.

13. On 20 November 2008 the Board issued its determination for the next financial year (2009/2010). Significantly the data to be used remained as in the determination for the 2008/09 year; it was to be based on the information held by the Pensions Regulator on 31 March 2008. This was a deliberate decision. The consultation explained that it was done in order to allow the levy scaling factor (**LSF**) to be calculated and published in the determination for the year. That way, schemes would know in the preceding November what their levy would be for the following financial year.

14. In due course the Trustee was invoiced for the 2009/10 levy. The Trustee says that as a result of Dependant Members having been allocated to the largest employer the risk-based levy was again about £600,000 higher than if the method of allocation now advocated had been used.

[Note: the sums by which it is said the risk-based levy would have been reduced on the "correct" allocation for the two years in question has varied from time to time – partly because more than one "correct" method has been put forward. So, at the time of the 2008/09 reconsideration decision the Committee recorded that the difference for that year according to the Trustee was about £800,000. Most recently the Board has calculated the differences as, in round terms, £500,000 for 2008/09 and £530,000 for 2009/10.]

15. The application for a review of the 2009/10 levy calculation has also been unsuccessful. However, there has been a shift of position by the Board which I summarise below.

16. Paragraph 6 of the Schedule to the Determination for each year says:

> "Nothing in the Board's determination or this Schedule shall prevent the Board from reviewing the amount of the levies calculated in respect of a scheme where it subsequently appears to the Board that the information upon which the calculation was based was incorrect in a material respect … For the avoidance of doubt, information is not incorrect for this purpose 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 this Schedule to be applied differently, and the Board is in any case under no obligation to review the amount of the levies merely because a scheme has been disadvantaged by the failure of those acting on its behalf to supply correct information at the proper time."

17. There is a footnote to paragraph 6:

> "This note is provided for information as to the manner in which the Board is likely to exercise the power described in paragraph 6. The note does not form part of the Determination, but has been approved by the Board when considering the Determination. The Board does not anticipate that this power of review will normally be exercised so as to correct validated data (as defined in paragraph 8(a) of the Schedule) held on the Scheme Maintenance system as at midnight on 31 March 2008. However, the Board may take such steps in appropriate cases, including (without limiting the exercise of the Board's discretion) any case in which a scheme would otherwise be advantaged by the submission of inaccurate information."

18. On 29 June 2009 the Board's Reconsideration Committee (the **Committee**) gave its decision on the referral relating to 2008/09. It took the stance that the data was "correct and legitimate in itself" and therefore that there was no discretion to exercise under paragraph 6. However, it also considered whether it would have exercised discretion if the information had been incorrect and decided that it would not.

19. In reaching that conclusion the Committee noted the published policy not to generally accept corrections for the year. It set out the Board's reasons for that policy as being:

- "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 factor ("LSF") calculation could only be based on the information provided to the Board by the relevant deadline.
- Building in a margin of error to the LSF to mitigate against 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, in particular as this was the third year for which data was being submitted for pension protection levies."

20. The Committee went on to say that "…having carefully considered the circumstances of this case" it did not consider an exercise of discretion justified.

21. In dealing with the 2009/10 levy referral, the Committee concluded that the data was *not* correct. It therefore considered whether to exercise discretion under paragraph 6. It again noted the policy and the reasons for it, as set out above. It went on to say:

> "The Committee having carefully considered the representations made did not consider that in the particular circumstances of this case it would have been appropriate to depart from the general policy of not taking account of corrections to Scheme Maintenance System data requested after 31 March 2009. The Committee did not believe there was anything sufficiently unusual in the circumstances of the case to justify such a departure"

22. The Board has asked me to proceed on the basis that the data was incorrect for both years, that discretion under paragraph 6 has been exercised for each year and has that it has been decided not to review the amount of either levy.

The PPF Ombudsman's Jurisdiction

23. Section 213 of the Pensions Act 2004 and regulations made under it provide for the reference of a "reviewable matter" to the PPF Ombudsman for investigation and consequential determination of what, if any, action is to be taken by the Board in relation to it.

24. There are 43 reviewable matters listed in Schedule 9 to the Pensions Act 2004, They range from the issuing of notices (or failure to issue them), through the making of loans and obtaining or approving of valuations, to the entitlement to and amount of compensation payable to individual pension scheme members.

25. A prerequisite for the PPF Ombudsman to determine that the Board must take action is a determination that the decision of the Committee in relation to the reviewable matter has "not been reached correctly".

26. The reviewable matter in this case (as described in paragraph 19 of Schedule 9 to the Pensions Act 2004) is:

> "The amount of the initial levy or any pension protection levy payable in respect of an eligible scheme determined by the Board under section 181(3)(b)."

27. Section 181(3) says:

> "The Board must in respect of the levy-
>
> …
>
> (b) calculate the amount of the levy in respect of each of those schemes, …"

28. Regulation 16(2) of the Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005 (**the PPFO regulations**) says:

> "(2) If the PPF Ombudsman considers that the decision of the Reconsideration Committee in relation to a reviewable matter referred to him was not reached correctly, the PPF Ombudsman-
>
> (a) must-
>
> (i) determine what action, if any, the Board should take in relation to the matter; and
>
> (ii) remit the matter to the Board with directions for the Board-
>
> (aa) to vary the determination, direction or other decision made by the Reconsideration Committee; or

(bb) to revoke and replace the determination, direction or other decision made by the Reconsideration Committee; and

(b) may direct-

(i) that-

(aa) any determination, direction or other decision which is to be made by the Board in accordance with any determination made or direction given by him; or

(bb) any variation, revocation or substitution of the determination, direction or other decision of the Reconsideration Committee which is to be made by the Board in accordance with any determination made or direction given by him,

is to be treated as if it were made at such time (which may be at a time prior to his determination or direction) as he considers appropriate;

(ii) that any notice varied, substituted, issued or given by the Board in accordance with any determination made or direction given by him is to be treated as if-

(aa) it were issued or given at such time (which may be a time prior to his determination) as he considers appropriate;

(bb) it became binding for the purposes of Part 2 of the Act (the Board of the Pension Protection Fund) at the time at which he makes his determination or gives his direction or at such later time as he considers appropriate;

(iii) the Board-

(aa) to pay such compensation as he considers appropriate to such persons as he considers appropriate;

(bb) to take or refrain from taking such other steps as he may specify."

29. The Board and the Trustee have each made observations on the extent of my powers under the legislation. They are summarised below, followed by my comments.

The Board's observations

30. The Board says that the question for me is not whether I would have exercised the discretion under paragraph 6 of the schedule to each determination in the same way as the Committee. It says my role is supervisory. I may decide whether the Committee has committed an error of principle, such as taking into account irrelevant considerations, asking itself the wrong question or reaching a decision that no reasonable decision making body could have reached.

31. The Board says that I should not be concerned with whether all of the reasons for a decision are correct, but with whether the decision itself has been reached correctly.

32. It says that should I find that a decision has not been reached correctly then it is not mandatory that I should remit the matter to the Board as regulation 6(2)(a)(i) requires me to determine "… what action, *if any*, the Board should take…" (my emphasis).

The Trustee's observations

33. The Trustee says that the fact that my remedial powers are based on whether a decision has been "correctly reached" or "incorrectly reached" shows that my powers overall are not equivalent to those of a judge in judicial review proceedings, acting in a supervisory role. The Trustee points out that the historic role of ombudsman goes wider, entitling me to consider the fairness of an individual decision. The Trustee says I "…can intervene at a lower threshold of substantive unfairness than a judge would do on judicial review." An unfair and unjust decision cannot be "correctly reached" even if it is one that a judge could not interfere.

34. The Trustee also notes the breadth of the remedial powers themselves. It says that there is power to substitute a different decision for the decision challenged and notes that the Board is empowered to do whatever I direct even if otherwise outside its powers. It points to similarities between my remedial powers and those of the Reconsideration Committee.

My view

35. There is no need to discuss at length the roles of ombudsmen generally. In brief, and as relevant, I make the following observations.

36. Ombudsmen usually exist to provide justice where there is a potential imbalance of power between the parties – most commonly institutions on the one hand and individuals on the other – for example between public sector institutions and the private citizen or between corporate bodies and consumers. Their powers vary widely, whether constituted by statute or otherwise and whether they operate in the public sector, the private sector or, in a few cases, both. However, those variations acknowledged, it is true that as a rule ombudsmen

think of themselves as approaching matters bearing fairness in mind and avoiding legalistic approaches in favour of broad justice and equity.

37. The term "ombudsman" has no special meaning in law. The PPF Ombudsman is strictly a statutory commissioner "to be known as the Pension Protection Fund Ombudsman". In many respects the jurisdiction is not like that of an ombudsman at all. The power to determine levy related referrals from pension schemes (potentially large and well resourced in capital terms) of a decision made by a statutory body lies well outside the usual range of ombudsman activities. So the general powers of ombudsmen are of limited value when approaching this particular jurisdiction.

38. But even if that were not so, my powers are laid down in legislation. Where the meaning of that legislation is clear there is no scope to find a different, wider jurisdiction (however subtly so) implied by the use of word "ombudsman" in the title of the post.

39. As a related point, a determination of the PPF Ombudsman is subject to appeal on a point of law. In this respect the legislation is akin to that of the Pensions Ombudsman (a post I also hold, as the parties will be aware). Successive Pensions Ombudsmen have discovered that the Courts tend not to infer from the fact that that commissioner is also called an ombudsman that he has wider remedial powers than the Courts would have in similar circumstances. The PPF Ombudsman legislation is not the same as the Pensions Ombudsman legislation but, whatever I might think with either hat on of the principles involved, it is likely that on appeal from the PPF Ombudsman the Courts would not find that my own view of what was merely fair was an appropriate benchmark in determining this referral.

40. The Trustee says that I have power to substitute a different decision from the decision which has been referred as a reviewable matter. Strictly, I have power to remit the matter to the Board with directions for it to vary the decision, or to substitute another decision for it. That compares with the explicit power of the Committee to "substitute a different determination, direction or decision" (regulation 11(b) of the Pension Protection Fund (Review and Reconsideration of Reviewable Matters) Regulations 2005). The difference reflects the fact that the

final decision must be the Board's, which it would be if made by the Committee (which is internal to the Board), but would not be if I made it on their behalf.

41. However, I agree that the effect is that, in appropriate circumstances, I may decide what decision the Board should reach and direct it to do so. That may mean I could go further than the Court in Judicial Review proceedings usually would. But it should not be forgotten that the remedial powers are aimed at a wide range of reviewable matters. They include procedural failures and disputed calculations. The Trustee invites me to infer from remedial powers which are intended to embrace the whole range of reviewable matters that I should adopt a particular approach in relation to one of them. I think it is right that I should adopt an approach that is consistent with providing a remedy from within the range available, that suits the reviewable matter in question and that is not inconsistent with the general approach to similar issues in other fora. I do not agree that, in this case, where the exercise of a discretion is the act at the heart of the matter, power to direct a different remedy implies a different approach to deciding whether there should be a remedy at all.

42. In reality, I doubt that there is much difference in principle between the approach that the Trustee urges me to take and the one that I am taking. The Trustee wishes me to have regard to what is fair and just. A manifestly unjust decision is likely to be one that is perverse - in the sense of being one no reasonable decision maker could reach. If, in practice, I do not find in the Trustee's favour it is likely to be because I find that the PPF's decision falls on one side of a line that we both agree exists, but which I have not drawn in the place the Trustee would like me to.

The Levy Calculations

43. So, to summarise my approach, this determination is of the referral of the Committee's decisions on the calculation of the levy for the two years in question. In determining that referral I have to consider, for the purpose of awarding any remedy, whether the Committee's decision was correctly reached. As part of its decision in each case the Committee considered whether it should exercise discretion under paragraph 6 in the Trustee's favour. I can consider whether that exercise of discretion took into account all relevant factors and no

irrelevant ones and whether the Committee exercised it in a way that such a body, acting reasonably, could.

44. The Board accepts that the Committee was in error in deciding in relation to 2008/09 that there was no discretion to be exercised. In my view the Board is right to do so. Paragraph 6 of the schedule to both determinations said that "For the avoidance of doubt, information is not incorrect for this purpose where it is correct and legitimate in itself …" but different or additional information could have been provided. The terms of a determination are outside my discretion other than where they fall to be interpreted. If I had needed to determine whether the information in this case was "correct and legitimate in itself" I would have found it difficult to attribute a clear meaning to the phrase.

45. Even if it had been clear, in this case there is no absolutely "correct" approach to attributing the Dependant Members to the employers. Most plausibly, perhaps, they could be allocated to the employers (or the successors of the employers) who last employed the members on whose death their pensions arose, though even that might leave some unallocated if the employer no longer exists and there is no obvious successor. In practice the "correctness" of the allocation can only be tested by reference to some conventional or agreed compromise method. There is such a method – as described in the Board's FAQ, but it is not obviously more correct than some alternatives, other than that it is the method that the Board has identified as appropriate.

46. However, allocating all the Dependant members to one employer was arbitrary. It did not confirm to the approved method or any other identified logic. In the circumstances I do not think that the attribution of all the Dependant Members to one employer could have been said to be "correct and legitimate in itself", whatever that is taken to mean.

47. As a result of the Board's concession, the sole remaining point of challenge for the Trustee is the exercise of discretion under paragraph 6. I have taken account of the Trustee's and the Board's arguments as actually expressed, but for convenience I summarise them below.

Summary of the Trustee's position

48. The decisions of the Board (including the Committee) reflect "…the discredited bureaucratic argument that administrative convenience must outweigh justice in individual cases."

49. There has been a failure to weigh the application of the Board's normal policy against the prejudice to the Scheme by its application in this case. The Board's policy statements in the footnote to paragraph 6 of the schedule to each determination do not provide for such a weighting.

50. The Board has disregarded the risk of over-collecting the levy. Under section 177(2) of the Pensions Act 2004 the Board is required to impose levies "…in a form which it estimates will raise an amount *not exceeding* the levy ceiling for the financial year." (Emphasis added). The Board's policy (to take steps where an inaccuracy is in a scheme's favour) is skewed towards over-collection. The policy has tainted the decisions in this case.

51. The small distortion in the 2008/09 LSF that would have been caused by the inaccurate data should have been outweighed by to the detriment to the Scheme of using the inaccurate data. By the time the 2009/10 LSF was fixed the Board knew that the Trustee had said that the information was incorrect. It was therefore possible to set the LSF based on *correct* data. The Committee should not therefore have had regard to the need to base the LSF on consistent data in deciding whether to allow the levy calculation for the Scheme to be based on the corrected data.

52. The Board and the Committee approached the request for a reconsideration with a closed mind – hence fettering their discretion.

53. The Trustee has asked that the Board be required to disclose the details of other cases in which data corrections have been allowed.

54. The consequence of the original stance that the data was correct was that the Committee misdirected itself. At the time of the 2008/09 levy decision it is likely that the hypothetical consideration of the exercise of discretion was influenced by the Committee's view that the information submitted by the Trustee was not incorrect. The 2009/10 levy decision was affected by the same error; because it was only when the matter reached the Committee that it was conceded that the information had in not in fact been correct.

55. The Trustee has proposed that I should refer questions of law arising in the case to the court in exercise of my discretion to do so under section 215 of the Pensions Act 2004. In particular the Trustee would like me to refer to the court my approach to a case such this (which the Trustee regards as too deferential to the Board).

56. The Trustee has asked for a direction to compensate it " …for the trouble and expense it has suffered by reason of the Board's error".

Summary of the Board's position

57. The Committee did weigh normal policy against the prejudice to the Scheme in both reconsideration decisions. Both decisions said that the Committee had considered the policy and the circumstances of he particular case.

58. Fixing the data on which the LSF was to be calculated at 31 March 2008 was an important change of policy in 2008/09 intended to result in an actual levy collection that was closer to the estimated collection than in previous years (when late corrections to data had meant that the data used to calculate the levy and the data used to calculate the LSF were different.)

59. Achieving the policy objective of actually collecting the intended total levy depends on using information held at 31 March 2008 for individual scheme levy calculations.

60. If corrections were allowed generally there would not be a "swings and roundabouts" effect as schemes would tend not to ask for reviews where errors were in their favour.

61. An overpayment by a scheme resulting from an error does not result in an over collection of the levy, because the LSF is based on the same error.

62. It is reasonable to expect schemes to take responsibility for their own data. The overall policy of not correcting errors serves as an incentive to accuracy.

63. The Board has referred to publications in which it has drawn attention to the need for information to be correct and urged schemes to make sure that it is, pointing out that corrections could be made up to midnight on 31 March 2008.

64. Data correction requests have in fact been agreed to in approximately 39 cases in the two years in question, which illustrates that there is no fettering of discretion in practice. It is not appropriate to reveal further details of those cases.

65. There is no reason for me to refer questions of law to the Court.

Conclusions

66. I shall start with two procedural matters.

67. First, I do not consider it necessary to refer any points of law arising in this case to the High Court. Such referrals will inevitably only be in exceptional cases. The power is discretionary and quite obviously not to be used in ordinary circumstances; to do so would render the jurisdiction inoperable. As will be clear from what follows, there is nothing that I consider to be so exceptional about this case to require that course of action. I have given my view of my jurisdiction and the approach I should take in this case above (which I regard as properly deferential to the law as enacted, rather than to the Board). I deal with the substance of the referral below.

68. Second, I do not think it is necessary to require the Board to disclose further information about the cases in which discretion to accept corrections *has* been exercised. The Board has put forward the approximate number in support of its discretion not having been fettered. The Trustee has sought more information about the cases. The Trustee says that it does not seek to establish whether there is a similar case that has received dissimilar treatment. It says it wants more information as evidence of the Board's assertion. Short of independently auditing the cases to ensure that they exist and the outcomes were as the Board says, I am not clear how more information could offer greater satisfaction that the Board has in fact exercised discretion. I am satisfied that I can reach a determination of this referable matter without further information about other cases decided by the Board or the Reconsideration Committee.

69. I turn now to the fact that (as the Board now accepts) the Committee was wrong to decide, in relation to the 2008/09 levy calculation, that the information was correct. As a result of that conclusion the Committee's consideration of the discretion in relation to 2008/09 levy was hypothetical. The reason for not accepting the correction to the information was wrong. The unavoidable

conclusion is that the decision was reached incorrectly. (The referable matter decided by the Committee, and to be dealt with by me, was the calculation of the levy for the Scheme, not the exercise of discretion that formed part of it.)

70. I say that, having taken into account the Board's view that it is the substance of the decision that I should be concerned with, not the reasoning. I disagree with the Board. The legislation could have referred to a decision being correct or incorrect, but it does not. I have to decide whether the decision was *reached* correctly or not. That clearly goes to the process, not just the outcome.

71. I have also considered whether the hypothetical consideration of the discretion should be regarded as correcting the decision. In my view it is not satisfactory that the Board or the Reconsideration Committee, charged with a decision of significance, should hedge its bets. The Trustee was entitled to clarity as to the basis of the decision. If the Committee was confident that it had no discretion it should have left it at that. If it was in doubt it should have resolved its doubts and acted accordingly. Plainly the Committee was not confident – but then it made its decision on the basis that there was no discretion.

72. If anything, there is a risk that the hypothetical consideration of the discretion was tainted by the Board's belief that there was no discretion to exercise. It is improbable that the Board would have said that there was no discretion but if there had been they would (rather than would not) have exercised it in the Trustee's favour. If it was to express a view as to the hypothetical outcome the Board was more or less tied to saying that discretion would not be exercised.

73. As the decision was incorrectly reached, I must, under regulation 16(2)(a)(i) of the PPFO Regulations (set out in paragraph 28) decide what action the Board is to take (which may include no action) *and* under regulation 16(2)(a)(ii) I must remit the matter to the Board with directions. It does not matter for the latter purpose that the Committee has made a later, almost identical, decision or that the Board has given expanded reasons. It does not matter that the Board thinks the decision would have been the same if the Committee had concluded that the information was incorrect. It is mandatory for me to remit the matter with directions.

74. This case is unusual because of the second levy decision, identical in outcome, but different in reasoning. Ordinarily I would not automatically have what amounts to justification by new reasoning after the event; nor would I have regard to it if it was provided. In this case it is there whether I want it or not – and I have to consider it because of the referral of the 2009/10 levy decision. So, in order to determine the appropriate directions in relation to the 2008/09 levy and to consider whether the decision in relation to the 2009/10 levy was correctly made, I now turn to the exercise of discretion. For this purpose I set aside the defect in relation to the 2008/09 levy decision and treat the hypothetical exercise as having been real.

75. As a starting point, I find that, on neither occasion that the Committee considered the matter, was the decision one that no reasonable body could reach in any circumstances. There are policy reasons that would support not allowing a correction. And where a legitimate policy exists it is inevitable that most decisions will be consistent with it.

76. So for the exercise of discretion on its own to have been faulty on either occasion, I would have to find that the Board (through the Committee) failed to address the matter correctly in such a way as to make improper an otherwise potentially reasonable conclusion. The Trustee has strongly expressed a view that the decisions did not have adequate regard to the particular circumstances – including giving proper weight to the detriment to the Scheme. The Board has pointed to the reasons that were given in the Committee's decisions, which were essentially statements that the particular circumstances had been taken into account. There was nothing to say what weight had been given to particular circumstances of this case or what particular facts were relevant to it (though it was plain that the Committee knew for example, what the magnitude of the detriment to the Scheme was).

77. Regulation 24 of the Pension Protection Fund (Review and Reconsideration of Reviewable Matters) Regulations 2005 requires that the Committee give reasons. The depth to which those reasons should go will vary from case to case depending on a range of factors including the complexity of the matter at hand and its significance to the PPF and/or the scheme in question. In the first decision of the Committee in this case the reasons were somewhat insubstantial. In the second they were slightly fuller. Accepting that, if the policy was not

departed from in the circumstances, the reasons in the actual decisions would inevitably have followed the policy reasons, in neither was there a clear explanation of why discretion was not being exercised beyond repeating what the policy was and that in the circumstances there was no reason to depart from it. In my judgment, in relation to both years, the Committee was running perilously close to failing to give meaningful reasons at all.

78. However, I do not go as far as to find that the reasons were so inadequate as to also make the 2009/10 levy decision incorrectly reached. I have no doubt that "not correctly reached" could include a procedural failure in the way the decision was delivered. But the core question is whether the process used to reach the substantive conclusion was incorrect.

79. As to that, I find that the policy reasons that the Board has referred to were sufficient to justify adhering to the policy other than exceptionally and that the Trustee has not been able to make out a case that the Board should have taken into account anything that it has not. At the heart of the Trustee's case are the amounts involved. There is no doubt that the Committee knew what they were.

80. It was not unreasonable to imply, in the note to paragraph 6 of the schedule to each levy determination, that discretion was more likely to be exercised where the inaccuracy was to a scheme's advantage. As a general policy it was acceptable to make statements that were intended to encourage schemes to give correct information, and to follow those statements through.

81. I do not find that the approach unreasonably tended towards over collection of the levy. As the Board has pointed out, an uncorrected error taken into account in both the levy calculation and the LSF has no effect on the overall collection. Allowing corrections that go against schemes that add up to more than the value of corrections go in schemes' favour *would* tend towards over collection. But that depends on quantum, not number – and the value of corrections would be more or less random. Anyway, even if the policy did plainly tend to result in over collection it would be justifiable on the grounds that it was an incentive to accuracy.

82. On the subject of the LSF, the Trustee says that the Board could have taken correct data into account for both the LSF and the levy calculation for the 2009/10 levy. It suggests the Board did not because it did not recognise that the allocation was in fact incorrect at all. But I do not think that the Committee's decision not to exercise discretion for 2009/10 was reached incorrectly as a result. I have no reason to think that it actually considered whether the LSF should have been calculated on correct data. I do not see why it should have done. The LSF was due to be calculated on information as at 31 March 2008. The LSF was set only a month after the Trustee had asked for a review. The review was not complete until January 2009. It would be unreasonable to think that the LSF should have been amended based on a correction that had not yet been considered. It would not be reasonable to expect that the review would have been complete within such a short time.

83. I have already found that the 2008/09 levy decision must be remitted to the Board.

84. Finally, the Trustee has requested a direction that the Board should compensate it for trouble and expense. The request came at the eleventh hour, when the Trustee knew what my conclusions were likely to be and no sums were particularised. For much of the process the Trustee has been unrepresented and so the bulk of costs at that time would have been internal.

85. I have considered the request. It would be unusual for me to make a general award for "trouble" where the party is a body (in this case incorporated) rather than an individual acting in a personal capacity. As to an award for costs, the Trustee has lost on all of its main arguments. In the circumstances I do not think an award for costs is justified – the effect being that both sides will bear their own costs.

Determination and Directions

86. For the reasons given above I find as follows:

- the Committee's decision of 29 June 2009 relating to the 2008/09 levy was not reached correctly;
- the Committee's decision of 7 June 2010 relating to the 2009/10 levy was reached correctly.

87. Accordingly I determine that the Board is to reconsider the calculation of the 2008/09 levy based on the information and submissions that were available at the time of the Committee's decision of 29 June 2009, but on the basis that the information as at 31 March 2008 was incorrect.

88. I remit the matter to the Board with directions:

- to revoke and replace the that decision with a new decision following the reconsideration as above;
- to give clear reasons for the decision, which shall itself be issued in a manner consistent with the requirements for a decision by the Committee.

TONY KING
Pension Protection Fund Ombudsman

30 March 2011