

PPF LEVY DETERMINATIONS: THE LIMITS OF DISCRETION

PENSIONS

BACKGROUND

As is well known, the PPF levy consists of a “scheme based” levy (calculated by reference to the number of members) and a “risk based” levy (based on, amongst other factors, the likelihood of the sponsoring employer becoming insolvent).

The method for the calculation of the risk based levy has two distinct steps:

- ◆ **Step 1** - The PPF sets the criteria for calculation for each year. This is subject to a consultation (if there are changes from the previous year) and then a levy determination is published.
- ◆ **Step 2** - The actual levy for each scheme is calculated in accordance with the levy determination.

The levy determination provides that the employer's solvency-assessment for the purposes of Step 2 is quantified by using a failure score calculated by a third party commercial credit agency, currently Dun & Bradstreet (D&B).

The relevant employer in relation to the West of England Insurance Services Limited Retirement Benefits Scheme was based in Luxembourg, and so D&B's Luxembourg arm was charged with making the relevant assessment. It was usually the case that D&B would access the relevant company's latest filed accounts but the practice in Luxembourg differed. There, any new accounting information needed to be supplied direct to D&B.

Apparently unaware of this requirement, no new account information was provided to D&B in respect of the Scheme, and the calculation was carried out on the basis of a set of old accounts. The resulting failure score was provided to the PPF, who used it to calculate the risk based levy for the 2010/11 year.

THE PPF OMBUDSMAN DETERMINATION

The Trustees had been successful in challenging the fairness of the calculation before the PPF Ombudsman. The PPF appealed to the High Court.

OUTCOME OF THE APPEAL

The Trustees' essential argument was that as a public body, the PPF was required to operate “fairly”, and this intrinsic requirement would justify the use of the PPF's statutory discretion to amend the levy in this instance by calculating it on the basis of the latest company accounts.

The High Court did not agree¹. The judge found the key to be the distinction between Steps 1 and 2 above. While the PPF had discretion in setting the levy determination in Step 1, once set it had to be followed in Step 2.

The overall fairness of the Step 1 determination for 2010-11 could not be an issue in the current proceedings. Step 2 required the PPF to use a failure score determined by way of D&B's “usual course of business”. The court held that such a phrase was to be interpreted literally, and the process followed by D&B Luxembourg was consistent with its usual business practices. The PPF's power to correct an “inaccuracy” was held as referring to an inaccuracy in recording the failure score (for example recording a score 3 rather than 0.3) once it had been reported to the PPF. Any other finding would require an impractical inquiry into the methods used for the calculation of each failure score.

The appeal against the PPF Ombudsman's determination was therefore successful, and the Scheme was ordered to pay the full levy for the 2010/11 year.

PRACTICE POINT

The ruling highlights the difficulties in challenging a levy determination once it has been made. On the face of it, it was very tough on the Scheme to be penalised (as the Scheme would no doubt see it) for not being aware that it should have been supplying up-to-date accounts to D&B if it had wanted to have seen a levy which reflected an improved employer failure score. This would not be the first time that pensions parties would have lost out through being unaware of some technical aspect of the legislation, and no doubt there would have been no challenge had the result of using out-of-date information been that the levy was lower than might otherwise have been the case.

¹ *re West of England Ship Owners Insurance Services Limited Retirement Benefits Scheme* [2014] EWHC 20 (Ch)

The key issue is to ensure that there is a proper understanding of the levy determination process. The additional administrative burden involved in understanding how the scoring system works can result in material levy reductions. To make matters even more complicated, however, D&B are currently set to announce a revised basis for assigning 2014-15 failure scores. It remains to be seen whether it will "business as usual" in their Luxembourg office.

CONTACT DETAILS

If you would like further information or specific advice please contact:

CAMILLA BARRY

DD: +44 (0)20 7849 2238
camilla.barry@macfarlanes.com

JAMIE ROBSON

DD: +44 (0)20 7849 2592
jamie.robson@macfarlanes.com

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MACFARLANES LLP

20 CURSITOR STREET LONDON EC4A 1LT

T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com

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