

PO-14963

## Ombudsman's Determination

|                   |  |
|-------------------|--|
| <b>Applicant</b>  | Oasis Community Learning ( <b>Oasis</b> )                  |
| <b>Scheme</b>     | London Borough of Croydon Pension Fund ( <b>the Fund</b> ) |
| <b>Respondent</b> | London Borough of Croydon ( <b>Croydon</b> )               |

### Complaint summary

1. Oasis has complained that when setting deficit contribution rates payable to the Fund by Oasis' academy schools, Croydon has acted unfairly and breached its public law and fiduciary duties, and its actions have constituted maladministration.

### Summary of the Ombudsman's preliminary decision and reasons

2. The complaint against Croydon is not upheld, because the contribution rates were a matter for Croydon to decide, having taken actuarial advice, and the methodology applied by Croydon for Oasis' academies is one which a reasonable administering authority could have decided.

## Detailed Determination

### Material facts

3. The Fund forms part of the Local Government Pension Scheme (**LGPS**), which is a defined benefit arrangement. Under the Local Government Pension Scheme Regulations 2013/2356 (**2013 Regulations**), and the Local Government Pension Scheme (Administration) Regulations 2008/239 (**2008 Regulations**) which preceded them, Croydon is the “administering authority” of the Fund. Croydon has delegated its administration of the Fund to a pensions committee (**the Pensions Committee**).
4. Oasis is a company limited by guarantee. It is a “multi-academy trust” (**MAT**). This means that it is the operator of schools which have been converted from council-maintained schools into academies. Academies are independent, state-funded schools, which receive their funding directly from central government, rather than through a local authority. The academies whose staff participate in the Fund and are the focus of the complaint are as follows (**the Academies**):
  - Oasis Academy Coulsdon (converted on 1 September 2008)
  - Oasis Academy Shirley Park (converted on 1 September 2009)
  - Oasis Academy Byron (converted on 1 September 2012)
  - Oasis Academy Ryelands (converted on 1 April 2014)
  - Oasis Academy Arena (converted on 1 September 2015).
5. At a meeting on 29 November 2011 (**the November 2011 Meeting**) the Pensions Committee agreed the funding approach that would apply to future new academies that joined the Fund, having considered a paper “Funding approach for Academies” dated 16 September 2011 (**the September 2011 Paper**), provided by Hymans Robertson, Croydon’s appointed actuary.
6. The September 2011 Paper confirmed the position at that time that the Department of Education guaranteed funding for academies for a period of seven years, although it was not clear what happened thereafter. Hymans Robertson went on to say that if further funding is not guaranteed, administering authorities may need to consider the strength of the covenant of the academies and furthering financing constraints when setting the length of time over which any deficit should be recovered.
7. In December 2011, the Department for Education (**DfE**) and the Department for Communities and Local Government (**DCLG**) issued a joint guidance note (**the Guidance Note**) regarding their recommended approach for pooling academies with relevant local authorities. The note said:

“Where an Academy pools with the local authority it is intended that this should result in the Academy Trust having the same employer contribution rate as the local authority would have in respect of its maintained schools...The clear aim is that there is a consistency of approach across LGPS administering authorities so that an Academy in one part of the country is not treated in a different manner to one in another and no Academy pays

unjustifiably high employer pension contributions to the LGPS compared to maintained schools in the local area.”

At point 12 of the document attached to the Guidance Note headed “Academy arrangements and the Local Government Pension Scheme – pooling of Academy arrangements with local authorities” the following is stated:

“To help practitioners in both educational establishments and LGPS administering authorities, supporting guidance is being developed and will be issued shortly covering Academy arrangements and the LGPS both for existing Academies and those schools considering conversion to Academy status.”

8. Following the publication of the Guidance Note, the Pensions Committee met on 21 February 2012. The Pensions Committee considered a paper by Nigel Cook, Head of Treasury and Pensions for Croydon and a paper by Hymans Robertson setting out its opinion on the funding approach to be taken in light of the Guidance Note. The Pensions Committee followed the recommendation that it should take no action to change its approach until the detailed guidance promised by the DfE and the DCLG became available.
9. On 2 July 2013, the DfE issued a parliamentary minute (**the Guarantee**) that the DfE would guarantee LGPS pension liabilities if an academy closed and the pension assets of its sponsor were insufficient to meet any outstanding pension deficit in the LGPS. The Guarantee stated:

“Providing such assurance will give Administering Authorities the confidence they need to treat academies equitably and ensure that there is no significant divergence in employer contribution rates upon academy conversion.”

However, the Guarantee also goes on to say that:

“The Department and HM Treasury will reserve the right to withdraw the guarantee at any time following a reasonable notice period.”

10. On 3 September 2013, the Pensions Committee met to decide whether the Guarantee would lead it to change its approach and actuarial assumptions when setting contribution rates. As part of that process, the Pensions Committee considered a report by Nigel Cook, that it would be appropriate to maintain the existing deficit recovery period of 15 years for academies. This was deemed to be a compromise between the 7-year length of the Guarantee for academies and the deficit recovery period of 22 years for maintained schools.
11. In March 2014 Hymans Robertson published its actuarial valuation report on the Fund as at 31 March 2013. This showed that the past service deficit had risen from £301m in 2010 to £359m. Croydon considered the valuation report and agreed with Hymans Robertson’s recommendations for the employer contribution rates to be payable from 1 April 2014 to 31 March 2017. As usual, these consisted of standard contributions

## PO-14963

(the future service rate) and, as the Fund was in deficit, additional contributions (the past service adjustment). A single discount rate for all employers was used for ongoing funding purposes.

12. In accordance with Regulation 36 of the 2008 Regulations, the valuation report included:
  - 12.1 the common rate of employer's contribution, being the amount which, in the actuary's opinion, should be paid to the fund by all employers, expressed as a percentage of the pay of their employees who are active members, and
  - 12.2 individual adjustments, being any percentage or amount by which, in the actuary's opinion, contributions at the common rate should, in the case of a particular organisation, be increased or reduced by reason of any circumstances peculiar to that body.
13. The average future service rate for Fund employers was raised to 18.5%. The past service adjustment for the Academies generated the following minimum total contribution rates for 2014-2017:
  - Oasis Academy Coulsdon: 20.8% plus a lump sum of £64,000 increasing to £68,000
  - Oasis Academy Shirley Park: 18.1% plus a lump sum of £123,000 increasing to £132,000
  - Oasis Academy Byron: 18.6% plus a lump sum of £15,000 increasing to £16,000
  - Oasis Academy Ryelands: 16.3% plus a lump sum of £34,000 increasing to £36,000.
14. In calculating the deficit contributions due, a deficit recovery period of 15 years was set for the Academies.
15. When a school converted from a maintained school to an academy, an amount of the Fund's past service deficit was allocated to the new academy (the "initial asset allocation"). The initial asset allocation methodology adopted by Croydon (taken on the basis of actuarial advice at the November 2011 Meeting) was to allow for the liabilities for deferred and pension members that do not transfer on conversion, but remain as Croydon employees, to be fully funded.
16. Croydon also allocated each academy a discount rate as at the date of conversion. This discount rate was specific to the academy and not the discount rate used in the most recent actuarial valuation.
17. The approach in paragraphs 15 and 16 was applied to the Byron, Ryelands and Arena academies, which converted in 2012-2015.
18. In 2015 Croydon asked Oasis to pay the Academies' contributions (including deficit contributions) as calculated for the 2015/2016 year. When Oasis did not respond

Croydon sent it several reminders. Croydon's email of 16 June 2015 said that the following amounts were still owing:

- Oasis Academy Shirley Park: £123,000;
- Oasis Academy Byron: £15,000;
- Oasis Academy Ryelands: £34,000.

19. Oasis then started paying deficit contributions at a lower rate, calculated by its own actuary by reference to a deficit recovery period of 22 years. On 19 June 2015 Croydon notified Oasis that Oasis Academy Byron owed £4,100, Oasis Academy Ryelands owed £9,200 and Oasis Academy Shirley Park owed £33,200.

20. When Croydon complained that these sums had not been paid, Oasis replied on 15 July 2015:

"I note your position that funds remain outstanding but that is on the basis of accelerated funding which does not, as was intended by Parliament, give us parity with maintained schools who are scheme employers under the Croydon fund... by insisting on the accelerated funding approach, you are effectively selecting against our academies by seeking to raise more money quickly which would improve the overall funding of the Fund to our detriment...we are not seeking to avoid our funding liabilities under the Scheme but simply trying to ensure that the academies are treated fairly as was intended by Parliament in 2013. As you are aware, we have taken actuarial advice on what the appropriate level of funding would be were we to be treated in the same manner as maintained schools in the Fund and we have, to date, remitted amounts that our actuary has calculated reflect that funding position...I have to ask you to look again at giving the academies parity at this time with maintained schools."

21. Croydon replied on 17 July 2015 that the actuary instructed by Oasis had no power over the contribution rates set by the Fund, and as there was now a consultation period regarding the 2016 triennial actuarial valuation it would not be appropriate to discuss a funding approach that was about to change.

22. In letters dated 3 February 2016, Croydon told the Academies how much they still owed for 2015/2016, and how much they were due to pay in 2016/2017.

23. Further correspondence between Oasis, its Academies and Croydon did not resolve the matter.

24. On 20 June 2016 Oasis' lawyers sent Croydon a formal letter of claim. This alleged that Croydon was in breach of its public law and fiduciary duties to the Academies as employing authorities. It complained that the Academies' deficit recovery period of 15 years compared unfavourably with the deficit recovery period of 22 years for Croydon's maintained schools, the lower discount rates which increased the Academies' contribution liabilities were unjustified, and the asset allocation methodology adopted by Croydon was unfair. Oasis' actuary estimated that the

**PO-14963**

differential recovery period and discount rates had led to Oasis suffering a detriment of about £470,000, and the Academies suffering a combined detriment significantly higher.

25. In a letter dated 6 July 2016, Croydon's lawyers said that any claim by Oasis for a judicial review was substantially out of time, and there had been no breach of Croydon's fiduciary duties.
26. In a letter dated 21 July 2016, Oasis' lawyers replied that a judicial review might not be out of time for other schools and academy sponsors, and a defence to claims of breaches of fiduciary duties had not been raised.
27. On 22 July 2016 Croydon's lawyers wrote to Oasis to seek payment of £283,648 plus interest in respect of the Academies' overdue deficit contributions.
28. In a letter dated 27 July 2016, Croydon's lawyers pointed out to Oasis that as Oasis was the proprietor of the Academies it was ultimately legally responsible as scheme employer for the payment of contributions to the Fund in respect of the Academies. The letter said:

“The approach taken by the Administering Authority, acting on the advice of its actuary, in respect of the Oasis Academies has been to calculate the contribution rate and deficit lump sum in respect of each individual school at the time of conversion.

.....An individual contribution rate is then calculated for the school. ....An alternative approach that the Administering Authority could apply going forward, in respect of the Oasis Academies, would be to combine the individual schools and apply a common contribution rate to all of the schools within OCL MAT [Oasis Community Learning Multi-Academy Trust]. Nigel Cook would be happy to discuss this approach with you in further detail.”
29. On 6 October 2016, after further correspondence, Croydon's lawyers told Oasis' lawyers that Croydon had instructed them to issue court proceedings for payment of the outstanding contributions (currently £296,258 with interest accruing daily).
30. Oasis' lawyers replied the next day that they disagreed with Croydon's analysis of the position, and that Croydon's approach was prejudicing multi-academy trusts. They said that Oasis would bring a complaint to this Office, alleging that Croydon's maladministration had caused Oasis financial loss.
31. Oasis first contacted this office in November 2016.
32. Croydon issued legal proceedings against Oasis on 16 December 2016, claiming payment of £281,525 plus interest and costs, but proceedings were stayed by court order on 16 January 2017 “pending the parties being notified of the outcome of the Determination of the Defendant's complaint by the Pensions Ombudsman.”

**Summary of Oasis' position**

33. Croydon had breached its public law and fiduciary duties when setting contribution rates for the Academies, and its conduct had also amounted to maladministration.
34. Leading Counsel had opined that Oasis was recognised as the LGPS employer; an Academy was a school, but it did not have legal personality and was not a LGPS employer. Therefore, it was wrong for Croydon to treat each Academy as a standalone legal entity. That meant there should be no special discount rate imposed on a school converting to an Academy. The Academies should be treated equitably with other schools, which are not subject to a separate covenant assessment when they receive new employees; the covenant assessment should be applied to Oasis itself as the LGPS employer.
35. Croydon had rubber-stamped the views of the LGPS actuary when it decided how to adopt funding principles for academies and had not given enough thought to government guidance or the Guarantee, from which it is clear that Government intent was for administering authorities to treat academies equitably with maintained schools. As a public body, Croydon had wider considerations than the LGPS actuary; Croydon also needed to satisfy the reasonableness tests set out in the cases of Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1 and IBM United Kingdom Holdings Ltd and others v Dalgleish and others [2017] EWCA Civ 1212.
36. Croydon had acted unreasonably by failing to take into consideration comparator administering authorities in the LGPS which had granted their academies parity with their maintained schools.
37. The initial asset allocation methodology used on conversion for Oasis Academy Ryelands and Oasis Academy Arena benefitted Croydon as it allocated most of the deficit to active members and fully funded Croydon's deferred and pensioner members, who did not transfer employment on conversion. That was unfair, perverse, and irrational. It was also an inappropriate use of public funds.
38. Instructing Croydon's actuary to set different discount rates on conversion to an Academy, 5% compared with 5.6% for maintained schools and imposing a deficit recovery period of 15 years, compared with 22 years for maintained schools, was incorrect and amounted to maladministration by Croydon.
39. The then Deputy Pensions Ombudsman's Determination in respect of Thomas Ferens Academy PO-2665 on 28 April 2015 was not a binding precedent and was not relevant here because in that case the Deputy Pensions Ombudsman imposed a time limit on the policy adopted by the relevant council, and that preceded the Guarantee.
40. There is no uncertainty over whether or not the DfE would step in under the Guarantee in the event of a failure of an individual school in a MAT. There was no evidence that the Academies were financially weaker than Croydon's maintained

schools. Exit contributions would not be payable on the cessation of participation of an Academy unless it was Oasis' only Academy left.

41. The claims were not time-barred.

### **Summary of Croydon's position**

42. The Pensions Ombudsman does not have jurisdiction to consider the complaint, because a Determination that has a negative effect on other Fund employers who are not parties to the complaint would infringe the principles set out in Edge and others v Pensions Ombudsman and another [1999] 4 All E.R. 546, and also in Pensions Ombudsman v EMC Europe Ltd [2012] EWVC 3508 (Ch).
43. Oasis' complaint involves questions in respect of breach of public law and breach of fiduciary duty on the part of Croydon. The appropriate way for these to be addressed would be for Oasis to make an application to court for a judicial review.
44. The minutes of the meetings that Croydon held between 2011 and 2013 showed that the Pensions Committee had acted rationally and taken account of all relevant factors.
45. Croydon had considered the Guarantee, and the report commissioned on it, before deciding the extent to which the Guarantee should be taken into account when setting the contribution rates. In this respect Croydon had acted reasonably.
46. There was no statutory requirement for Croydon to take account of the funding decisions made by other LGPS funds. The methodology applied by Croydon to determine the contribution rates was one which a reasonable administering authority could have used.
47. The Guidance Note contained broad principles and was "high level"; it did not clarify the specific approach to asset allocation and contribution rate setting for academies. As a consequence, LGPS funds had adopted a wide range of funding approaches.
48. The conversion date of each school determined the discount rate used to calculate its initial assets and liabilities; a single discount rate was applied at triennial valuations, for example 5.0% as at 31 March 2013.
49. The limits and conditions on the Guarantee meant that the degree of security provided by it in respect of academies was less than for the most secure employers.
50. Croydon had no obligation to treat all employers the same, and its decision was not unreasonable or perverse.
51. Under the relevant statutory regulations, the power to set contribution rates and adjustments was vested in the administering authority and Fund actuary, and both were given a wide measure of discretion.



**Ombudsman's Decision**

52. Both Oasis and Croydon have submitted in depth documentation and detailed technical analysis regarding contribution rates and how the Fund has been administered. I consider that there are three specific areas of disagreement between the parties as follows:
- (A) Croydon's treatment of each of the individual academies as separate employers;
  - (B) the way in which academies are treated by Croydon when they are converted from authority funded schools, including the initial asset allocation and the use of a special discount rates; and
  - (C) the relevance of the Guarantee and the setting of a 15 year deficit recovery period for academies, when compared to other employers.
53. However, before considering these specific points I need to address the more general concerns that have been raised in respect of this complaint. Any other points raised with me have been considered, but as they do not impact on my decision they will not be directly commented on.

My jurisdiction

54. I have considered whether I have the jurisdiction to determine this complaint, taking into account Croydon's argument that my Determination may negatively affect other Fund employers who are not party to the complaint.
55. This Determination relates to the complaint by Oasis against Croydon and my directions are final and binding only on those parties, subject to any appeal to the High Court. If my directions result in a change to the way that Croydon administers the Fund in respect of Oasis, that may cause Croydon to decide to change the way it administers the Fund in respect of other academies, or for all employers. However, those are decisions for Croydon. I consider that any directions would not directly affect any other parties and that I do have jurisdiction to determine this complaint.

Time for bringing the complaint

56. Oasis raised this complaint on 3 November 2016.
57. I consider that most, if not all, of the decisions made in respect of how Croydon would approach its actuarial valuation reports were made in November 2011 and that this methodology was furthered considered in September 2013, following the publication of the Guarantee. The actuarial assumptions made for the purpose of the 2013 actuarial valuation were also agreed by Croydon before 31 March 2013.
58. I understand that Oasis's complaint covers:
- 58.1 the methodology applied in respect of employer contributions from 1 April 2014; and

58.2 in respect of Ryelands and Arena, the discount rates set at the date of their conversion, both after November 2013.

59. Both of these elements of the complaint were brought within three years of the acts in question and are therefore within time for me to investigate.

### Judicial Review

60. I acknowledge Croydon's position that an appropriate route of claim might have been an application for judicial review.

61. However, I do not have to determine whether this complaint would have been accepted for a judicial review. I consider that my jurisdiction allows me to determine the complaint, regardless of whether an alternative route could have been chosen.

### Public Law and Fiduciary Duties

62. In their respective documentation both Oasis and Croydon have covered the question of Croydon's duties under both public law and fiduciary duties. As a statutory public service scheme, the LGPS has a different legal status compared with trust-based schemes in the private sector, although those entrusted to make statutory decisions under the LGPS are, in many ways, required to act in the same way as trustees in terms of their duty of care. However, they are subject to a different legal framework, which derives from public law and they also have a fiduciary duty to the Fund employers, the members of the LGPS and local taxpayers.

63. The 2013 Regulations require that every three years Croydon must obtain:

63.1 an actuarial valuation,

63.2 an actuarial report in respect of the valuation, and

63.3 a rates and adjustments certificate prepared by an actuary, confirming the level of general employer contributions in respect of future accrual and any individual adjustments that are required in the opinion of the actuary<sup>1</sup>.

Considering that these requirements are statutory requirements, it is reasonable that Croydon works closely with Hymans Robertson, the Fund actuary.

64. In particular, I note that the 2013 Regulations require that both the primary rate and secondary rates of employer's contribution are based on the actuary's opinion, with the emphasis placed on the necessity to secure the solvency of the fund.<sup>2</sup>

---

<sup>1</sup> Reg 62 (1) of the 2013 Regulations.

<sup>2</sup> Reg 62(5) and 62(7) of the 2013 Regulations

65. In respect of its fiduciary duties, my understanding is that Croydon's corporate policy is one of operating on a sound financial basis, such that it is reasonable to assume that this includes minimising any funding risk. This policy was touched on in the Pension Committee meeting on 3 September 2013, when the DfE/DCLG objective of achieving consistency of approach was discussed; the committee recognised the need to treat non-academy employers fairly in the event of being exposed to additional liabilities in respect of failing academies.

#### (A) Employer Status

66. It is acknowledged by both parties that the proprietor of an academy school is the "Scheme employer" for the purposes of the 2008 and 2013 Regulations. I agree with this and confirm that for those purposes Oasis is a Scheme employer, and the Academies are not. Both parties agree that Oasis is liable for the contributions in respect of all its academies. The point at issue is how that liability is calculated. The way in which Croydon has calculated the contributions payable by Oasis has been to make calculations for each of the academies.

67. The 2008 and 2013 Regulations are silent on many aspects of funding, in particular how an administering authority must set its funding strategy and the extent to which the circumstances of Scheme employers should be taken into account. The Regulations are not prescriptive other than to say in Regulations 58(1) of the 2013 Regulations that Croydon must "*after consultation with such persons as it considers appropriate, prepare, maintain and publish a written statement setting out its funding strategy*".

#### Treatment at valuations

68. In the 2013 Actuarial Valuation Report the individual Oasis schools are listed under the heading "Employer name", though the schools are identified as being part of Oasis.

69. At a valuation, irrespective of whether a consolidated Oasis contribution rate or individual contribution rates are calculated, the overall position in relation to Oasis's funding liability is the same as if the entries were aggregated. I consider that this approach is reasonable and one that I understand is common among other administering authorities.

70. A joint paper issued on behalf of the DCLG, the DfE, and the Local Government Association, in April 2017– "Local Government Pension Scheme (LGPS) – arrangements for academies<sup>3</sup> (the **Joint Paper**) comments as follows:

"Where a multi-academy trust (MAT) is in place, it is legally the scheme employer for staff in all the academies in its trust. However, it is acceptable practice for LGPS funds to treat each academy in a MAT as a separate employer, because each

---

<sup>3</sup> <http://lgpslibrary.org/assets/othergov/201704Academies.pdf>

academy has its own staffing profile. Employer contribution rates can therefore differ between academies within the same MAT”.

71. The paper goes on to comment that a MAT may ask an authority to treat it as a single employer, however, where a MAT is treated as a single employer it may incur extra costs to carry out the necessary calculations to share out those asset and liabilities each time a school enters or leaves the MAT.
72. A further paper prepared by PwC for the Local Government Pension Scheme Advisory Board was issued in May 2017. This paper records that the academies and MATs interviewed considered there to be a lack of transparency over which funding method is applied by a particular LGPS Fund. It also comments that *“In practice Funds and actuaries have not been bound by standardised guidance on funding in relation to academies: a range of funding approaches have been and are currently adopted across funds”*.
73. In the September 2011 Paper, which was Appendix C to the internal report to the Pension Committee dated November 2011, Hymans Robertson referred to a Chartered Institute of Public Finance and Accountancy survey and set out how several authorities calculated contribution rates and set deficit recovery periods. It is clear from this report that the approach taken by authorities varied widely across the LGPS.
74. There are advantages and disadvantages to a MAT having its funding obligations calculated on a whole-employer basis or as the total of its academies’ individually calculated amounts. Ideally Croydon and Oasis would have agreed in advance how Oasis’ funding obligations would be calculated and discussed the arrangements for whatever was agreed. However, this did not happen and under the 2008 and 2013 Regulations Croydon is required to prepare and publish a funding strategy statement which sets out the method for calculating employer contributions, so must determine which methodology will apply. I consider that Croydon’s decision to use individual academy assessments to calculate Oasis’ liability to the Fund was permitted and reasonable.

#### Treatment on conversion

75. Oasis has argued that on conversion of a school to an academy, there is no new employer being admitted to the Fund, so it should not be given its own discount rate. The Academies should be treated equitably with other schools, which are not subject to a separate covenant assessment when they receive new employees; the covenant assessment should be applied to Oasis itself as the LGPS employer.
76. The approach taken by Croydon to scheme funding from 1st April 2014, is set out in the Funding Strategy Statement, as required by the LGPS Regulations, and prepared by Hymans Robertson. This statement clearly sets out how employer contribution rates are calculated and in Appendix D it refers to employers such as Oasis that admit new entrants.

77. As noted in paragraph 74 above, ideally Croydon and Oasis would have agreed in advance how schools converting to Oasis academies would be treated. However, I consider that Croydon's decision to use individual academy assessments to calculate Oasis' liability to the Fund, including an individual assessment of an academy on conversion, was permitted and reasonable.

**(B) Treatment of academies on conversion – asset allocation and discount rate**

78. As set out in Regulation 67 of the 2013 Regulations, the employer contributions to the Fund are determined by a rates and adjustment certificate with the employer's primary rate of contribution determined by the Fund actuary, who has to take into consideration, among other things, the administering authority's Funding Strategy Statement. Croydon's Funding Strategy Statement, dated April 2014, sets out its approach to new academy employers at note (e) on page 11. This strategy reflects earlier decisions, though it does note that the Fund's policies are "subject to change in the light of any amendments to DCLG guidance."

Asset allocation

79. Hymans Robertson gave advice to the Pensions Committee concerning the funding approach for academies in the September 2011 Paper. This paper noted that at that time "there has been no clear guidance on the approach to allocating LGPS assets and liabilities for Academies" and set out two alternative approaches for determining the share of deficit an academy would be allocated on conversion.

80. These approaches were set out in the internal report to the Pension Committee dated 29 November 2011 as follows (the **November 2011 Report**):

78.1 Actives only: To award the academy the same funding level as Croydon. This would mean that the academy's deficit would be recoverable over a proportionately larger payroll (since the academy will only have active members) and in the absence of other factors, the academy would have a lower contribution rate than Croydon who, by virtue of its deficit being spread across a smaller payroll (because of the loss of active members to the academy) and with the need to fund all deferred and pensioner members, would end up with a higher contribution rate.

78.2 Including deferreds and pensioners: To allocate assets to the academy which allow for a proportionate share of the deferred and pensioner members remaining with Croydon to be fully funded. In its report dated 16 September 2011, Hymans Robertson comment in respect of this second approach that "Whilst the Academy will see a significantly decreased funding level, and larger deficit, for the reasons explained previously, it does not necessarily follow that the Academy's contribution rate will be higher than that of the Council."

81. At its meeting on the 21 February 2012, the Pensions Committee confirmed its approach to allocating Fund assets and liabilities for academies on conversion. It was

agreed that the share of the deficit should be calculated including deferred members and pensioners as well as actives, after consideration of the November 2011 Report. Nigel Cook noted that this approach could be argued to be “fairer” on the grounds that it provided more protection for the Council. The November 2011 Report also recorded the fact that the actuary had surveyed other administering authorities and had concluded that there is no “normal” method for calculating contribution rates, with both types of “share of deficit” method having been elected by a number of funds.

82. Oasis object to this approach and argues that as an existing participating employer only the active members should be transferred to it on the date of a new conversion and that it should be awarded the same funding level as Croydon: the actives-only option 1 above.
83. I refer again to my conclusion at paragraph 77 above, that it was permitted and reasonable for Croydon to use individual academy assessments to calculate Oasis’ liability to the Fund. Regulation 62(7) of the 2013 Regulations states that *“The secondary rate of an employer’s contributions is any percentage or amount by which in the actuary’s opinion, contributions at the primary rate should, in the case of Scheme employer, be increased or reduced by reason of any circumstances peculiar to that employer.”* I consider that the conversion of a school to an academy run by an existing scheme employer can be treated as a “circumstance particular to that employer”, and accordingly that the employer’s contributions can be increased or decreased as the actuary considers appropriate.
84. On balance, I consider that in the absence of a clearer legislative framework the approach taken by Croydon in respect of the asset and liability allocation on each school conversion is reasonable and within an acceptable range of decisions that could be taken, considering the professional advice that it received and the evidence on how other administrative authorities have responded to the development of academy schools.

#### Discount Rates

85. Oasis contends that its individual academies have had differential discount rates applied to them at the date of their individual conversion and that these rates are then not corrected during the Fund’s actuarial process. Oasis considers that the school contributions to the Fund immediately post conversion is different to the level of contribution made by non-academy schools prior to the conversion.
86. Legislation requires that Croydon obtains an actuarial valuation report for the Fund and the 2013 actuarial valuation report records the rate of the employer contribution for each employer and an individual adjustment, as set out under Regulation 36(4) of the 2008 Regulations. The level of individual adjustment is permitted according to the actuary’s opinion, “by reason of any circumstances particular to that employer” (Regulation 36(7)).

## **PO-14963**

87. The discount rate is one of several assumptions agreed by Croydon as part of the valuation, having obtained advice from the Fund actuary. As such, the discount rates change over time and are date specific in respect of the valuation reports. A single discount rate was applied for all the employers in the 2010 valuation of 6%, the 2013 valuation 5%, and the 2016 valuation 4.4%.
88. Where a conversion takes place between valuations, an assessment of the schools' assets and the future funding requirements of the Fund at the date of conversion is required at the relevant time to calculate the contributions due until the next valuation, based on the circumstances at the time, which may be different from those at the date of the last valuation.
89. Oasis considers that Croydon should have taken into consideration Oasis's entire financial position on the date of the conversion of an individual school. If Croydon had taken this approach, it would have needed to recalculate the position for Oasis as a whole, taking into account the newly converted academy.
90. On the basis that Croydon were using individual academy assessments to calculate Oasis' liability to the Fund, I consider it was reasonable for Croydon to calculate an individual discount rate for a school converting to an Oasis academy between valuations.

### **(C) Taking into account the Guarantee and the 15-year Recovery Period**

#### Strength of the Guarantee

91. Oasis relies on the Guidance Note and the Guarantee that seek to provide assurances to administering authorities that in the event of the closure of an academy trust any outstanding liabilities will not revert to the Fund.
92. However, the Guarantee does not provide an absolute guarantee, with paragraph 8 of the Guarantee confirming that:

“The Department and HM Treasury will reserve the right to withdraw the guarantee at any time following a reasonable notice period.”

This paragraph goes on to say:

“HM Treasury also reserves the option to re-assess the approval of the guarantee at a later date, as appropriate, due to spending considerations or policy developments.”

The report to the Pension Committee, dated September 2013, refers to the Guarantee and the DfE/DCLG's wish to achieve a consistency of approach towards academies and confirms that the Pension Committee discussed the practical and conceptual issues of academy funding at its meeting on 21 February 2012. Specifically, the internal 2013 report refers to the expectation of a further consultation in respect of academy funding and that the “timing of the announcement means that

this can all be factored into contribution strategy decisions later this year as part of the 2013 valuation exercise which will determine contribution rates from April 2014”.

93. At the September 2013 meeting the Pensions Committee was asked to consider to what extent the provision of the Guarantee would lead them to change the approach and assumptions used when setting the contribution rates for academies, including for example the deficit recovery periods. The report goes on to say:

“The proposed guarantee, in its current form, does not offer the same degree of security that Administering Authorities assume for employers with the strongest covenant.”

The report’s recommendation to the Pensions Committee was to continue with the current arrangements: (i) to maintain the previous calculation methodology for contribution rates; and (ii) to adopt a compromise deficit recovery period of 15 years. The minutes of the September 2013 meeting record that the Committee resolved that a recovery period of 15 years was adopted and that the share of deficit should be calculated including deferred, pensioners and active members.

94. The Joint Paper, published in 2017, says that because of the Guarantee, “Academies ... present no greater risk to funds than local authorities and should not be treated as higher risk employers.”

95. In respect of the right to withdraw the guarantee, the Joint Paper says that:

“This is a standard condition for all government guarantees where there is no specific end date; there is absolutely no expectation that the guarantee would be withdrawn. Before any withdrawal of the guarantee the DfE would consult all relevant parties and give reasonable notice to allow funds to undertake new risk assessments.

The guarantee is not time bound. The liabilities set out in the parliamentary minute have been projected over a seven-year period and the DfE will continue to project future academy numbers and assess potential liabilities on a rolling programme.”

96. The Joint Paper was published in 2017 and therefore could not be taken into account in decisions made in 2013. I consider that it was reasonable for Croydon to reach the conclusion, having taken professional advice, that the Guarantee was limited and to take its significance into account accordingly. The existence of the Joint Paper does not mean that Croydon should necessarily reach a different conclusion in future valuations, but they should take it into account and show that they have done so.

#### Scrutiny of advice

97. Oasis is of the opinion that the Pension Committee merely rubber stamped the reports provided to it by Hymans Robertson and did not properly scrutinise the advice it was given.



98. Reading in isolation the respective reports to the Pension Committee, Hymans Robertson's reports and the minutes of the Pension Committee meetings held in November 2011, February 2012, and September 2013, I can appreciate Oasis' position as there is no detailed commentary from those in attendance of the Pension Committee meetings.
99. However, I consider that the relationship between the Pension Committee and Hymans Robertson, as the Fund actuary, is necessarily a close one. The role of the Fund actuary is set out in legislation and the content of the Pension Committee reports and minutes are sufficient to record the decisions made. It is clear in the 2013 Regulation that it is the actuary's opinion that determines the employer contribution rates. I would consider it unusual if Croydon had not taken particular note of the reports provided by Hymans Robertson.
100. I consider that the report to the Pension Committee meeting in September 2013, provides enough reference to discussions at the February 2012 meeting where the "practical" and "conceptual" issues were discussed by the Pensions Committee. The Pension Committee discussed the practical difficulty of administering academies that had already been set up, the question of allocating assets within the Council pool and the accounting treatment about FRS17 requirements for academies. The report also refers to the conceptual issues being problematic and makes it clear that the fairness of the practical implications and the lack of a legislative framework were considered.
101. The respective reports to the Pension Committee show that relevant statutory regulations, how to exercise its discretion in the funding decision and how to apply the actuarial analysis were considered by Croydon, as required. It is also clear that Croydon considered the impact of the Guarantee before deciding on the deficit recovery period for the Academies; with the Pensions Committee specifically asked to consider whether the Guarantee would lead it to change its approach. It decided to maintain a deficit recovery period of 15 years, and I consider that it was entitled to reach that decision.
102. Based on the information and advice available to it, I consider that Croydon made a rational decision when accepting the recommendations made to the Pensions Committee in relation to the Academies by resolving that a recovery period of 15 years should be adopted.
103. In my opinion, Croydon as the administering authority has the power, as set out in the relevant legislation,<sup>4</sup> to determine both the asset allocation and the discount rate for each year between the dates of the triennial valuation reports. In fact Croydon must obtain an annual rates and adjustment certificate from the Fund actuary, who in turn must have regard to the current version of the administering authority's funding strategy statement.

---

<sup>4</sup> The Local Government Pension Scheme (Administration) Regulations 2008 (SI2008/239) and The Local Government Pension Scheme Regulations 2013 (SI2013/2356).

Acting fairly between employers with different covenants

104. Oasis contends that Croydon has not acted fairly as other employers have weaker covenants than it, but their contributions are not proportionate. The strength of employer covenant is an issue for Croydon to determine, having sought advice, and I will only interfere in these circumstances where I consider that a flawed decision has been made.
105. The Pensions Committee took advice from Hymans Robertson on the strength of employer covenants as part of the valuations. One factor in this assessment was the enforceability of the legal agreements in place to support the Fund, including the Guarantee. I have concluded that the weight given to the Guarantee was reasonable at the time and that Croydon received appropriate advice from Hymans Robertson.

Summary

106. I recognise that it was open to Oasis and Croydon to agree to calculate Oasis' liability to the Fund on a whole-employer basis, rather than by using individual academy assessments, and that this would have affected the calculation of contributions payable.
107. In the absence of such an agreement and any prescriptive legislation in respect of the funding strategy, I consider that the methodology applied by Croydon to determine contribution rates is one which a reasonable administering authority could have arrived at; Croydon acted in accordance with actuarial advice; and was acting within its legal powers. I consider that Croydon, the administering authority, has acted reasonably in setting the contribution rates and the deficit recovery period of 15 years for the Academies.
108. I do not uphold Oasis's complaint.

Anthony Arter

Pensions Ombudsman

4 May 2021