

Ombudsman's Determination

Applicant	YMCA Pension Plan Trustee Limited (the Trustee)
Scheme	The YMCA Pension and Assurance Plan (the Plan)
Respondent	Huddersfield YMCA (HYMCA)

Outcome

1. The Trustee's complaint is upheld and to put matters right within 28 days of receiving a current payment schedule, detailing the contribution arrears total and ongoing contributions, HYMCA shall commence payment of the sums set out in the payment schedule.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. The Trustee's complaint against HYMCA, concerns its failure to pay contributions to the Plan, as set out in the payments schedule sent to HYMCA in April 2017.

Background information, including submissions from the parties

4. This is the second complaint that the Trustee has brought to TPO against HYMCA. The first¹, determined on 27 March 2013, by the then Deputy Pensions Ombudsman (DPO) (the **Determination**), considered:-
 - Whether HYMCA is:
 - (i) an employer for the purposes of TPO's jurisdiction.
 - (ii) a participating employer for the purposes of the Plan's Rules; and
 - (iii) a participating employer liable for contributions demanded under the Plan.

¹ TPO reference: 80480/3

- Whether the Trustee's functions include the power to seek contributions from HYMCA and to take steps to recover contributions from HYMCA when due to the Plan.
- HYMCA's status as a Plan employer and resultant liability for contributions under the Rules of the Plan.

5. The Determination noted:-

- Except for "orphan liabilities" within the Plan, there was no obligation/reason why one YMCA should meet the liabilities of another YMCA. It was in any event not possible for one charitable body to indemnify or subsidise another unconnected organisation as this would be in breach of its duty to use its funds for the charitable purpose for which it was established.
- The last actuarial valuation of the Plan at 1 May 2005 revealed a deficit. Initially it was proposed that the deficit would be covered on a "last employer" basis. However, in 2006 the Trustee agreed with the principal employer (**YMCA England**) that the deficit would be allocated between the participating employers.
- Following the non-payment of a requested payment for £20,071 and deficit contributions falling due, on 4 January 2008, the Trustee served a demand on HYMCA for a contribution calculated on the buyout basis of £556,419 (the **Demand**).

6. The DPO found:-

- HYMCA is a participating employer in the Plan.
- The Trustee had power to demand contributions from HYMCA under the Plan's Rules.
- The Trustee had a clear duty to other participating employers and Plan members to recover contributions to fund Plan benefits and the August 2006 letter made participating employers, including HYMCA, aware of the future position on Plan contributions.
- It was maladministration on the part of HYMCA, as a participating employer, of failing to pay contributions due to the Plan.

7. However, the DPO was concerned about the level of contributions requested by the Trustee as the Demand represented the full cost of securing the Plan benefits in respect of HYMCA by means of annuities. This was normally requested in circumstances where a scheme was being wound-up (under section 75 of the

Pensions Act 1995) or a participating employer had ceased to participate. But there was no indication that either circumstance applied here.

8. The DPO upheld the Trustee's complaint and directed (the **Directions**):-

- Within 28 days of the Determination the Trustee to contact HYMCA with a view to agreeing a suitable payment plan/schedule of contributions to the Plan and provide HYMCA with the information required to agree that plan/schedule.
- Within 28 days of being contacted by the Trustee, HYMCA and the Trustee to agree a suitable payment plan/schedule of contributions to the Plan.
- Within 28 days of reaching such agreement, HYMCA to commence payment of the agreed contributions to the Plan.

9. The Plan is a centralised scheme for non-associated employers. Similar types of scheme include the Merchant Navy Officers Pension Fund, the Merchant Navy Ratings Pension Fund and the Pilots National Pension Fund.

10. The Plan is closed to new entrants. From 1 May 2007, all active members became "employed deferred members" retaining a salary link. From 2 May 2011, all 'employed deferred members' became deferred members.

11. The YMCA federation consists of a mixture of individual, incorporated and unincorporated charities and charitable associations. Each YMCA is an autonomous body and they are not subsidiaries of a common parent.

12. The Plan is currently governed by the Fifth Definitive Trust Deed and Rules, dated 7 October 2012. As relevant:-

- Rule 3.3, 'Employers' Contributions' says:

"(a) Each Employer must contribute to the Scheme in each Scheme Year the amount which the Trustees, after consulting the Actuary, consider ought (after taking into account the Members' Compulsory Contributions) to be paid by it in order to provide for the present and the future liabilities of the Scheme.

(b) The Employer and Trustees will comply with Part 3 ['Scheme Funding'] of the Pensions Act 2004 while it applies."

- Rule 13.2, 'Actuarial Investigations', says:

"(a)...The Trustees must instruct the Actuary, as soon as practicable after each valuation date, to investigate the financial condition of the Fund at that date."

- The "Fund" is defined as:

"means the assets from time to time held by the Trustees on the trusts of the Scheme".

13. As at 1 May 2017 the Plan had assets of £138.9m and liabilities of £174.8m.
14. The Trustee is represented by Hogan Lovells International LLP (**HL**). At the time of the Determination HYMCA was represented by Linder Myers Solicitors (**LM**).
15. On 26 April 2013 LM wrote to HL:-
 - It was not and had never been the wish of HYMCA to avoid paying contributions to the Plan.
 - The DPO had recognised there could be no element of cross-subsidy in the amount claimed from HYMCA and the basis for calculation of the liability should not be on a buyout basis.
 - As things stood it was HYMCA's position that it was only liable for contributions for two members – Ms E and Mr D.
 - To comply with the DPO's directions it required:-
 - Actuarial valuations for 1996, 1999 and 2002.
 - Disclosure of the accounting standard(s) over the same period.
 - A breakdown of the figures, assets and liabilities used to calculate the Demand.
 - Confirmation of the underlying assets and liabilities attributed to HYMCA in terms of FRS17.
 - An explanation of the rationale behind the Trustee's use of the exemption for multi-employer schemes where there is no cross-subsidy allowed.
 - Minutes of Trustee meetings covering the period from 1995 to date where reference is made to funding issues and participation of employers.
 - Any report or review carried out by the Plan's actuarial advisers over the same period.
16. Following an exchange of correspondence between the Solicitors, on 17 May 2013 HL informed LM that it intended to adhere to the first bullet point of the DPO's directions and provide HYMCA with a payment plan and supporting information within 28 days of LM's letter. HL said the second bullet point of the directions required that HYMCA consider the information, put forward an alternative (if necessary) and for both parties to agree a payment plan within 28 days, by 21 June 2013.
17. LM replied that it would review the documentation when presented, but it reserved HYMCA's position in respect of the extent of disclosure which was provided and/or

any further issues which might arise from the disclosure made. Therefore, while 21 June was an aspirational date it was dependent on the extent the information provided to enabled it and HYMCA to establish that the calculations were correct.

18. HL wrote to LM on 23 May 2013:-

- HL believed that there was scope for constructive discussion and, on that basis, enclosed a payment plan and supporting technical information.
- HL recognised the need for HYMCA to understand the basis for calculating its liabilities and had carefully considered what information it reasonably required. A pack of actuarial information was therefore enclosed, which explained the calculation of HYMCA's contributions from 2013 onwards.
- HL intended to supply further actuarial information that explained the calculation of the Demand, albeit the Trustee did not propose to seek a schedule of contributions based on the full buyout cost.
- The Plan was an unsegregated defined benefit multi-employer scheme. Liabilities for all pensions were held in a common fund and there were no separate sections for any particular participating body. Consequently, HYMCA was liable for the pensionable service liabilities allocated to it by the Trustee in accordance with the Rules and not restricted to the liabilities of its own employees. This applied equally to all current participating employers.
- The Trustee wished to apportion liabilities fairly between the participating bodies. This had been used to calculate employers' contributions as set out in its August 2006 letter. The DPO had referred to the letter in the Determination and in that context, it was clear that the DPO found it to be an appropriate basis to calculate contributions.
- Nowhere in the Determination did the DPO criticise the status of the Plan as an unsegregated scheme and it was also noted that the Plan had not lost its tax approval.
- While the Trustee was willing to engage with HYMCA to consider the level of contributions it could afford to pay; and over what period, it was unable to reduce the amount of the recovery plan.

19. The actuarial pack detailed:-

- The member data used to calculate HYMCA's deficit payments due from 1 May 2009, for three deferred members (Mr S, Mr R and Mr P) and three pensioner members (Ms E, Mr D and Mr N).

- The basis used to calculate the liability attributable to each employer (agreed by the Trustee and YMCA England following the 2005 valuation). Namely, each member's liability allocated between the employers the member was employed by in the period beginning 1 May 1995. The pro-rated calculation based on:
 - (i) the member's length of service with each employer after 1 May 1995; and
 - (ii) a weighting reflecting actual salary increases compared to a benchmark of 5% per annum.

If the member left prior to 1 May 1995 the member's liability was allocated to their last employer.

- The total liability assigned to HYMCA, as at 1 May 2008, is £414,495.
- The calculation of annual contributions due from HYMCA from 1 May 2009 is £14,603:

<i>HYMCA liability (A)</i>	<i>£414,495</i>
<i>Total Plan liability (B)</i>	<i>£78,300,000</i>
<i>Deficit contribution due from 1 May 2009 (C)</i>	<i>£2,760,000</i>
<i>HYMCA deficit contribution (A)/(B)*C</i>	<i>£14,603</i>

- The calculation of annual contributions due from HYMCA from 1 May 2011 is £16,100.
- The calculation of HYMCA's total contribution arrears (including interest for non-payment) is £106,908.25, as at 25 April 2013
- A draft payment plan, detailing the contributions due from 1 May 2013 to 1 May 2022 and for the contributions arrears repayment over the first three years.

20. LM replied on 3 June 2013:-

On the member data

- Mr P – HYMCA's understanding was that as part of a compromise agreement Mr P contracted out completely from the Plan. Therefore, it did not understand its liability for Mr P as quoted.
- Ms E – HYMCA accepted that it was primarily liable for any pension contributions and shortfall in respect of her employment, but nothing further. It therefore disputed its liability for Ms E as quoted.

- Mr D – HYMCA understood that Mr D moved to Aberdeen YMCA. Consequently, it did not accept its liability for Mr D as quoted.
- For each member it asked the Trustee to confirm: whether they were retired; and if so was the Plan paying a pension and had consideration been given to buying out that pension and if bought out to provide details.
- Mr N – It noted there was no liability and it may be that he had died.
- Mr S – HYMCA had no recollection of Mr S. It asked for further details so that records could be checked.
- Mr R – HYMCA had no recollection of Mr R, but as the liability quoted was so small it saw no point in discussing the matter.

On the provision of requested documentation

- To date only a Statement of Funding Principles, dated March 2012, had been provided. The documents which it had previously requested represented the minimum that was necessary to enable it to carry out a full and proper review of the issues and to enable HYMCA to establish the sums it might owe to the Plan.
- Apart from saying that consideration had been given to what information was reasonably required by HYMCA, HL's letter failed to address why it had not provided the documentation requested.

On the Plan

- It was not an unsegregated scheme as purported. The Plan was a centralised scheme for non-associated employers who held charitable status. As such there could be no cross-subsidy (as noted in the DPO's Determination). This had not been recognised in the calculation of liabilities, which was an exercise of cross subsidisation.
- As things stood there was no basis for meaningful discussions to take place. If indeed the Trustee considered that it had an obligation to collect funds it would ultimately have to consider court proceedings against HYMCA. In that eventuality HYMCA would seek security in respect of the costs incurred and the disclosure of the documentation it had requested. It would refer to the fact that the litigation had arisen as a consequence of the Trustee's decision not supply HYMCA with documentation that it necessarily required to progress matters which was HYMCA's genuine wish.

21. HL wrote to LM on 7 June 2013:-

- It was regrettable that HYMCA had chosen not to engage with the actuarial data, to ignore the conclusions of the DPO set out in the Determination, and to delay or seek to avoid paying the amounts due by disputing the basis of its liability.
- The DPO had determined unequivocally that HYMCA was a participating employer in the Plan and was therefore liable to pay contributions as requested by the Trustee. The Trustee (in consultation with the Plan's Actuary) was seeking to collect HYMCA's unpaid contributions to the Plan over a period that was reasonably affordable, and the payment of contributions under the current recovery plan.
- The Plan's Actuary had confirmed that the information supplied was sufficient for a participating employer to comply with the DPO's directions. The historic documents it had requested (many of which had been requested in June 2012) were not relevant to the DPO's directions.
- The requested actuarial valuations had previously been supplied to LM and the DPO noted that these had been provided to HYMCA.
- The supply of actuarial information supporting the Demand was not included in the DPO's directions. As the Trustee was not seeking a schedule of contributions based on the full buyout cost the provision of this information held secondary importance to the more urgent matter of agreeing a contribution schedule.
- HYMCA must comply with the DPO's directions and requested that it comply with the proposed payment plan or suggest an alternative.

On the member data

- Mr P – A transfer quotation was provided in February 2007. The Trustee did not know if his request was part of any negotiation with HYMCA. In any event no action was taken by Mr P and he therefore remained a deferred member of the Plan.
- Ms E – Had retired and the Plan was paying her a pension.
- Mr D – Had retired and the Plan was paying him a pension.
- Mr N – Was alive and receiving a pension.
- Mr S – Had not retired.

- Mr R – Received a trivial commutation lump sum in August 2012.

22. LM replied:-

- It noted that HL had not responded to its comments that HYMCA could not cross-subsidise other employers in the Plan.
- It saw no recognition in the actuarial figures, or within HL's correspondence, that the calculation of liabilities excluded cross-subsidisation. No rule change could alter the charitable status of the employers or consultation (between the principal employer and Trustee with individual branches) could alter the construction of the Plan.
- It noted the continued refusal to provide requested documentation. It did not have hard copies of the 1996, 1999 and 2002 valuations. Of the documents provided in 2012, the 1996 valuation was a draft and the 1999 and 2002 valuations were not signed.
- It acknowledged receipt of the member data, however, it requested confirmation of the pension amounts being paid.
- The documentation it had requested was sufficient and the bare minimum required so that HYMCA could establish the amounts due and enter into negotiations with the Trustee over their payment.
- HYMCA remained committed to finding a resolution but would not be forced into a settlement by the Trustee and its solicitors.

23. HL informed LM that the actuarial valuations provided were the final versions; confirmed the pensions in payment from the Plan (to Ms E, Mr N and Mr D); and reiterated the Trustee's position, namely: its duty to levy contributions; its power to set contributions; the basis of allocation of liabilities; and HYMCA's obligations as a participating employer to adhere to the Trustee's proposed repayment plan and commence payment of the contributions due.

24. LM replied that HYMCA did not dispute that it had a liability to make contributions in respect of its pensionable employees. However, there could be no cross-subsidy and no rule change could alter that.

25. On 25 November 2013 HL wrote to LM:-

- While the Trustee did not accept HYMCA's position or concede any of HYMCA's arguments, for the purposes of calculating the liabilities due from 1 May 2008 until 30 April 2014, the Trustee was prepared to make adjustments to the liabilities that had been allocated to HYMCA to allow HYMCA to pay contributions on an

alternative basis. In exchange HYMCA would agree to pay the revised contributions and not to pursue further disputes with the Trustees about these matters.

- The Trustee was willing to base the calculations on 'full service' liability allocation. Accordingly, HYMCA would only contribute to the Plan in respect of those members that accrued benefits during their employment with HYMCA; and contributions would be calculated using up-to-date member data.
- The Trustee remained open about a flexible payment plan for the arrears.
- After April 2014 the Trustee reserved the right to seek contributions from HYMCA in respect of its liabilities to the Plan as it saw fit under the Rules or Statute.

26. In January 2014 LM informed HL:-

- The Board of HYMCA was of the view that the Trustee's proposal did not form any basis for a resolution to the matter.
- Whilst the concession was noted the figures were not definitive and amounted to a considerable sum of money. It was also clear that any resolution of the amounts was only going to be a temporary measure and effectively the parties may have to start again in terms of seeking to find agreement as to asserted liabilities.
- Above and beyond all other matters the settlement was on the basis that the Trustees approach to the issue was correct. That was not accepted by HYMCA.

27. LM suggested that the Trustee fund HYMCA to instruct an actuary of its choice to prepare a report as to the amounts of pension contributions it ought to pay on the basis of the stance adopted by HYMCA.

28. As an alternative HYMCA offered to pay £50,000 as a lump sum in full and final settlement of its liabilities in the Plan.

29. On 13 February 2014 the Trustee wrote to the Chair of the Trustees of HYMCA suggesting a small working party between each side to work together to resolve the dispute. HYMCA agreed.

30. HYMCA's agreement crossed with two letters written on the same day from HL to LM. In the first letter HL said:-

- HYMCA's proposed settlement offer of £50,000 was completely unacceptable. A significantly higher amount would be required. For reference the Plan Actuary had indicated that a payment of around £360,000 would be necessary to buyout the liabilities as calculated on a 'full service' basis.

- The suggestion that the Trustee bear the cost of HYMCA instructing an actuary of its own choice was not reasonable. The Plan's Actuary had already provided HYMCA with calculations on a 'full service' and on the standard '1995 basis'.

31. In the second letter HL restated the Trustee's position:-

- HMYCA had not paid contributions since 2008. Arrears and expenses now totalled over £100,000.
- None of LM's arguments justified the cessation of contributions by HYMCA.
- The Trustee had provided extensive actuarial information and responded to various queries which was sufficient for HYMCA to understand its liabilities.
- Cross-subsidisation, as LM described it, was permitted due to the participating employers aligned objectives, and was unavoidable in an unsegregated scheme.
- To eliminate the issues raised by HYMCA the Trustee had determined that HYMCA's liabilities may be allocated on a 'full service' basis.
- Alternatively, if HYMCA wished to discharge its obligations to the Plan immediately it would need to buyout its liabilities through the payment of a lump sum. The Plan Actuary had indicated that this would cost £357,895.
- With contributions now payable on a 'full service' basis there was no longer any credibility in the previous arguments raised by HYMCA and its advisors.

HL said if payments failed to commence it had been instructed to initiate proceedings with TPO.

32. LM acknowledged HL's letters. With the exception of the contributions issue, LM deferred its response pending the outcome of the meeting between the Trustee and HYMCA. On the contributions issue it said pending an agreement as to how to move matters forward; and in particular how to establish the correct level of contributions, HYMCA proposed to make an immediate payment of £25,000 followed by quarterly payments of £1,250 from 31 July 2014.
33. HL replied that the Trustee was happy to accept the payments as a contribution to the amounts due while discussions continued.
34. The Trustee and HYMCA met on 30 April 2014. Following the meeting, the Company Secretary (**Mr E**) for the Trustee wrote to the HYMCA. On the Plan's status as an unsegregated scheme HL had advised the Trustee:

- The Plan was currently governed by the Fifth Definitive Trust Deed and Rules dated 1 October 2012.
- While HYMCA had ceased to employ active members, as it remained a participating employer the 2012 Rules applied to it.
- Even if the Rules permitted segregation, the employer debt and funding legislation would not consider the Plan to be segregated unless prescribed criteria were satisfied.
- The Plan was an unsegregated pension scheme. Since the Plan's inception the Rules had not had any provisions ring-fencing either assets or liabilities. Liabilities and assets for all pensions in the Plan were held in a common fund.
- For a pension scheme to be considered a segregated scheme it must meet the criteria set out in regulation 8(2) of the Occupational Pension Scheme (Employer Debt) Regulations 2005.
- However, the Plan did not meet that criteria. It was not divided into two or more sections, employer contributions were not allocated to a section, and there were no such restrictions on assets within the scheme being used for specific purposes.
- The Plan's Rules (3.3 and 14.4 – 'Employers' Contributions') required each participating employer to contribute the amount the Trustee, after consulting the Plan's Actuary, considered ought to be paid to provide for the present and future liabilities of the Plan. There was no provision for employer contributions to be paid into a segregated section. Rule 13.2(a), 'Actuarial Investigation', required the Plan Actuary to conduct an actuarial valuation of the whole Plan, not of a discrete section. Under Rule 16.6, 'Partial Winding-Up', there was no provision for separation of the Plan's assets and liabilities except on a partial termination caused either by a Principal Employer or Trustee resolution.
- According to the Pension Regulator's guidance, paragraphs 15 and 21 of 'Multi-employer schemes and employer departures':

"Each employer in a multi-employer defined benefit scheme is responsible for a share of the total amount of scheme liabilities, which may change with changing circumstances...the term 'employers' includes 'former employers'."

- The Trustee apportioned liabilities in such a way that was fair between the various participating bodies and apportioned contributions in a proportionate share of liabilities in the Plan. The Trustee sought contributions from HYMCA to ensure that the Plan met its statutory funding objective (under Part 3 of the Pensions Act

2004). There were many ways open to a trustee to apportion liabilities and the current method applied within the Plan was the subject of extensive consultation.

- Because the Plan was unsegregated all of the participating employers stood behind and were responsible for all of the liabilities in the Plan. Circumstances may arise where liabilities could not be allocated to a specific employer. These 'orphan liabilities' would be allocated to the rest of the participating employers in similar proportions to their existing liabilities in the Plan. The DPO had made specific reference to this in the Determination.
- This type of arrangement was not particular to the Plan. There were a number of other schemes that operated on the same basis.

35. There followed a number of email exchanges between Mr E and HYMCA and further information was provided to HYMCA. On 7 November 2014, Mr E asked HYMCA whether it was now in a position to meet with the Trustee and the Plan Actuary or whether the Trustee now needed to consider a further application to TPO.

36. On 25 November 2014 HYMCA replied:-

- Its thinking had been focused on how it could face up to the debt, which at May 2014 appeared to stand at £369,753.
- It was not trying to delay or avoid its liabilities but was seeking validation of the figures. It required: the current valuation of each HYMCA's employee's pension fund, each individual's shortfall and Section 75 buyout figure, the scheme's benefit basis and the original documents setting out the basis of each employee's benefit or pension to be paid.
- After an opportunity to scrutinise this information it would like a meeting to agree a final settlement figure.
- If the final amount was as intimated in May 2014, this would necessitate it having to borrow the monies or sell assets to raise the funds. If it was forced down the latter route its ability to continue to support young people in the area would be significantly reduced. It would have to make its actions accountable to the local press which might shine a negative light on Central YMCA and the way it had managed the Plan's funds in the past.

37. The Trustee proposed a meeting in December 2014. HYMCA declined to attend.

38. At the end of February 2015 HYMCA was provided with a schedule detailing the S75 debt figures for HYMCA members of the Plan.

39. From March to June 2015, the Trustee chased HYMCA regarding how it proposed to settle the matter.
40. In July 2015, the Trustee wrote to HYMCA requesting, within 28 days of the date of the letter, HYMCA's commitment to a payment plan comprising:-
- (i) Contributions from 1 August 2015 to be paid in line with the Plan's recovery plan and schedule of contributions.
 - (ii) Payments due for May, June and July 2015 totalling £3,850 to be paid by no later than 30 September 2015.
 - (iii) £102,071 of contributions that remained outstanding up to 30 April 2015, to be paid over a period not exceeding five years, starting on 1 September 2015.
41. HYMCA replied on 10 August 2015, that it would like to meet to resolve the dispute; and on 3 September 2015, requested information "to quantify our liabilities and allow HYMCA put a plan in place". Later that month the Trustee provided HYMCA with the requested information and suggested two dates in October 2015 for the meeting.
42. On 18 September 2015, HYMCA wrote to the Chair of YMCA England. HYMCA said:-
- It was shortly to meet with the Trustee and hoped to be able to submit to HYMCA's Board of Directors a mutually agreeable plan to meet its deficit.
 - It was a small YMCA with an annual turnover of £350,000 and to face up to the pension deficit it would require financial assistance.
 - At the Roadshow it had been suggested that wealthier YMCA's may be able to assist the YMCAs with deficits. Had this idea progressed and if so who should it contact to advise on the procedure?
 - It had had numerous changes of leadership in the past two years but now had a Board of Directors who were determined to address the deficit. Could the YMCA help it?
43. Three days prior to the meeting, scheduled for 15 October 2015, HYMCA cancelled its attendance on the grounds that it had sufficient information to present to the Board of Directors.
44. The following month HYMCA informed the Trustee that it would declare its intention before the Trustee's next pension meeting, which it understood was to be held in early December 2015.
45. On 26 November 2015, HYMCA replied to the Trustee's July 2015 letter:-

- HYMCA had decided to seek professional advice on the issues raised.
- It aimed to submit realistic proposals to the Trustee.
- It did not think any third-party interference would be helpful at this stage.
- It anticipated that it would be able write to the Trustee on or before 22 December 2015.

46. On 15 December 2015, HYMCA wrote to the Trustee:-

- The current HYMCA Committee had only a further six weeks in office. This would be reviewed at the annual general meeting of HYMCA. While a number of Committee members would remain the same the new Committee would be best placed to take matters forward.
- HYMCA'S next audited accounts were unlikely to be available until late January 2016. These were very important in providing critical information for the Committee to make realistic proposals.
- It proposed to contact the Trustee with further updates in the week commencing 25 January 2016.

47. On 1 February 2016 the Chairman of HYMCA (Mr Y) informed the Trustee that his update would be provided shortly after HYMCA's AGM on 16 February 2016.

48. Hearing nothing further, the Trustee chased Mr Y on 21 March 2016. Mr Y said matters had been delayed as he had had a number of other issues to deal with. He said he had been informed that HYMCA's accounts should be available by mid-April 2016.

49. The Trustee replied that it required HYMCA to submit concrete plans with regard to a payment schedule by 31 May 2016.

50. On 26 May 2016 Mr Y wrote to the Trustee:-

- He anticipated a resolution of the position within the next few weeks.
- He would like to arrange a meeting in June 2016.
- In advance of the meeting he would be grateful for updated figures on the calculation of liability.

- It had been suggested that HYMCA may purchase an appropriate insurance policy which he considered might provide a constructive resolution for all concerned.

51. On 28 June 2016 Mr Y wrote again to the Trustee:-

- He could not trace having received a formal reply to his May 2016 letter.
- He reiterated that he wanted to have a meeting to discuss the history and most constructive way forward. But in advance of the meeting it would be helpful if it could provide the figures/information he had requested in his May letter.
- Meanwhile, it could not move forward to seek an appropriate quotation from an insurance company.

52. Mr Y asked for details of the Plan Actuary and that the Trustee give the Actuary the authority to discuss matters freely and frankly with it so that it could consider the position.

53. Mr E replied on 30 June 2016:-

- He was puzzled and disappointed by Mr Y's request for information as this had previously been provided.
- He did not consider any benefit in meeting until he had received clear proposals on how HYMCA were going to meet the outstanding contributions and commence contributions going forward.
- If he gave permission to the Plan's Actuary to provide HYMCA with information the Actuary would charge HYMCA.
- He did not understand the suggestion that HYMCA purchase an appropriate insurance policy. HYMCA could not purchase an annuity for any of the HYMCA members in the Plan. That gift rested with the Trustee.
- He was happy to have a telephone conversation with Mr Y. However, he had been instructed to commence proceedings to secure the outstanding monies and seek enforcement of the contributions going forward.
- He would hold off taking any further steps until he had heard back from Mr Y within 14 days.

54. On 10 August 2016 Mr E emailed Mr Y requesting that he urgently call him, prior to his submission of an application to TPO in relation to enforcement. He said he would be on leave for two weeks commencing on 26 August 2016.

55. Mr Y replied, that in view of the threat of an enforcement order it appeared that HYMCA needed to seek independent legal advice. Unfortunately, the solicitor instructed, and he were going to be on holiday imminently and their holiday overlapped with Mr E's. He suggested that they speak on Mr E's return from holiday. Mr Y said it would be helpful to understand the process which the Trustee proposed to adopt with regard to an application to TPO.
56. There followed a further exchange of emails between Mr E and Mr Y, but no progress was made.
57. On 25 April 2017, HL wrote to the Directors of HYMCA on behalf of the Trustee. The letter reiterated the requirement to make contributions and committing to do that before the Trustee commenced proceedings with TPO. A payments schedule was enclosed which detailed outstanding contributions due to December 2016 of £123,124, contributions payable from January to April 2017 of £5,325 and future contributions from May 2017 to April 2018 of £16,580.
58. On 24 April 2017, Mr E emailed Mr Y that he had been advised that a letter from HL to HYMCA had been refused and returned. Mr E asked for confirmation that this was the intent and what the rationale was. Unless the refusal of the letter was a mistake it was his view that the Trustee would commence proceedings with TPO.
59. Mr Y replied that he had just returned from abroad. He said no one at HYMCA had refused a letter from HL and asked that it be resent.
60. HYMCA instructed Cronos Associates (**CA**) to respond to the letter.
61. On 19 May 2017, HL and CA held a conference call. HL granted an extension to the response deadline to 16 June 2017.
62. On 20 June 2017, HL asked CA to let it know urgently if HYMCA was intending to respond to the letter of 25 April 2017. HL said in the absence of a response the Trustee had instructed it to prepare submissions to TPO.
63. In November 2017, HL submitted the Trustee's dispute to TPO and notified the Directors of HYMCA.
64. TPO requested and chased for a formal response from HYMCA but to date none has been received.

Adjudicator's Opinion

65. The Trustee's complaint was considered by one of our Adjudicators who concluded that further action was required by HYMCA. The Adjudicator's findings are summarised below:-

- The Plan is not a segregated scheme as defined in Regulation 8(2) of 'The Occupational Pension Schemes (Employer Debt) Regulations 2005' (as amended). The Plan is not divided into two or more sections where:
 - (i) any contributions payable to the Plan by an employer in relation to the scheme are allocated to that employer's section; and
 - (ii) a specified proportion of the assets to the Plan is attributable to each section of the scheme and cannot be used for the purposes of any other section.
- Under Rule 3.3, of the Plan's Rules, each employer must contribute to the Plan in each Plan year the amount which the Trustee, after consulting the Plan Actuary, considers ought to be paid by it in order **"to provide for the present and future liabilities of the Scheme"** (my emphasis). Rule 13.2(a), 'Actuarial Investigation', requires the Trustee to instruct the Plan Actuary to conduct an actuarial valuation of "the Fund" at each valuation date. The valuation is on the Plan as a whole, not individual sections.
- HYMCA and its legal adviser drew attention to the Determination's statement that "Except for "orphan liabilities within the Plan, there is no obligation / reason why one YMCA would meet the liabilities of another YMCA." But this does not mean that each participating employer's liability is not apportioned to the Plan's liabilities as a whole. The Plan's participating employers, including HYMCA, stand behind the Plan's ongoing liabilities (technical provisions).
- Any concern HYMCA may have had about its charitable status is arguably not relevant as the DPO decided that HYMCA is a participating employer of the Plan. HYMCA did not appeal the Determination. Therefore, as a participating employer, HYMCA is bound by the Plan's Rules. This equally applies to all other participating employers of the Plan.
- The Determination directed the Trustee to agree a payment schedule with HYMCA and to provide HYMCA with the information it required to agree such a schedule. HYMCA was given 28 days to agree the payment schedule and a further 28 days to commence its payment.
- The Directions did not give HYMCA any control over the calculation of the amounts due - Rule 3.3 is clear that it is for the Trustee to determine, after consulting the Plan Actuary, the level of contributions to be paid. References in the Directions to agreeing a schedule of payment should be taken to mean agreeing the timing of and the level of contributions HYMCA could afford to pay in any particular instalments, and over what period.
- The Trustee in consultation with the Plan's actuary has provided HYMCA with a payments schedule, which details the participating employer's outstanding contributions and ongoing contributions. Additionally, HYMCA has been given

additional information which appears to be sufficient for it to understand its liabilities.

- The Trustee has a clear duty to the other participating employers and the Plan members to recover contributions to fund benefits.
- HYMCA's failure to pay contributions due to the Plan is maladministration.
- HYMCA is required to pay to the Plan its outstanding contributions and ongoing contributions as set by the Trustee in accordance with the Rules of the Plan. It has been given ample opportunity to agree a payment schedule and has repeatedly failed to do so. It must now meet its obligations under the Plan Rules and pay the contributions required by the Trustee.

66. HYMCA did not comment on the Adjudicator's Opinion.

Ombudsman's decision

67. I agree with the Adjudicator's findings.

68. HYMCA has been given ample opportunity to agree a payment schedule and has repeatedly failed to do so. HYMCA has prevaricated over a considerable period of time and, in my view the Trustee has been extremely fair and has given HYMCA considerable latitude. However, its failure to pay has gone on for far too long; it must now meet its obligations under the Plan Rules and pay the contributions and arrears as required by the Trustee.

69. I uphold the Trustee's complaint.

Directions

70. To put matters right, within 28 days of receiving a current payment schedule detailing the contribution arrears total and ongoing contributions, HYMCA shall commence payment of the sums set out in the payment schedule without any further delay.

Anthony Arter

Pensions Ombudsman
19 March 2019