

UK Public Sector Pensions Speedbrief

Pensions Ombudsman rules on academy conversion

Summary

The Deputy Pensions Ombudsman has rejected a complaint by an academy against the administering authority of its Local Government Pension Scheme (**LGPS**) fund about the funding methodology used to allocate assets to the Academy when it was initially set up. The academy claimed that the fund's asset allocation policy was unfair and ultra vires.

This is one of the first cases to look at the specific pension issues relating to academy conversions. The case also addresses general issues regarding the powers of administering authorities to run and administer their funds.

The decision sends out a warning to maintained schools who are thinking of converting to academy status about the scale of pension liabilities they may inherit when they convert, and the need to address these issues before conversion rather than after.

Factual Background

The Thomas Ferens Academy (the Academy) was created on 1 September 2012. Staff transferred to it from Hull City Council and the Academy became an employer in the East Riding Pension Fund (the Fund) administered by East Riding of Yorkshire Council (the Administering Authority).

In relation to maintained schools converting to academy status, the Administering Authority adopted a methodology whereby the assets allocated for a new academy were calculated by firstly fully funding the transferor council's (Hull City Council in this case) deferred and pensioner liabilities in the Fund and then transferring a proportionate share of the remaining active-only assets to the new academy.

This methodology resulted in the Academy being 18% funded when it was established, with a deficit of £1.5M. The Academy's employer contribution rate to fund the deficit and future accrual was 43.4% of pensionable pay. The Administering Authority subsequently reduced the contribution rate by extending the Academy's recovery period. However, this did not change the Academy's actual deficit.

The methodology used for academies was not reflected in the Administering Authority's Funding Strategy Statement in place at the time, although the new employer contribution rate had been communicated by the Administering Authority prior to the creation of the Academy.

The Academy argued that the Administering Authority did not have the power to set its funding level by taking into account the deferred and pensioner members of Hull City Council, as these were liabilities of Hull City Council and not of the Academy.

The Academy further argued that the Fund's approach was unreasonable and contrary to the Joint Statement on academy conversions issued by the Department for Communities and Local Government and the Department for Education in December 2011. The Statement indicated that where a maintained school converts to academy status, it is the Government's intention that the overall costs of the academy as an employer in the LGPS should not increase.

Both Departments had been approached by the Academy prior to the submission of the complaint, but said they had no powers to intervene in individual cases.

The Deputy Pension Ombudsman's Decision

The Deputy Pensions Ombudsman found that:

- The Administering Authority owes a duty to the members and to the participating employers of its fund as a whole, not to the Academy as a single employer in isolation, to adopt a policy which it considers to be fair and reasonable.
- Whilst other funding methodologies could have been used, the methodology applied by the Administering Authority in this case was one which a reasonable administering authority could have arrived at. The Administering Authority acted in accordance with actuarial advice and within its legal powers in adopting the methodology.
- The Administering Authority had general powers under the main LGPS regulations to adopt a funding policy and it had more specific powers regarding funding arrangements under the regulations.
- The fact that the Administering Authority adopted a policy which was contrary to its Funding Strategy Statement was, in the circumstances, reasonable.
- The fact that the Funding Strategy Statement was not immediately revised did not mean that decisions already reached about its revision were unlawful or ultra vires.

The Ombudsman gave weight to the fact that although the Academy did not legally exist prior to its creation, its prospective officers had been made aware of the Academy's indicative funding position and new contribution rate, and should have raised their concerns prior to the conversion.

Comment

The determination provides a useful examination of the issues relating to academy conversions and of administering authorities' general powers to run and administer their funds.

From an administering authority perspective, the determination confirms an administering authority's ability to rely on implied and incidental powers in the absence of express provisions in the LGPS regulations. It also suggests that administering authorities have wide discretion to set their own policies, even where these may be contrary to current Funding Strategy Statements and wider Government principles.

From an employer (and more specifically an academy) perspective, the decision suggests there is limited scope to challenge an administering authority's funding methodology. It also highlights the need for schools considering academy status to ensure that they have possession of all relevant information in respect of the pension position before they convert, and that they address any funding issues prior to conversion, and not afterwards (when it may be too late).

It remains to be seen whether this decision will cause the Department for Communities and Local Government and the Department for Education to consider changes to the LGPS regulations to avoid these situations arising in the future. The 2011 Joint Statement had hinted that changes to the LGPS regulations may be considered if inconsistencies or unjustifiably higher employer contributions remain.

For more information on the implications of this determination, please speak to your usual Eversheds adviser or contact:

Gary Delderfield
Pensions Partner

0121 232 1786

garydelderfield@eversheds.com

Jane Marshall
Principal Associate
0121 232 1219
janemarshall@eversheds.com