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pay, pensions and
employment solutions

Local Government Pensions Committee
Secretary, Terry Edwards

LGPC Bulletin 67 – February 2010

This month's Bulletin contains a number of general items of information.

Please contact Dave Friend with any comments you might have on the contents of this Bulletin or to suggest other items that you would wish to see included in future Bulletins.

Contents

This month, Bits and Pieces includes articles on LGPC Communications and the Timeline Regulations.

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LGPS – Redundancies: Member aged 50 to 55

As authorities will be aware, there are likely to be situations where an employee, who is a member of the LGPS and who is currently aged 50 or over but under age 55, is due to be made redundant post March 2010 (for example in September 2010 when he or she will still be under age 55). If that employee,

- is employed by an authority in England or Wales and was a member of the LGPS on 31 March 2008, or
- is employed by an authority in Scotland and was a member of the LGPS on 31 March 2009 but not on 5 April 2006,

the employee will clearly be aggrieved that, had he or she been made redundant before April 2010, he or she would have been entitled to the immediate payment of unreduced pension benefits from the LGPS but, as the minimum pension age for such employees increases from 50 to 55 from April 2010, he or she will not be entitled to the immediate payment of benefits upon redundancy in September 2010.

The LGPC Secretariat has recently been approached by a number of authorities asking what options an employer could consider in such cases.

(1) The starting position is that the employer simply takes the view that, whilst obviously upsetting for the employee, it is merely a reflection of the change in the law - tough on the employee concerned, but that is life. The employee would be entitled to a deferred pension, payable from age 60 at the earliest unless:

> (a) the person successfully applies for earlier payment of their deferred benefits on the grounds of permanent ill health; or
>
> (b) the person applies to the (ex) employer for early payment of their deferred benefits, on or after age 55 and before age 60, and the employer agrees to that request under their discretionary policy. The (ex) employer could agree on compassionate grounds to waive any actuarial reduction for early payment. Any strain on the fund cost for early payment and / or waiving any actuarial reduction would have to be paid to the Pension Fund by the (ex) employer.

There are other options listed below that the employer could consider, but each of these has potential difficulties.

(2) The employer could consider bringing the date of redundancy forward so that it occurs pre April 2010. However, the starting position must be that a redundancy is a factual event, driven by the closure of the workplace; the cessation of, or reduction in, the need for workers to carry out a certain type of work; or a change in the place of work of the employee. To "create" a redundancy situation earlier than it actually exists with the sole intention of ensuring the early release of pension would, based on the case of Hinckley and Bosworth BC v Shaw (1999) 1 LGLR 38, be potentially unlawful i.e. a local authority has no power to make a gift of taxpayers' money.

(3) Subject to the wording of the employer's discretionary policy and the needs of the employer to ensure service delivery, if the employee has been in continuous employment with them since 31 March 2008 (31 March 2009 in Scotland) the employer could consider letting the employee reduce their hours or grade in order to take flexible retirement prior to April 2010. Clearly, if the employer did not agree to flexible retirement and simply made the employee redundant in September 2010 there would be no strain on the fund cost to be met, only the redundancy termination payment cost (i.e. the redundancy

payment and any lump sum payment under the 104 weeks provision), based on the employee's pay at September 2010. So would flexible retirement prior to April 2010 followed by redundancy at September 2010 be cheaper for the employer?

Well, if:

- the employee has not already met the 85 year rule; and
- would not have met it before age 60; and
- is granted flexible retirement at March 2010

the pension benefits built up prior to the flexible retirement would be payable immediately but, due to the actuarial reduction to be applied to the pension benefits, there would be no strain on the fund cost attached to the flexible retirement.

When the employee is subsequently made redundant in September 2010:

- the additional pension built up between April and September 2010 would not be payable immediately as the employee would still be under age 55 (so it would be a deferred pension),

- the redundancy payment and any payment under the 104 weeks provision would be less than if flexible retirement had not been granted (as the pay upon which those payments will be based will be less due to the reduction in hours or grade), and

- the employer will have saved salary between April and September (due to the reduction in hours or grade).

Overall, this would result in a saving to the authority and so such an approach might be objectively justifiable.

If, however:

- the employee has already met the 85 year rule, or would do so before age 60, and

- is granted flexible retirement at March 2010

the pension benefits built up prior to the flexible retirement would be payable immediately and there would be a strain on the fund cost attached to the flexible retirement.

Agreeing to flexible retirement in the latter case could, nonetheless, potentially be justifiable, depending on the circumstances. If the strain on the fund cost is not offset by (or not more than offset by) the savings from the reduction in salary between April and September and the reduction in the redundancy payment and any payment under the 104 weeks provision (due to the reduction in pay resulting from the reduction in hours or grade), then the employer might be hard pressed to justify agreeing to the flexible retirement as it could be argued that the employer had only agreed to the flexible retirement to benefit the employee. The legality of this could be questionable given the ruling in Hinckley and Bosworth BC v Shaw (1999) 1 LGLR 38. If, on the other hand, the strain on the fund cost is offset by (or more than offset by) the savings on salary between April and September and the reduction in the redundancy payment and any payment under the 104 weeks provision, then it could be argued that this would be objectively justifiable as a good use of taxpayers' money.

However, the 85 year rule has already been found to be age discriminatory (hence its removal from the LGPS subject to certain protections). Thus, accepting or turning down a request for flexible retirement based on whether or not there is a strain on the fund cost, which in turn is determined by reference to the 85 year rule, might be open to challenge. If the employer were to agree to a case where there is no strain on the fund cost and turn down a case where there would be such a cost, the employer would, if challenged by the employee whose application has been turned down, need to be able to demonstrate objective justification - see pages 30 and 31 of the ACAS Booklet "Age and the workplace".

One other consideration

One other matter of which authorities need to be cognisant is that delaying a redundancy in the case of an employee who is currently age 50 or over but under age 55 until after March 2010, with the objective of avoiding strain on the fund costs (i.e. by making the employee redundant post March 2010 when the employee is under 55 and the age 50 protection has ceased), would potentially be open to challenge. If challenged, the employer would need to be able to objectively justify its decision as being a proportionate means of achieving a legitimate aim.

The principles involved in delaying a redundancy to beyond March 2010 for an employee who is currently aged 50 or over but under age 55 are, in essence, much the same as in the EAT case of London Borough of Tower Hamlets v Wooster where the authority should properly have taken steps to prolong the employment relationship but chose not to, thus ensuring that the employee on dismissal was still under age 50 and so denied access to immediate payment of his pension benefits (thereby avoiding any strain on the fund cost). Mr Wooster won his claim (although the employer appears not to have put forward any objective justification defence).

Conclusion

Authorities are advised to consult with their lawyers and/or external auditors and to consider all potential issues including, but not limited to, legality, discrimination (whether related to age or otherwise), etc. before embarking on any of the courses of action outlined above, other than (1).

LGPS: Age 50 Earliest retirement age – Deferred Members

Following the advice given in previous Bulletins, the Secretariat has been approached by a number of administering authorities seeking clarification of the earliest retirement age for deferred members.

Other than for those deferred members seeking early payment on the grounds of permanent ill health (which can be paid at any age), there are four categories of deferred members in England and Wales:

(1) Members who left with a deferred benefit prior to 1 April 1998 can seek payment, with employer permission (but on compassionate grounds only), from age 50 under the LGPS Regulations 1995

(2) Members who left with a deferred benefit on or after 1April 1998 and before 1 April 2008 can seek payment, with employer permission, from age 50 under the LGPS Regulations 1997

(3) Members who left with a deferred benefit on or after 1 April 2008 and who were active members on 31 March 2008 can seek payment, with employer permission, from age 50 up until 31 March 2010 under the Benefits Regulations 2007 and thereafter the minimum age rises to age 55

(4) Members who left with a deferred benefit on or after 1 April 2008 and who were not active members on 31 March 2008 can seek payment, with employer permission, from age 55 under the Benefits Regulations 2007

Other than for those deferred members seeking early payment on the grounds of permanent ill health (which can be paid at any age), there are four categories of deferred members in Scotland:

(1) Members who left with a deferred benefit prior to 1 April 1998 can seek payment, with employer permission (but on compassionate grounds only), from age 50 under the LGS (Scotland) Regulations 1987

(2) Members who left with a deferred benefit on or after 1April 1998 and before 1 April 2009 can seek payment, with employer permission, from age 50 under the LGPS (Scotland) Regulations 1998

(3) Members who left with a deferred benefit on or after 1 April 2009 and who were active members on 31 March 2009 can seek payment, with employer permission, from age 50 up until 31 March 2010 under the Benefits Regulations 2008 and thereafter the minimum age rises to age 55

(4) Members who left with a deferred benefit on or after 1 April 2009 and who were not active members on 31 March 2009 can seek payment, with employer permission, from age 55 under the Benefits Regulations 2008

Notes:

Category **(1)** and **(2)** members

If the BCE date for those in category **(1)** or **(2)** above is on or after 6 April 2010 and before the member is aged 55, this would constitute an unauthorised payment under the Finance Act 2004 with the associated tax charges (a fact that the member would need to take into account and the employer would need to be aware of). Regulation 3 of the Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006 [SI 2006/364] provides that the scheme manager (i.e. the administering authority) shall, where the ex-employer agrees to the payment of unauthorised benefits, have the power up until 5 April 2011 to exercise a discretion not to pay those unauthorised benefits.

With all of this in mind, administering authorities might wish to inform employers participating in their Fund that, where they receive an application from a deferred member in category **(1)** or **(2)** where the BCE would be on or after 6 April 2010 and before the member is aged 55, they should contact the administering authority to discuss the case. The administering authority can then let the employer have details of the tax charges that would be due and, for cases prior to 6 April 2011, the administering authority's stand on whether or not they will agree to the payment of an unauthorised benefit. The employer can convey the relevant information to the member who will then need to consider whether to continue with the application. If they wish to continue, the employer will have to consider whether or not to accede to the request and, if they do so, the administering authority will, for cases prior to 6 April 2011, need to consider whether or not to pay the unauthorised benefit. If they make the payment, it would be subject to the unauthorised payments charge under section 208 of the Finance Act 2004 and, if applicable, the unauthorised payments surcharge under section 209 of the Finance Act 2004. However, by virtue of regulation 2 of the Registered Pension Schemes (Unauthorised Payments by Existing Schemes) Regulations 2006 [SI 2006/365], in cases prior to 6 April 2011, only that part of the deferred benefits that relates to membership after 5 April 2006 (if any) will be subject to the scheme sanction charge under section 239 of the Finance Act 2004.

Can this scheme sanction charge (if any) be recharged to an ex-employer who agrees to an early release of benefits? Well, it would appear that an administering authority who currently asks employers for a contribution to the cost of administering the Fund under regulation 42(1)(d) of the LGPS Administration Regulations 2008 or regulation 38(1)(d) of the LGPS (Administration) (Scotland) Regulations 2008 could charge the employer with the scheme sanction charge under that regulation (as it would represent a cost of administering the Fund). Equally, an administering authority who does not utilise that regulation in the Administration Regulations but, instead, charges the cost of administration to the Fund under regulation 4(5) of the LGPS (Management and Investment of Funds) Regulations 2009 or regulation 5(6) of the LGPS (Management and Investment of Funds) (Scotland) Regulations 1998 could pay the scheme sanction charge from the relevant employer's part of the Fund (thereby ensuring the employer picks up the cost in the longer term through the employer's contribution rate).

Category **(3)** members

If a category **(3)** member, who is under age 55, obtains agreement from his former employer to payment of his benefits with effect from a date falling before 1 April 2010 but for some reason the BCE date falls on or after 6 April 2010 (e.g. because the member does not complete his or her commutation election until on or after 6 April 2010), the payment will be an unauthorised payment under the Finance Act 2004 with the associated tax charges (a fact that the member would need to take into account and the employer would need to be aware of). The payment would be subject to the unauthorised payments charge under section 208 of the Finance Act 2004 and, if applicable, the unauthorised payments surcharge under section 209 of the Finance Act 2004, plus there would be a scheme sanction charge under section 239 of the Finance Act 2004. It is vitally important, therefore, that in such cases all the relevant paperwork is completed and received by 5 April 2010.

LGPS – age 50 protections and subsequent BCEs

In last month's Bulletin, there was an article which stated that the Secretariat had sought clarification from HMRC, for those cases subject to the rise in the minimum retirement age from 50 to 55, on the following two matters which had been raised by administering authorities in England and Wales:

(i) a member retires just before the rise in the minimum retirement age but, because they are paid in arrears, it is not possible to calculate their final pay until after 5 April 2010. As the paperwork notifying actual final pay cannot be completed before 6 April 2010, will the payment of benefits post 5 April 2010 constitute reportable unauthorised payments; and if the benefits are based on a notional final pay figure before 6 April 2010 and recalculated based on the actual final pay figure post 5 April 2010, will the extra benefits derived from the recalculation constitute reportable unauthorised payments?

(ii) a member retires before the rise in the minimum retirement age but, because there is a backdated pay award (or regarding) agreed and paid post 5 April 2010, necessitating a recalculation of benefits, will the extra benefits derived from the recalculation constitute reportable unauthorised payments?

In response to our enquiry, HMRC said in an e-mailed reply that the principles set out in Pension Schemes Newsletter 38 should be applied. That Newsletter would seem to suggest that in both of the above scenarios, and based on our understanding of when a BCE occurs, the additional pension benefits would constitute reportable unauthorised payments. However, in the e-mailed reply, HMRC also said

"As page 2 of the newsletter states, one consequence of having the pension entitlement (BCE) date freeze the NMPA for a specific pension, is that so long as the pensioner was at or over the prevailing NMPA at the time the pension entitlement arose (BCE date), it makes no difference if the pension does not actually start to be paid until after the date of the change in NMPA (for example where the pension is paid in arrears). In these circumstances the pension payments will still be authorised payments even though the member has not reached NMPA of 55. So in the examples you mention you might take the view that the pension entitlement arises before 6 April 2010 but because you cannot finalise the benefit calculation for whatever reason, you might feel unable to begin the pension payments until after 6 April 2010. Alternatively you might decide that because of outstanding paperwork (or any other reason) the pension entitlement hasn't arisen before 6 April 2010, therefore if the member is below the age of 55 any benefits paid after 6 April 2010 will constitute unauthorised payments."

The LGPC wanted straight answers to two straight questions; but we did not get that. Not very helpful!

LGPS and the Pre-Budget Report 2009

The Secretariat has produced two leaflets for high earners – i.e. people with incomes of £100,000 or over. One leaflet is for employees in England and Wales and the other is for employees in Scotland. The leaflets are available from the LGE website. The leaflets represent the Secretariat's understanding of the legislation and the Government's proposed implementation of a taper to the tax relief on pensions contributions. The four areas covered are:

- tapering away of basic tax-free personal allowance with effect from 6 April 2010 for those with incomes (after pension deductions) of over £100,000;
- a higher tax rate of 50% from 6 April 2010 on taxable income above £150,000;
- the application of a taper to the tax relief on pensions contributions from 6 April 2011 for those with pre-tax incomes, **excluding** employer pension contributions, of £130,000 or more and whose gross incomes, **including** the value of employer pension contributions, is £150,000 or more; and
- the new special annual allowance effective from 22 April 2009 and the associated anti-forestalling measures and tax charges. These will apply to high income individuals who, with a view to taking advantage of the current higher pensions tax relief that would normally apply until 5 April 2011, change their normal ongoing regular pension savings and whose total pension savings in the tax year exceed £20,000.

The Secretariat recommends that any employees potentially affected by one or more of the above measures should consider their own position very carefully and, where necessary, seek their own independent financial and tax advice.

LGPS 2008 – Purchase of pre 6 April 1988 membership for nominated co-habiting partners

The LGPS (Miscellaneous) Regulations 2009 [SI 2009/3150] introduced regulation 14A (Election to pay additional contributions: survivor benefits) into the Benefit Regulations which allows members to purchase pre 6 April 1988 membership so that it counts towards a nominated co-habiting partner's pension. In such cases, administering authorities in England and Wales will need to identify what counts as pre 6 April 1988 membership for a member in a nominated co-habiting partnership (NCP).

The starting points are:

- regulation 3(4) of the LGPS (Transitional Provisions) Regulations 2008 which says "only periods of membership after 5 April 1988 are to be taken into account", and

- regulation 14A(5) of the Benefits Regulations 2007 which says "If a member elects to pay ASBCs under paragraph (1), a surviving nominated cohabiting partner's entitlement to a pension by virtue of regulations 24, 33 or 36 as the case may be, will be based on the period of membership occurring after 5 April 1988 plus any period of membership occurring before that date in respect of which the member chooses to pay ASBCs."

[Note, regulation 3(4) of the Transitional Provisions Regulations ought to be amended to reflect the introduction of regulation 14A into the Benefit Regulations.]

Neither of the above regulations define "membership after 5 April 1988". Schedule 1 of the Transitional Provisions Regulations 2008 saves regulations 122(6C) and 122(6D) of the LGPS Regulations 1997 which say:

> **122 Right to count credited period**
>
> (6C) A credited period arising from a request to accept a transfer value under regulation 121 which is made by a person who was an active member immediately before 1st April 2008 shall be treated as a period of membership before that date.
>
> (6D) A credited period arising from a request to accept a transfer value under regulation 121 which is made by a person who becomes a member on or after 1st April 2008 shall be treated as a period of membership after that date.

So a request to accept a transfer in now would count as post 31 March 2008 membership. If a request was made pre 1 April 2008 to accept a transfer in it will count as pre 1 April 2008 membership we would then also need to have to look at the remaining provisions of regulation 122 of the LGPS Regulations 1997 as they stood prior to 1 April 2008. Regulations 122(5) and (6) said:

> (5) If the member is a man, the credited period must be treated as a period after 5th April 1978.
>
> (6) If the member is a woman, the credited period must be treated as a period after 5th April 1988.

Those provisions were mirrored in regulation K14(2) of the LGPS Regulations 1995 which said:

> (2) For the purposes of making any calculation under these regulations a period of membership which may be counted under paragraph (1)(a) shall be treated -
>
> (a) where the person is a man, as a period after 5th April 1978,and
>
> (b) subject to regulation K15A(7), where the person is a woman, as a period after 5th April 1988.

and in regulation J9(2) of the LGS Regulations 1986 (as amended by SI 1991/2471) which said:

> (2) For the purposes of making any calculation under these regulations a period reckonable under paragraph (1)(a) shall be treated -
>
> (a) where the person is a man, as reckonable service after 5th April 1978,and
>
> (b) where the person is a woman, as reckonable service after 5th April 1988.

The amendments made to regulation J9(2) of the LGS Regulations 1986 by SI 1991/2471 came into force on 25 November 1991 but with retrospective effect from 6 April 1988. An exception to this retrospection was where an application for a transfer from a Club scheme had been made before 6 April 1988 unless both the fund authority and the managers of the Club scheme agreed otherwise. One other exception was contained at regulation 26 of SI 1991/2471, where the service would still count as pre 6 April 1988 service. It said:

> **26.** (1) This regulation applies where -
>
> (a) a person ceased to be employed in local government employment ("the former employment") before 6th April 1988; and
>
> (b) a transfer value ("the first transfer value") was paid in respect of him by his fund authority to the trustees or managers of a club scheme; and
>
> (c) he again becomes a pensionable employee before 6th April 1993; and
>
> (d) he has, between his ceasing the former employment and his again becoming a pensionable employee, participated in the club scheme referred to in sub-paragraph (b), and has at no time during that period been employed otherwise than in an employment in which he was entitled to participate in that scheme; and
>
> (e) within 12 months of again becoming a pensionable employee, he applies for a transfer value to be paid by the trustees or managers of the club scheme to his new fund authority in accordance with the rules of that scheme; and
>
> (f) the trustees or managers of the club scheme pay to the new fund authority for the credit of their superannuation fund-
>
> (i) a sum equal to the amount of the first transfer value together with compound interest on that sum calculated at the rate of 2 1/4% per quarter for the period beginning on the day after the person ceased the former employment and ending on the date on which the sum is paid to the new fund authority; and
>
> (ii) a transfer value, calculated in accordance with Part J of the principal Regulations (as amended by these Regulations) in respect of the person's service while he was a member of the club scheme ("the second transfer value").
>
> (2) Where this regulation applies-
>
> (a) the person shall be entitled to reckon the same qualifying service and reckonable service as he would have been entitled to reckon if the first transfer value had not been paid; and
>
> (b) regulation J9 (as amended by these Regulations) shall apply in respect of the second transfer value.

All of this is straightforward for a female scheme member, i.e. inward transfers under the new Part J CETV provisions in the 1986 Regulations which were effective from 6 April 1988, or under later regulations, have (subject to the above provisions) purchased post 5 April 1988 membership (as opposed to transfers under the old Part J interchange provisions in the 1986 Regulations which purchased pre 6 April 1988 membership).

The regulations only say that for a man however, the transfer in buys post 5 April 1978 membership. The only option, therefore, is to apply the same rules to men as applied to women in determining whether the membership is to count as pre or post 6 April 1988.

As for other types of membership under the 1986 Regulations the following also counted as post 5 April 1988 membership:

- actual post 5 April 1988 local government reckonable service
- any service the member could reckon under regulations D4 (increase of reckonable service on lump sum payment), D5 (increase of reckonable service on making periodical payments) or D9 (previous service of certain whole-time manual workers) where the necessary payment was made or commenced on or after 6 April 1988
- any additional reckonable service granted by the employer under regulation D7 (increase of reckonable service at the discretion of the employing authority) where the resolution to grant it was made on or after 6 April 1988
- any increase of reckonable service under regulation D13 (part-time buy-back) where the person already had service after 5 April 1988 which counted as reckonable service.

LGPS 2008 – Civil partners' pensions

The LGPS (Miscellaneous) Regulations 2009 [SI 2009/3150] deleted "or civil partners" from regulation 3(4) of the Transitional Provisions Regulations 2008. This means that for a post 31 March 2008 leaver in England or Wales, a civil partner's pension is now based on all the deceased member's membership (even if the civil partnership was entered into post leaving). This places a post leaving civil partner in a better position that a post leaving widow or widower, as their benefits are, by virtue of regulation 6(3) of and Schedule 1 to the Transitional Provisions Regulations, still covered by regulation 42 of the LGPS Regulations 1997 by virtue of which the widow's benefit in respect of a post leaving marriage is based on membership in contracted-out employment post 5 April 1978 and the widower's benefit of a post leaving marriage is based on post 5 April 1988 membership. Regulation 42A of the LGPS Regulations 1997 (calculation of pension for surviving civil partners) is not a saved provision and so does not apply to post 31 March 2008 leavers (but it does still apply to pre 1 April 2008 leavers for whom a civil partner's pension is still based only on post 5 April 1988 membership).

LGPS 2008 - ability to collect outstanding pension contributions when an admission agreement ceases to have effect

CLG have requested that the Secretariat brings to the attention of administering authorities the letter attached at Annex A.

LGPS – Section 148 Revaluation Order

In last month's Bulletin, we reported that Pensions Increase in April will be 0%. A follow-on question, from this fact, is whether or not there will be section 148 revaluation increases this April.

Paragraph 7.4 of the Explanatory Memorandum which accompanied the Social Security Revaluation of Earnings Factors Order 2009 [SI 2009/608] states that the revaluation in earnings factors is based on the annual increase in the Average Earnings Index for the whole economy (non-seasonally adjusted) to the previous September. [The index values for September 2008 and September 2009 are available from the Office of National Statistics website.] The annual increase in the index to September 2009 was 1.0%. It

is reasonable to assume, therefore, that the earnings factors will be increased as at April 2010 although administrators will need to wait for the SI to be laid before Parliament to learn the actual figures.

Equalisation of GMPs

In a written Ministerial Statement on 28 January 2010, Angela Eagle, the Minister for Pensions and the Ageing Society, said:

> *"In the Barber judgment of May 1990 the European Court of Justice ruled that, as occupational pensions are a form of deferred pay, scheme rules must treat men and women equally. The UK Government incorporated this obligation into domestic law in the Pensions Act 1995. A similar obligation was placed on the Pension Protection Fund in the Pensions Act 2004 in relation to PPF compensation. In line with the understanding of the ECJ judgment at the time, these provisions apply only where there is a comparator–that is, where more favourable treatment has been afforded to an individual of the opposite sex engaged in comparable work.*
>
> *As part of the work relating to the draft Financial Assistance Scheme (Miscellaneous Amendment) Regulations recently laid before the House, the Government have been preparing guidance for trustees who are preparing to transfer their scheme assets to Government. As part of that work, the Government have considered whether further practical guidance on equalisation for these transferring schemes is desirable, to ensure that payments of assistance do not discriminate between men and women.*
>
> *The examination of the relevant legislation and case law has led the Government to conclude that where a scheme member has accrued entitlement to a guaranteed minimum pension after May 1990, European law requires that any inequality in scheme rules which results from the legislative provisions governing GMPs should be removed, whether or not a person can show that a comparator exists.*
> *The Government intend to bring forward amending legislation when Parliamentary time allows. However, in the meantime, it is the Government's opinion that, in order to ensure full compliance with European law, trustees and others should act as if existing domestic legislation requires equalisation in respect of differences resulting from GMPs whether or not real comparators exist."*

The Secretariat has raised this with CLG and await a view on the implications for the LGPS.

The Pensions Regulator Consultation – Record-keeping: measuring member data

On 2 February 2010, the Pensions Regulator (tPR) announced a further consultation on improving the standard of record-keeping by the administrators of pension schemes. The consultation is further to the research undertaken by tPR and discussions held with employers last year. tPR also issued in early 2009 a good practice guidance on record-keeping based on its website content as at December 2008.

The good practice guidance detailed a set of common data which will permit scheme administrators to uniquely identify a scheme member. The common data includes the N.I. Number, surname with forenames or initials, sex, date of birth, address including the postcode, the date pensionable service commenced, expected retirement age, membership status and the last status event.

This most recent consultation is partly due to the disappointing take-up of the good practice guidance published last year. Of the schemes surveyed by tPR, only 19% had checked that every member data set had all the fundamental common data set. Of those 19% of schemes, 53% of members' records were missing at least one item.

The closing date for the consultation is Tuesday, 27 April 2010.

The Agency Workers Regulations 2010

The Agency Workers Regulations 2010 [SI 2010/93] were laid before Parliament on 21 January 2010 and come into force on 1 October 2011. Under these regulations all agency workers are entitled to the same basic working and employment conditions as if they had been recruited by the employer or hirer. However, those conditions exclude, "any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office" but the Personal Accounts regime will apply to agency workers..

The Agency Regulations 2010 are the Government's response to Council directive 2008/104/EC of 19 November 2008 on temporary agency work. The Regulations provide rights and protection for temporary agency workers based on the principle of equal treatment as set out in article 5 of the directive.

Bits and Pieces

LGPC Communications Update

The current versions of the DVD/CD-Rom presentations on the New Look LGPS in England and Wales and the New Look LGPS in Scotland are those dated April 2009. The LGPC Secretariat will not be updating these for April 2010. This decision has been taken on the basis that, currently, the contribution rates and pay band ranges will not be increased for inflation in April 2010 and those changes that we could make for April 2010 would not give added value for the amount of expenditure that would be involved in updating the DVD/CD-Rom presentations. We will, of course, consider matters further should there be any significant changes to the schemes in the coming months.

Timeline Regulations

The Timeline Regulations website was not updated this month.

Legislation

United Kingdom

SI Reference	Title
2010/93	The Agency Workers Regulations 2010
2010/154	The Additional Statutory Pay (Birth, Adoption and Adoption from Overseas) (Administration) Regulations 2010
2010/196	The Pension Protection Fund and Occupation Pension Schemes (Miscellaneous Amendments) Regulations 2010
2010/294	The Authorised Investment Funds (Tax) Amendment) Regulations 2010

Useful Links

The LGE Pensions page

The LGPS members' website

LGPS Discretions lists all the potential discretions available within the LGPS in England and Wales, and Scotland.

Qualifying Recognised Overseas Pension Schemes approved by HMRC and who agreed to have their details published.

Tax Guide (Version 11)

The Timeline Regulations

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Annex A

Communities and Local Government

www.communities.gov.uk
community, opportunity, prosperity

19 February 2010

Mr T Edwards
Head of Pensions
Local Government Employers

Our Ref:
Your Ref:

- by email –

Dear Terry,

Local Government Pension Scheme (LGPS) – the ability to collect outstanding pension contributions when an admission agreement ceases to have effect

1. You brought to our attention the case concerning an admitted body that had been given advice saying that the LGPS Regulations provide no powers for an administering authority to seek payment for outstanding pension liabilities from them where their admission agreement had come to an end and before the administering authority had had the opportunity of obtaining an actuarial valuation as at the date the admission agreement ceases.

2. This is not an isolated case that has been brought to our attention and, as CLG does not share this view, I thought it would be helpful to set out, in this letter, our understanding of the relevant regulations so that practitioners will be more confident in applying the Regulations in respect of amounts due when an admission agreement ceases to have effect. We would be happy for you to circulate this letter widely to LGPS interested parties.

3. The principal reason cited for there being no power was because, at the date the admission agreement ended, there were no active contributing members and it had been argued, therefore, no monies could be called for. We have been informed by

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some practitioners that this view is being taken following the Court of Appeal judgement in April 2009 relating to *South Tyneside Metropolitan Council v Lord Chancellor and Ministry of Justice, and Another*[1]., concerning former employees of the magistrates' courts committees. It should be noted that the Court of Appeal judgement related to a scheme employer in the fund and did not relate to bodies admitted to the scheme by way of an admission agreement.

4. We believe that the South Tyneside case does not in any way alter the regulatory position as it applies to admission bodies – namely that the regulations do allow an administering authority to secure the correct contributions that an outgoing employer has accrued during the period of the admission agreement, even after the termination event and the admission agreement has ceased to have effect.

The regulations

5. Regulation 38 (2) of the LGPS (Administration) Regulation 2008, provides for revised contributions to be paid when an admission agreement ceases to have effect. The regulation obliges the relevant administering authority, or authorities, to obtain a revision of any rates and adjustments certificate showing the contributions due from that body. The term revision is particularly relevant in this context as the requirement in Regulation 38 (2) is a revision to a pre- existing arrangement and the liability of the employer at the end of the admission agreement is tied to the pre-existing rates and adjustment certificate. In other words, the revised contributions which arise from the revised rates and adjustment certificate obtained as required by Regulation 38 (2) relate to the period in which the admission agreement was in force and, self evidently, during whose currency the body had at least one employee contributing to the Fund.

6. Our view is that it does not matter that the revision takes effect after the body's last employee has ceased contributing nor does it matter whether the revision takes effect after the end of the three year period covered by the rates and adjustment certificate which is being revised; the certificate may be revised retrospectively. Reliance on the South Tyneside decision to support the argument that admission bodies are in the same position as Scheduled bodies is not supported by Regulation 38.

7. There is also a view being taken that the revision of the rates and adjustment certificate required under Regulation 38 (2) should ensure that the liabilities are simply brought up to date to reflect market conditions and should not seek to use a different asset base. The purpose of the Regulation 38 (2) valuation is to secure the sum, once and for all, which the outgoing body must pay in respect of the liabilities of the members for whom it is responsible. This valuation must reflect the changed position of the admission body from one which could be expected to fund its liabilities over an extended period, to one which cannot be required to do so after the cessation of its participation in the scheme. As such, the Regulation 38 (2) valuation needs to take account of changed benefits for early leavers, altered demographic expectations and altered future investment expectations.

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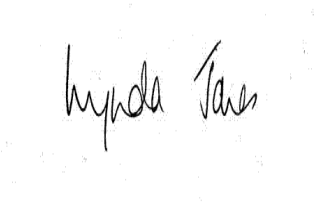
1 [2009] EWCA Civ 299.

CLG informal consultation on related matters

8. This letter sets out the Department's informal views about the collection of cessation payments but we are aware of other concerns relating to bodies admitted to the scheme, such as how to manage a contractor's contributions during the life of the contract, and other issues which were raised with us as part of the informal admitted body status review. We are also aware of concerns about how best to retain and attract third sector bodies in the fund who may consider that LGPS pension obligations appear onerous. As such, we do not propose to amend the Regulations simply to re-state the legal position concerning cessation payments but will undertake an informal consultation with LGPS interested parties starting this month on a range of issues.

Yours sincerely



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