



# Tyne and Wear Pension Fund

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**My Reference** DS/Pens

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Dear Vincent

## **Consultation on “Fair Deal” proposals and on the draft Local Government Pension Scheme (Amendment) Regulations 2016**

I refer to your consultation in respect of the proposal for a reformed “Fair Deal” in the Local Government Pension Scheme and the draft Local Government Pension Scheme (Amendment) Regulations 2016. Thank you for the opportunity to comment on these proposals.

This response reflects the views of South Tyneside Council in its role of administering authority to the Tyne and Wear Pension Fund. Consequently this response primarily addresses administrative and technical issues.

### **The “Fair Deal” Proposals**

Whilst these proposals primarily impact upon employers, we, as an administering authority, are supportive of the policy intent. However we do have concerns that, as currently drafted, the proposals will not achieve their aim of implementing the reformed “Fair Deal” within the Local Government Pension Scheme (LGPS).

As we understand it, a key principle of the reformed “Fair Deal” is that staff transferring from the public sector will have continued access to their existing public service pension scheme. In the context of the proposals being consulted upon, this is the LGPS. We are concerned that the proposals and the related regulatory changes contain an exception to the key principal in that they will not require membership of the LGPS be provided if the transferees are being offered membership of another public service pension scheme.

We understand the position would be that if an LGPS scheme employer was to tender a contract and the successful bidder offered the transferring members membership of, say, the Principal Civil Service Pension Scheme (PCSPS), there would be no requirement that those members have continued access to the LGPS.

In addition to this arrangement not complying with the key principle, we are concerned that the arrangement may cause serious problems when the contract is retendered. At that point the transferred staff will be members of the PCSPS. Under reformed Fair Deal these staff will have an entitlement to continued membership of their current public sector scheme (which at that point will be the PCSPS). This is not a problem if the existing provider is reappointed, or if the successful tenderer also has access to the PCSPS. But what happens if this is not the case? Retendering authorities may find their options are severely constrained because they can only consider potential tenderers

who have access to the other public sector scheme, which in some cases may mean that only the existing contractor bids/can be shortlisted.

We also note that the “Fair Deal” proposals appear to conflict with the existing Regulation 4 (2) of the LGPS Regulations 2013, as amended, which allows access to the LGPS via an admission agreement for certain staff who previously had access to the NHS scheme.

## **Draft Local Government Pension Scheme (Amendment) Regulations 2016**

Many of the provisions contained in the draft Local Government Pension Scheme (Amendment) Regulations 2016 [the Amendment Regulations] are corrections or clarifications with which we are entirely comfortable. I therefore propose to comment only by exception on those proposed changes about which we have concerns.

### Amendments to the Local Government Pensions Scheme Regulations 2013 (the principal regulations)

Regulation 9 of the Amendment Regulations introduces a new regulation, 17A, into the principal LGPS regulations. The new Regulation 17A defines how a member can dispose their additional voluntary contribution benefits. Regulation 17A refers to “a member” having various different options, and the definition of membership, which is contained in Schedule One of the principal regulations, refers to the definition contained in Section 124(1) of the Pensions Act 1995. This defines a member as “any active, deferred or pensioner member”. We believe that, due to overriding provisions governing the ability to transfer pension accruals, certain of the options contained in the new Regulation 17A should only be available to active and deferred members.

We fully support the concept that members should have the option to either take their accrued AVC benefits or to defer their decision until a later date. As drafted, however, the new Regulation 17A (5) (c) and (d) allow a member who has initially chosen to defer taking their AVC benefits to thereafter, and on more than one occasion, choose to take some of the AVC benefits and to continue to defer the rest. We do not support this ability for a member to repeatedly “salami slice” their AVC benefits accrual, as we believe the administrative cost (and particularly in respect of the due diligence work required where members are choosing to transfer out) would be excessive.

We are also concerned that the new Regulation 17A would appear to allow for the situation to occur where a member has transferred out their LGPS benefits but left their AVC fund with the Fund – an “orphan” AVC situation. Experience has shown that dealing with “orphan” AVC cases is problematic and we urge that the draft regulations be amended to prevent “orphan” AVC situations occurring.

I turn now to Regulation 10 of the Amendment Regulations. Amongst other things, Regulation 10 introduces a new paragraph 5A into Regulation 21 of the principal regulations. We believe the new paragraph 5A should cover situations whether the pensionable pay received by a member is either materially lower or materially higher than that member normally receives. Currently the draft only covers situations where the pensionable pay is materially lower.

Regulation 14 of the Amendment Regulations inserts additional text into a number of regulations within the principal regulations. We believe the additional text should also be introduced into Regulation 48(5)(a).

Regulation 15 of the Amendment Regulations amends Regulation 64 of the principal regulations to allow for the payment of an exit credit to an employer who is exiting the fund and in respect of which the cessation valuation has revealed a funding surplus. The amendments are welcomed but we request that the proposed amendments should clarify that, once the exit credit has been paid, then no further claims can subsequently be made by the fund’s administering authority on the exiting employer.

We also believe that the text of the new paragraph (2ZA) should say “If an exit credit is payable to an exiting employer the administering authority must pay the amount payable to that employer within one month of the date upon which the Fund actuary has advised the administering authority of the surplus revealed by the cessation valuation...”. The current draft requires payment is made within one month of the date when the employer ceases to be a scheme employer, and this requirement is clearly not realistic when it is born in mind that an administering authority will need to obtain leaver documentation for all the exiting employer’s active members, process the leaver entitlements of those

active members, compile and submit cessation data to the fund's actuary and wait for the cessation valuation to be completed. This typically takes several weeks and then the actuary can often take a month and, in some busy times six weeks, to supply the cessation valuation, which means that the timescales currently envisaged are entirely unrealistic.

Turning now the Regulations 17 and 18 of the Amendment Regulations that deal with transfers under the Club Memorandum, we are comfortable with the principle behind the proposed changes but would ask you to note that for the amended regulations to work, the special provisions for the LGPS that are currently contained in Government Actuary's Department guidance will need to be included within the Club Memorandum itself.

In addition, the definition of the Club Memorandum, which is being inserted into Schedule 1 of the principal regulations by Regulation 20 of the Amendment Regulations, needs to be future proofed by referring to the memorandum initially issued in March 2015 and any subsequent revisions of that memorandum.

Regulation 20 also includes a revised definition for a "revaluation adjustment" and this refers to "a balance transferred under a Club Transfer". We believe the adjustment described is not required in all Club Transfers but rather should only apply in respect of those balances being transferred under an Inner Club Transfer that is covered by the Public Sector Pensions Act 2013 and that the text of Regulation 20 should be amended reflect this.

Regulation 21 of the Amendment Regulations adds a new paragraph 14 in Part 3 of Schedule 2 of the principal regulations. The new paragraph 14 states that an admission agreement "may take effect on a date before it is executed". We strongly oppose the inclusion of the new paragraph 14 for the following reasons:-

Firstly any provision that allows the effect of an admission agreement to be backdated to a date before the execution of that admission agreement will inevitably take away the pressure on outsourcing organisations and contractors to put in place admission arrangements for the transferring staff before those staff transfer. Based upon past experience we are clear that in practice both outsourcing organisations and contractors will start to think that they have the luxury of regularising the pension provision at some time in the future convenient to them.

Even under the current provisions, we occasionally see cases where the admission agreement has not been completed before the staff transfer to the employment of the contractor. All too often where this happens we receive contribution payments that demonstrate (or we are told that) the contractor has continued to deduct pension contributions from the members and we have to advise them that the Fund cannot accept these contributions, as the employees are not currently members of the LGPS. This causes very considerable distress to the transferred staff and their unions, as they quite rightly realise that until the admission agreement is completed the transferred staff are not active members within the LGPS. It also has the potential to open the contractor to claims of illegal deductions from pay (as the employees have had pension deductions when they are not currently in a pension scheme). If the proposed paragraph 14 is included in the principal regulations then we believe that what is currently an occasional event will become commonplace or even occur in the majority of cases.

Secondly, we have grave concerns about what will happen if an admission agreement is not put in place by the time staff transfer and is still not in place when either a contractor fails or by the date a short outsourcing contract ceases. In these circumstances it will be impossible to then put an admission agreement in place and, as the contractor, has never been a scheme employer in respect of that contract, there is no way for them to grant the transferred staff the pension they should have accrued since the day they transferred to the contractor. Furthermore, even if it is held that the transferred staff must receive the pension benefits they should have accrued, nothing in the current version of Regulation 64 of the principal regulations could be used to charge the cost of those lost accruals to either the contractor or the outsourcing organisation and they would have to be met by all of the Fund's employers.

Thirdly, and where an admission is delayed, we are wholly unconvinced that the position of a member of staff who has left or died during the period when the employer is not a scheme employer is properly protected. Regulation 3 of the principal regulations defines that, in respect of an admission body a person is eligible to be an active member if they are "employed by an admission body and is

designated, or belongs to a class of employees that is designated by the body under the terms of an admission agreement, as being eligible for membership of the Scheme". By the time the admission agreement is finally put in place leavers and the deceased will no longer be employed by the admission body, so they are not eligible to be designated an active member. And if they are not eligible to be an active member in respect of that period of employment then they cannot be members of the LGPS for that period.

Fourthly, we think there will be very significant problems with contractors refusing to obtain (or being unable to obtain) the bond cover required. Currently any such problem is highlighted before the staff transfer and, as it will be a material obstacle to the contract proceeding, it is inevitably sorted out promptly. If backdating of admission agreements is allowed and the admission has not been completed before the staff transfer and the contractor starts delivering the service, then the likelihood of a contractor simply ignoring the requirement to put the bond in place will increase massively. We would not wish to see a situation where a contractor fails and an outsourcing organisation attempts to walk away from meeting a funding deficiency on the basis that the administering authority should have somehow ensured the contractor had met the requirement to put a bond in place.

We would urge you, for all of the reasons set out above, to not proceed with the proposed paragraph 14.

### **Amendments to the Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014 (the Transitional Provisions Regulations)**

Regulation 24 of the Amendment Regulations amends Regulation 3 of the Transitional Provisions Regulations, which deals with membership accrued before 1<sup>st</sup> April 2014. We are comfortable with the approach proposed by the new Regulation 5A, but note that the removal for the needs for members aged between 55 and 60 to obtain employer consent for the early payment of pension does not, as drafted, cover Pension Credit Members and we believe it should do so.

Regulation 25 of the Amendment Regulations inserts a new paragraph 1A that would potentially require LGPS funds to provide underpin protection to certain members who have transferred in benefits from other public service pension schemes.

I understand that the Local Government Association (LGA) has raised a number of concerns with you about this proposed change. We share LGA's concern that the proposed change will provide some members with a protection based upon a type of LGPS membership – final salary membership – that they never accrued.

I understand that LGA have raised additional concerns regarding the retrospective imposition of the proposed change at this stage which is long after the reformed LGPS protections were costed and implemented. Like LGA, we worry that the imposition at this stage of such a protection will have cost implications for the scheme and could potentially make it more likely that the scheme will breach either of the cost control measures that impact upon the LGPS.

We think it wrong that the proposed amendment will provide individuals with a higher level of protection than they would have had if they had re-joined their former public service pension scheme without a break of more than 5 years in active membership of a public service pension scheme. Protection within the other public service pension schemes is limited to continued access to a final salary pension scheme and not to the higher of final salary or CARE. Underpin protection gives members the better of the two.

We understand that LGA is concerned that the proposed extension of the underpin was not agreed by the LGPS's employee and employer representatives at the time of the scheme's reform, and imposing it upon the scheme goes against the principles of collective bargaining which have worked so productively in the LGPS in recent years. We fully support the collective bargaining approach and share LGA's concerns

We ask that you reconsider your proposal, and especially as we understand that the Public Sector Pensions Act 2013 does not require that the protections to the level you propose be provided.

Regulation 26 of the Amendment Regulations introduces a 12 month time limit (which can be extended by the employer) if a former member of the Earlier Schemes takes up active membership of the Scheme and wishes to aggregate the benefits.

You will no doubt recall that my colleague, Mrs Robason, wrote to you on 8<sup>th</sup> June 2016 in respect of this consultation exercise. Mrs Robason pointed out that this Council has contacted DCLG on a number of occasions requesting that you include, in the next set of amendment regulations, amendments to the Transitional Provisions Regulations that will provide an ability for employers to extend the one year period under which LGPS members who commenced with them prior to 1st April 2014 (i.e. under the 2008 LGPS regulations) can elect to amalgamate earlier periods of LGPS membership with their current period of membership or can transfer in pension rights from other schemes.

The regulatory clauses that need to be included within the Transitional Provisions Regulations so that such decisions can now be made are Regulation 16(4)(b) of the Local Government Pension Scheme (Administration) Regulations 2008 (which covers amalgamation of earlier periods of LGPS membership) and Regulation 83(8) of the Local Government Pension Scheme (Administration) Regulations 2008 (which covers transfers in from other schemes).

As there is nothing currently provided for in the Transitional Regulations that gives employers the ability to extend the one year period under which LGPS members who commenced with them prior to 1st April 2014 (i.e. under the 2008 LGPS regulations) there can be no election to amalgamate earlier periods of LGPS membership with their current period of membership or to transfer in pension rights from other schemes.

We continue to emphasise the need for the amendments outline above, and would urge you to include these changes in the finalised Amendment Regulations.

If, however, and for whatever reason, you feel that the amendments outlined by Mrs Robason cannot be included in the finalised Amendment Regulations, then we would request that the text set out in Amendment Regulation 26 that includes a proposed new paragraph 6A for Regulation 10 of the Transitional Provisions be amended as follows:-

(6A) A member with deferred benefits relating to Earlier Schemes who subsequently becomes an active member of the 2014 Scheme may-

- (a) within 12 months of the active member's pension account being opened, or
- (b) such longer time as the Scheme employer permits

elect to receive a transfer value payment in relation to the deferred benefits.

Where the member has not become a member of the 2014 Scheme by virtue of Regulation 5(1) of these Regulations then the transfer value is to be credited to the active member's account to purchase earned pension in accordance with actuarial guidance issued by the Secretary of State.

Where the member has become a member of the 2014 Scheme by virtue of Regulation 5(1) of these Regulations and the transfer value is in respect of pension rights accrued in respect of service before 1st April 2014 then the member will be entitled in respect of that transfer value to final salary benefits with final pay calculated under regulations 8 to 11 of the Benefits Regulations (calculation of final pay) as if they were still in force.

I hope these comments and observations will be will be of use to you in your deliberations.

Yours sincerely

*Dave Smith*

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