

**NORTHUMBERLAND COUNTY COUNCIL PENSION FUND
Pension Fund Panel Meeting 23 February 2018**



South Tyneside Council

Pensions Committee

Date: 14th September 2017

Pensions Administration

Report of the Corporate Director Business and Commercial Development

- **Purpose of Report**

This report briefs the Committee on developments in pensions administration.

Contact Officer: Ian Bainbridge, Head of Pensions – Tel 424 4112

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Ongoing Consultations

2. Members will recall that it was reported to the March and June meetings that the Fund had responded to an HM Treasury consultation on options for how the Guaranteed Minimum Pension element of pensions paid to those members who will reach State Pension age on or after 6th December 2018 should be indexed.
3. We had hoped that we would hear relatively quickly how the Government intends to proceed as the decision will have a significant impact in a number of areas of pensions administration and we will need to plan and prepare for implementing the chosen approach. However, nothing has so far been forthcoming from HM Treasury.
4. There has also been no further update upon when the delayed LGPS (Administration) Regulations 2016 will be taken forward. As members will recall, the draft regulations were published on 27th May 2016, with a consultation deadline of 19th August 2016. Whilst most of the amendments contained in the proposed regulations consist of minor corrections and technical changes, they also included a number of noteworthy changes, including
 - revised access provisions and flexibilities for members who have contributed to an in-house AVC arrangement
 - a new ability to return excess funding to employers who have left the Fund, and
 - a proposed amendment that would allow for an admission agreement to have retrospective effect.

Academies – SAB Review

5. In response to the continuing growth in the number of schools converting to academy status and becoming LGPS employers in their own right, the Scheme Advisory Board (SAB) is reviewing the issues that have been identified in respect of the participation of existing academies.
6. The SAB commissioned PwC to investigate these issues and prepare a report setting out the issues impacting on academies and the many stakeholders, including funds. The report made no recommendations but set out three broad types of approach or mechanisms to try and resolve these issues. These are
 - non-regulatory measures within the LGPS
 - regulatory measures within the scheme, and
 - measures outside of the LGPS, including through primary legislation.
7. The conclusion reached by the SAB, which is supported by Ministers is that there should be a focus on solutions within the LGPS and that the SAB should continue to work with all stakeholders to gather evidence before making recommendations to Government.

8. On 17th July, the SAB commenced a consultation aimed at seeking responses from interested parties on draft objectives for the development of options for academies. This consultation is aimed at LGPS Pension Fund Managers and Pensions Committees. The following objectives have been proposed

- Protect the benefits of Scheme members through continued access to the LGPS
- Ring fence local taxpayers and other Scheme employers from the liabilities of the academy trust sector
- Improve the efficiency and effectiveness of administrative practices
- Increase the accuracy and reliability of data

In achieving the above, any options for change should not:

- significantly alter cash flows at the fund level
- significantly alter assets at the pool

9. The consultation asks

“Do you agree that the above should represent the Board’s objectives for the academies project.

If no, please explain what you would change or add and why.”

10. The proposed response is

“Yes the Fund agrees with the proposed objectives, however one further caveat should be added in that the options for change should not significantly alter assets at the fund level”

11. The Committee is asked to support the proposed response. The closing date for responses is 29th September 2017.

Academies – LGA Guidance Booklet

12. The Local Government Association has, in association with DfES and DCLG, devised and published an information sheet for academies on participating in the LGPS.

13. The Fund is concerned about the content of the information sheet, as some statements do not reflect regulatory requirements and/or actuarial practice.

14. On 18th July, the Fund wrote to DCLG advising that although we do generally welcome the recent guidance, we would like to comment/express concern on the following areas addressed in the guidance:

- Consultation with the Fund’s actuary and employers on likely contribution rates

- Funding of ill-health retirements
- Multi academy trusts and the treatment of each academy as a separate employer
- Closure and any outstanding liabilities

A copy of this letter is attached as Addendum A.

15. DCLG responded on 3rd August advising that they will reflect on the points made and aim to remedy any error or ambiguity in the next generation of guidance, in particular looking to clarify where statements reflect current practice are just recommended or have a legal basis. A refresh of the content is anticipated in the early autumn. A copy of this letter is attached as Addendum B.

SAB Survey on Local Pension Boards

16. In May the SAB invited the chairs of LGPS pensions committees and local pension boards to participate in a survey to assess the effectiveness and operational efficiency of the new governance arrangements, with particular emphasis on the role and function of the local pension board. The SAB agreed that the survey should also be extended to scheme stakeholders, in particular, the main local government trade unions.
17. This survey was considered and completed by the Chair and Vice Chair of the Pensions Committee. A copy of this response was circulated to the Committee on 25th July. This also included a link to the survey should individuals wish to submit their own response.
18. At the 6th July meeting of the Local Pension Board, members were asked to consider this Survey. The Chair of the Local Board noted that he had already completed the survey and asked others to consider doing likewise.
19. Although the deadline for completion was originally set to 28th July, this has been extended and the current deadline is now 29th September 2017.

Brewster Judgement – Unmarried cohabitant pensions

20. On 8th February the Supreme Court handed down its unanimous decision in the case brought by Denise Brewster in relation to the refusal of the Northern Irish Local Government Pension Scheme to pay her a cohabitant's pension.
21. The decision confirmed that the requirement for a cohabiting member to be included on a nomination form, despite meeting the criteria, was incompatible with Article 14 of the European Convention on Human Rights and must be disapplied.
22. The LGPS removed the necessity to nominate in 2014 for active members who joined from 2008 when cohabiting partner pensions were first introduced. Therefore, the cases that could be potentially affected will be deaths between 1st April 2008 and 31st March 2014.

23. On 17th August DCLG issued a letter of guidance. This suggests that the approach of not requiring a nomination is reasonable and that funds should give careful consideration to adopting this, and accept that in adopting this, the power to pay these benefits already exists. The letter also suggests an approach to application. A copy of this letter is attached as Addendum C.
24. The Fund intends adopting the approach as identified in this letter as when relevant cases are brought to its attention.

**Non-Pension Administration-Related Developments that will impact our Employers
- Public Sector Exit Payment Reforms**

25. The following items are not a matter for LGPS Administering Authorities to consider. They are employer issues which are brought to the Committee for information purposes.
26. As members will be aware, the Government has committed to restricting the size of redundancy payments and other early exit costs across the public sector. To further this objective the Government consulted on significant changes to the rules applying to public sector exit payments. The current position on these are set out below.

Clawback provisions for high earners (those earning £80,000 or more) returning to public sector employment within twelve months.

27. We understand that the regulations required to introduce this have still not been laid before Parliament, although they were expected imminently prior to the announcement of the June 2017 General Election.

The £95,000 Public Sector Exit Payments Cap

28. Provisions allowing for the introduction of a Public Sector Exit Payments Cap were included in the Enterprise Act 2016. HM Treasury now has to decide how the new requirements will be implemented in the various public sector schemes.
29. The Treasury has decided to undertake a further consultation on the draft regulations and guidance that will cover the cap but we have still not been advised when this consultation will be issued.

Further fundamental reforms to the rules governing the availability and calculation of public sector exit payments

30. The Government has decided not to introduce a new single exit payment regime across all the public services, instead choosing to allow a more flexible approach reflecting the needs of different public sector workforces.
31. Individual Government Departments are being tasked with compiling proposals for reform that are based around a common Government framework.
32. Each Government department's proposals will then need to be agreed with unions and other workforce representatives.

33. The Government does, however, retain the right to introduce change via primary legislation if no meaningful proposals are put forward or there is a failure to reach agreement.
34. DCLG have put forward some proposals to the unions and workforce representatives in respect of the LGPS, which we understand are still being considered.

Recommendation

35. The Committee is recommended to
- agree to the proposed response to the Scheme Advisory Board consultation on academies as set out in paragraph 10 above, and
 - note the report

Reason for Recommendation

36. To ensure that the Fund's views are fed into the consultation process

Department for Communities and Local Government
Fry Building
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Date: 18 July 2017
Our Ref: PSM/P/Academies
Your Ref:

Dear Sirs,

Tyne and Wear Pension Fund (TWPF)
Local Government Pension Scheme (LGPS) arrangements for academies

As you are aware, South Tyneside Council is the Administering Authority of the Tyne and Wear Pension Fund.

We have recently been provided with, and considered, the 'Local Government Pension Scheme (LGPS) arrangements for academies' guidance booklet. We are well aware that the issue of academies within the LGPS is very topical at this time and we do welcome additional guidance being provided. We would hope this is beneficial to academies who quite often struggle with the local government pension scheme.

Whilst we do generally welcome the recent guidance, we do have several areas where we would like to comment / express concern. These are as follows:

(1) The final sentence on page 4 states:

"The fund actuary will consult employers on the likely contribution rates; this employer consultation is confined to a small window and usually occurs on the autumn before publication."

The above quote is in the context of the triennial valuation. Our concern about this comment is that the fund actuary does not undertake any such consultation exercise. The only consultation requirement on a LGPS sub-fund is to consult on the Funding Strategy Statement, which does set out the method for calculating contribution rates.

Whilst in practice TWPF, like many other sub-funds, as part of the triennial valuation process, hosts a Scheme employers' meeting in the autumn prior to the introduction of the new employer contribution rates there is no legal requirement to do so. Moreover, it is the sub-funds themselves that lead on this rather than the fund actuaries.

In addition to the Scheme employer meeting, TWPF will of course engage in discussions with Scheme employers about their own individual rates. Again this is fund led and Scheme employers do not have direct contact with the Fund actuary.

For the reasons stated, the extract quoted above is factually incorrect and may give rise to false expectation on the part of academies of a consultation exercise which is not legally required and in practice does not actually occur.

(2) The first full paragraph on page 7 begins:

"The employer contribution rate that is set will not cover events such as ill health retirement or deaths in service. Where these occur the AT will normally have to make an additional, possibly substantial lump sum payment to the fund. Trusts should therefore investigate insuring against

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these events, whether as individual trusts or as part of a group. Trusts should discuss this issue with the fund manager and, if necessary, seek independent professional advice'.

At TWPF, along with other sub-funds who use Aon Hewitt for actuarial services, an allowance is made for ill health retirements and death in service in the valuation assumptions. In respect of such funds, the above quoted extract is factually incorrect.

The concern in this case is that some academies may act upon the above quoted advice and take out unnecessary insurance cover. Such cover would be at a cost at a time when academies, like most of the public sector, are faced with considerable financial challenges.

Whilst it is acknowledged that the above quoted statement does state that *'trusts should discuss this issue with the fund manager ...'*, this may not always be the case. To the extent that a statement on ill health or deaths in service was considered necessary, it would have been better to have stated that *'the employer contribution rate that is set may not cover events such as ill health retirement or deaths in service ...'*

(3) On page 9 it is stated:

"Where a multi-academy trust (MAT) is in place, it is legally the scheme employer for staff in all the academies in its trust. However, it is acceptable practice for LGPS funds to treat each academy in a MAT as a separate employer, because each academy has its own staffing profile. Employer contribution rates can therefore differ between academies within the same MAT."

As you are of course aware, the LGPS is predominantly governed by secondary legislation, namely the Local Government Pension Scheme Regulations 2013 (as amended) ("the LGPS Regulations 2013").

Schedule 1 of the LGPS Regulations 2013 provides a definition of Scheme employer as being *'a body listed in Schedule 2 employing an employee who is eligible to be a member and includes an admission body'*. This in turn leads to Schedule 2 and the appropriate provision for an academy is found in Schedule 2, Part 1 Paragraph 20 which provides:

20. A proprietor of an Academy within the meaning of section 579 (general interpretation) of the Education Act 1996 who has entered into Academy arrangements within the meaning of section 1 (academy arrangements) of the Academies Act 2010.

Proprietor is defined in section 579 of the Education Act 1996 as meaning *'in relation to a school, means the person or body of persons responsible for the management of the school or academy (so that, in relation to a community, foundation or voluntary or community or foundation special school, or a maintained nursery school, it means the governing body).'*

'Academy arrangements' is defined in section 1 of the Academies Act 2010. For the purposes of being concise I will not set out the contents of section 1 of the Academies Act 2010, however, it is clear from the definitions of 'Academy arrangements' that it is a Multi Academy Trust that enters into the Academy arrangements as opposed to the individual academies within a MAT.

Applying the above extract from the LGPS Regulations 2013, together with the definitions of 'proprietor' and 'Academy arrangements', it is evident that it is only a Multi Academy Trust that can be classed as a Scheme employer within the LGPS rather than the individual academies within a MAT. In this context, it is very difficult to see how a LGPS sub-fund can lawfully treat individual academies within a MAT as separate employers and vary the employer contribution rates for academies within the MAT. Such an approach is unlawful and would require amendments to the LGPS Regulations 2013.

(4) On page 10 it is stated:

"The DfE has provided a Departmental guarantee to all LGPS administering authorities in England that in the event of the closure of an academy trust or MAT any outstanding LGPS liabilities that

cannot be met by the Trust's assets will be met by the DfE and will not revert to the fund. Academies therefore present no greater risk to funds than local authorities. Arrangements for the transfer of liabilities and exit payments should not treat academies as higher risk employers."

It is of course accepted that the DfE has provided Administering Authorities with a guarantee in respect of academy trusts. However, the concerns of this guarantee are very widely shared and relate to the fact that the DfE has reserved the right to withdraw this guarantee 'at any time'. Whilst the DfE may have no intention of revoking this guarantee at any time in the foreseeable future, the possibility remains that it can be revoked. Consequently, it is difficult to agree with the statement that 'academies present no greater risk to funds than local authorities'.

Notwithstanding the above, TWPF does, at this time, allow academies to benefit from the highest discount rate in setting the employer contribution rate for academy trusts. However, in a scenario where an academy trust were to leave the Fund, with no successor body, then TWPF may well only allow the use of a lower discount rate in any cessation valuation that is undertaken.

(5) On page 17, the concluding section states:

"When an academy closes but the MAT continues to operate the MAT would retain responsibility for the liabilities as it would remain as an employer in the LGPS fund.

The intention is that in all cases, there should be no crystallisation of the deficit, and therefore no scheme exit payment needed, as responsibility for the liabilities will continue to be met by an LGPS scheme employer. It is possible that the employer's contribution rate could be revised depending on the administering authority's assessment of the new sponsor."

TWPF has no objections to most of the above statement; however, the sentence stating 'it is possible that the employer's contribution rate could be revised depending on the administering authority's assessment of the new sponsor' is legally incorrect.

The LGPS Regulations 2013 allow for the setting of an employer contribution rate upon admission to a fund, following a triennial valuation (regulation 62) and in circumstances when an administering authority considers a scheme employer will likely become an 'exiting employer' (regulation 64(4)). Aside from the above situations, an Administering Authority has no legal power for varying a contribution rate. The above quoted extract is therefore legally incorrect.

I would again reiterate that TWPF welcomes the additional information on the LGPS for academies. We would however request that the above comments are taken into consideration if / when the document is updated.

Yours faithfully,

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Our Ref: 3443269
Your Ref:

Date: 3 August 2017

Dear Mr McCann,

Thank you your letter of 18 July concerning the information note on the participation of academy schools in the Local Government Pension Scheme (LGPS) which was recently agreed between this Department, the Department for Education and the Local Government Association.

We will certainly reflect on the points you make and aim to remedy any error or ambiguity in the next iteration. In particular we will be looking to clarify where statements reflect current practice, are just recommended or have a legal basis.

The document was always intended to be kept under review and we very much welcome all the feedback we have had from a variety of stakeholders. This will help to improve the note and has also generated useful discussion between partners where there were divergent views. We anticipate a refresh of the contents of the note in the early autumn.

Yours faithfully,

Jeremy Hughes



Department for
Communities and
Local Government

17 August 2017

Dear Pensions Manager

Implications for the Local Government Pension Scheme of Brewster Decision

A number of funds have been in touch now regarding the implications of the Supreme Court's ruling earlier this year in the case of Brewster. This letter is intended to provide some guidance to those managing funds. It is not statutory guidance, as we have no power to issue statutory guidance on this point, and neither is it intended to be, and should not be construed as, legal advice. As you will appreciate, the correct interpretation of LGPS regulations is a matter for the courts and not government departments.

In the case of Denise Brewster, she successfully challenged the requirement in the Local Government Pension Scheme (Northern Ireland) that a surviving adult partner had to be formally nominated in order to be entitled to payment of survivor benefits. The Court ruled that this administrative requirement constituted unlawful discrimination and a breach of the European Convention on Human Rights. As the other underlying scheme conditions were met then it should be disapplied.

Most public sector pension schemes that have, or have had, such a nomination requirement for unmarried partners, are now taking the view that scheme managers can rely on this judgment and section 3 of the Human Rights Act 1998 as the legal basis for not requiring that a surviving adult partner be nominated in order to receive survivor benefits. This section of the Act provides that, as far as possible, regulations such as those covering the LGPS must be read and given effect in a way which is compatible with the European Convention on Human Rights. This approach is also being applied to applications which have previously been rejected. In these circumstances, schemes are also being encouraged not to require survivors to claim within any specific limitation period.

We consider that this approach is reasonable in the circumstances and that LGPS funds should give careful consideration to adopting a similar approach to relevant cases. In adopting this approach a fund accepts that a power to pay these benefits already exists in the LGPS regulations when read and given effect in a way which is compatible with Convention rights and that the tax status of them is no different from any other payments made under the scheme.

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We suggest that LGPS funds should consider the following:

- Relevant cases will be those in the period between 2008 and 2014 when a "nominated cohabiting partner" test was applied to restrict survivor benefits. Any relevant case presenting now for a survivor's pension, who can demonstrate that they were, at the point of their partner's death, in a relationship with an LGPS member and met all the underlying conditions apart from the nomination requirement, should be awarded a survivor's pension, appropriately backdated;
- Funds should take reasonable steps to identify cases where an application for a survivor's pension was rejected for want of a nomination. Such cases should be reviewed to check whether there is evidence that the underlying conditions may have been met at the time and whether a survivor's pension should now be considered;
- Where a new claim for a survivor's pension is accepted but a child's pension was being paid at the higher rate (due to an adult survivor's pension not being paid) the fund should advise as soon as possible the recipient of the child's pension that its intention would be to reduce it once the adult survivor pension is being paid;
- In these circumstances, technically there will have been an element of overpayment in the child's pension. Decisions on whether to attempt recovery should be handled sensitively, having regard to the need to avoid hardship or injustice, the fund's own policy on overpayments and general guidance on the appropriate use of public money;
- We expect that funds will not be able to offset overpayments of a child's pension against the adult survivor's benefits given that they are separate individual entitlements.

Some cases will inevitably raise complex issues and it is not possible to provide guidance on the application of the judgment in all circumstances. Accordingly, scheme managers should seek their own independent legal advice if they are in any doubt as to how to proceed.

Yours sincerely,



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