

## **THE NEW LOOK ILL-HEALTH RETIREMENT PENSION PROVISIONS PART 1 – GENERAL PRINCIPLES**

This informal guidance is issued to all administering authorities, employing authorities, independent registered medical practitioners and other relevant interested parties in England and Wales with statutory responsibilities under the Local Government Pension Scheme Regulations 2007.

The guidance includes a combination of descriptive text explaining the background and operation of the new ill-health retirement benefit provisions as they will apply in the new look scheme after 31 March 2008. Further guidance, issued under Regulation 56(3) of the Local Government Pension Scheme (Administration) Regulations 2008, on the procedures to be followed under the new arrangement, including a set of best practice documentation, will be issued as soon as possible after all the necessary regulations are in place.

### **Section 1 - Background**

1. In July 2000, HM Treasury published its review of ill-health retirement in the public sector. The 35 recommendations of the report were accepted in full by the Government and government departments responsible for public service pension schemes were tasked to come forward with individual action plans to implement the report's recommendations. The then DETR's action plan was agreed and published in October 2001.

2. The Department's action plan to implement the inter-Departmental report into ill-health retirements in the public sector 2000, included an undertaking to prepare a discussion paper outlining the scope for introducing four changes to the present arrangements for the payment of ill-health retirement benefits under the Local Government Pension Scheme Regulations 1997.

3. The four recommendations included in the Action Plan relevant to this guidance were :-

- **Recommendation 27** - To examine the scope for introducing a two-tier ill-health retirement provision into the LGPS;
- **Recommendation 28** – To introduce the facility to review the levels of ill-health retirement benefit during retirement;
- **Recommendation 29** – To consider the role of abatement in the context of ill-health retirement, and
- **Recommendation 34** – To consider the scope for introducing a more efficient system for awarding enhanced membership on ill-health retirement with less incentive for members to seek ill-health retirement at specific ages.

### **The rationale for LGPS ill-health pension provision**

4. In common with most other occupational pension schemes in the public sector, the LGPS has historically assessed entitlement to ill-health retirement benefits on the individual employee's capacity to perform efficiently the duties of their former employment. However, the LGPS is different to the extent that for the past three years, it has also required LGPS employers to consider the capacity to undertake other local government employments that are comparable on the basis of pay, location, training/skill levels, etc. But that apart, there remained the problem envisaged by the July 2000 report that the LGPS, in common with most other occupational pension schemes in the public sector, failed to address the issue of a person's ability to perform a wide range of jobs in the employment sector as a whole.

5. The proposal to introduce a multi-stage level of ill-health retirement benefit entailed the introduction of a new upper level of benefit for the minority of LGPS members whose condition rendered them permanently incapable of any work, whether in local government or elsewhere. For the remainder whose incapacity meant that they were still capable of performing work elsewhere, the second level of benefit would be assessed on a case by case basis according to a number of factors, including the degree of incapacity and the extent to which this might affect the ability to undertake employment in the general workforce.

6. Given the Government's aim of reducing the levels of ill-health retirement and of retaining people in the workforce up to their normal retirement age and possibly beyond, the scope for introducing a series of measures designed to ease the transition between work and retirement and to retain staff in the general workforce despite their inability to perform their current duties because of ill-health have been explored.

7. Although the HM Treasury review focussed its attention on a two tier ill-health pension arrangement, the working group set up by the then DETR to take forward implementation of the action plan considered that the range of incapacities covered by the second tier from those just short of meeting the top tier criteria and those who would be capable of obtaining gainful employment almost immediately after ceasing their local government employment on permanent ill-health grounds, was such that an additional, third, tier was necessary for those scheme members who satisfied the permanency test in terms of their local government employment, but whose incapacity was such that they could undertake gainful employment within a reasonable period of leaving their local government employment.

### **Recent Policy development**

8. In the light of previous discussions and consultation with stakeholders, in December 2007, interested parties were consulted on a three tier arrangement with those members judged to be permanently incapable of both their local government employment and any gainful employment before reaching their normal retirement age ("NRA") receiving the immediate payment of their benefits enhanced by 50% of their prospective service up to their NRA. For those members also leaving on the grounds of permanent ill-

health but who were judged to be capable of obtaining gainful employment after a reasonable period, but before their NRA, the immediate payment of benefits would be enhanced by 25% of prospective service. This left those members, again leaving on the grounds of permanent ill-health, but who could undertake gainful employment within a reasonable period after cessation. Members falling within this third tier would receive the immediate payment of benefits, but with no enhancement. It was further proposed that for administrative simplicity, there would be no review arrangement or mobility between tiers.

9. After consideration of the views expressed by interested parties during that statutory consultation, Ministers decided to come forward in April 2007 with a two tier arrangement. Members who were totally incapacitated from their local government employment and any other gainful employment would receive their accrued pension entitlements, plus a service enhancement of all their prospective membership to NRA, and those with a lower level of incapacity would receive their accrued pension entitlements plus a service enhancement of 25% of their prospective membership

10. A “third tier” arrangement, referred to in paragraph 7 above was not taken forward because Ministers wished interested parties to explore the scope for coming forward with a form of allowance, outwith the pension scheme and paid by local authority employers from their revenue. However, it has not been possible to reach agreement on a way forward and, in November 2007, the Department came forward with draft amendments proposals to re-introduce a third tier into the scheme’s Benefit Regulations.

## **Section 2 - Statutory position**

11. As at the date of this guidance, the regulatory provisions governing all ill-health retirements under the LGPS with effect from 1 April 2008 remain to be finalised. In particular, the provisions on a third tier, proposed in November 2007, have yet to be introduced. The statutory provisions referred to below are therefore those in force at the time this guidance was issued. Any amendments introduced between the date of the guidance and the operative date of the new scheme will be reflected in the statutory guidance to follow as soon as possible after the provisions have been finalised.

### **A : Entitlement on ceasing employment :-**

#### **“Early leavers: ill-health**

20 (1) If an employing authority determines, in the case of a member who has at least two year’s total membership—

- (a) to terminate his local government employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and

- (b) that he has a reduced likelihood of obtaining gainful employment (whether in local government or otherwise) before his normal retirement age,

they shall pay him benefits under this regulation.

(2) If the authority determine that there is no reasonable prospect of his obtaining gainful employment before his normal retirement age, his benefits are increased—

- (a) as if the date on which he left local government employment were his normal retirement age; and
- (b) by adding to his total membership at that date the whole of the period between that date and his actual normal retirement age.

(3) If the authority determine that, although he cannot obtain gainful employment within a reasonable period of leaving local government employment, it is likely that he will be able to obtain gainful employment before his normal retirement age, his benefits are increased—

- (a) as if the date on which he left local government employment were his normal retirement age; and
- (b) by adding to his total membership at that date 25% of the period between that date and his actual normal retirement age.

(4) In the case of a member in part-time service, the period to be added under paragraph (2)(b) or (3)(b), as the case may be, is calculated in accordance with regulation 7(3) as if he had remained in such part-time service until his actual normal retirement age.

(5) But if, in the case of a person who is a member before 1st April 2008, and—

- (a) has attained the age of 50 before that date, or
- (b) became a member of the 1997 Scheme having—
  - (i) attained the age of 45 before that date; and
  - (ii) not received a transfer for any other scheme,

the period to be added under paragraph (3)(b) is less than the period that would have been added had regulation 28 of the 1997 Regulations applied, then his benefits are increased by adding the latter period.

(6) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine as to whether in his opinion the member is permanently incapable of discharging efficiently the duties of the relevant local government employment because of ill-health or infirmity of mind or body and, if so, as to the likelihood of the member being able to obtain other gainful employment within a reasonable time of leaving local government employment or, as the case may be, before reaching his normal retirement age.

(7) In this regulation, “qualified in occupational health medicine” means—

- (a) holding a diploma in occupational medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA State; and for the purposes of this definition, “competent authority” has the meaning given by the General and Specialist Medical Practice (Education, Training and Qualification) Order 2003(1[e]); or
- (b) being an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State.

(8) In this regulation, “gainful employment” means paid employment for not less than 30 hours in each week for a period of not less than 12 months.”

## **B : Entitlement after ceasing employment :-**

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### **“Early payment of pension: ill-health**

31. (1) Subject to paragraph (2), if a member who has left a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body—

- (a) he may request to receive payment of the retirement benefits immediately, whatever his age, and
- (b) paragraphs (2) and (4) of regulation 20 apply.

(9) If a member does not request immediate payment under this regulation, he is entitled to receive a pension without reduction, payable from his normal retirement age.”

## **Section 3 - General Guidance**

### **Part I - Role of the employer**

12. In the context of ill-health retirements, the role of local authority employers begins long before employment has been terminated and the question of entitlement to an ill-health retirement benefit arises. The management of ill-health in the work force and in particular, during the period leading up to termination, is outside the scope of this guidance but is covered in the “Management of Ill-Health Handbook” published by the Employers Organisation in 2002 and revised in 2007.

13. As before, any question concerning entitlement to an ill-health pension, can only be decided when a member’s employment has been terminated on the grounds of permanent ill-health. This does not fetter the right of a local authority employer, the scheme member, medical advisers and other interested parties to commence proceedings beforehand but in regulatory terms, the actual decision about entitlement and any appeal arising from the determination of that question can only be made on or after termination.

14. As has always been the case, responsibility for deciding the grounds on which the employment of a scheme member has been terminated rests solely with the local government employer. But a determination for the purposes of the new regulations can only be made where the authority has obtained a certificate from an independent registered medical practitioner qualified in occupational health. It is also important to note that all the regulations referred to in this guidance are subject to the civil law code. As such, the determination of questions is based on the balance of probabilities test and not on the stricter criminal law test of beyond reasonable doubt.

### **Part II - Questions for the employer to determine**

15. Under the new arrangements, the appropriate LGPS employer is required to consider and decide a number of questions under Regulation 20

before entitlement to an ill-health retirement benefit can be decided. These include :-

- Does the length of total membership satisfy the minimum qualifying period? (Note : Ministers have been asked to agree to the introduction of a 3 month qualifying period with effect from 1 April 2008);
- Was employment terminated on the grounds that the member's ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment? ; and
- Does the member have a reduced likelihood of obtaining gainful employment (whether in local government or elsewhere) before his normal retirement age?

If all three criteria are satisfied, there is a prima facie entitlement to payment of an ill-health benefit under Regulation 20. As regulation 20 is currently drafted, the LGPS employer must further decide :-

- Is there no reasonable prospect of the member undertaking gainful employment before reaching his NRA. In these circumstances, the member receives benefits based on his accrued rights up to the date of termination and enhancement equal to all his prospective service from that date to his NRA.
- If, on the other hand, the member is judged to be incapable of undertaking gainful employment within a reasonable period after leaving local government employment, but is likely to be able to do so before reaching his NRA, benefits equal to his accrued rights and enhancement of 25% of his prospective service to NRA will be awarded.

In addition to these questions, additional questions concerning part time employment and the protection rights of certain members fall to be considered.

16. Under Regulation 31, an ill-health benefit can also be paid to a person who has left a local government employment with an entitlement to a deferred benefit, who becomes permanently incapable of discharging efficiently the duties of their former employment before becoming entitled to payment of that benefit.

### **Part III - The role and status of the independent registered medical practitioner**

17. The introduction of the certification of ill-health retirements by an independent registered medical practitioner qualified in occupational health was one of the 35 recommendations made in the HM Treasury review. It has been a feature of the 1997 scheme regulations for a number of years and is carried forward into the new scheme arrangements. The new regulations sets out the questions that the independent doctor must address in his certificate but provisions relating to their conduct is dealt with in the Local Government (Administration) Regulations 2007. In particular, regulation 56(1) of those regulations, shown below, requires the independent doctor to include a statement confirming his independent status in his certificate.

**“First instance determinations: ill-health**

56. (1) The independent registered medical practitioner referred to in regulation 20(6) (early leavers: ill-health) of the Benefits Regulations must be in a position to certify that—

- (a) he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested; and
- (b) he is not acting, and has not at any time acted, as the representative of the member, the employing authority or any other party in relation to the same case;

and he must include a statement to that effect in his certificate.

(2) If the employing authority is not the member’s appropriate administering authority, it must first obtain that authority’s approval to its choice of registered medical practitioner for the purposes of regulation 20 and 31 of the Benefits Regulations.

(3) The employing authority and the independent registered medical practitioner must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation or, in the case of the employing authority, when making an ill-health determination.”

18. For the purposes of the new arrangements, “qualified in occupational health medicine” means a person holding a diploma in occupational medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA State; and for the purposes of this definition, “competent authority” has the meaning given by the General and Specialist Medical Practice (Education, Training and Qualification) Order 2003, or, being an Associate, Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State.

**Part IV - Questions for the independent registered medical practitioner**

19. In many respects, these reflect the questions that the LGPS employer is ultimately responsible for deciding but it is important to bear in mind that the independent doctor is not being asked to confirm the termination or otherwise of the member’s employment. And as now, the role of the independent doctor under the new arrangements will be to certify whether or not, in his opinion, on the balance of probabilities, the criteria for entitlement to an ill-health benefit of some description is satisfied in any individual case. The detailed questions to be considered by the independent doctor will be covered in the statutory guidance to follow shortly.

## **Part V - Definitions**

20. At this stage, it is important that all parties are clear about the meanings behind the terms shown in bold above.

21. Although the word “**permanent**” is not defined in either the Benefit or Administration Regulations, it is clear from the context of Regulation 20 of the Benefit Regulations that it means a person’s normal retirement age, in most cases, age 65. In addressing questions about permanency, whether in terms of the local government employment or gainful employment elsewhere, consideration must be given, not to the immediate or foreseeable future, but to the date when the member attains their NRA.

22. The term “**gainful employment**” is defined as “paid employment for not less than 30 hours in each week for a period of not less than 12 months”. This term is not to be confused with the concept of “comparable employment” which has been a feature of the 1997 Scheme Regulations for many years. As from 1 April 2008, independent doctors will be required to apply the wider test of capacity to undertake general employment of a remunerative nature rather than one based on the type of local government formerly held by the member. This reflects the change in government policy whereby public service ill-health pensions are to be paid not only on the basis of capacity to undertake actual employment, but also other employment in the general workforce. It is also important to note that the 30 hour threshold is a universal provision to be applied in every case, regardless of the status of the former employment in respect of which the ill-health benefit was awarded. For example, in the case of a person who left their part-time local government employment with an entitlement to an ill-health pension under Regulation 20, the test for determining whether or not they were capable of undertaking or had obtained gainful employment would be based on the 30 hour threshold without any adjustment to reflect the former part-time employment.

23. As things stand, benefits under Regulation 20 are only payable to those members who are either unlikely to ever be capable of undertaking gainful employment before their NRA or could become so capable, but only after a “reasonable time” after leaving their local government employment. Those judged to be capable of undertaking gainful employment within that “reasonable time”, do not fall within the scope of Regulation 20 but this may change in the light of the current statutory consultation exercise to introduce a third specifically to deal with this group of people.

24. The recent consultation exercise on the introduction of a third tier invited comment on what would constitute an appropriate **reasonable period** for the purposes of Regulation 20. The decision taken in the light of those comments will be taken shortly, but in the meantime, it might be helpful to explain that serious consideration is being given to including a definition of **reasonable**

**period**” in the Benefit Regulations, rather than the statutory guidance as had been previously considered. In those circumstances, the statutory guidance would expand on the definition given in the regulations.

25. There has been much discussion about whether the concept of **reasonable period** should relate to a specific and universally applied period of time or instead, vary from case to case according to the nature of the incapacity and its prognosis. The term **reasonable period** will be key in determining whether cases fall under either the second or third tier, in other words, between those cases where the capacity to undertake gainful employment is achieved within the **reasonable period** (third tier), or over a longer timescale but before normal retirement age is reached (second tier). Based on the comments made to date, the balance of the argument is in favour of defining **reasonable period** as a set period of time.

## **Part VI – Other Issues**

### **Transitional Arrangements**

26. Concern has been expressed about the handling of ill-health retirement cases that have started while the 1997 regulations are extant (ie, before 1 April 2008), but where termination of employment is likely to occur on or after that date. The position remains that the benefit provisions that apply are determined by the actual date of termination of employment and so termination dates on or after 1 April 2008 would result in the member having entitlement to benefits under the 2007 benefit regulations.

27. In most cases, the application of the either the 1997 or 2007 regulations would be benefit neutral or to the advantage of the member, but there may be some members who suffer a detriment as a result of the 2007 regulations. As there is uncertainty about which provisions should apply in the period immediately before 1 April 2008, transitional provisions for some months are being proposed to ensure that the member is not in a worse position than he would have been if the 1997 regulations had applied.

28. There is also the practical question of whether in these transitional cases, occupational health advisers and independent registered medical practitioners should consider the entitlement criteria of the 1997 Regulations or, because termination of the employment is likely to occur after 31 March, those of the 2007 Regulations. In view of the fact that nobody whose employment ceases after 31 March will suffer any detriment because of the protection described above, there is no reason why arrangements currently in hand for determining ill-health retirement questions could not be held in abeyance until 1 April when the new provisions will be in force. On this basis, cases would be considered against the new three tier criteria but as part of that process, the benefits that would have been payable had the 1997 regulations still been in force would also fall to be calculated to decide what set of benefits should be paid under

the transitional protection provisions. Given the relatively short period of time between the final provisions being in place and the commencement of the new scheme on 1 April, delaying consideration of currently active cases until after 31 March would seem to be both an appropriate and a practical way forward.

### **Review of Ill-health retirement pensions**

29. The Benefit Regulations setting out new tiered ill-health pension provision do not permit any review. However, in the CLG consultation on the introduction of a third tier of ill-health pension benefit issued in November 2007, proposals were made for a review mechanism to ensure that pensioner members retained their third tier benefit only for so long as they were not in gainful employment.

30. In the light of comments received in response to the consultation, the basis for which 3<sup>rd</sup> tier benefits would stop has been revised. It is being proposed that the 3<sup>rd</sup> tier of ill-health benefit will provide a pension until such time as the member obtains gainful employment, or at the point that an IOHP confirms that they are capable of gainful employment following a review. Employers will have powers to stop payments in these circumstances.

31. A review process should be started when payments had been made for a certain period to check that no gainful employment had been obtained. At the review, if it is found that the 3<sup>rd</sup> tier member is not in gainful employment, the employer will be able to seek a further opinion from an IOHP which could result in the level of benefits being revised to the enhanced 2<sup>nd</sup> tier. Enhanced payments following a review would not be backdated but would be payable from the later determination following advice from the IOHP.

32. It must be emphasised that at the time of writing, the detailed statutory provisions on the terms of the third tier benefit and the review mechanism have yet to be finalised and the guidance given in paragraphs 26 to 31 should therefore be regarded as illustrative at this stage. A revised note will be issued as soon as the amending regulations have been confirmed.

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