

WIRRAL COUNCIL

EMPLOYMENT AND APPOINTMENTS COMMITTEE

16 JUNE 2008

REPORT OF THE DIRECTOR OF FINANCE

ILL HEALTH RETIREMENT REGULATIONS

1. EXECUTIVE SUMMARY

- 1.1. This report informs Members of the latest guidance on ill health arrangements issued by the Department for Communities and Local Government (DCLG) on 4 and 14 March 2008 and other issues regarding the operation of the new ill health retirement regulations from 1 April 2008.
- 1.2. The Pensions Committee on 31 March 2008 agreed that MPF would accept instructions from employers to pay ill health retirement benefits for members who leave from 1 April 2008 and to pay benefits in anticipation of the expected final regulations as outlined in the DCLG document dated 14 March 2008 if so requested by employers.

2. BACKGROUND

- 2.1. The DCLG issued the LGPS (Benefits, Membership and Contributions) Regulations 2007 on 4 April 2007, dealing with the introduction of new tiered ill health regulations from 1 April 2008.
- 2.2. A prerequisite for qualification under the new ill health regulations is that the person is certified in the opinion of a doctor who is suitably qualified in occupational health medicine to be “permanently incapable of efficiently discharging the duties of the relevant local government employment by reason of ill health until age 65”.
- 2.3. The relevant benefit tier and level of enhancement if any, to be awarded is then dependent on the likelihood of the person being capable of obtaining alternative gainful employment (in local government or elsewhere before age 65). **Gainful employment** is defined as an employment of 30 hours or more per week for at least 12 months.
- 2.4. The Regulations currently made only set out details of the top two tiers of ill health benefit award (Tiers 1 and 2). The intended terms for Tier 3 referred to throughout this report were only announced in an information note issued by the DCLG on 14 March 2008 (Appendix 2 attached).
- 2.5. The table overleaf summarises; the details of the two tiers currently prescribed by the Regulations, the intended definition of “**reasonable period**” for the purpose of determining whether a member qualifies under tier 2 or tier 3 and the Ministers reported intentions to make further regulations to introduce the third tier.

Summary of Existing Tiers 1 and 2 and intended tier 3 Ill Health Benefits

Tier	Eligibility and Benefits Details
1	<p>Where the member has no reasonable prospect of being able to obtain gainful employment before 65,</p> <p>this highest tier of ill health retirement award - provides for 100% enhancement of prospective membership up to age 65</p>
2	<p>Where the member is not expected to be capable of obtaining gainful employment within a “reasonable period” of leaving the employment (3 years*) but is expected to be able to obtain gainful employment before age 65.</p> <p>this middle tier - provides for 25% enhancement of prospective membership up to age 65</p> <p><i>*The DCLG has indicated in a guidance note issued on 14 March 2008 that regulations are to be made confirming the definition of within a “reasonable period” of leaving as a period of up to three years.</i></p>
3	<p>Where the member is expected to be capable of gainful employment within a “reasonable period” (3 years*) of leaving the employment.</p> <p>this lowest tier – is intended to provide for payment of annual accrued benefits as a pension (without enhancement) for such time as the third tier member does not obtain gainful employment, or until the employer stops payments following a review (as described further below).</p> <p><i>*The DCLG has indicated in a guidance note issued on 14 March 2008 that the necessary Statutory Instrument is to be made shortly and laid in Parliament to provide third tier benefits as described in the guidance note and for these to be effective from 1 April 2008.</i></p>

Enhanced membership awarded under the new ill health regulations is subject to reduction based on the part time hours worked at date of retirement.

Protection is provided by the Regulations to ensure that those existing members of the old scheme who are aged 45 or over on becoming subject to the new Scheme receive ill health benefits calculated on the higher of the old or new terms.

2.6. The DCLG has still not formally confirmed the outcome of the most recent consultation exercise on the third tier and other ill health retirement matters which took place between 21 November 2007 and 12 January 2008 or issued the required statutory instrument setting out the final position from 1 April 2008. It has however issued on 4 and 14 March 2008 further informal guidance (Appendix 1 and 2 attached) dealing with the ill health retirement provisions that take effect from 1 April 2008.

2.7. 4 March 2008 - Informal Guidance Note on Ill Health Retirement confirmed that: -

“Ministers are being asked to agree the final package of benefits in the light of the responses to the recent consultation exercise and that a revised note setting out the full terms of the third tier benefit arrangements, will be issued as soon as the amending regulations have been confirmed”.

2.8. The DCLG informal guidance states that **“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 should therefore be regarded as illustrative at this stage. A revised note will be issued as soon as the amending regulations have been confirmed”.**

2.9. 14 March 2008 - DCLG Pension Changes Newsletter confirms the following:-

The note sets out the intended terms of the third tier that will be contained in Regulation 20 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007. Ministers have agreed that the necessary Statutory Instrument can be finalised and it should be published shortly when made and laid in Parliament. DCLG believes that **“stakeholders may find the informal comments helpful as they await the final provisions”.**

3. III HEALTH RETIREMENT – THIRD TIER

3.1. The measures which come into force on 1 April 2008, provide local authority employers with powers to award benefits for those scheme members who are permanently incapable of their local authority employment but are judged by an Independent Occupational Health Practitioner (IOHP) to be capable of gainful employment **within a reasonable period** after leaving that employment.

3.2. The proposed measures would provide local authority employers with powers to award benefits for those scheme members who are permanently incapable of their local authority employment but are judged by an occupational health practitioner to be capable of gainful employment **within three years** after leaving that employment.

3.3. The third tier benefit (**tier 3**) will be a pension payable out of the Fund based on the annual equivalent of the member’s accrued pension benefits at the point of leaving employment.

- 3.4. The note referring to the intended third tier ill health benefit states that there will be a qualifying period of three months of continuous contributory membership.

(It is not clear whether this period will also be applicable to tier 1 and 2 cases where enhancement will be relevant).

- 3.5. An employee who leaves local government employment as a third tier member will be entitled to annual accrued benefits payable as a pension for such time as they do not obtain gainful employment, or until **the employer stops payments** following the review.
- 3.6. The third tier member will be required to notify the **previous employer** when employment is found providing details, including pay, working hours and length of contract of that employment, and the employer would then stop payments if this was '**gainful employment.**' If payments have continued when gainful employment has been found, the **employer will have powers** to recover any overpayment from the third tier member.
- 3.7. MPF has contacted DCLG to point out again as in the response to the consultation paper dated 10 January 2008 that: -

MPF believes that there is a doubt as to the legality of stopping a pension following review because the pensioner "has obtained gainful employment". It is my understanding of the Finance Act 2004 (Schedule 28) that ill health pensions may only cease before death in circumstances in which the individual's physical and mental condition has improved to an extent that they would no longer meet the criteria for an ill health pension.

To expand on this further Schedule 28 of the Finance Act 2004 lays down the conditions under which an ill health pension is payable. The provision is that such a pension is payable for life unless: -

"The ill health condition is met when the member becomes entitled to the pension, the pension not being payable for a period under which the individual's physical and mental condition is no longer such as would, under the terms of the scheme, give rise to entitlement to the pension" (Finance Act 2004, Schedule. 28, (4) (a)).

- 3.8. The guidance states that if third tier payments cease, there should be no reinstatement and that there will be protection for those members who have a reduction in hours which directly relate to the ill health condition resulting in termination of employment.

3.9. **Ill Health Regulation Definitions**

'Reasonable period' means a period of 3 years.

'Gainful employment' means paid employment for not less than 30 hours in each week for a period of not less than 12 months.

4. THE REVIEW MECHANISM

- 4.1. The **previous employer** will be required to undertake a review **when payments have been made for 18 months** if payments are still continuing at that point.
- 4.2. At the review, the previous employer will ask the third tier member if their circumstances have changed seeking details of working hours, pay and length of contract. If the employer decides, from the information provided that gainful employment had been obtained, the third tier payments will be stopped.
- 4.3. The **employing authority** will be required to **notify the appropriate administering authority** without delay when payments should be stopped.

Seeking a further opinion from an Independent Occupational Health Practitioner (IOHP)

- 4.4. If, as a result of the employer's enquiry, it was found that a third tier member **had not found gainful employment**, the **employer** will be able to **seek a further opinion from an IOHP** concerning the condition which resulted in the third tier benefit award.
- 4.5. **Statutory Guidance** will set out that the IOHP should be asked:

"whether it remained the case that gainful employment could have been obtained within a reasonable period of leaving the former local authority employment (and the doctor should be asked to state the precise point at which gainful employment could be obtained) *or*

if the member is judged to be incapable of undertaking gainful employment within a reasonable period but is likely to be able to obtain gainful employment before his retirement age".
- 4.6. If the IOHP is of the opinion that the member **remains capable of gainful employment within the reasonable period**, the **employer will have powers to stop payments** at the date specified by the IOHP.
- 4.7. Following the review and in the light of the further medical opinion the **employer** will have powers to determine that a third tier member should become a second tier member and the date of further determination will decide the date from which the uplift to second tier will be put into payment.

5. EARLY PAYMENT OF DEFERRED BENEFITS ON ILL HEALTH GROUNDS

- 5.1. Under the provisions of **Regulation 31** deferred benefits can be brought into payment early on grounds of permanent ill health.
- 5.2. The DCLG has confirmed that it is intended that the current incorrectly worded regulation will be redrafted to make it clear that un-enhanced retirement benefits are payable, and that the member requesting early release of the retirement benefits should be judged by an IOHP to be **permanently incapable of the previous local authority employment** until normal retirement age in order to be awarded benefits.

6. TRANSITIONAL ARRANGEMENTS

- 6.1. The 4 March DCLG guidance refers to concerns having been expressed about the handling of ill-health retirement cases that have started 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 new Scheme 2007 benefit regulations.
- 6.2. The DCLG suggests that in most cases, the application of either the 1997 or 2007 regulations would be benefit neutral or to the advantage of the member, but points out that there may be some members who suffer a detriment as a result of the introduction of the new 2007 regulations.
- 6.3. As there is uncertainty about which provisions should apply in the period immediately before 1 April 2008, the DCLG states that **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.

Unfortunately the details of these transitional provisions have still not been confirmed.

- 6.4. There is also the practical question of whether in these transitional cases, occupational health advisers should consider the entitlement criteria of the 1997 Regulations or, because termination of the employment is likely to occur after 31 March 2008, those of the new Scheme 2007 Regulations.
- 6.5. The DCLG informal guidance states that “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**”.
- 6.6. The latest guidance note dated 14 March 2008 should enable occupational health practitioners and employers to determine eligibility for ill health retirement benefits and which tier the member should fall into and benefits to be paid provided that employers and MPF are prepared to anticipate the proposed further changes to the regulations, notwithstanding the questions over the proposed review arrangements for the third tier benefit.

7. FINANCIAL IMPLICATIONS

- 7.1. The Actuary has incorporated assumptions of the impact of the new regulations when completing the 31 March 2007 Actuarial Valuation to determine employers' contribution rates for the period 1 April 2008 to 31 March 2011. These may need to be revised at the next valuation depending on the final outcome of the ill health consultation.
- 7.2. The latest DCLG guidance states that when establishing the framework for the third tier, account has been taken of all the representations made including those from employer organisations and trades unions. The final terms of the regulations have been prepared on the basis that the provisions must remain within the agreed cost envelope and cost no more than 0.1% of payroll.
- 7.3. The latest guidance addresses some of the concerns previously raised by the Fund Actuary including the key concern that the third tier benefit would continue to be payable in full until the individual actually takes up relevant "alternative gainful employment". However the concern previously identified by MPF that the introduction of reviews would be extended to enable employees whose condition deteriorates to be reassessed in to a higher tier involving employers in higher costs has been realised. The practical problems for employers of carrying out reviews are also to be resolved.
- 7.4. It will not be until the 31 March 2010 actuarial valuation, at which time the cost sharing mechanism will also be implemented, that the long term future costs of the LGPS including the ill health changes are likely to become clear.
- 7.5. The proposed reduction of the qualifying period for ill health pensions from two years to three months if applied across all the three tiers will present a clear cost danger for employers, that many of the between a quarter and a third of the workforce who choose not to be in the Pension Scheme will opt in to the Scheme just prior to ill health retirement in order to receive the benefit of a significantly enhanced pension (up to 100% of their potential future membership up to age 65) after as little as three months membership.
- 7.6. The response submitted to DCLG after the last consultation confirmed that to avoid this selection against the employer, that to be entitled to ill health enhancement at either tiers 1 or 2 the member should still be required to have at least two years membership and that only accrued benefits without enhancement at tier 3 should be payable after three months membership. It would appear that the DCLG has not accepted this argument.
- 7.7. The long term cost implications for employers and future funding implications of these changes will be reviewed as part of the Cost Sharing Arrangements by the Local Government Review Group in the light of experience.

8. STAFFING IMPLICATIONS

- 8.1. There are none directly arising from this report.

9. EQUAL OPPORTUNITY IMPLICATIONS

- 9.1. There are none arising from this report.

10. COMMUNITY SAFETY IMPLICATIONS

10.1. There are none arising from this report.

11. HUMAN RIGHTS IMPLICATIONS

11.1. There are none arising from this report.

12. LOCAL AGENDA 21 IMPLICATIONS

12.1. There are none arising from this report.

13. PLANNING IMPLICATIONS

13.1. There are none arising from this report.

14. BACKGROUND PAPERS

14.1 Informal Guidance Notes dated 4 and 14 March 2008 issued by DCLG.

15. MEMBER SUPPORT IMPLICATIONS

15.1. There are none arising from this report.

16. RECOMMENDATION

16.1. That Wirral Council continues to pay ill health retirement benefits for members who leave from 1 April 2008 and that these benefits be paid in anticipation of the expected final regulations as outlined in the DCLG document dated 14 March 2008.

IAN COLEMAN
DIRECTOR OF FINANCE

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