

## LOCAL GOVERNMENT PENSION SCHEME (LGPS)

### GUIDANCE ON THE APPLICATION OF THE LGPS ILL HEALTH REGULATIONS WHICH TOOK EFFECT FROM 1 APRIL 2008

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THIS ILL HEALTH GUIDANCE REFLECTS THE REGULATORY PROVISIONS OF THE LOCAL GOVERNMENT PENSION SCHEME (BENEFITS, MEMBERSHIP AND CONTRIBUTIONS) REGULATIONS 2007 (SI 2007/1166), AS AMENDED BY THE LOCAL GOVERNMENT PENSION SCHEME (AMENDMENT) REGULATIONS 2008 (SI 2008/1083)



## **GUIDANCE ON THE LGPS ILL HEALTH RETIREMENT PENSION PROVISIONS**

1. This guidance is issued, under Regulation 56(3) of the Local Government Pension Scheme (Administration) Regulations 2008, to all administering authorities, employing authorities, other employers who are admitted to the Local Government Pension Scheme (LGPS), Independent Registered Medical Practitioners (IRMP) and other relevant interested parties in England and Wales with regulatory responsibilities under the new LGPS that came into effect on 1 April 2008.

2. Employers and IRMPs must have regard to this guidance when carrying out their functions under Regulation 20 of the LGPS (Benefits, Membership and Contributions) Regulations 2007 (SI 2007/1166) as amended by the LGPS (Amendment) Regulations 2008 (SI 2008/1083), and Regulation 56 of the LGPS (Administration) Regulations 2008.

3. In this guidance, the term 'employer' relates to local authority employing authorities and other employers participating in the Scheme.

4. This guidance includes details of the relevant regulatory provisions and an explanation of the operation of the new ill-health retirement benefit provisions as they apply from 1 April 2008. The background and policy development for the new ill health framework is at Annex A. Two model ill health certificates are provided at Annex B and C to assist employers participating in the scheme, and independent doctors will need to complete a certificate for each ill health retirement case.

5. The Ill Health Monitoring Group (IHMG) has been set up to evaluate the effectiveness of the new LGPS ill health framework, and the Group will ask for relevant data about the application of the new regulations to inform their work. The IHMG is able to make recommendations for changes to the regulatory framework in the light of experience of implementing the new ill health provisions.

6. The Secretary of State will keep the content of the guidance under review and will update it as necessary, in the light of recommendations from the IHMG, or experience of administering authorities, employers, IRMPs and others, in the application of this guidance.

7. Unless a specific reference is made to regulations by their full title, the reference is to a regulation of the LGPS (Benefits, Membership and Contributions) Regulations 2007 (SI 2007/1166), as amended by the LGPS (Amendment) Regulations 2008 (SI 2008/1083) ("the Benefits Regulations").

## **Section 1 - The Legal Framework**

8. The regulatory provisions governing ill health retirements under the LGPS with effect from 1 April 2008 are set out in regulations 20 and 31 of The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI 2007/1166), as amended by The Local Government Pension Scheme (Amendment) Regulations 2008 (SI 2008/1083), and in regulation 56 of the Local Government Pension Scheme (Administration) Regulations 2008 (SI 2008/239) as amended by The Local Government Pension Scheme (Amendment) Regulations 2008 (SI 2008/1083) :-

### **A : Entitlement on ceasing employment early owing to ill health:-**

“20.—(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5—

- (a) to terminate his 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 any gainful employment before his normal retirement age,

they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2), (3) or (4), as the case may be.

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

- (a) as if the date on which he leaves his 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 the date on which he would have retired at normal retirement age.

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

- (a) as if the date on which he leaves his 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 the date on which he would have retired at normal retirement age.

(4) If the authority determine that it is likely that he will be able to obtain any gainful employment within three years of leaving his employment, his benefits—

- (a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and
- (b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(5) 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 suffering from a condition that renders him permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition he has a reduced likelihood of obtaining any gainful employment before reaching his normal retirement age.

(6) A person who receives benefits under paragraph (4) shall—

- (a) inform the authority if he obtains employment; and
- (b) answer any inquiries made by the authority as to his current employment status, including as to his pay and working hours.

(7) (a) Once benefits have been in payment to a person for 18 months, the authority shall make inquiries as to his current employment.

(b) If he is not in gainful employment, the authority shall obtain a further certificate from an independent registered medical practitioner as to the matters set out in paragraph (5).

(8) (a) The authority shall discontinue the payment of benefits under paragraph (4) if they consider—

(i) that the person is in gainful employment; or

(ii) in reliance on the certificate obtained under paragraph (7)(b), that he is capable of obtaining such employment

and may recover any payment made in respect of any period before discontinuance during which they considers him to have been in gainful employment.

(b) The authority shall in any event discontinue the payment of benefits under paragraph (4) after they have been in payment to a person for three years.

(c) The authority shall forthwith notify the appropriate administering authority of any action they have taken under this paragraph.

(9) A person in respect of whom the payment of benefits is discontinued under paragraph (8) shall be treated as a pensioner member with deferred benefits from the date the suspension takes effect, and shall not be eligible to receive benefits under paragraph (4) in respect of any future period.

(10) If a person in respect of whom the payment of benefits is discontinued under paragraph (8) subsequently becomes an active member of the Scheme, his earlier period of active membership in respect of which benefits were paid under paragraph (4) shall not be aggregated with his later active membership.

(11) (a) An authority which has made a determination under paragraph (4) in respect of a member may make a subsequent determination under paragraph (3) in respect of him.

(b) Any increase in benefits payable as a result of any such subsequent determination is payable from the date of that determination.

(12) (a) Subject to sub-paragraph (b) and to paragraph (13), 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 normal retirement age.

(b) If the certificate obtained under paragraph (5) states that, in the medical practitioner's opinion, the member is wholly or partly in part-time service as a result of the condition that has caused him to be incapable of discharging efficiently the duties of the relevant local government employment, no account shall be taken of such reduction in his service as is attributable to that condition.

(13) But if, in the case of a person who is a member before 1st April 2008, and who has attained the age of 45 before that date, the period to be added under paragraph (2)(b) or (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.

(14) 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;

“permanently incapable” means that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday; and

“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); or

(b) being an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State.

(15) Where, apart from this paragraph, the benefits payable to a member in respect of whom his employing authority makes a determination under paragraph (1) before 1st October 2008 would place him in a worse position than he would otherwise be had the 1997 Regulations continued to apply, then those Regulations shall have effect in relation to him as if they were still in force instead of the preceding paragraphs of this regulation.”.

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(1) S.I. 2003/1250.

## **B : Entitlement after ceasing employment early owing to ill health:-**

### **(Regulation 31 of the benefits regulations)**

“31.—(1) Subject to paragraph (2), if a member who has left his 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 he may ask to receive payment of his retirement benefits immediately, whatever his age.

(2) Before determining whether to agree to a request under paragraph (1), 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 employment because of ill-health or infirmity of mind or body and, if so, whether that condition is likely to prevent the member from obtaining gainful employment (whether in local government or otherwise) before reaching his normal retirement age, or for at least three years, whichever is the sooner .

(3) In this regulation, “gainful employment”, “permanently incapable” and “qualified in occupational health medicine” have the same meaning as in regulation 20.”.

## **C : First instance determinations: ill-health :-**

### **(Regulation 56 of the Local Government Pension Scheme (Administration) Regulations 2008 (SI 2008/239) (“the Administration Regulations”) as amended by regulation 24 of the Local Government Pension Scheme (Amendment) Regulations 2008)(SI 2008/1083).**

“56.—(1) An independent registered medical practitioner from whom a certificate is obtained under regulation 20(5) of the Benefits Regulations in respect of a determination under paragraph (2), (3) or (4) of that regulation (early leavers: ill-health) must be in a position to declare 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 a determination under regulation 20 of the Benefits Regulations.”

## **Section 2 - General Guidance**

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

9. In the context of ill health retirements, the role of the employer begins a long time 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 of employment, is outside the scope of this guidance. The “prevention and management of sick absence” replaced the “management of Ill health handbook” and was published by the Local Government Employers in 2007. The handbook does not, however, contain details of the changes to the ill-health retirement benefits from 1 April 2008.

### **Change in process for the employer in the 2008 ill health provisions**

10. Under the 1997 Scheme regulations, any question concerning entitlement to an ill-health retirement benefit could only be decided when a member had left local government employment on the grounds of permanent ill health. Whilst this did not prevent an employer and medical advisers from looking onto the question of entitlement to an ill health pension and grant beforehand, in regulatory terms, the actual decision about entitlement and any appeal arising from the determination of that question could only have been made on or after the member left employment. Concerns have been raised in the past about the effect that certain decisions made by the courts and the Pensions Ombudsman might have on this separation between the “leaving employment” and the “entitlement to pension benefit” question that has been part of the scheme’s regulations for a considerable time. The ill health provisions in Regulation 20 now require the employer to commence medical processes prior to any termination of employment on ill health grounds.

11. Responsibility for deciding the grounds on which the employment of a scheme member has been terminated rests solely with the employer (Reg 20 (1)). But an employer cannot make a determination under Regulation 20 unless they have obtained a certificate from an independent registered medical practitioner (“IRMP”) qualified in occupational health medicine (Regulation 20 (5) and (14 (a) and (b))).

12. It is also important to note that all the regulations referred to in this guidance are subject to the civil law burden of proof. 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**

13. Under Regulation 20, the appropriate employer is required to consider and decide a number of questions before entitlement to an ill health retirement benefit under that regulation can be awarded. These include :-

- a) is the length of total membership at least three months or a transfer value is credited to the member? (but see the Benefits Regulations 5 (1)(a) and 20(1)); and
- b) does the member's ill health or infirmity of mind or body render him permanently incapable of discharging efficiently the duties of his current employment? (Regulation 20(1)(a)); and
- c) does the member have a reduced likelihood of obtaining gainful employment (whether in local government or elsewhere) before his normal retirement age? (Regulation 20(1)(b)).

(Note: see explanations concerning 'gainful employment' and 'reduced likelihood' at paras 24 and 28 below)

14. If the answers to all three questions are in the affirmative, there is a prima facie entitlement to payment of an ill-health benefit under Regulation 20. To decide the level of benefit, the employer must further decide which of the following three situations applies:-

- a) is there no reasonable prospect of the member obtaining any gainful employment before reaching his Normal Retirement Age (NRA) (i.e. age 65)? 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. (Regulation 20(2); or
- b) is the member is judged to be incapable of obtaining gainful employment within three years of leaving local government employment, but is thought likely to be able to do so before reaching his NRA? In these circumstances benefits equal to his accrued rights and an enhancement of 25% of his prospective service to NRA will be awarded. (Regulation 20(3)), or
- c) Is the member likely to recover sufficiently from his incapacity to enable him to be capable of obtaining gainful employment within three years of leaving local government employment? In these circumstances, benefits equal to his accrued rights, with no enhancement, will be awarded. (Regulation 20(4)).

15. Additional questions concerning part time employment and the protection rights of certain members fall to be considered by virtue of Regulations 20(12), (13) and (15) respectively.

### **Entitlement to payment of deferred benefits on the grounds of ill health**

16. Under Regulation 31 of the Benefits Regulations, an ill health benefit can also be paid to a member, who has left a local government employment with an entitlement to a deferred benefit, and becomes permanently incapable of discharging efficiently the duties of their former employment before becoming entitled to payment of that deferred benefit. The member has to apply for the early release of the deferred benefit and payment would be from the date of the application. By virtue of regulation 31(2), the early payment of deferred benefits can only be made in circumstances where the IRMP has certified that the member's condition is likely to prevent him from obtaining gainful employment, whether in local government employment or elsewhere, before reaching his normal retirement age or for at least three years, whichever is the sooner. In other words, the deferred pensioner member would have to satisfy the criteria set out in regulation 20(2) or (3).

## Payments

17. Ill health retirement benefit payments are made by the relevant LGPS administering authority following notification of the determination by the employer (regulation 64 of the administration regulations).

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

18. 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 in Regulation 20(5). This regulation sets out the questions that the IRMP must address in his certificate but provisions relating to the doctor's certification are also set out in the Local Government Pension Scheme (Administration) Regulations 2008. In particular, regulation 56(1) of those regulations requires the IRMP to include a statement confirming his independent status in his certificate under regulation 20 (5). The IRMP may be asked to sign the certificate required under regulation 20 (5) and it is recommended that the IRMP complies with this request.

19. Regulation 20(14) of the Benefits Regulations defines what is meant by "qualified in occupational health medicine".

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

20. In many respects, these reflect the questions that the 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. Under Regulation 20(5), the role of the IRMP is to certify whether or not, in his opinion, on the balance of probabilities, the criteria for entitlement to an ill health benefit are satisfied in any individual case. On this basis, the questions to be considered by the IRMP doctor are:-

- a) is the member **permanently** incapable of discharging efficiently the duties of the relevant local government employment because of ill health or infirmity of mind or body (**Regulation 20(5)**) and, if so –
- b) whether this has resulted in a reduced likelihood of **obtaining any gainful employment** and, if so :-
  - whether there is no reasonable prospect of his obtaining any gainful employment before his normal retirement age (**Regulation 20(5) when read in conjunction with Regulation 20(2)**), or
  - Whether, although there is no prospect of obtaining gainful employment within three years, there is a reasonable prospect of his obtaining gainful employment before reaching his normal retirement age. (**Regulation 20(5) when read in conjunction with Regulation 20(3)**);or
  - whether there is a reasonable prospect of his obtaining gainful employment within three years of leaving local government employment (**Regulation 20(5) when read in conjunction with Regulation 20(4)**).



- c) in the case of a member who is wholly or partly in part-time service, was this as a result of the condition that had caused him to be permanently incapable of discharging efficiently his current employment? (Regulation 20(12)(b)).
- d) under regulation 20(5), the IRMP is also asked to consider whether or not there is a reduced likelihood of obtaining gainful employment. But, in the context of regulation 20(8)(a)(ii) (action at the review) and the definition of “reduced likelihood” below, it is clear that if the IRMP says there is no reduced likelihood of obtaining gainful employment, then this means that regulation 20(8)(a)(ii) is satisfied. This means that a 3rd tier benefit should be discontinued following the 18 month review, if the employer, based on the opinion of the certifying doctor, determines that the member is now capable of obtaining gainful employment.
- e) regulation 20(15) provides that for determinations made by the employer up to and including 30<sup>th</sup> September 2008, the employer will need to consider a member’s entitlement under both the current provisions of regulation 20 and the former ill-health provisions of the 1997 Scheme regulations (see para. 48 below). This does mean that, for this limited period, IRMPs will need to consider the permanency question both in relation to a member’s actual local authority employment and any comparable employment for the purposes of regulation 27 of the 1997 Scheme regulations. Under those regulations, the term “comparable employment” was defined as any other comparable employment with his employing authority as follows:

"comparable employment" means employment in which, when compared with the member's employment

(a) the contractual provisions as to capacity either are the same or differ only to an extent that is reasonable given the nature of the member's ill-health or infirmity of mind or body; and

(b) the contractual provisions as to place, remuneration, hours of work, holiday entitlement, sickness or injury entitlement and other material terms do not differ substantially from those of the member's employment.

21. It is important at this stage to highlight the fact that both regulations 20(1) and (5) restrict entitlement considerations to medical factors. Although regulation 20(1) enables the authority to make an award where a member, amongst other things, “...has a reduced likelihood of obtaining any gainful employment”, it is important to note that by virtue of the conjunctive “and” at the end of regulation 20(1)(a), any “reduced likelihood” for the purposes of regulation 20(1)(b) must be as a direct result of the permanent incapacity referred to in regulation 20(1)(a). On this basis, non-medical factors such as the availability of gainful employment in a particular area, are not relevant factors for the purposes of regulation 20(1). The same rule applies to regulation 20(5), except here, the relevant conjunctive is “and, if so, whether as a result of that condition”.

## **Part V - Definitions**

22. It is important that all parties are clear about the meanings behind the terms used in either the regulations or this guidance. The examples given below expand on the definitions given in regulation 20(14), but others refer to words or phrases that are not defined but which merit explanation.

23. The term “**permanently incapable**” is defined in regulation 20(14) as meaning “that the member will, more likely than not, be incapable until, at the earliest, his 65<sup>th</sup> birthday.” In addressing questions about permanent incapacity, whether in terms of the local government employment or gainful employment elsewhere, consideration must therefore be given not to the immediate or foreseeable future, but to the date when the member attains their NRA.

24. The term “**gainful employment**” is defined by Regulation 20(14) 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 was a feature of the 1997 Scheme from 1999. From 1 April 2008, the IRMP will be required to judge the member’s capability of obtaining any gainful employment - rather than one based on the type of local government formerly held by the member. This reflects government policy whereby public service ill health pensions are to be paid not only on the basis of ability to undertake the member’s current employment, but also other employment in the general workforce.

25. **Significance of ‘3 years’**. The level of benefits payable under regulation 20 are dependant upon the duration of the “reduced likelihood” of obtaining gainful employment, having taken into account the medical condition at the time when the employer determines to terminate a member’s employment. Originally, the view was taken that the regulations should rely on the concept of a “reasonable period” to distinguish 2<sup>nd</sup> tier from 3<sup>rd</sup> tier cases. In the light of representations made by interested parties, the decision was taken that any reference to a reasonable period should be replaced with a fixed period of time, applied consistently across all cases. Three years represents a “reasonable period” distinction for the purposes of considering either a 2<sup>nd</sup> or 3<sup>rd</sup> tier award (Regulation 20 (3) and (4)). The regulations also provide for a limit of 3 years for payment of 3<sup>rd</sup> tier benefits (Regulation 20 (8(b))).

26. “**Obtaining**”. It is important to highlight the fact that both regulations 20(1) and (5) restrict entitlement considerations to medical factors. The IRMP will wish to consider, in the context of regulations 20 and 31, that the word “obtaining” may be taken to include the capacity of the individual in question to carry out gainful employment, taking into account the full medical effects of the condition which gave rise to the retirement on the grounds of permanent ill health. In some cases, the condition may comprise certain medical or physical impediments which have a bearing on the individual’s capacity to obtain gainful employment. For example, a person who is house-bound or unable to travel because of the medical condition, but is otherwise capable of carrying out gainful employment, is likely to have a reduced likelihood of obtaining gainful employment for the purposes of regulations 20 and 31. The regulations therefore allow for the possibility that certain individuals with a permanent incapacity, although theoretically having the capacity to carry out gainful employment, may not in practice be able to obtain it because of the full medical effects of their condition.

27. Non-medical factors, such as the general availability of gainful employment in a particular area or the attitude of employers to certain conditions, **would not be material factors and should not be part of the IRMP’s consideration**, while the effect a medical condition would have on their practical ability to obtain gainful employment would. The same would apply to the individual’s own attitude towards their condition, which could be a limiting factor to obtaining gainful employment, although it is recognised that in some cases, the member’s attitude may constitute a medical condition in itself and the IRMP could be asked to make a judgement about this.

28. **“Reduced likelihood”**. From the outset, the policy objective has always been to encourage a return to work for those people who have left their local government employment because of ill health but who are otherwise capable of carrying out a wide range of employment elsewhere. Regulation 20 does not, therefore, provide an ill health retirement benefit to any member whose employment was terminated on the grounds of ill health or infirmity of mind or body which renders him permanently incapable of discharging efficiently the duties of his current employment, but he does not have a reduced likelihood of obtaining gainful employment (20(1)). In such circumstances, the member would be regarded as immediately capable of obtaining gainful employment as defined in regulation 20(14). “Immediately” means at the point the member’s employment is terminated. It follows that a 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> tier pension can only be awarded to a member whose likelihood of obtaining gainful employment is reduced because of that permanent incapacity.

### **Section 3 – The Regulations in practice**

#### **Part VI – The first tier**

29. Regulation 20(2) provides for payment of a first tier ill-health retirement pension where :-

- a) the member has a qualifying period of at least 3 months or a transfer value is credited to the member (but see the Benefits Regulations, regulation 5 (1));
- b) a certificate has been obtained under regulation 20(5);
- c) based on that certificate, the employer has decided to terminate the member’s 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, because of that condition, he has a reduced likelihood of obtaining any gainful employment before normal retirement age (regulation 20(1) (a) and (b), and
- d) the authority determines that there is no reasonable prospect of him obtaining any gainful employment before normal retirement age (regulation 20(2).

30. Where a first tier pension is awarded under regulation 20(2), the member’s normal benefits are increased as if the date on which he left local government employment was his normal retirement age and by adding to the total membership at that date the whole of the prospective service up to normal retirement age. Regulation 20(12) makes provision for a different calculation in the case of a member in part-time service. A first tier pension is not subject to any review mechanism.

#### **Part VII – The second tier**

31. Regulation 20(3) provides for payment of a second tier ill health retirement pension where the circumstances are the same as those described in the first three bullet points in paragraph 29 above, but the employing authority determines it is likely that the member will become capable of obtaining gainful employment before their normal retirement age but cannot obtain gainful employment within three years of their leaving local government employment.

32. Where a second tier pension is awarded under regulation 20(3), the member’s normal benefits are increased by adding to the member’s total membership at the time of leaving, 25% of their prospective service to normal retirement - subject to the provisions of regulation 20(12) if

the service in question was part-time. A second tier pension is not subject to any review mechanism.

### **Part VIII – The third tier**

33. The 3<sup>rd</sup> tier provides retirement benefits for a member who is judged by an IRMP to be permanently incapable of their local authority employment and has a reduced likelihood of obtaining gainful employment before his normal retirement age, but is also medically considered capable of obtaining gainful employment within three years of leaving employment. The member would be entitled to their accrued LGPS pension benefits, with no enhancement, and payments are made until such time as the member obtains gainful employment. Payments would be discontinued if, following a review, under regulations 20 (7) (a) and (b), the IRMP certificate is to the effect that the member is now capable of gainful employment. 3<sup>rd</sup> tier payments cannot, in any event, continue beyond three years (regulation 20 (8) (b)).

34. All ill health payments are made by the relevant LGPS administering authority following notification of the determination by the employer (regulation 64 of the administration regulations).

### **Requirement to obtain a certificate from an Independent Registered Medical Practitioner qualified in occupational health medicine (IRMP)**

35. Regulation 20(5) requires an employer to obtain a certificate from an IRMP qualified in occupational health medicine.

### **Return to gainful employment**

36. The member with 3<sup>rd</sup> tier benefits is required to notify the previous employer when employment is obtained and provide details, including the pay and working hours, of that employment. The employer considers the details regarding that employment and, if they decide this is gainful employment as defined in paragraph 20 (14) of the Benefits Regulations, payments are discontinued. The employer should notify the relevant administering authority without delay when payments are to be stopped, and payments should be stopped from the date when gainful employment commenced (see para 38 concerning the treatment of overpayments).

### **The Review mechanism**

37. 1<sup>st</sup> and 2<sup>nd</sup> tier ill health benefits are not reviewable but 3<sup>rd</sup> tier benefits are subject to a review. Under regulation 20(7)(a), the previous employer needs to undertake a review when 3<sup>rd</sup> tier payments have been made for 18 months. The employer should write to the 3<sup>rd</sup> tier member asking for details of their employment status. If, from the information provided, the employer decides that gainful employment had been obtained, the 3<sup>rd</sup> tier payments are discontinued.

### **Repayment of overpaid payments**

38. The date of return to gainful employment will determine the date payments should be stopped and the employing authority is required to notify the relevant administering authority without delay when 3<sup>rd</sup> tier payments should be discontinued and from what date (regulation 20 (8) (c)). If payments have continued when gainful employment has been found, the employer has powers to recover any overpayment from the 3<sup>rd</sup> tier member under regulation 20(8)(a). Employers are recommended to pass the amount of the recovered 3<sup>rd</sup> tier payments, without delay, to the relevant pension fund.

### **3<sup>rd</sup> tier member returns to local government employment**

39. Regulation 20(10), requires that when benefits are stopped and the 3<sup>rd</sup> tier member subsequently becomes an active member of the LGPS, the earlier period of membership which resulted in 3<sup>rd</sup> tier benefits is not aggregated with the later active membership.

### **Status of member when payments cease**

40. The status of a 3<sup>rd</sup> tier member whose benefits are stopped is 'a pensioner member with deferred benefits', and he is not eligible to receive 3<sup>rd</sup> tier payments in respect of any future period, regulation 20(9) refers.

### **Seeking a further opinion from an IRMP**

41. If, as a result of the employer's enquiry at the review, it is found that a 3<sup>rd</sup> tier member has not found gainful employment, the employer is required by regulation 20(7)(b) to seek a further opinion from an IRMP concerning the condition which resulted in the 3<sup>rd</sup> tier membership.

42. The same IRMP can sign the certificate that resulted in the first determination and the certificate at the 3<sup>rd</sup> tier review. This is because the provision to obtain a further certificate from the IRMP is under regulation 20(7) (b) which means that 56(1) of the LGPS Administration Regulations does not apply. There is, effectively, no requirement that the IRMP has to be able to certify at a 3<sup>rd</sup> tier review that they have not previously advised, given an opinion on, or otherwise been involved in the case.

### **Employers' ability to uplift the member from 3<sup>rd</sup> tier to a 2<sup>nd</sup> tier following the review (Regulation 20 (11))**

43. The employer can determine that a member with 3<sup>rd</sup> tier benefits can receive the enhanced 2<sup>nd</sup> tier benefits upon the certification by the IRMP following the review or at any time, even if the payment of the 3<sup>rd</sup> tier benefit has been discontinued. The employer must take the same steps when determining the 2<sup>nd</sup> tier concerning certification by an IRMP. The date of the second determination will decide the date from which the uplift to 2<sup>nd</sup> tier will be put into payment. There is no provision to make a determination for a 1st tier payment at the review or a subsequent occasion. If at the 3<sup>rd</sup> tier review or subsequently, the IRMP judges that the member is, because of the condition resulting in 3<sup>rd</sup> tier benefits, now permanently incapable of their local authority employment and has no prospect of obtaining gainful employment before normal retirement age, the employer only has powers to award a 2<sup>nd</sup> tier enhanced pension from the date of the later determination and can do this where the medical certification justifies it. The 2<sup>nd</sup> tier determination may be considered when 3<sup>rd</sup> tier payments are ongoing or have been discontinued. Also, the employer is not prevented from seeking a medical reassessment during the three year period should this be requested by the member.

## **Part IX – Special considerations**

### **Member reduces their hours because of the ill health condition which subsequently results in ill health retirement**

44. Where a member is awarded ill health retirement benefits but, prior to their leaving employment, they have had to reduce their hours as a result of the condition that lead to the ill health retirement award, no account is taken of the reduction in hours. The member's reduction in service which is accrued between the date of the reduction in hours and the date they leave employment is ignored for the purposes of calculating his ill health benefits. The IRMP has to certify that the reduction in hours is as a result of the condition that causes him to be permanently incapable of the relevant local government employment and have a reduced likelihood of obtaining gainful employment, in accordance with regulation 20 (12) (b). If this is certified, the employer can make a determination, and the ill health pension will be calculated based on accrued service with no reduction in service because of the reduction in hours; this applies to past service and, where appropriate, any future service enhancement for a 2<sup>nd</sup> or 1<sup>st</sup> tier award.

45. If a member who is employed at the outset on a part time basis because of an ill health condition, further reduces their hours as a result of that ill health condition, and this is certified to be the case by an IRPM, no account is taken of that further reduction when calculating an ill health retirement award. This applies for both past service and, where appropriate, any future service enhancement for a 2<sup>nd</sup> or 1<sup>st</sup> tier award. The calculation is based on the pre reduction part time service.

46. If, after starting part-time employment, there is no subsequent reduction in the member's part time hours as a result of the ill health condition that is being assessed for ill health retirement, regulation 20 (12) (b) will not apply as there has been no reduction in the current service as a result of the condition resulting in ill health retirement.

### **Treatment of those aged 45 before 1 April 2008 - 1<sup>st</sup> and 2<sup>nd</sup> tier determination**

47. Under regulation 20(13), protection is given for a person who was both a member and aged 45 before 1 April 2008, and where there is entitlement to enhanced ill health retirement benefits (i.e. a 1<sup>st</sup> or 2<sup>nd</sup> tier award). This protection means that the member should be in no worse a position than they would have been had Regulation 28 of the 1997 Regulations applied and the conditions of that regulation were met. The employer will be required to establish entitlement under the 1997 regulations and the 2007 Benefit Regulations as amended, and award the greater of the benefits.

### **Transitional protections**

48. Under regulation 20 (15), transitional protections apply for determinations made before 1 October 2008 to provide that if the benefits payable to a member under the amended regulation 20 would place him in a worse position than he would otherwise be had the 1997 Regulations continued to apply, then those Regulations shall apply as if they were still in force. For all practical purposes, Regulation 27 of the 1997 Regulations remains in force in the transitional period.

49. This means that the employer needs to consider whether the employee would be entitled to ill health benefits under Regulation 20 of the benefit regulations as amended by the LGPS (Amendment) Regulations 2008. The employer also needs to consider whether the member is entitled to ill health benefits under the 1997 Regulations. A calculation of any benefits payable, under the two sets of regulations, is made and any enhancement of prospective service for both calculations is at the 1/60<sup>th</sup> accrual rate. A comparison should then be made and the member is awarded the greater amount.

50. Until the end of September 2008, the ill health certificate to be completed by the independent registered medical practitioner will need to include questions about whether the member would meet the ill health definition in the LGPS Regulations 1997 as well as ill health questions relating to the Benefits Regulations 2007 (as amended).

51. For example, in the transitional period, a member who qualifies for a 3<sup>rd</sup> tier pension and would also qualify for an enhancement of 6 2/3 under the 1997 Regulations, would receive a 1997 Regulation non reviewable, permanent pension with the enhancement calculated at 1/60<sup>th</sup> accrual.

### **How to assess 'gainful employment' if a member in receipt of a 3<sup>rd</sup> tier pension informs the employer that they have a short term contract.**

52. It would be unreasonable for an employer to assume that a person is in gainful employment having notified them that they have just entered a short term contract of employment for, say, six months. Whether that contract will be renewed or not, would be pure conjecture and should not, therefore, fall to be considered. Even if a 3<sup>rd</sup> tier member had served two months of the six month contract, it follows that the definition of gainful employment has not been satisfied. Neither would it be reasonable to make any assumption that four months on, the contract might be reviewed for a further six months which could arguably bring it within the gainful employment definition.

53. Where the employer is notified of a member's employment showing contract details of 30 hours or more in each week, for a period less than 12 months, the 3<sup>rd</sup> tier payments should not be stopped but the employer should check the current employment status with the member at the point the contract is due to end. If it is found that a further contract has been obtained, and this was again for 30 hours or more in each week, for a period less than 12 months, it will be reasonable to stop payments when a continuous 12 month period has been undertaken, as the gainful employment test will have been satisfied.

54. Under some contracts, the hours may be variable and this may cause some difficulty in deciding whether, over the future, the 30 hour test is satisfied over a 12 month period. If employment was obtained some time ago, it should be possible to ascertain a pattern of working from the variable hours worked up to that point and to base a decision on that evidence. A better way forward would be to defer any decision until later in the employment when evidence about working hours has been established.

55. In other words, taking short term contracts may avoid the 3<sup>rd</sup> tier pension being suspended in the short time, but once the employment in individual contracts for 30 hours or more in each week have been undertaken over a continuous 12 month period, the definition of gainful employment would be satisfied.

56. In any event, if it is clear from the outset that the member has obtained employment with a specified period of less than 12 months, the employer will wish to ask the member in receipt of a

3<sup>rd</sup> tier pension, to let them know their employment status at the end of the period of the first short term contract, and subsequent contracts until the gainful employment test has been met.

57. The view is also taken that the words “in each week” where they appear in the definition of “gainful employment” in regulation 20(14) means in each week throughout the 12 month period, rather than in each week where there is a contract of employment. Otherwise, the definition would be satisfied by a person taking just a one month contract of employment for 35 hours a week.

58. Where a member notifies the previous employer that they have obtained employment, for example, 37 hours a week on an open contract ie one that has no specified end date, it would be reasonable for the employer to take the view that the gainful employment test was met and to discontinue payment of the 3<sup>rd</sup> tier benefits.

### **Regulation 31 – Early payment of pension by reason of ill health**

59. A pensioner member whose 3<sup>rd</sup> tier benefits have ceased and who has deferred benefits is not precluded from applying under Regulation 31 as a result of a medical condition unrelated to the condition that resulted in 3<sup>rd</sup> tier payments. A member whose 3<sup>rd</sup> tier payments have ceased, is precluded from resumed 3<sup>rd</sup> tier payments under regulation 20 (9). If a pensioner member whose 3<sup>rd</sup> tier benefits have ceased, seeks release of benefits as a result of the condition that resulted in the 3<sup>rd</sup> tier payment, an employer should consider whether there is eligibility for a 2<sup>nd</sup> tier pension under Regulation 20 (11) (a).

### **Resolution of disagreements and Internal Dispute Resolution Procedure (IDRP)**

60. Regulation 58 of the Administration Regulations enables a scheme member to make an application for any disagreement, between themselves and an employer or an administering authority, to be resolved about a matter in relation to the scheme. This includes any decision taken by an employer or administering authority under the LGPS ill health regulations regarding entitlement to an ill health retirement benefit at the date employment ends (regulations 55 (6) and (7), or the early payment of deferred retirement benefits on ill health grounds having already ceased that employment (regulation 31 of the Benefits Regulations). The IDRP arrangements also apply in cases where an employer or administering authority has failed to make a decision within any period prescribed by the scheme’s regulations.

61. Other decisions which fall within the scheme’s IDRP provisions include:-

- a) any disagreement with the entitlement level of 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> tier pension (regulations 20(2), (3) and (4) of the Benefits Regulations;
- b) whether a certificate has been obtained from an IRMP in compliance with the scheme’s regulations (regulation 20(5) of the Benefits Regulations and regulation 56 of the Administration Regulations);
- c) whether the employing authority has had regard to guidance in carrying out their functions under regulation 56 of the administration regulations or regulation 20 of the Benefits Regulations; and
- d) whether a 3<sup>rd</sup> tier pension should be suspended because the member has obtained gainful employment or, if not, is judged to be capable of obtaining such employment (regulation 20(8)) of the Benefits Regulations.



62. This list is by no means exhaustive and is only given as an illustration of some of the main decisions on ill health retirement pensions that fall within the scheme's IDRPs arrangements. It is also important to note that these arrangements do not apply directly to the opinions given by the IRMP because their role is to give an opinion on whether or not the medical criteria for entitlement to an ill health pension is satisfied. It is the scheme employer that has the regulatory responsibility to decide the entitlement question based on the certificate and/or report submitted by the IRMP and against whom any IDRPs dispute regarding entitlement to benefit rests.

63. Detailed guidance for both scheme employers and scheme members on the scheme's IDRPs arrangements can be found at <http://www.xoq83.dial.pipex.com/empgb.htm> (scheme members) and <http://www.xoq83.dial.pipex.com/idrpguide.pdf> (scheme employers). The guides also refer to the role of the Pensions Ombudsman.

### **Exchange of information by authorities**

64. Regulation 64 of the administration regulations requires employers to provide the relevant administering authority with such information as it needs to discharge its Scheme functions.

### **Section 4 – Documentation**

65. The regulations themselves do not prescribe the precise format of the certificate that the IRMP is required to provide under Regulation 20(5), although the overall content is set out in the regulation itself. To assist practitioners in this process, examples of pro-forma certificates are included at **Annex B and C**. Individual employers, in consultation with their medical advisers, and IRMP, may wish to adapt the example to reflect local circumstances and procedures provided that the content complies fully with the scheme's regulatory requirements. In addition, a complete suite of forms including action at the review, reapplication by 3<sup>rd</sup> tier member whose benefits are discontinued etc, can be provided for employers from their administering authority.

## **Annex A**

### **Background and policy formulation for the current ill health framework**

66. 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.

67. 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 arrangements for the payment of ill-health retirement benefits under the Local Government Pension Scheme Regulations 1997.

68. 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 a multi tier ill-health pension provision**

69. 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 since April 1999, it has also required 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.

70. The proposal to introduce a two-stage level of ill-health retirement benefit entailed the introduction of a new upper level of benefit 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 future earning potential. But 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 employment despite their inability to perform their current duties because of ill-health would have to be explored.

71. 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 within a reasonable period after ceasing their local government employment on permanent ill-health grounds - was such that a three tier provision might be more appropriate.

72. It was also suggested that there could be a role for some form of income-protection arrangement as a way of managing long term sickness absence and ensuring that other alternatives to ill-health retirement, eg, re-training, rehabilitation, re-deployment and flexible retirement, were fully explored before employment is finally terminated on grounds of incapacity.

### **Policy development**

73. After consideration of the views expressed by interested parties, Ministers came forward, in April 2007, with a two tier arrangement as set out in the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (*benefit regulations*). A 1<sup>st</sup> tier member will receive their accrued pension entitlements plus a service enhancement of all (100%) of their prospective membership to their normal retirement date. A 2<sup>nd</sup> tier member with a lower level of incapacity will receive 25% of that prospective membership along with their accrued pension entitlements.

74. The final element of ill health remained to be decided. CLG explored with key stakeholders the scope for a form of income replacement allowance, outside the pension scheme and to be paid by employers from their revenue. However, agreement was not reached. As new tax rules, introduced in the 2007 Finance Act, did not preclude the cessation of a pension, consideration of a 3<sup>rd</sup> tier within the LGPS was then an option.

75. In November 2007, interested parties were consulted on a reviewable third tier of ill health retirement benefit for a Scheme member who leaves employment because they are assessed by an independent occupational health practitioner as being permanently incapable of their current job but medical evidence indicates that they are capable of obtaining alternative employment within three years of their leaving.