Discretions

Guidance Notes

East Riding Pension Fund

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Contents

1. Introduction

The Local Government Pension Scheme (LGPS) is a statutory scheme; the rules and regulations governing the scheme are laid down under Act of Parliament however there are some provisions of the Scheme that are discretionary.

Discretionary powers allow employers to choose how, or if, they apply certain provisions. This document provides guidance on the discretions an employer can exercise in relation to the LGPS.

Within the list of discretions that an employer must have a policy on, only five have to be published - some examples of discretions that an employer has to make a policy on but not publish are:

- Will an employer extend the 12 month window for transfers in?
- Will an employer include one-off payments or bonuses when calculating Assumed Pensionable Pay (APP)?
- Other than at 01 April of each year, how often will an employer review the contribution bandings?

For further guidance on the discretions which exist within the LGPS regulatory framework and the parties responsible for exercising those discretions, please refer to the following website (under "Discretions Policies" and "Discretions List"):

http://www.lgpsregs.org/index.php/guides/administration-guides-to-the-2014-scheme

Once an employer has made a policy on their discretions, that policy must be published for all staff to see for 30 days. Only after this period, and only after any queries have been dealt with, can the policy become effective; at this time, an employer should forward a copy to the ERPF.

The ERPF require a copy of the discretionary policies held by each employer to ensure that the potential employer costs are correctly reflected in future valuation result; in the absence of a policy being held the actuary will assume the higher cost option is taken by the employer which would increase the employer's liabilities.

An employer's discretionary document confers no contractual rights and an employer retains the right to change the policies at any time without prior notice or consultation. Only the policy which is current at the time a relevant event occurs to an employee/scheme member will be applied to that employee/member. If you do revise your policy, the revised policy must be published for all staff to see for 30 days. Again, only after this period, and only after any queries have been dealt with, can the policy become effective; at this time, an employer should forward a copy to the ERPF.

It is important to stress the guidance provided in this document is not exhaustive and in formulating and reviewing its policy, an employer must have regard to any serious loss of confidence in the public service which may occur as a result of exercising its discretionary powers.

2. Regulation 30(6) – Flexible Retirement

An employer can allow any of their actively contributing LGPS members who are age 55 or over to access their benefits and continue to work for them. This option is not available for anybody who has opted out of the LGPS (i.e. they are not currently paying into the pension scheme).

An employer will need to develop a procedure whereby members can request to reduce either their hours or their grade (or both) and, with the employer's approval, access their LGPS benefits and continue to work; they can also continue to pay into the LGPS and build up further benefits that will be payable when they fully retire.

The policy wording should be used to explain to member how they can go about requesting flexible retirement and whether the employer has any specific restrictions that must be adhered to.

In flexible retirement cases, pension benefits will be reduced in accordance with actuarial tables unless the employer waives the reduction (either fully or in part) or if a member has protected rights.

Where there will be a strain cost for approving flexible retirement, any costs associated with this will be payable immediately in one instalment. Where the member is aged between 55 and 60, there most likely will be a strain cost. Where the member is aged 60 or over, there is no strain cost.

Where flexible retirement is agreed for an employee aged 55 or over but under Normal Pension Age the cost of waiving any actuarial reduction, in whole or in part, would have to be met by, and paid to the Pension Fund by, the employer.

An employer must take in to consideration that strain costs **will** be higher if they chose to waive reductions.

Overall, the benefits of flexible retirement include:

- It assists in reducing capacity if required, and helps avoid redundancies (and associated costs),
- It can be a useful tool to support change management,
- It helps achieve and retain a balanced age profile within the workforce,
- It aids retention of required skills / knowledge / experience and enables transfer of skills / knowledge in the period leading up to an employee's full retirement,
- It offers a potentially acceptable solution to staff who may currently be a 'blockage' to promotion or re-organisation,
- It helps to alleviate stress; it improves morale; it assists in achieving a "work/life" balance,
- It may assist a return to work after a medical related absence where ill health retirement is not appropriate, and
- It assists employees to ease into retirement, making a gradual adjustment to full retirement.

An employer can request strain costs from the ERPF for flexible retirement. The employer will receive the strain cost information only and will **not** receive a copy of the member benefits (this information is sent directly to the member) – if the employer wishes to see a copy of the information before making a decision, it is the responsibility of the member to supply the employer with this information.

2.1 Option 1 – Carry forward the employers existing policy

Scheme employers should, prior to 1 April 2014, already have prepared and published a policy on flexible retirement for flexible retirements under the 2008 Scheme and for waiving any actuarial reduction in whole or in part (in accordance with the LGPS (Administration) Regulations 2008). Employers may, therefore, wish to simply carry forward their existing policy (assuming they have one), but suitably amended for post 31 March 2014 flexible retirements to reflect the necessary provisions below.

Provisions

Whether to permit flexible retirement for staff aged 55 (see additional notes for any members who transferred from the Learning and Skills Council [8.2]) or over who, with the agreement of the employer reduce their working hours or grade and, if so, as part of the agreement:

- whether, in addition to the benefits the member has accrued prior to 1 April 2008 (which the member must draw if flexible retirement is agreed), to permit the member to choose to draw

  - all, part or none of the pension benefits they accrued after 31 March 2008 and before 1 April 2014, and / or
  - all, part or none of the pension benefits they accrued after 31 March 2014, and

- whether to waive, in whole or in part , any actuarial reduction which would otherwise be applied to the benefits taken on flexible retirement before Normal Pension Age (NPA) (see additional notes for further information on NPA [8.1]).

2.2 Option 2 – The employer will not agree to requests for flexible retirement

Please note that this option may be open to the challenge or complaint that it fetters the employer's discretion. Fettering of discretion occurs when a decision-maker does not genuinely exercise independent judgment in a matter. Although an administrative decision maker may properly be influenced by policy considerations and other factors, he or she must put his or her mind to the specific circumstances of the case and not focus blindly on a particular policy to the exclusion of other relevant factors. Please see the additional notes on fettering available in section 7.

2.3 Option 3 – The employer will not agree to requests for flexible retirement except in circumstances where it is considered to be in the employers financial or operational interests to do so

Where flexible retirement is agreed, the benefits payable will be subject to any actuarial reduction applicable under the Local Government Pension Scheme Regulations and the Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014. Employers might wish to include in their policy that where flexible retirement is being considered, there must be a reduction of at least one grade or, in the case of a flexible retirement due to a reduction in working hours, be a minimum reduction in hours of (example) 20% e.g. the equivalent of the hours for one working day.

2.4 Option 4 – The employer can make their own policy

If an employer wishes to make their own policy, they must take in to consideration the notes made above.

3. Regulation 31 –Granting additional pension of up to £6755* annual pension

***figure at 1 April 2016**

An employer can grant extra annual pension of up to £6755* (at full cost to the employer) to an active scheme member or, within 6 months of leaving to a member who is dismissed by reason of redundancy or business efficiency or whose employment is terminated by mutual consent on the grounds of business efficiency.

The maximum amount of £6755* includes any amount of additional pension already granted by the employer under regulation 13 of the LGPS (Benefits, Membership and Contributions) Regulations 2007. The cost of any extra annual pension awarded would have to be paid to the Pension Fund by the employer as a lump sum payment unless the employer agrees with the LGPS Pension Fund administering authority to pay increased contributions to meet the cost.

Any extra annual pension granted by the employer would be subject to an actuarial reduction where, other than in a case of ill health retirement or retirement on redundancy or business efficiency grounds, that extra annual pension is drawn before the member's Normal Pension Age. The extra annual pension provides a benefit for the scheme member only i.e. a share does not flow through to any survivor's pension payable upon the death if the scheme member.

The amount of extra annual pension purchased (or being purchased) by the employer under a Shared Cost Additional Pension Contributions (SCAPC) arrangement (including a SCAPC arrangement where an employer is contributing 2/3rds of the cost of purchasing pension 'lost' during a period of absence) counts towards the £6755* limit of extra annual pension that the employer can award.

Employers cannot grant extra annual pension if the employer makes an award of lump sum compensation (of up to 104 weeks' pay) under regulation 6 of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006. Employers can, however, grant extra annual pension if the employer makes an award under regulation 5 of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 i.e. bases a redundancy payment on an employee's actual weeks' pay where this exceeds the statutory weeks' pay limit. The difference between the statutory redundancy payment and the redundancy payment based on the employee's actual week's pay is, in this paper, termed the discretionary redundancy payment.

An issue that potentially arises in granting extra annual pension is that, in some cases, it can result in the value of the scheme member's benefits being increased by more than the permitted standard Annual Allowance of, currently, £40000 (2015/16). Any increase in value above that figure could result in a tax charge for the individual.

Any additional pension granted will also count towards the capitalised value of a person's pension benefits which have to be assessed against the member's Lifetime Allowance (LTA) under the tax regime governing pension schemes. Each time a person retires and draws benefits from a pension scheme they use up a part of their LTA.

If, on retirement under the LGPS, the capitalised value of their total LGPS benefits is more than the person's remaining LTA, they will have to pay tax on the excess (at the rate of 25% if the excess is paid in the form of pension and 55% if paid in the form of a lump sum). For more information see

http://www.hmrc.gov.uk/manuals/rpsmmanual/RPSM06105000.htm and
http://www.hmrc.gov.uk/manuals/rpsmmanual/RPSM11100000.htm

Employers considering granting extra annual pension to members of the LGPS will need to take a view on whether doing so could leave them open to challenge on age or gender discrimination grounds (e.g. if those not in the Pension Scheme tend to be younger employees and part-time female workers).

Compare this to an award of lump sum compensation which can be awarded to not only those who are members of the LGPS but also to those who are eligible for membership of the LGPS (and so can be less open to challenge on age or gender discrimination grounds). An implication of the Equality Act 2010 and the Equality Act (Age Exceptions for Pension Schemes) Order 2010 is that all staff should be treated equally regardless of their age, unless different treatment can be objectively justified.

3.1 Option 1- Carry forward the employers existing policy

Scheme employers should, prior to 1 April 2014, already have prepared and published a policy on granting extra annual pension of up to £5000 under the 2008 Scheme (in accordance with the LGPS (Administration) Regulations 2008). Employers may, therefore, wish to simply carry forward their existing policy (assuming they have one), but suitably amended to refer to the LGPS Regulations 2013.

If an employer wishes to award extra annual pension, the employer will need to consider the criteria for deciding to whom to grant such pension and for determining the amount of extra annual pension to grant in each case. The criteria should be included in the employer's policy statement. The policy should not use criteria that are directly or indirectly discriminatory (unless objectively justified e.g. the employer could demonstrate that the policy pursues a legitimate aim and that it is proportionate and is an appropriate and necessary means of achieving that aim).

3.2 Option 2 – The employer will not make use of the discretion to grant extra pension of up to £6755 (figure at 1 April 2016)

Please note that this option may be open to the challenge or complaint that it fetters the employer's discretion.

Fettering of discretion occurs when a decision-maker does not genuinely exercise independent judgment in a matter. Although an administrative decision maker may properly be influenced by policy considerations and other factors, he or she must put his or her mind to the specific circumstances of the case and not focus blindly on a particular policy to the exclusion of other relevant factors. Please see the additional notes on fettering available in section 7.

3.3 Option 3 – The employer will not make use of the discretion to grant extra pension of up to £6755 (figure at 1 April 2016) except in exceptional circumstances where it is considered to be in the employer's financial or operational interests to do so

This option does not fetter the employer's discretion and leaves the option open for the employer to grant extra annual pension in exceptional circumstances. An example of an exceptional circumstance is where it is felt necessary in order to attract an employee who has the specialist skills and experience an employer needs, or where it is felt necessary in order to induce an employee with specialist skills and experience not to leave.

3.4 Option 4 – The employer will not make use of the discretion to grant extra pension of up to £6755 (figure at 1 April 2016) except in exceptional circumstances where it is considered to be in the employer's financial or operational interests to do so. However, the employer will make use of the discretion to grant extra annual pension to a member who is dismissed by reason of redundancy or business efficiency or whose employment is terminated by mutual consent on the grounds of business efficiency.

If an employer wishes to award extra annual pension, the employer will need to consider the criteria for deciding to whom to grant such pension and for determining the amount of extra annual pension to grant in each case. The criteria should be included in the employer's policy statement. The policy should not use criteria that are directly or indirectly discriminatory (unless objectively justified e.g. the employer could demonstrate that the policy pursues a legitimate aim and that it is proportionate and is an appropriate and necessary means of achieving that aim).

An alternative approach that employers who wish to award extra annual pension could consider (for members whose employment is being terminated on the grounds of redundancy or business efficiency) is what might be termed 'extra annual pension by conversion'. In effect, the employer would have a policy that would permit the employer to:

- Award a lump sum compensation payment (of up to 104 weeks' pay) under regulation 6 of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006, inclusive (in redundancy cases) of any statutory redundancy payment and any increase in the redundancy payment made under regulation 5 of those Regulations (where an employee's actual weeks' pay exceeds the statutory weeks' pay limit) or,

- Having considered the view of the employee, to make an award of extra annual pension that is actuarially equivalent to the lump sum compensation payment that the employer would otherwise have made.

The employer would need to reflect this in their policy in relation to discretionary lump sum compensation payments. It is important to stress that the employee would not be sacrificing a lump sum compensation payment in return for extra annual pension in the LGPS and would not be using lump sum compensation payment that is paid or due to him/her in return for extra annual pension. Instead, the employer would, having considered the view of the employee, simply be making a determination to award extra annual pension and not to award a lump sum compensation payment. It should be noted that the amount of extra annual pension cannot exceed £6755 (figure at 1 April 2016).

Extra annual pension that would exceed this limit is not permitted; it is not permissible to split the award and award part as extra annual pension (up to the aforementioned limit) and the balance as a lump sum compensation payment.

3.5 Option 5 – The employer can make their own policy

If an employer wishes to make their own policy, they must take in to consideration the notes made above.

4. Regulation 16(2)(e) and 16(4)(d) - Voluntarily contributing to an active member's APC

This discretion is where an active scheme member wishes to purchase extra annual pension of up to £6755 (figure at 1 April 2016) by making Additional Pension Contributions (APCs) and the employer will voluntarily contribute towards the cost of purchasing that extra pension via a Shared Cost Additional Pension Contribution (SCAPC).

This discretion does not relate to cases where a member has a period of authorised unpaid leave of absence and elects within 30 days of return to work to pay a SCAPC to cover the amount of pension 'lost' during that period of absence. That is because, in those cases, the employer **must** contribute 2/3rds of the cost to a SCAPC. There may be some cases, even if it is not the employer's general policy to voluntarily contribute to a SCAPC, where an employer might wish to do so (see options 2, 3, 4 and 5 below).

It should be noted that the amount of extra annual pension purchased (or being purchased) by the employer under a SCAPC arrangement (including a SCAPC arrangement where an employer is contributing 2/3rds of the cost of purchasing pension 'lost' during a period of absence) reduces the amount of extra annual pension the employer could award under Regulation 31 above.

Any extra annual pension granted by the employer under a SCAPC arrangement would be subject to an actuarial reduction where, other than in a case of ill health retirement, that extra pension is drawn before the member's Normal Pension Age.

The maximum amount of £6755 (figure at 1 April 2016) includes any amount of additional pension purchased, or being purchased, by the member under regulation 14 of the LGPS (Benefits, Membership and Contributions) Regulations 2007.

4.1 Option 1- The employer will not make use of the discretion to voluntarily contribute towards the cost of purchasing extra pension via a Shared Cost Additional Pension Contribution (SCAPC).

Please note that this option may be open to the challenge or complaint that it fetters the employer's discretion.

Fettering of discretion occurs when a decision-maker does not genuinely exercise independent judgment in a matter. Although an administrative decision maker may properly be influenced by policy considerations and other factors, he or she must put his or her mind to the specific circumstances of the case and not focus blindly on a particular policy to the exclusion of other relevant factors.

Please see the additional notes on fettering available in section 7.

4.2 Option 2 – The employer will only voluntarily contribute towards the cost of purchasing extra pension via a Shared Cost Additional Pension Contribution (SCAPC) where:

- an active scheme member returns from a period of authorised leave of absence, and

- the member does not, within 30 days of returning from the leave of absence, make an election to buy-back the amount of pension 'lost' during that period of leave of absence, and

- the member subsequently makes an election to do so whilst an active member and it can be demonstrated that the reason for the member missing the original 30 day deadline was because the member had not been made aware of that deadline, and

- the election is made no more than 3 months* after the member returns from the period of leave of absence or such longer period as the employer may deem reasonable in any individual case.

A decision on whether the member meets the above criteria (and on whether the 3 month* period referred to should be extended in any individual case) will be taken by [enter appropriate details] and, where it is agreed that the conditions are met, the employer will be required to contribute 2/3rds of the cost of buying back the 'lost' pension via a SCAPC.

* the employer can enter a different period if they feel a different period would be more appropriate.

This option covers cases where it would be reasonable to contribute to a SCAPC to deal with an administrative error.

4.3 Option 3 – The employer will only voluntarily contribute towards the cost of purchasing extra pension via a Shared Cost Additional Pension Contribution (SCAPC) in two situations.

1. Firstly, where:

- an active scheme member returns from a period of authorised leave of absence, and

- the member does not, within 30 days of returning from the leave of absence, make an election to buy-back the amount of pension 'lost' during that period of leave of absence, and

- the member subsequently makes an election to do so whilst an active member and it can be demonstrated that the reason for the member missing the original 30 day deadline was because the member had not been made aware of that deadline, and

- the election is made no more than 3 months* after the member returns from the period of leave of absence or such longer period as the employer may deem reasonable in any individual case.

A decision on whether the member meets the above criteria (and on whether the 3 month* period referred to should be extended in any individual case) will be taken by [enter appropriate details] and, where it is agreed that the conditions are met, the employer will be required to contribute 2/3rds of the cost of buying back the 'lost' pension via a SCAPC.

* the employer can enter a different period if they feel a different period would be more appropriate.

2. Secondly, where a member has a string of odd days of authorised unpaid leave of absence throughout the scheme year (1 April to 31 March). In such a case, the employer will (instead of requiring elections to buy-back the amount of pension 'lost' during the periods of leave of absence to be made within 30 days of returning from each day of absence) allow the member (whilst an active member) to make a single election during the scheme year to cover each one of the absences that occur during the scheme year.

This option covers cases where it would be reasonable to contribute to a SCAPC to deal with an administrative error and cases where the employer is willing to accept a single application each scheme year in respect of multiple absences in that year.

4.4 Option 4 – The employer will only voluntarily contribute towards the cost of purchasing extra pension via a Shared Cost Additional Pension Contribution (SCAPC) in two situations.

1. Firstly, where:

- an active scheme member returns from a period of authorised leave of absence, and
- the member does not, within 30 days of returning from the leave of absence, make an election to buy-back the amount of pension 'lost' during that period of leave of absence, and
- the member subsequently makes an election to do so whilst an active member and it can be demonstrated that the reason for the member missing the original 30 day deadline was because the member had not been made aware of that deadline, and
- the election is made no more than 3 months* after the member returns from the period of leave of absence or such longer period as the employer may deem reasonable in any individual case.

A decision on whether the member meets the above criteria (and on whether the 3 month* period referred to should be extended in any individual case) will be taken by [enter appropriate details] and, where it is agreed that the conditions are met, the employer will be required to contribute 2/3rds of the cost of buying back the 'lost' pension via a SCAPC.

* the employer can enter a different period if they feel a different period would be more appropriate.

2. Secondly where, in exceptional circumstances, the employer considers it is in its financial or operational interests to do so. Each case to contribute to a SCAPC (and a decision on the amount to be contributed) will be considered on the merits of the financial and/or operational business case put forward.

This option covers cases where it would be reasonable to contribute to a SCAPC to deal with an administrative error and any other exceptional cases that might arise.

4.5 Option 5 – The employer will only voluntarily contribute towards the cost of purchasing extra pension via a Shared Cost Additional Pension Contribution (SCAPC) in three situations.

1. Firstly, where:

- an active scheme member returns from a period of authorised leave of absence, and
- the member does not, within 30 days of returning from the leave of absence, make an election to buy-back the amount of pension 'lost' during that period of leave of absence, and
- the member subsequently makes an election to do so whilst an active member and it can be demonstrated that the reason for the member missing the original 30 day deadline was because the member had not been made aware of that deadline, and
- the election is made no more than 3 months* after the member returns from the period of leave of absence or such longer period as the employer may deem reasonable in any individual case.

A decision on whether the member meets the above criteria (and on whether the 3 month* period referred to should be extended in any individual case) will be taken by [enter appropriate details] and, where it is agreed that the conditions are met, the employer will be required to contribute 2/3rds of the cost of buying back the 'lost' pension via a SCAPC.

* the employer can enter a different period if they feel a different period would be more appropriate.

2. Secondly, where a member has a string of odd days of authorised unpaid leave of absence throughout the scheme year (1 April to 31 March). In such a case, the employer will (instead of requiring elections to buy-back the amount of pension 'lost' during the periods of leave of absence to be made within 30 days of returning from each day of absence) allow the member (whilst an active member) to make a single election during the scheme year to cover each one of the absences that occur during the scheme year.

3. Thirdly, where in exceptional circumstances, the employer considers it is in its financial or operational interests to do so. Each case to contribute to a SCAPC (and a decision on the amount to be contributed) will be considered on the merits of the financial and/or operational business case put forward.

This option covers cases where it would be reasonable to contribute to a SCAPC to deal with an administrative error, cases where the employer is willing to accept a single application each scheme year in respect of multiple absences in that year, and any other exceptional cases that might arise.

4.6 Option 6 – The employer can make their own policy

If an employer wishes to make their own policy, they must take in to consideration the notes made above.

5. Regulation 30(8) – Waiving actuarial reductions on compassionate grounds

This discretion is for:

i) active members voluntarily retiring on or after age 55 (see additional notes for any members who transferred from the Learning and Skills Council [8.2]) and before Normal Pension Age who elect under regulation 30(5) of the LGPS Regulations 2013 to immediately draw benefits, and ,

ii) deferred members and suspended Tier 3 ill health pensioners who elect under regulation 30(5) of the LGPS Regulations 2013 to draw benefits (other than on ill health grounds) on or after age 55 (see additional notes for any members who transferred from the Learning and Skills Council [8.3]) and before Normal Pension Age

It allows the employer waive (on compassionate grounds) any actuarial reduction that would otherwise be applied to benefits accrued **before** a certain point and/or waive, in whole or in part (on any grounds), any actuarial reduction that would otherwise be applied to benefits accrued **after** a certain point.

If the employer does agree to waive any actuarial reduction, the employer will have to meet the cost of the strain on fund resulting from that waiver.

There is no definition in the Regulations of "compassionate grounds". However, one could take the view that, for example, releasing benefits because the member is short of funds/out of work would not be appropriate (as the pension scheme is not a social security scheme); whereas, for example, releasing benefits because the member has had to give up work to look after orphaned grandchildren would clearly be a case where an employer might wish to exercise compassion.

For members who were not members of the LGPS before 1 October 2006 [Group 4 members], whether to:

- waive on compassionate grounds, any actuarial reduction that would otherwise be applied to benefits, if any, accrued before 1 April 2014, and/or,
- waive, in whole or in part (on any grounds), any actuarial reduction that would otherwise be applied to benefits accrued after 31 March 2014

For members who were members of the LGPS before 1 October 2006 and will be 60 or more on 31 March 2016 [Group 1 members], whether to:

- waive on compassionate grounds, any actuarial reduction that would otherwise be applied to benefits accrued before 1 April 2016, and/or
- waive, in whole or in part (on any grounds), any actuarial reduction that would otherwise be applied to benefits accrued after 31 March 2016

For members who were members of the LGPS before 1 October 2006 and will not be 60 or more on 31 March 2016 and will not attain age 60 between 1 April 2016 and 31 March 2020 [Group 3 members], whether to:

- waive on compassionate grounds, any actuarial reduction that would otherwise be applied to benefits accrued before 1 April 2014, and / or
- waive, in whole or in part (on any grounds), any actuarial reduction that would otherwise be applied to benefits accrued after 31 March 2014

For members who were members of the LGPS before 1 October 2006 and will not be 60 or more on 31 March 2016 but will attain age 60 between 1 April 2016 and 31 March 2020 [Group 2 members], whether to:

- waive on compassionate grounds, any actuarial reduction that would otherwise be applied to benefits accrued before 1 April 2020, and / or
- waive, in whole or in part (on any grounds), any actuarial reduction that would otherwise be applied to benefits accrued after 31 March 2020

Please refer to the additional note for local authorities with staff in maintained schools [8.4] if applicable.

5.1 Option 1- Where members choose to voluntarily draw their benefits on or after age 55 and before Normal Pension Age, the employer will not agree to waive in whole or in part (on any grounds, including compassionate grounds) any actuarial reduction that would otherwise be applied to their benefits.

Please note that this option may be open to the challenge or complaint that it fetters the employer's discretion.

Fettering of discretion occurs when a decision-maker does not genuinely exercise independent judgment in a matter. Although an administrative decision maker may properly be influenced by policy considerations and other factors, he or she must put his or her mind to the specific circumstances of the case and not focus blindly on a particular policy to the exclusion of other relevant factors.

Please see the additional notes on fettering available in section 7.

5.2 Option 2 – Where members choose to voluntarily draw their benefits on or after age 55 and before Normal Pension Age the employer will not agree to waive in whole or in part any actuarial reduction that would otherwise be applied to their benefits except in circumstances where the employer considers it is in its financial or operational interests to do so or there are compelling compassionate reasons for doing so.

Each case

- will be considered on the merits of the financial and / or operational business case put forward, or
- will be considered on the merits of the compassionate case put forward, and
- will require the approval of [enter appropriate details] including, where the reduction is only to be waved in part, approval for the amount of reduction to be waived.

5.3 Option 3 – The employer can make their own policy

If an employer wishes to make their own policy, they must take in to consideration the notes made above.

6. Regulation 1(1)(C) – Switching back on the “Rule of 85” for employees retiring between 55 and 60

This discretion allows the employer to “switch on” (i.e. apply) the 85 year rule for voluntary retirement when it does not (other than on flexible retirement – see section 2 above) automatically apply to members who would otherwise be subject to it and who are choosing to voluntarily draw their benefits on or after age 55 and before age 60 (see the additional notes for information on those who transferred to the Environment Agency [8.5]). The 85 year rule is satisfied if the person was a member of the LGPS on 30 September 2006 and the member’s age at the date they draw their benefits and their scheme membership (each in whole years) add up to 85 or more. If they are part-time, their membership counts towards the 85 year rule at its full calendar length. If the employer does agree to apply the 85 year rule, the employer will have to meet the cost of any strain on fund resulting from the payment of benefits before age 60 i.e. where the member has already met the 85 year rule, or would meet it before age 60. If the member has met the 85 year rule or would have met it before age 60, there would be no strain cost charged to the employer unless the employer has agreed to apply the 85 year rule in the case in question. Instead, the cost would be met by an actuarial reduction to the scheme member’s benefits.

Applying the 85 year rule might be a mechanism employers would wish to consider to encourage members to retire early to, for example, help achieve a balanced age profile within the workforce or to avoid possible redundancies later (which have attendant greater costs). A half-way house would be to not apply the 85 year rule but to agree to waive some of the actuarial reduction that would otherwise be applied to the member’s benefits (see section 5). In this way the cost of drawing benefits early would be met in part by the scheme member (via an actuarial reduction to their benefits) and in part by the employer (via a strain cost). Please refer to the additional note for local authorities with staff in maintained schools [8.4] if applicable.

6.1 Option 1- The employer will not agree to apply the 85 year rule where members choose to voluntarily draw their benefits on or after age 55 and before age 60.

Please note that this option may be open to the challenge or complaint that it fetters the employer’s discretion. Fettering of discretion occurs when a decision-maker does not genuinely exercise independent judgment in a matter. Although an administrative decision maker may properly be influenced by policy considerations and other factors, he or she must put his or her mind to the specific circumstances of the case and not focus blindly on a particular policy to the exclusion of other relevant factors. Please see the additional notes on fettering available in section 7.

6.2 Option 2 – The employer will not agree to apply the 85 year rule where members choose to voluntarily draw their benefits on or after age 55 and before age 60 except in circumstances where the employer considers it is in its financial or operational interests to do so.

Each case will be considered on the merits of the financial and/or operational business case put forward, and will require the approval of [enter appropriate details].

6.3 Option 3 – The employer can make their own policy

If an employer wishes to make their own policy, they must take in to consideration the notes made above.

7. Notes on “fettering”

When considering the options available, it will be necessary to have regard to the question of fettering of discretion. There are two trains of thought on this particular subject:

1. The first is that, in order not to be seen to fetter in any way an employer’s discretion, the policy should state that each case will be determined based on its circumstances and merits and, if relevant to the discretion in question, up to a maximum of **XX** will be awarded.

The policy should set out the criteria upon which the discretion will be based. It is argued that constructing a policy in this way helps to satisfy the requirements set out in paragraphs 15 to 17 above.

2. The second type of approach is that, for a particular discretion, an employer might wish to adopt a standard policy but make it plain in the policy statement that:

    - The policy confers no contractual rights,
    - Subject to paragraphs 20 to 22 of the statement of policy discretions document, the employer retains the right to change the policies at any time without prior notice or consultation, and
    - The policy which is current at the time a relevant event occurs to an employee/scheme member will be the one applied to that employee/member.

It may be argued that the employer is not fettering its discretion because it retains the right to amend/change the policy at any time and that the approach is seen to be fairer in that the policy is applied consistently across all employees. However, it can also be argued that such policies do fetter an employer’s discretion (because they leave no scope to deal with individual, perhaps exceptional, cases) and may not adequately take into account the requirements set out in paragraphs 15 to 17 of the statement of policy discretions document.

A view given by the Pensions Ombudsman is that:

- Where regulations allow an employer to exercise discretion a policy should be in place to set out how to exercise that discretion.
- A policy is there to guide the decision-maker on how to exercise discretion.
- An employer cannot generally bind itself as to how it will exercise discretion – fettering discretion is unlawful.
- Every case should be considered on its merits; a decision is to be made on whether to follow the policy or make an exception,
- Policies do not override the law; they should not apply a stricter test.

8. Additional notes

8.1 Normal Pension Age (NPA)

NPA means the employee's individual State Pension Age at the time the employment is terminated, but with a minimum of age 65 (although, the NPA for membership accrued prior to 1 April 2014 is still linked to age 65, apart from those LGPS members transferred from the Learning and Skills Council to whom regulation 16A of the LGPS (Benefits, Membership and Contributions) Regulations 2007 applies for whom the NPA for membership accrued prior to 1 April 2014 is, by virtue of that regulation and regulation 24 of the LGPS (Transitional Provisions, Savings and Amendment) Regulations 2014, still linked to age 60, and those LGPS members who are employees of the Meat Hygiene Service in the London Pension Fund Authority fund who are covered by regulation 144B of the LGPS Regulations 1997 for whom the NPA for membership accrued prior to 1 April 2014 is, by virtue of that regulation and regulation 24 of the LGPS (Transitional Provisions, Savings and Amendment) Regulations 2014, still linked to age 60). State Pension Age is currently age 65 for men. State Pension Age for women is currently being increased to be equalised with that for men and will reach 65 by November 2018. The State Pension Age will then increase to 66 for both men and women from December 2018 to October 2020. Under current legislation the State Pension Age is due to rise to 67 between 2026 and 2028 and to 68 between 2044 and 2046. However, the government has announced plans to link rises in the State Pension Age above age 67 to increases in life expectancy.

8.2 LGPS members transferred from the Learning and Skills Council to whom regulation 16A of the LGPS (Benefits, Membership and Contributions) Regulations 2007 applies [point 1]

Age 50 for those LGPS members transferred from the Learning and Skills Council to whom regulation 16A of the LGPS (Benefits, Membership and Contributions) Regulations 2007 applies. Such members only need the employer's permission to reduce their working hours or grade but, if that permission is given, do not require their employer's permission to draw their benefits (as such members have the automatic right to take the benefits by virtue of regulation 18A of the LGPS (Benefits, Membership and Contributions) Regulations 2007 and regulation 24 of the LGPS (Transitional Provisions, Savings and Amendment) Regulations 2014).

8.3 LGPS members transferred from the Learning and Skills Council to whom regulation 16A of the LGPS (Benefits, Membership and Contributions) Regulations 2007 applies [point 2]

Age 50, by virtue of regulation 24 of the LGPS (Transitional Provisions, Savings and Amendment) Regulations 2014, for those LGPS members transferred from the Learning and Skills Council to whom regulation 16A of the LGPS (Benefits, Membership and Contributions) Regulations 2007 applies and who are electing for early payment of a deferred benefit (but not if they are electing for early payment of a suspended Tier 3 ill health pension) and those civil servants transferred to the Environment Agency to whom regulation 15 of the LGPS (Transitional Provisions) Regulations 2008 applies and who are electing for early payment of a deferred benefit or early payment of a suspended Tier 3 ill health pension.

8.4 Additional note for local authorities with staff in maintained schools:

Although section 37 of the Education Act 2002 gives all of the Maintained Schools with a delegated budget the power to go beyond the Local Authority's policies in respect of the dismissal of, or for the purpose of securing the resignation of, any member of the school's staff, in reality, as this will entail additional cost, a community school, a community special school, a maintained nursery school, a foundation school, a foundation special school, a foundation trust school or a voluntary school is unlikely to depart from the Local Authority's policy. Nevertheless, the power to go beyond the Local

Authority's policy for the purposes of the dismissal of, or securing the resignation of, any member of the school's staff exists and so the Local Authority's policy statement in relation to the ability to award extra annual pension of up to £6,675 (figure as at April 2015) as part of an arrangement for the dismissal of, or for the purpose of securing the resignation of, a member of staff will have to contain a modification to reflect the powers conferred by the Education Act 2002 on such Maintained Schools with a delegated budget

8.5 The 85 year rule- Environment Agency

The 85 year rule does not apply to former members of the Metropolitan Civil Staffs Superannuation Scheme, or Meat Hygiene Service members, or civil servants transferred to the Environment Agency who by virtue of regulation 24 of the LGPS (Transitional Provisions, Savings and Amendment) Regulations 2014 are subject to, respectively, regulation 144A of, and Schedule 7 to, the LGPS Regulations 1997, regulation 144B of the LGPS Regulations 1997 and regulation 15 of the LGPS (Transitional Provisions) Regulations 2008.