Cost Management, Benefit Design and Administration Committee

DATE:	03 June 2019
VENUE:	Room 1 & 2, 18 Smith Square, London SW1P 3HZ
TIME:	1.00PM – 3.00PM

AGENDA

Item		Page(s)	Timings
1	Welcome, introductions, apologies and declaration of interests	**-**	1:00
2	Matters arising -	**Paper A**	1:05
3	Scheme Advisory Board Cost Management Process – Update		1:15
4	95K Cap - Update		1.25
5	Academies, 3rd Tier Employers and Good Governance projects – Update		1.40
6	Late Retirement Factors - Update		2.00
7	Local Pension Board Survey II	**Paper B**	2.10
8	Forfeiture Regulations	**Paper C**	2.30
9	TPR scheme return - Conditional Data - Update		2:50
10	AOB and date of next meeting		2.55
	a) HE/FE Consultation – Glyn Jenkins		

Cost Management, Benefit Design and Administration Committee

Item 2 Paper A

ACTIONS AND AGREEMENTS
MEETING HELD ON 5th February 2019 – 11.00am
AT LOCAL GOVERNMENT ASSOCIATION, 18 SMITH SQUARE, WESTMINSTER, LONDON, SW1P 3HZ

PRESENT

George Georgiou	Members (GMB)	Chair
Rachel Brothwood	CIPFA	
Sean Collins	Practitioners	
Emma Mayall	Practitioners (via cc)	
Glyn Jenkins	Members (UNISON)	
Graeme Muir	Actuaries: Barnett-Waddingham	
John Livesey	Actuaries: Mercer	
Alison Murray	Actuaries: Aon Hewitt	
Peter Summers	Actuaries: Hymans Robertson	
Jeff Houston	LGA - Board Secretariat	
Robert Holloway	LGA - Board Secretariat	
Liam Robson	LGA - Board Secretariat	
Brian Allan	GAD	
Mike Scanlon	GAD	
Jeremy Hughes	MHCLG	
Con Hargrave	MHCLG	

APOLOGIES

There were apologies from John Neal and Kevin Gerrard

1. Welcome, introductions and apologies

The Chair welcomed all in attendance to the meeting.

2. Matters arising

The Committee agreed the minutes for the previous meeting. Agenda item 3 was expected to require most time, therefore was moved to item 9, all other agenda items remained in the same order.

3. Scheme Advisory Board Cost Management Process – Update

On 30th January 2019, the Government published a written statement which announced a pause in the cost cap process for public service

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pension schemes pending the outcome of the application to appeal the McCloud case to the Supreme Court.

The statement gave no timescales for the outcome of this case. However, it was understood that it could be late 2019 or early 2020 before an outcome is reaches.

The Board considered, given this announcement, whether it should withdraw the benefit change recommendations made to MHCLG as a result of its own cost cap process.

Action - The Board agreed that the Chair should formally confirm to the Minister that the SAB cost cap process was being paused.

If the McCloud case is upheld, the LGPS (and other PS Schemes) could be required to make changes to the underpin and that such changes would need to be taken into account in a revised SAB cost cap result.

In taking this view, the SAB was aware that delaying benefit changes to possibly 2020 while backdating them to April 2019 would constitute a significant administrative burden on administering authorities and employers. The Board also considered that there was no clarity in approach to 2019 valuations.

Action - The Board agreed that the opinions of administrating authorities should be sought regarding whether a central approach to making assumptions about benefit changes (or otherwise) should be provided, or whether pension funds should be left to their own devices.

Action - The Board agreed that the sub group of the Chair, Vice chair and lead employer representative should agree the next stage and course of action.

4. Academies/3rd Tier employer projects - Update

Bob Holloway (BH) provided an update, stating that work on both projects would resume in the near future.

5. Good Governance project – Update

The committee noted that Hymans Robertson had been awarded the contract, previously known as the separations project. An update to the timescales was provided, with an expected final report to be made to the Board in June/July.

6. Late Retirement Factors - Update

Jeremy Hughes (JH) presented his paper on the proposed new approach to Late Retirement Factors (LRFs). The committee welcomed the efforts to smooth the transition between current factors and the next.

7. Local Pension Board Survey II - Update

A new, follow up survey for Local Pension Boards was planned. This would build on the 2017 survey.
<u>Agreed</u> - A draft would be circulated to the committee for comment before released.

8. GAD factor review - Update

Mike Scanlon (MS) and Brian Allen (BA) explained the updates to the suite of factors, highlighting that in addition to amended figures in tables there were also so format changes. Revision of discount rates had resulted in an uplift in transfer values compared with previous factors.
<u>Action</u> - Practitioners, in light of Freedom and Choice, were asked to monitor levels of transfers out for information.

9. TPR scheme return – Conditional Data - Update

The tPR governance and administration survey was run at the end of 2018.

10. AOB and date of next meeting

Fair Deal – New Fair Deal – continued protected membership of the LGPS on TUPE transfers would apply. MHCLG statutory consultation will be issued shortly.

The next meeting date was to be confirmed, but likely to be in April 2019.

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Item 7 Paper B

LOCAL PENSION BOARD SURVEY II

Issue

1. The Investment, Governance and Engagement committee has been given delegated authority by the Scheme Advisory Board to prepare and publish a second survey to assess the continuing effectiveness of local pension boards since the first survey was undertaken in 2017.

2. A copy of the draft survey is attached at Annex A for the information of committee members.

Consideration

3. The draft survey has been the subject of consultation with members of the Investment committee and their comments will now be taken on board with the aim of preparing a final version for approval by the Chair and/or Vice Chair of that committee.

Action

4. If members of the CMBDA committee have any comments they wish to make on the draft survey, these should be sent to Bob Holloway at Robert.holloway@local.gov.uk before the 14th June 2019.

Annex A

DRAFT LOCAL PENSION BOARD SURVEY – 2019

Please complete and return to your response to this survey by [date]. Please ensure that one survey response is submitted in respect of each Fund's Local Pension Board. If not completed directly by the Local Pension Board members, the survey response should at least be approved by the Chairperson of the Board, and preferably also agreed by all Board members. However, individual Board members may submit their own responses where they wish to include alternative responses to some questions.

List of definitions and terms:

"*Required*" – this means something that is a prerequisite within the Board's terms of reference
"*Scheme manager*" – the Administering Authority e.g. the Council

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"*Scheme manager officers*" – the officers who are responsible for the management of the pension fund, including the section 151 officer.
"*Board*" – Local Pension Board
"*Pension Committee*" – the section 101 committee which has delegated responsibility for pension fund matters, or where there is no formal committee, any equivalent advisory committee or panel.

Q1a. Is the Board constituted under regulation 106 of the Local Government Pension Scheme Regulations 2013? YES/NO/DON'T KNOW
Q1b. If the answer is "No", under what power is the Board currently constituted? (text box)
Q2. Who is responsible for recruiting and appointing Board members? (text box)
Q3. How often is the Board required to meet? (text box)
Q4. How often did the Board meet in –
- **a) 2015/16 (text box)**
- **b) 2016/17 (text box)**
- **c) 2017/18 (text box)**
- **d) 2018/19 (text box)**

Q5. What is the required number of employer representatives? (text box)
Q6. How many employer representatives were vacant on the 1st April 2019? (text box)
Q7. What is the required number of member representatives? (text box)
Q8. How many member representatives roles were vacant on the 1st April 2019 (text box)
Q9. Is the Chair of the Board selected by –
- **a) the scheme manager's officers? YES/NO/ DON'T KNOW**
- **b) Board members? YES/NO/ DON'T KNOW**
- **c) Any other (please describe)? (text box)**

Q10. Is the Chair independent? YES/NO/ DON'T KNOW
Q11a. Excluding reimbursement of direct expenses:
- **i) is the Chair of the Board remunerated? YES/NO/ DON'T KNOW**
- **ii) are other Board members remunerated? YES/NO/ DON'T KNOW**

Q11b. If the answer "YES", explain below the level of remuneration, in relation to what period, i.e., per meeting or per annum and any restrictions?
- **i) Chair of the Board (text box)**
- **ii) Other Board members (text box)**

Q12. Are expenses paid to Board members? YES/NO/ DON'T KNOW
Q13. On a scale of 1 (very difficult) to 5 (very easy), how easy has it been to recruit and appoint new employer representatives? (text box)

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Q14. On the same scale of 1 to 5, how easy has it been to recruit and appoint new member representatives? (text box)
Q15a. Does the Board have terms of reference or equivalent that sets out the roles and responsibilities of the Board and how it operates? YES/NO/ DON'T KNOW
Q15b. If the answer is "YES", were the terms of reference approved by the scheme manager? YES/NO/ DON'T KNOW
Q16. If the answer is "NO", explain below who approved the terms of reference. (text box)
Q17. Are Board members subject to a conflicts of interest policy that is:

a) **Local Pension Board Policy YES/NO/ DON'T KNOW**
b) **Pension Fund Policy YES/NO/ DON'T KNOW**
c) **Other – please explain YES/NO/ DON'T KNOW (text box)**

Q18a. Have all Board members completed a declaration of their potential conflict of interests? YES/NO/ DON'T KNOW
Q18b. If the answer is "YES", when did this last happen? (text box)
Q19. Are Board members provided with a copy of the Fund's procedures for identifying and managing pension's breaches of the law? YES/NO/DON'T KNOW
Q20. Are Board members provided with or have access to a copy of the Fund's record of breaches of the law? YES/NO/ DON'T KNOW
Q21a. In 2018/19 did the Board itself identify any breaches of the law? YES/NO/ DON'T KNOW
Q21b. If the answer is "YES" describe them below including how they were identified (text box)
Q22. Are Board members provided with or have access to a copy of the Fund's risk register? YES/NO/ DON'T KNOW
Q23. Does the Board have a training or knowledge and skills policy? YES/NO/ DON'T KNOW
Q24. On average, how many hours of training per Board member were completed in –

a) **2015/16 (text box)**
b) **2016/17 (text box)**
c) **2017/18 (text box)**
d) **2018/19 (text box)**

Q25a. Have Board members been asked to complete any form of self-assessment of their knowledge and skills? YES/NO/ DON'T KNOW
Q25b. If the answer is "YES", when did this last happen? (text box)
Q26. Where "YES" has been given to Q17, Q20, Q22, Q24 and Q25, on a scale of 1 (very poor) to 5 (excellent), how would you evaluate –

a) **The terms of reference (text box)**
b) **Conflict of interest policy (text box)**
c) **The register of breaches (text box)**
d) **The risk register, and (text box)**

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e) The knowledge and skills policy (text box)

Q27. Is specialist Local Pension Board personal liability or indemnity insurance provided to Board members? YES/NO/ DON'T KNOW

Q28. Give up to three examples of significant achievements by the Board (text box)

Q29. Give up to three examples where the Board is working well (text box)

Q30. Give up to three examples where the Board could improve what it does (text box)

Q31a. Do you think the Board is restricted in any way in carrying out its responsibilities? YES/NO/ DON'T KNOW

Q31b. If the answer is "YES", give the reasons below (text box)

Q32a. Has the Board ever reviewed the scheme manager's compliance against TPR's Code of Practice 14? YES/NO/ DON'T KNOW

Q32b. If the answer is "YES", when? (text box)

Q33. On a scale of 1(very poor) to 5 (excellent), how would you evaluate –

- a) The relationship between the scheme manager officers and the Board (text box)
- b) The relationship between the pension committee and the Board (text box)
- c) The Board's ability to identify non-compliance with legal requirements (text box)
- d) The Board's ability to make recommendations to the scheme manager officers and/or pension committee where non-compliance has been identified (text box)
- e) The scheme manager officer/pension committee's response(s) to such recommendations, if any (text box)
- f) The Board's ability to identify areas of improvement in the effective and efficient administration and governance of the scheme manager (text box)

Q34. Other than scheme manager officers supporting the Board (e.g. the Board secretary), does the scheme manager in any other capacity regularly attend Board meetings? YES/NO/ DON'T KNOW

Q35. Who is responsible for setting the agenda for Board meetings? (text box)

Q36. Were any scheduled Board meetings in 2018/19 non-quorate or became non-quorate and if so, how many? (text box)

Q37. Who drafts the section about the Board for including in the scheme manager's Pension Fund Annual Report required by regulation 57 of the 2013 Regulations and CIPFA Preparing the Annual Report Guidance? (text box)

Q38. During 2018/19 did the Board prepare a Local Pension Board annual report? YES/NO/DON'T KNOW

Q39a. Does the Board have a web page(s)? YES/NO/DON'T KNOW

Q39b. If the answer is "YES" is the web page part of the scheme manager's website or elsewhere? (text box)
Q40. Does the web page(s) including the following?

a) **Board Agenda YES/NO/DON'T KNOW**
b) **Board reports YES/NO/DON'T KNOW**
c) **Board minutes YES/NO/DON'T KNOW**
d) **Board terms of reference YES/NO/DON'T KNOW**
e) **Board members' identities YES/NO/DON'T KNOW**
f) **How stakeholders can contact a member of the Board YES/NO/DON'T KNOW**
g) **The latest Board annual report YES/NO/DON'T KNOW**
h) **The Board's Conflicts of Interest Policy YES/NO/DON'T KNOW**

Q41a. During 2018/19 was a review of the effectiveness of the Board undertaken? YES/NO/DON'T KNOW
Q41b. If the answer is "YES", who undertook the review (text box)
Q42a. Are Board members able to attend pension committee meetings other than as a member of the public? YES/NO/DON'T KNOW
Q42b. If the answer is "YES", are they able to attend Part 2 of the committee meeting? YES/NO/DON'T KNOW
Q42c. If the answer is "YES", are Board members able to participate in pension committee meetings? YES/NO/DON'T KNOW
Q43a. Does the Board have a budget? YES/NO/DON'T KNOW
Q43b. If the answer is "YES" –

i) **What was the size of the budget for 2018/19 (text box)**
ii) **How much of that budget was spent in 2018/19? (text box)**
iii) **Can it be used to access independent external advice? YES/NO/DON'T KNOW**

Q43c. If the answer to the last point is "YES" give examples below where such advice has been commissioned (text box)
Q44. On average, how much time as a percentage is spent at each Board meeting on the following topics;

a) **Governance? (text box)**
b) **Administration and Communications? (text box)**
c) **Other? (text box)**

Q45. During 2018/19, did the Board consider any aspect of the governance of asset pooling? YES/NO/DON'T KNOW
Q46. Describe below ways in which the relationships between the Board, scheme manager officers and pension committee could be improved (text box)
Q47. Use the space below to comment on any other aspect of the governance arrangements that you consider to be relevant. (text box)

<u>Submission details</u>

Cost Management, Benefit Design and Administration Committee

Name of Pension Fund -

Person submitting this:

Name -

Role within Pension Fund –

Email address –

Telephone contact number -

If person submitting is not Local Pension Board Chairperson, please confirm this submission has been agreed by the Board Chairperson YES/NO

Has this submission been agreed by the Local Pension Board as a whole? YES/NO

If no, why not? (text box)

Date -

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Cost Management, Benefit Design and Administration Committee

Item 8 Paper C

AMENDMENT TO FORFEITURE REGULATIONS

Issue

1. The Technical Group has requested that the Scheme Advisory Board should consider making recommendations to MHCLG to amend the provisions of the scheme to ensure that forfeiture of pension rights can still apply where conviction occurs after the termination of the member's employment.

Background

2. The request from the Technical Group is shown below –

"Formal request by the National LGPS Technical group for a change to the forfeiture regulations

This email is a formal request, by the National LGPS Technical Group, to change the policy behind the application of the forfeiture regulations. The group requests an amendment to regulation 91(2) of the LGPS Regulations 2013 [SI 2013/2356].

Regulation 91(1) of the LGPS Regulations 2013 (Forfeiture), prescribes that if a member is convicted of a relevant offence, the former Scheme employer may apply to the Secretary of State to issue a forfeiture certificate. A 'relevant offence' is defined in regulation 91(2) as "an offence committed in connection with an employment in which the person convicted is a member, and because of which the member left the employment".

The group requests that the definition of 'relevant offence' in regulation 91(2) (and equivalent predecessor regulations) be changed to "an offence committed in connection with an employment in which the person convicted is a member~~, and because of which the member left the employment~~".

Reason for request

There have been several high profile cases by which individuals have circumvented the forfeiture provisions, by simply leaving employment before conviction. There was a fraud case earlier this year where a Chief Finance Officer stole over £400,000 though it didn't come to light until after the individual had left employment.

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The problematic wording within the regulations is as follows "*A relevant offence is an offence committed in connection with an employment in which the person convicted is a member, and because of which the member left the employment*".

The problem with the extant prescription is that the individual must have left employment because they have been convicted of an offence in relation to that employment. In the majority of cases, the only part of the definition satisfied is "*an offence committed in connection with an employment in which the person convicted*". The wording does not address historical events coming to light, which are now more frequent in today's society.

The group believes that the policy should be, where an individual is convicted of an offence in relation to the employment in which the individual is a member, the former Scheme employer should be able to apply for a forfeiture certificate, regardless as to the reason as to why the individual is no longer in that employment (i.e. this would close the loop hole, so that an individual who voluntarily leaves employment before conviction, may still be subject to a forfeiture certificate at some point in the future, whilst retaining the link to a conviction in relation to that employment)"."

3. A paper describing the case referred to above by the Technical Group is at Annex A.

Consideration

4. The committee is invited to consider the proposal made by the Technical Group and to make a recommendation to the Scheme Advisory Board. In addition, the committee may wish to consider the following –

- Should a time limit after termination of employment be applied during which forfeiture can apply?
- How would the proposal work when benefits have been legitimately been paid on termination or subsequently transferred before any post-employment conviction comes to light?
- Would consideration also need to be given to making similar amendments to the provisions on recovering a monetary obligation?
- Should further work be undertaken to establish how forfeiture provisions operate in other public service pension schemes?

Recommendation

5. That the committee considers the proposal made by the Technical Group and invites the Scheme Advisory Board to consider whether a

recommendation should be made to MHCLG for appropriate amendments to be made to the scheme.

Annex A

Background

A recent decision by the Pensions Ombudsman (copy attached) held that Enfield LBC, a scheme employer in the local government pension scheme, did not have the power under Regulation 74 of The Local Government Pension Scheme (Administration) Regulations 2008 to recover a monetary obligation from a former member's pension rights.

The relevant section of Regulation 74 provided that :-

*"**74.**—(1) This regulation applies where a person—*

(a) has left an employment, in which he was or had at some time been a member, in consequence of a criminal, negligent or fraudulent act or omission on his part in connection with that employment;

(b) has incurred some monetary obligation, arising out of that act or omission, to the body that was his employing authority in that employment; and

(c) is entitled to benefits under the Benefits Regulations.

(2) The former employing authority may recover or retain out of the appropriate fund—

(a) the amount of the monetary obligation; or

(b) the value at the time of the recovery or retention of all rights in respect of the former employee under the Scheme with respect to his previous membership (as determined by an actuary),

whichever is less."

Facts

The member in question had worked as Head of Finance for the council. Between June 2008 and December 2010, the member sent a total of 104 payments to his personal bank account from the council's staff provider account totalling £448,207. The member was made redundant in December

2010 and later in 2011, the City of London Police investigated a fraudulent property deal in which the member had invested heavily using the monies fraudulently obtained from the council. The member was convicted of fraud in July 2012 and sentenced to four years imprisonment.

The council secured a judgement in the sum of £509,889.23 and in October 2012, wrote to the member giving notice of the proposal to retain £476,300 of the value of his pension rights using the power to recover a monetary obligation under Regulation 74 of The Local Government Pension Scheme (Administration) Regulations 2008. The exercise of this power was challenged by the member's legal advisers who claimed that their client had left the council's employment by reason of redundancy and not, as required by Regulation 74, in consequence of his fraudulent act and subsequent conviction.

The council argued that applying the strict interpretation of Regulation 74 as argued by the member's legal adviser produced an absurd result that Parliament could never have intended. The council also relied on the general principle that a person should not benefit from their own wrongdoing.

The matter was eventually passed to the Pensions Ombudsman for determination.

The Pension Ombudsman's conclusion

In his determination, the Pensions Ombudsman concluded that on a literal construction of Regulation 74, the regulation does not allow the council to retain any of the member's pension rights. The member had left the council's employment as a result of their redundancy programme and not in consequence of his fraudulent act.

The Pensions Ombudsman also refuted the council's argument that applying the literal interpretation of Regulation 74 produced an absurd result. He said :-

"*Whilst I agree that the overriding objective in statutory construction is to give effect to the presumed intention of Parliament. I do not consider that there are sufficient grounds to suggest that Parliament intended for those who had left employment not in consequence of their fraud, to be caught by the Regulation."*

The determination upheld the complaint and required the council to reconsider their interpretation of Regulation 74 and whether in seeking to retain the member's pension rights, it has applied these correctly.

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The Pensions Ombudsman concluded that the council should reassess the method it wishes to apply in its recovery of the member's debt and take the appropriate steps to allow the member to access his benefits. The council was given three months to complete its reassessment.

The statutory background

The power to enable occupational pension schemes like the LGPS to forfeit, retain or recover a member's pension rights is given by Sections 92 and 93 of the Pensions Act 1995 :-

92. Forfeiture, etc

(1) Subject to the provisions of this section and section 93, an entitlement, or accrued right, to a pension under an occupational pension scheme cannot be forfeited.

(2) Subsection (1) does not prevent forfeiture by reference to—

> *(a) a transaction or purported transaction which under section 91 is of no effect, or*
>
> *(b) the bankruptcy of the person entitled to the pension or whose right to it has accrued,*

whether or not that event occurred before or after the pension became payable.

(3) Where such forfeiture as is mentioned in subsection (2) occurs, any pension which was, or would but for the forfeiture have become, payable may, if the trustees or managers of the scheme so determine, be paid to all or any of the following—

> *(a) the member of the scheme to or in respect of whom the pension was, or would have become, payable,*
>
> *(b) the spouse, widow or widower of the member,*
>
> *(c) any dependant of the member, and*
>
> *(d) any other person falling within a prescribed class.*

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(4)Subsection (1) does not prevent forfeiture by reference to the person entitled to the pension, or whose right to it has accrued, having been convicted of one or more offences—

(a) which are committed before the pension becomes payable, and

(b) which are—

(i) offences of treason,

(ii) offences under the Official Secrets Acts 1911 to 1989 for which the person has been sentenced on the same occasion to a term of imprisonment of, or to two or more consecutive terms amounting in the aggregate to, at least 10 years, or

(iii) prescribed offences.

(5) Subsection (1) does not prevent forfeiture by reference to a failure by any person to make a claim for pension—

(a) where the forfeiture is in reliance on any enactment relating to the limitation of actions, or

(b) where the claim is not made within six years of the date on which the pension becomes due.

(6) Subsection (1) does not prevent forfeiture in prescribed circumstances.

(7) In this section and section 93, references to forfeiture include any manner of deprivation or suspension.

93. Forfeiture by reference to obligation to employer

(1) Subject to subsection (2), section 92(1) does not prevent forfeiture of a person's entitlement, or accrued right, to a pension under an occupational pension scheme by reference to the person having incurred some monetary obligation due to the employer and arising out of a criminal, negligent or fraudulent act or omission by the person.

(2) A person's entitlement or accrued right to a pension may be forfeited by reason of subsection (1) to the extent only that it does not exceed the amount of the monetary obligation in question, or (if less) the value

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(determined in the prescribed manner) of the person's entitlement or accrued right to a pension under the scheme.

(3) Such forfeiture as is mentioned in subsection (1) must not take effect where there is a dispute as to the amount of the monetary obligation in question, unless the obligation has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff.

(4) Where a person's entitlement or accrued right to a pension is forfeited by reason of subsection (1), the person must be given a certificate showing the amount forfeited and the effect of the forfeiture on his benefits under the scheme.

(5) Where such forfeiture as is mentioned in subsection (1) occurs, an amount not exceeding the amount forfeited may, if the trustees or managers of the scheme so determine, be paid to the employer.

Consideration

The key point here is that neither section 92 nor 93 of the Pensions Act 1995 requires there to be a causal connection between the offence or misconduct and termination of employment, the main requirement being that the offence or misconduct occurred before benefits become payable. Had Regulation 74 of the 2008 Administration Regulations adopted the strict wording of Section 93 of the Pensions Act 1995 without any causal connection, there is a very strong likelihood that the Pensions Ombudsman would have reached a determination in the council's favour.

The essential question therefore is whether the stricter tests adopted by Regulations 91 and 93 of the LGPS Regulations 2013 and their corresponding provisions under the 1997 and 2008 Regulations, puts a scheme employer in a position where recovery of a monetary obligation is frustrated unless the act which gives rise to the obligation is discovered before benefits become payable and employment terminated by reason of that misconduct. In this respect, it is relevant to note that in the recent Pension Ombudsman's case, the council claimed that by late 2015 they had only been able to recover about £50,000 of the total monetary obligation of £509,889.

It is also relevant to note that no other major public service pension scheme requires there to be a causal connection between the act giving rise to a monetary obligation and termination of employment.

There might also be a case for considering different approaches to forfeiture under Regulation 91 and recovery or retention of a monetary obligation under Regulation 93 of the 2013 Regulations.

Forfeiture cases typically do not involve a direct monetary obligation to a scheme employer. They are more concerned with cases where a member has abused a position of responsibility which results in a serious loss of confidence in the public service or is gravely injurious to the State. Would such loss of confidence or grave injury to the State be any less because an offence only came to light and a conviction made after employment had been terminated on normal grounds? There is perhaps a strong case therefore to extend Regulation 91(2) of the 2013 Regulations with the underlined words shown below :-

"(2) A relevant offence is an offence committed in connection with an employment in which the person convicted is a member, and because of which the member left the employment <u>or the scheme employer would have terminated the employment</u>."

Conversely, Regulation 93 of the 2013 Regulations is used by a scheme employer to recover a monetary obligation from a member's pension rights. But the same principle applies, that is, whether recovery or retention of a member's pension rights should depend solely on the act or omission resulting in the monetary obligation being identified prior to and resulting in the termination of employment. However, if the general policy aim is to ensure that a scheme employer is able to fully recover any monetary obligation owed to it by one of its employees, it is reasonable to examine other ways in which the monies can be recovered outside of the scheme. For example, how would a local authority employer recover a monetary obligation from an employee who was not a member of the pension scheme?

If, upon examination, recovery of a monetary obligation by a scheme employer outside of Regulation 93 of the 2013 Regulations is as effective, it would be reasonable to conclude that Regulation 93 need not be amended to cover those cases where the monetary obligation only comes to light after employment has been terminated.

<u>Conclusion and recommendations</u>

It is clear that the forfeiture, recovery and retention provisions of the LGPS in England and Wales goes far beyond that set out in primary legislation and

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the provisions adopted by similar schemes in the public sector. This undoubtedly restricts the number of cases where forfeiture and recovery/retention of pension rights can be secured by LGPS scheme employers but there is no evidence available to determine the number of cases frustrated by the scheme's stricter test of causation.

For the reasons given in paragraphs 16 to 19 above, different considerations should apply to the provisions under Regulations 91 and 93 of the 2013 Regulations.

In the case of the forfeiture provisions of Regulation 91, the view is taken that the causation test between conviction and termination of employment should be removed to ensure that pension rights can be forfeited in cases where the offence was committed before benefits become payable but where conviction of that offence occurs after employment has been terminated on normal grounds. Some consideration may need to be given to time limiting applications after employment has been terminated to avoid cases where the passage of time has lessened the social impact of any earlier employer-related offence.

In the case of Regulation 93, the view is taken that no amendment to remove the causation test should be considered until it is shown whether other means of recovering a monetary obligation provides scheme employers with a reasonable guarantee of recovering such monies.

Bob Holloway
Pensions Secretary
Local Government Association
7 April 2017

Cost Management, Benefit Design and Administration Committee

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Item 8a Paper D

AMENDMENT TO REFUND OF CONTRIBUTIONS REGULATIONS

Issue

1. The Technical Group has requested that the Scheme Advisory Board should consider making recommendations to MHCLG to address concerns over the requirement in Regulation 18(5) of the 2013 Regulations that refunds of contributions must be made to the entitled person within 5 years of the employment having been terminated.

Background

2. The request from the Technical Group is shown below –

"The National Technical Group recommend to SAB, to change the regulations concerning the payment of a refund to reflect the position prior to 1 April 2014 (i.e. to remove the prescription that requires an administering authority to pay a refund on the expiry of a period of five years beginning with the date the person's active membership ceased if no request is made before then – regulation 18(5) of the LGPS Regulations 2013 [SI 2013/2356]). In making this recommendation the group acknowledged that interest would be added up to the date of payment, as opposed to on the expiry of 5 years.

Brief background

Further to the discussion and recommendations that took place in the meeting of 28 September 2018, the group considered as to whether or not the '5 year rule' set out in regulation 18(5) of the LGPS Regulations 2013 could be removed? After investigation it was discovered that the '5 year rule' had been inserted into the LGPS Regulations 2013 at request from Administering Authorities. It is understood that an equivalent rule is not present in other PSPS. The rule was inserted to avoid building up any further 'frozen refunds, however, this has had unintended consequences.

Detailed background covered in meeting held on 28 September 2018

Members who left active membership of the scheme on and after 1 April 1974 and prior to 1 April 2008

Any refunds being processed 'now' for members who left under the 1974 Regulations, the 1986 Regulations (which were a consolidation of the 1974 Regulations), or the 1995 Regulations (which were merely a consolidation of the 1974 and 1986 Regulations) are paid under regulation 29 of the LGPS

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(Transitional Provisions) Regulations 1997. These revoked regulation C21 of the LGPS Regulations 1995 (refunds), as it is one of the "replaced provisions" named in regulation 2(1) of the LGPS (Transitional Provisions) Regulations 1997. Therefore, all refunds that are paid 'now' for members who left active membership of the scheme on and after 1 April 1974 and before 1 April 2008 are paid in accordance with regulations 87 and 88 of the LGPS Regulations 1997. *There is no time limit by when the refund must be paid.*

Members who left active membership of the scheme on and after 1 April 2008 and prior to 1 April 2014

Any refunds paid 'now' for members who left active membership of the scheme on and after 1 April 2008 and before 1 April 2014 are paid in accordance with regulations 46 and 47 of the LGPS (Administration) Regulations 2008. *There is no time limit by when the refund must be paid.*

Members who left active membership of the scheme on or after 1 April 2014

Any refunds paid 'now' for members who left active membership of the scheme on and after 1 April 2014 are paid in accordance with regulations 18 and 19 of the LGPS Regulations 2014 (a small group of members did have transitional protection under regulation 7 of the LGPS (Transitional Provisions, Savings and Amendment) Regulations 2014 though for the purpose of setting a policy approach for the issue to hand this is irrelevant).

Regulation 18(5) of the LGPS Regulations 2013 prescribes that *there is a time limit for payment*:
"*An administering authority shall refund contributions to a person entitled under paragraph (1) when the person requests payment, or on the expiry of a period of five years beginning with the date the person's active membership ceased if no request is made before then or, if the person attains age 75 before then, on the day before attaining age 75.*"

Group discussion

There was overall agreement that the refund could not automatically be paid (i.e. using bank information that may be up to 5 years old) without the necessary up to date mandates and relevant approval/confirmation from the member.

There was also a reluctance to pay refunds to an ESCROW account for a number of reasons:
a) Difficulty in opening ESCROW accounts,

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b) If an ESCROW account is opened, payments into the account would need to be tracked causing more work as these members will still not have completed documentation to pay the refund from the ESCROW account. This would impact on those administering authorities with large volumes of refunds who don't reply.
c) This approach is inconsistent with how refunds in respect of members who left prior to 1 April 2014 are processed (albeit the group acknowledges that there are no time constraints regarding payment for those cases).
d) It was recognised that members are reluctant to provide their bank details in order to receive refunds for lower values, for example, those less than £10.
e) The regulations prescribe that a refund should be paid to the 'person entitled' and it's not clear that an ESCROW account meets that criteria.

The group considered the impact of leaving the refund in the pension fund and paying the refund to the member at a date beyond the timescale set down in regulation 18(5)? There are a number of impacts:

1) If the refund were to be paid to the member beyond the expiry of 5 years from leaving active membership and the member had not re-joined the scheme beyond that date, then should the refund be paid this would be a breach of the scheme rules and would need to be recorded as such. These cases would need to be reported to pensions committee, Local Pension Board and included on the breaches register.

   Additionally, the payment could not be treated as a Short Service Refund Lump Sum payment under section 166 and paragraph 5 of the Finance Act 2004 if the member:
   a) Had previously had a BCE in the Scheme, and/or,
   b) Holds deferred benefits in the Scheme, and/or,
   c) Has reached age 75

   If any of the above circumstances have occurred, the payment would be an unauthorised payment, as such would need to be reported on the event report and the payment (excluding both interest which is a scheme administration member payment and any charge by virtue of section 205 of the Finance Act 2004) would be subject to:
   Member tax charges of:
   - 'Unauthorised Payments Charge' (40%)
   - Maybe subject to 'Unauthorised Payments Surcharge' (15%)

   Administering Authority tax charges of:
   - 'Scheme Sanction Charge' (40% though may be reduced to 15% if 'Unauthorised Payments Charge' paid by the member –

administering authorities may wish to consider adopting the mandating procedure set down in PTSM134300).

2) If the refund were to be paid to the member beyond the expiry of 5 years from leaving active membership and the member had re-joined the scheme beyond that date, then should the refund be paid this would be a breach of the scheme rules and would need to be recorded as such. These cases would need to be reported to pensions committee, Local Pension Board and included on the breaches register.

   Additionally, the payment could not be treated as a Short Service Refund Lump Sum payment under section 166 and paragraph 5 of the Finance Act 2004 as the payment would not extinguish the member's benefits under the scheme. The unauthorised payment, would need to be reported on the event report and the payment would be subject to the tax charges as set out in point 1 above.

3) If the refund is not paid to either the member or an ESCROW account these cases should be reported to pensions committee, Local Pensions Board and recorded as a breach.

   Two final points to note in this scenario, is that:

- An interfund adjustment could not take place under regulation 22(5) of the LGPS Regulations 2013. This is because there is no entitlement to an interfund, because the refund should have been paid before the expiry of 5 years from leaving active membership. To allow the payment of an interfund, would in effect place the member in a better position than a member who re-joins the scheme after the expiry of 5 years from leaving active membership, who took payment of their refund within the prescribed manner.
- A cash transfer sum could not be paid to another registered pension scheme under regulation 96 of the LGPS Regulations 2013. Again this is because there is no entitlement to cash transfer sum, because either a cash transfer sum or a refund should have been paid before the expiry of 5 years from leaving active membership.

Group policy recommendation

Taking all of the above considerations into account the group have recommended the following policy approach to the payment of a refund of contributions in respect of a member who left active membership on or after 1 April 2014:

General principle

The group agreed that a refund should be paid from the fund before the expiry of 5 years of the member leaving active membership. However, the group acknowledges in practice, this is not always possible. Where this is the case the following approach should be followed:

Old refunds (i.e. those where the member left on and after 1 April 2014, the administering authority has already communicated with the member – though no response has been received)

1) On approach to the expiry of 5 years from leaving active membership provide the member with a statement containing the prescribed information (i.e. value of refund and cash transfer sum (CTS) plus the rest of the information as set down in sections 101AC and 101AI of the Pension Schemes Act 1993 and regulation 7 of the Occupational Pension Schemes (Early Leavers: Cash Transfer Sums and Contribution Refunds) Regulations 2006 [SI 2006/33] – at this point it would be appropriate to set the 'reply date' to around a month before the expiry of 5 years from leaving active membership – this will allow the administering authority sufficient time to receive the completed mandate and pay either the CTS or the refund before the expiry of 5 years from leaving active membership).

    a) If a fully completed mandate is returned from the member and the administering authority can pay the refund before the expiry of 5 years from leaving active membership – pay the refund -no further action.
    Interest would be added to the payment in accordance with regulation 18(3) of the LGPS Regulations 2013.

    b) If a fully completed mandate is returned from the member though the administering authority cannot pay the refund before the expiry of 5 years from leaving active membership. Then the refund may be paid though it will be recorded as a breach against the scheme regulations and depending upon the circumstances may be subject to a tax charge (see points 1 and 2 in **group discussion**).
    Interest would be added to the payment in accordance with regulation 18(3) of the LGPS Regulations 2013, though capped on the expiry of 5 years from leaving active membership (as agreed in a meeting with MHCLG (as was DCLG) on 22 April 2015.

    c) If a fully completed mandate is not returned by the member, leave the payment in the fund – no further action (i.e. the group agreed not to waste time or money on using Tracing services in respect of members who have been contacted repeatedly and do not reply). Though it may be beneficial to record the 'frozen refund' as a 'post

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14 frozen refund' to differentiate between the entitlements of a 'pre 14 frozen refund' (i.e. a post 14 frozen refund cannot be aggregated with later membership if the member were to re-join the scheme).

New refunds (i.e. those where the administering authority is communicating for the first time 'now')

1) Within a reasonable period after leaving active membership provide the member with a statement containing the prescribed information (i.e. value of refund and cash transfer sum (CTS) plus the rest of the information as set down in sections 101AC and 101AI of the Pension Schemes Act 1993 and regulation 7 of the Occupational Pension Schemes (Early Leavers: Cash Transfer Sums and Contribution Refunds) Regulations 2006 [SI 2006/33] – for all new refunds, at this point it would be appropriate to set the 'reply date' to coincide with the date of intended communications at point 2 below, maybe 4 years 9 months?). If the member makes a positive election for either a CTS or a refund, pay in accordance with the members instructions.

   If the member does not respond:

2) On approach to the expiry of 5 years (i.e. on the date that the 'reply date' was set in the previous point) from leaving active membership provide the member with a written Statement containing only the value of the refund of contributions (because the administering authority can refuse to pay a CTS where the member has not made an election before the reply date in point 1).

   a) If a fully completed mandate is returned from the member and the administering authority can pay the refund before the expiry of 5 years from leaving active membership – pay the refund -no further action.
   Interest would be added to the payment in accordance with regulation 18(3) of the LGPS Regulations 2013.

   b) If a fully completed mandate is returned from the member though the administering authority cannot pay the refund before the expiry of 5 years from leaving active membership. Then the refund may be paid though it will be recorded as a breach against the scheme regulations and depending upon the circumstances may be subject to a tax charge (see points 1 and 2 in **group discussion**).
   Interest would be added to the payment in accordance with regulation 18(3) of the LGPS Regulations 2013, though capped on the expiry of 5 years from leaving active membership (as agreed in a meeting with MHCLG (as was DCLG) on 22 April 2015.

c) If a fully completed mandate is not returned by the member, leave the payment in the fund – no further action (i.e. the group agreed not to waste time or money on using Tracing services in respect of members who have been contacted repeatedly and do not reply). Though it may be beneficial to record the 'frozen refund' as a 'post 14 frozen refund' to differentiate between the entitlements of a 'pre 14 frozen refund' (i.e. a post 14 frozen refund cannot be aggregated with later membership if the member were to rejoin the scheme)"."

Consideration

Prior to the 2013 Regulations there had been no time limit on when any refund of contributions had to be paid. Inevitably, this resulted in orphan refunds not being claimed with a resultant administrative overhead and the need to continue making reasonable effort to make the payment.

At the request of administering authorities, the 2013 Regulations introduced a time limit of 5 years from the date the entitlement to a refund first arose for the payment to be made. The wording of Regulation 18(5) is such that there would appear to be no allowance for payments to be made after the five year period has elapsed with the result that where payment has not been possible, a technical breach has occurred which may be reportable. There is also the concern that the strict wording of the regulations may not allow an administering authority to transfer the sum owed into an ESCROW account or other third party account.

For these reasons, the Technical Group is recommending to the Scheme Advisory Board that the refund of contributions provisions in the 2014 scheme should revert back to the position under the former regulations, that is, with no time limit on when payment has to be made.

Recommendation

That the committee considers the paper from the Technical Group and invites the Scheme Advisory Board to consider the proposal as submitted or as amended by agreement of the committee.

Bob Holloway
Pensions Secretary
29 May 2019

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