

**IN THE MATTER OF THE LOCAL GOVERNMENT PENSION SCHEME
AND SCHEME EMPLOYERS OWNED COMPANIES**

**INSTRUCTIONS TO LEADING COUNSEL MR JAMES GOUDIE QC
TO
ADVISE IN CONSULTATION ON MONDAY 30TH APRIL 2018
AND IN WRITING**

Leading Counsel's attention is drawn to the following relevant legislation, regulations and direction:

1. Local Government Pension Scheme Regulations 2013
2. The Best Value Authorities Staff Transfers (Pensions) Direction 2007
3. Fair Deal for staff pensions: staff transfer from central government October 2013
4. Transfer of Undertakings (Protection of Employment) Regulations 2006
5. The Pensions Act 2008 (<http://www.legislation.gov.uk/ukpga/2008/30/data.pdf>)

1. Instructions

Leading Counsel is instructed by Thelma Stober Corporate Legal Adviser and Company Secretary for the Local Government Association (LGA) and associated companies. LGA provides secretariat support to the LGPS Advisory on whose behalf of whom it is seeking Leading Counsel's opinion on number of questions relating to Local Government Pension Scheme (LGPS) and Scheme Employer owned companies as set out below.

2. The Local Government Association (LGA)

2.1 Leading Counsel will be familiar with the LGA having provided legal advice and representation on its behalf in the past. The LGA is an unincorporated Association of Local Authorities which operates under the Constitution which was adopted by the LGA's Shadow General Assembly on 17 December 1996, subsequently amended from time to time.

In total, 415 authorities are members of the LGA for 2017/18. These include English Councils, Welsh Councils via the Welsh LGA, 30 Fire Authorities, seven National Parks, Passenger Transport Authorities plus one town council.

2.2 The LGA is the national voice of local government. It is a politically-led, cross-party organisation that works on behalf of councils to ensure local government has a strong, credible voice with national government. It aims to influence and set the political agenda on the issues that matter to councils so they are able to deliver local solutions to national problems. The LGA work with councils to support, promote and improve local

government. Details of the purpose objects and powers of the LGA are set out in its Constitution

3. Context

3.1 The creation of companies by LGPS scheme employers is becoming more commonplace and a number of issues are being raised in relation to pension provision, the LGPS and the potential for two tier workforces. The Local Government Pension Scheme Regulations 2013 “the regulations”, establish a scheme for the payment of pensions and other benefits to or in respect of persons working in local government service. Schedule 2 part 1 of the regulations sets out who can be Scheme employers and makes provision relating to admission agreements between employers who are not listed within the Schedule and administering authorities.

3.2 The scenario which provides the context for the questions set out below upon which Leading Counsel is asked to advice relates to a scheduled scheme employer listed in Schedule 2 part 1 of the regulations establishing a wholly owned company “the company,” then transfers a function or functions to the company without a public sector procurement using the Teckel exemption. Staff of the employer are then transferred to the company using TUPE. In the 1999 judgment of *Teckel* (C-107/98) the ECJ established an exemption from public procurement for the award of contracts by a public authority to a separate entity provided certain requirements were met.

The Teckel exemption was formally codified into the 2014 EU Procurement Directive (Article 12), and therefore our Public Contracts Regulations 2015 (Regulation 12).

3.3 Working in partnership with the private and third sectors to modernise and reform the delivery of public services often involves the transfer of public sector employees to new employers. The success of these projects will depend, critically, on the fair treatment of the transferring staff that will need reassurance that their rights will be fully respected and that they will be treated fairly throughout an outsourcing exercise.

3.4 In addition LGPS Schemed Employers are increasingly setting up owned company and transferring staff to those companies. The questions upon which Leading Counsel is asked to advice relates to this situation.

3.5 Under provisions in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) [SI 2006/246], the pay, and terms and conditions of employment for transferred employees are protected, preventing these entitlements from being changed without agreement. The Transfer of Employment (Pension Protection) Regulations 2005 [SI 2005/649] covers the pension and contribution arrangements for employees to which a TUPE transfer applies.

3.6 With effect from 1 October 2007, best value contracting authorities in England and police authorities in Wales have been required to comply with The Best Value Authorities Staff Transfers (Pensions) Direction 2007 made under section 101 of the Local Government Act 2003. This means that a best value authority must secure pension protection for each TUPE transferring best value authority employee which

must be the same as, broadly comparable to, or better than, those they had a right to acquire prior to the transfer.

3.7 The Fair Deal for Staff pensions 2013¹, is a non-statutory policy setting out how pensions issues are to be dealt with when staff are compulsorily transferred from the public sector to independent providers delivering public services. It sets out the standard practice which the Government will follow when its own staff are compulsorily transferred to non-public sector employers.

4. Instructions

4. Leading Counsel is asked to advice in consultation and in writing on the following of questions and generally:

4.1 Does the transfer of functions described in the scenario fall under the provisions of “The Best Value Authorities Staff Transfers (Pensions) Direction 2007” issued on 27 June 2007, in relation to local authority employers or Fair Deal for staff pensions: staff transfer from central government October 2013 in relation to Academy schools?

4.2 Does the company meet the requirements of (5) or (6) of part 2 of Schedule 2 of the regulations necessary to offer LGPS membership?

4.3 Having regard to the answer to 4.1 and wider TUPE legislation what protections are available to the employees transferring under TUPE in relation to pensions in the scenario described?

4.4 Having regard to the answer to 4.1 and 4.2 and wider Automatic Enrolment legislation what obligations are placed on the employer with regard to the provision of pensions based on the scenario described?

4.5 Having regard to the answers to 4.3 and 4.4 and should the employer offer different pension schemes to different employer groups in what circumstances would an employee be able to make a claim against the employer under the regulations or automatic enrolment legislation?

4.7 Generally on any other matters relevant to this issue.

Other questions may arise during the course of consultation upon which Leading Counsel will be asked to advice.

5. Attendance at Consultation

Instructing Solicitor Thelma Stober and Jeff Houston Head of Pensions, Phil Bundy Senior Adviser Employment and Colin Meech, (unison) but in his capacity as a member

¹ 1 Staff transfers within the public sector are outside of the scope of this guidance – such transfers are matter for the Cabinet Office Statement of Practice on Staff Transfers within the public sector (http://resources.civilservice.gov.uk/wp-content/uploads/2011/09/stafftransfers2_tcm6-2428.pdf).

of the LGPS Advisory Board, will be attending the consultation with Leading Counsel on **30 May 2018 at 11.30am in chambers**. Should Leading Counsel require any further information please contact Thelma Stober on (tele) Mobile 07899 896 562 or Telephone 0207 664 3246 (email) thelma.stober@local.gov.uk

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John Davit
Clerk to
Mr James Goudie QC
(0)20 7632 8502
Email: john.davitt@11kbw.com

Instructing Solicitor
Thelma P Stober
Corporate Legal Adviser
Local Government House
18 Smith Square
London
SW1P 3HZ
Direct Line: 020 7664 3246
Mobile: 07899896562
Thelma.stober@local.gov.uk