

**LOCAL GOVERNMENT PENSION SCHEME
("LGPS")**

**SCHEME EMPLOYER WHOLLY OWNED COMPANIES
("EOCs")**

OPINION

INTRODUCTION

1. I am asked to confirm advice I gave in Conference on 30 April 2018 for the Local Government Association. The advice relates to the above.

CONTEXT

2. The context of the advice sought is that:-
 - (1) A local authority employer that is a "best value" authority and a "scheme employer" under Schedule 2 to the Local Government Pension Scheme Regulations, S.I.2013/2356 ("the Regulations"), creates an EOC;
 - (2) The employer transfers a function or functions to the EOC;

- (3) The employer does so without a public procurement;
- (4) In that respect it relies upon the Tecal exemption;
- (5) There is then a TUPE transfer of staff assigned to such a function to the EOC.

ADVICE SOUGHT

3. I am asked five questions. I address them in the order in which they are raised in my Instructions.

FIRST QUESTION

4. I am asked whether the above transfer of functions falls under the provisions of:-

- (1) The Best Value Authorities Staff Transfers (Pensions) Direction 2007, pursuant to the Local Government Act 2003, in relation to local authority employers (“the Direction”); or

- (2) The non-statutory Fair Deal for Staff Pensions: Staff Transfer from Central Government, October 2013 (“the Fair Deal”), in relation to Academy Schools.

5. In my opinion, the Direction, and in particular paragraph 5 thereof, applies. That is because paragraph 5 is engaged. This is on account of:-

- (1) The authority entering into a contract with the EOC;
- (2) That being a contract for the provision of services;
- (3) They are services carried out by the authority immediately before the contract; and
- (4) The EOC has a legal personality separate from the authority and is in my view a “person” (not defined).

6. Moreover, Fair Deal applies also to Academies: paragraph 1.7.

SECOND QUESTION

7. I am asked whether the EOC meets the requirements of paragraphs 5 or 6 of Part 2 of Schedule 2 to the Regulations.

8. Paragraph 5 covers:-

“An entity connected with a local authority listed in paragraphs 1 to 5 of Part 1 of this Schedule where “*connected with*” has the same meaning as in section 212(6) of the Local Government and Public Involvement in Health Act 2007.”

9. Section 212(6) of the 2007 Act provides that:-

“For the purposes of this section an entity (“E”) is “connected with” a local authority at any time if –

- (a) it is an entity other than the local authority; and
- (b) according to proper practices in force at that time, financial information about E must be included in the local authority’s statement of accounts for the financial year in which that time falls.”

10. Paragraph 6 of Part 2 of Schedule 2 to the Regulations covers:-

“A company under the control of a body listed in [paragraphs 6 to 24 of Part 1 of this Schedule] where “*under the control*” has the same meaning as in section 68 or, as the case may be, 73 of the Local Government and Housing Act 1989 (except that any direction given by the Secretary of State must be disregarded, and

any references to a local authority treated as references to such a body).”

11. Section 68 of the 1989 Act provides:-

“(1) For the purposes of this Part, unless the Secretary of State otherwise directs, a company is for the time being under the control of a local authority if –

[

(a) the company is at that time a subsidiary (as defined in section 1159 of the Companies Act 2006) of the local authority; or

]

(b) paragraph (a) above does not apply but the local authority have at that time power to control a majority of the votes at a general meeting of the company as mentioned in subsection (3) below; or

(c) paragraph (a) above does not apply but the local authority have at that time power to appoint or remove a majority of the board of directors of the company; ...”

12. In my opinion, the EOC meets the requirements of the Regulations necessary to offer LGPS membership.

THIRD AND FOURTH QUESTIONS

13. I am asked what protections are available to employees transferring under TUPE in relation to pensions, and having regard to automatic enrolment.

14. TUPE does not itself provide such protection: Regulation 10.

15. However, some pension protection is afforded by Sections 257 and 258 of the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005, S.I. 2005/649.

16. Moreover, the Direction provides pension protection. The CLG letter to Chief Executives dated 27 June 2007 accompanying the Direction stated:-

“In the case of employees who are members of the Local Government Pension Scheme, it will be possible for the new employer, if they wish, to seek admitted body status within the LGPS so that transferred staff continue to have access to that pension scheme for their future service. This would appear to satisfy the requirements contained in the Direction.”

FIFTH QUESTION

17. I am asked what obligations are placed on the employer with regard to the provision of pensions.

18. In addition to the above, there is automatic enrolment under Section 3 of the Pensions Act 2008.

SIXTH QUESTION

19. I am asked about the situation were an employer to offer different pension schemes to different employee groups.

20. This would be highly likely to contravene equal pay legislation. EOC employees would be comparators with each other and with the authority's retained employees.

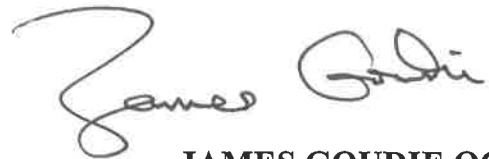
CONCLUSION

21. In April 2018 CLG has published the Government's Response to its 2016 Consultation on the Regulations and in particular "Fair Deal" in the

LGPPS and a proposal for the revocation and replacement of the Direction. The Government is not proceeding with that proposal at this time but will be proceeding with a further consultation “by the end of the year”. Meanwhile the Direction continues to have effect.

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A handwritten signature in dark ink, appearing to read 'James Goudie', written in a cursive style.

JAMES GOUDIE QC
30 April 2018

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OPINION

SG
30/04/18

Thelma Stober

Local Government Association