

LONDON BOROUGH OF BRENT

Executive – 23 May 2005

Report from the Borough Solicitor

For action

Wards affected:
All

Report Title: Internal Disputes Resolution Procedure – Officer Indemnity

Forward Plan Ref: Cor-04/05-83

1.0 Summary

- 1.1 The Pensions Act 1995 requires that the trustees or managers of a pension scheme have in place a two-tier procedure for resolving disputes. Under the Council's approved procedure under regulation 102 of the Local Government Pension Scheme Regulations the Deputy Director of Corporate Services is responsible for determination of applications at stage 2 of the procedure. The report seeks members' approval to an indemnity being granted to the Deputy Director in respect of this role following a recent Order which gives the Council specific powers to grant such an indemnity (these new powers being exercisable by the Executive).

2.0 Recommendations

- 2.1 That Members agree that an indemnity in the form in Appendix 1 be granted to the Deputy Director of Corporate Services and to any other officer in the future with responsibility for the determination of 2nd stage appeals under the IDR.
- 2.2 That members note that a further report will be brought to them in due course on the Council's general approach to and procedures for dealing with indemnities under the Local Authorities (Indemnities for Members and Officers) Order 2004 which will address the wider implications of the Order.

3.0 Detail

3.1 The IDR

Section 50 of the Pensions Act 1995 requires the trustees or managers of an occupational pension scheme to put in place an Internal Disputes Resolution Procedure (IDRP) to permit disagreements to be considered and a decision given. The Local Government Pension Scheme Regulations 1997 (the

“LGPS”), as recently amended by the Local Government Pension Scheme (Amendment) Regulations 2004 with effect from 1 June 2004, detail the form this internal procedure should take.

- 3.2 The IDRPs apply where a relevant LGPS employer makes a decision under the provisions of the LGPS which affects the pension position of a person who falls within the broad categories of "applicant" or "alternative applicant". If the applicant or alternative applicant is dissatisfied with the decision taken by the body that made it, he or she may refer the disagreement to a person specified by the Scheme employer; or, where a first instance decision has been made by an administering authority, to a person specified by that authority. The IDRPs are also applied to decisions made under the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2000 (and earlier equivalent regulations).
- 3.3 Where the applicant is dissatisfied with the specified person's decision, the applicant may apply in accordance with the Regulations for the matter to be referred to the administering authority for determination at the second stage of the procedure. The Deputy Director of Corporate Services is responsible for determining stage 2 applications on behalf of the Council.
- 3.4 The Local Authorities (Indemnities for Members and Officers) Order 2004
The Order which is made under the Local Government Act 2000, came into effect on 23rd November 2004. The Order gives the Council a specific power to provide an indemnity itself to any of its members or officers and/or to secure an indemnity for them by way of insurance. The implementation of this Order does not affect the Council's pre-existing powers to provide indemnities.
- 3.5 Prior to the new Order coming into force, where an indemnity for an officer was considered to be appropriate the indemnity was provided by way of a contractual term in the relevant officer's contract of employment. Most commonly in Brent this has been where, in relation to a major contract, a contract certificate needs to be signed by an officer confirming that the Council has power to enter into the contract. Some time ago members agreed to such a term being included in all contracts for deputy chief officers or more senior staff in respect of signature of contract certificates.
- 3.6 As noted, the powers under the new Order are exercisable by the Executive and the indemnity is not implemented by means of incorporating a term in an individual officer's contract of employment.
- 3.7 The Chief Executive has, on one recent occasion, authorised the giving of an indemnity under the new powers in circumstances related to a major contract. A further report will be brought forward to a later meeting of the executive for members to consider the general implications of and procedures for dealing with any indemnities given on behalf of the Council under the Order. However, the following outlines the relevance of the new Order here.

3.8 Broadly speaking, under the new Order an indemnity (or insurance) may be provided in relation to any action of, or failure to act by, the member or officer in question, which -

(a) is authorised by the authority; or

(b) which arises in the process of the officer or member exercising council functions at the request of, or with the approval of, or for the purposes of the Council.

3.9 The Order provides that even if the officer or member was acting beyond the powers of the Council, the indemnity can still be given to the extent that the member or officer in question reasonably believed that the action, or failure to act, was within the powers of the Council (and their own powers) at the time. There is specific provision that an indemnity can be given if the action or failure comprises the issuing or authorisation of any document containing any statement as to the powers of the Council, or that certain steps have been taken or requirements fulfilled, provided the officer or member reasonably believed that the contents of that statement were true.

3.10 There are restrictions on this general power. No indemnity can be given in relation to anything which constitutes a criminal offence or is the result of fraud, or other deliberate wrongdoing or recklessness or in relation to defamation of the officer or member concerned. On the other hand the indemnity can extend (subject to the points made in paragraph 3.5 and 3.10) to the costs defending any criminal or civil proceedings brought against the officer or member in relation to these matters.

3.11 The terms of the indemnity or insurance are generally a matter for the Council but there are restrictions contained in the Order in the case of criminal proceedings or proceedings relating to a breach of the Member Code of Conduct. In these cases the indemnity or insurance must provide that if an officer or member is convicted of a criminal offence (after any appeals) or a member admits that he failed to comply with the Code or there is a finding to that effect, the member or officer concerned must repay any sums spent on in relation to the proceedings.

3.12 Proposed Indemnity in respect of “2nd stage” IDRP Determinations

It is intended that a detailed report concerning the wider implications of the Order and proposing steps that should be taken at Brent in relation to it will be brought to members in due course. In the meantime it is necessary to address the position of the Deputy Director of Corporate Services (and any officer asked to undertake the role of determining appeals under the IDRP in the future) since the arrangements in place in respect of contract certificates described at paragraph 3.5 above do not apply to this role. An indemnity was agreed by the Chief Executive for this officer in respect of the IDRP role, using powers given in cases of extreme urgency to him by paragraph 2.3 of Part 4 of the Constitution, but it is considered appropriate that this now be replaced by an indemnity under the new provisions.

- 3.13 In considering the question of whether to offer a contractual indemnity, the Council must clearly address itself to the reasonableness of doing so. An officer carrying out the task of determining applications at stage two of the IDRPs runs the risk of personal liability given the possible existence of the duty of care arising to the person affected by his or her decision. Guidance issued in relation to the IDRPs refers specifically to this risk to the person making stage 2 determinations and to draft regulations on indemnification of officers and members then in circulation. Given this situation it is reasonable to afford the officer concerned an indemnity for his or her protection, and it might otherwise be difficult to find an officer prepared to undertake this role.
- 3.14 The proposed Deed of Indemnity in Appendix 1 gives an indemnity to the extent permitted by the Order and also provides that:
- (a) the Council will be required to act on behalf of the officer in relation to any matter relating to or arising under the indemnity if asked to do so by the officer and the Council will be entitled to take over any such matters (other than criminal proceedings) covered by the indemnity should it wish to do so .
 - (b) the Council will not seek to recover the costs of defending any criminal proceedings which may be covered by the indemnity until all appeals have been exhausted. In order that this provision is not open to abuse, the indemnity provides that the Council can require the employee to obtain counsel's advice as to the merits of an appeal, at the Council's cost. If Counsel advises that the appeal has no reasonable prospect of success the employee has to fund any further appeals personally, although the indemnity will apply if the appeal is successful.
 - (c) the Council will not take proceedings against the officer in respect of relevant acts in relation to the IDRPs unless the act constitutes a criminal offence of which the employee is finally convicted or amounts to deliberate serious wrong doing which has caused loss to the Council.

4.0 Financial Implications

- 4.1 In the event that circumstances arose in which payments required to be made under the indemnity to be given, they are likely to have to be met from the Insurance Fund. The fund is utilised to pay all uninsured losses which become payable during the financial year.
- 4.2 All the Council's main policies carry an excess of £279,000 per claim i.e. the Council funds all losses up to this figure. This results in most of the claims and losses being self funded. The indemnity granted would have the benefit of insurance of claims in excess of £279,000 with the claims under this value being met from the Insurance Fund.
- 4.3 A risk assessment has been carried out and the probability is regarded as low.

5.0 Legal Implications

- 5.1 Officers of the Local Authority are protected by Section 265 of the Public Health Act 1875 (as amended) which provides a form of statutory indemnity. Whilst this is a wide indemnity it is not totally comprehensive. The new power to provide indemnities under the order enables the Council to give additional protection to staff asked to undertake particular roles and responsibilities.
- 5.2 The form of the indemnity in Appendix 1 has been approved by Legal Services and to provide such an indemnity to the officer determining stage 2 applications under the IDRP on behalf of the Council is considered reasonable.

6.0 Diversity Implications

- 6.1 Officers have screened this report and there are no diversity implications arising from it.

7.0 Staffing

- 7.1 The granting of the indemnity requested does not have implications for staff other than the individual officer concerned.

Background Papers

Contact Officers

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