

LONDON BOROUGH OF BRENT

GENERAL PURPOSES COMMITTEE – 27th April 2004

REPORT FROM THE DIRECTOR OF FINANCE

PENSION ARRANGEMENTS FOR TRANSFERRED STAFF/ COUNCIL POLICY ON AUGMENTATION OF PENSIONABLE SERVICE

1. SUMMARY

This report addresses Brent Council's responsibilities for pension provision for former Council staff under the Two Tier Workforce Code issued by the Office of the Deputy Prime Minister (ODPM) and proposes amending the Council's policy concerning the award of additional service under Regulation 52 of the Local Government Pension Scheme Regulations.

2. RECOMMENDATIONS

Members are asked to agree:

- (i) that the Council's policy concerning bulk transfer agreements should be as set out in paragraph 3.6 below, and that the Director of Finance be authorised to decide whether in any particular case there are exceptional circumstances justifying the Council departing from the normal approach to bulk transfer agreements set out in the ODPM's Code
- (ii) that the Director of Finance should be authorised to decide in any particular case whether a payment should be made from the Council's general funds to secure a bulk transfer where a contract is being retendered, and if so on what conditions
- (iii) that the Council's policy concerning the securing of a pension scheme for former Council staff transferring to a private or voluntary sector employer should be as set out in paragraph 3.5 below and should be reviewed if and when directions are issued by the Government under sections 101 and 102 of the Local Government Act 2003
- (iv) that the Director of Finance is authorised to decide whether in any particular case there are exceptional circumstances justifying the Council not requiring an alternative pension scheme to the LGPS being offered by a contractor to be broadly comparable to the LGPS.
- (v) that the Council's approach to protecting the pension position of Council staff transferring to other public bodies operating non-local government pension schemes should be the same as the approach

adopted by the Council in the case of staff transferring to private or voluntary sector contractors.

- (vi) that the Council's policy concerning the augmentation of additional service under Regulation 52 of the LGPS Regulations 1997 (as amended) should be as set out in paragraph 3.20 below.

3 DETAIL

PENSION ARRANGEMENTS FOR STAFF TRANSFERRED TO CONTRACTORS AND OTHER PUBLIC BODIES

- 3.1 On the 5th October 1995 the Policy and Resources General Purposes Sub-Committee decided in principle that a pension scheme broadly comparable to the Local Government Pension Scheme should be sought from private sector contractors for TUPE transferred staff, subject to review if financial evidence was obtained which required reconsideration by Members and in any event as soon as there was legal clarity, and that any transfer of accrued pension rights by staff to the new scheme would be on the basis of normal cash equivalent transfer values rather than on the basis of enhanced cash equivalent transfer values. A normal cash equivalent transfer value is the value required by legislation and is calculated with regard to the actual accrued benefits of the employee. A bulk transfer will represent an enhanced payment. Such an arrangement may involve the award of enhanced cash equivalent transfer values, calculated with regard to the future earnings capacity of the employee, or a fund apportionment. A bulk transfer is likely to require greater amounts from the Council's Pension Fund than normal cetv's.
- 3.2 The transfer of accrued pension rights by cetv may not be sufficient to enable the new employer to grant a day for day service credit for the transferring employee in the new pension scheme. The decision not to use enhanced cash equivalent transfer values was made to protect the pension fund from additional strain. The Sub- Committee's decision did not address the issue of what, if any, pension protection should be sought for former Council employees who had TUPE transferred out from the Council as a result of outsourcing and who were then TUPE transferred to a new contractor under a retender of the contract.
- 3.3 Where employees transfer between pension schemes it is open to the actuaries of the two pension schemes to enter into an agreement in which the basis for calculation of the transfer value is different from the minimum value required by legislation, resulting in the transferor scheme making higher transfer payments and or the receiving scheme accepting a loss. Such agreements between pension schemes are called "bulk transfer agreements". A bulk transfer agreement specifies the basis for calculating the transfer payment and the size of the transfer credits it will secure. Such an agreement can include provision that the transferring employees will obtain the same length of service credit, where the two schemes are broadly comparable or equivalent benefits where they are not comparable, as they had in the old pension scheme. In cases where staff transfer from the Council to a

contractor operating a pension scheme broadly comparable to the LGPS or to some other organisation such as a public body operating a non-local government pension scheme such agreements are authorised by Regulation 119 of the LGPS Regulations 1997 (as amended).

- 3.4 In 1995 there were no statutory obligations on the Council to facilitate an alternative pension provision for transferred staff or to ensure that bulk transfer arrangements securing a full service credit in the transferee pension scheme were made for the staff in question. In accordance with the current policy of only using normal cash equivalent transfer values the Council has not entered to date into any bulk transfer agreements.
- 3.5 The Office of the Deputy Prime Minister (“the ODPM”) published guidance under the Local Government Act 1999 on 13th March 2003 entitled “ Best Value and Performance Improvement” (“ the Guidance”). This included a new Code of Practice on Workforce Matters in Local Authority Service Contracts (“the Code”). The Council has a statutory obligation to have regard to the Guidance. The Code provides guidance to local authorities and service providers in relation to certain service contracts which either:-
- a) involve a transfer of staff from the Local Authority to a service provider or
 - b) in which staff originally transferred out from the Local Authority as a result of an outsourcing are TUPE transferred to a new provider under a re-tender of a contract.
- 3.6 Under the Guidance the Code must be incorporated into all relevant Service Contracts advertised on or after 13 March 2003. The main intentions of the Code are:
- (i) better protection of terms and conditions for transferred staff, and
 - (ii) fairness for new joiners taken on to work on service contracts beside transferred employees. The Code requires the service provider to offer new recruits who work alongside transferred staff on a local authority contract either membership of the LGPS, where the employer has admitted body status and makes the requisite contributions, membership of a good quality employer pension scheme or a stakeholder pension scheme. The Code also states that on a retender of the contract the new service provider will be required to offer one of these pension options to any staff who transfer to it and who had prior to the transfer a right under the Code to one of these pension options.

A summary of the guidance under the Code relevant to this report is set out below.

- 3.7. Under the Code Local Authorities must apply the principles set out in the Cabinet Office statement of practice on Staff Transfers in the Public Sector and the annex to it, ‘A Fair Deal for Staff Pensions’. There is an expectation that the terms of the business transfer must specifically protect the pensions of transferees. Former local government staff, whether transferring as a result

of an outsourcing or a retendering of the contract, must continue to have access to the LGPS or be offered an alternative good quality occupational pension scheme. Such an alternative scheme must, save in exceptional circumstances be actuarially certified as broadly comparable to the LGPS. A broadly comparable scheme will be one which, in the professional opinion of the actuary, satisfies the condition that there are no identifiable employees who will suffer material detriment overall in terms of their future accrual of pension benefits under the alternative scheme. Where the alternative scheme is not broadly comparable to the LGPS the terms of the business transfer must ensure appropriate compensation for all the disadvantaged staff.

- 3.8 The Code also states there must be arrangements for handling former local government staff's accrued benefits where they transfer as a result of an outsourcing or a retendering of the contract. In the case of an outsourcing, except in exceptional circumstances, where the contractor offers an alternative pension scheme the local authority is expected to make it a condition of the business transfer that there will be a bulk transfer agreement under which the pension scheme of the new employer will provide day for day past service credits (or an equivalent recommended by the Government Actuary's Department as a suitable reflection of differences in benefit structures between the schemes) to staff choosing to transfer their accrued credits. When retendering, except in exceptional circumstances, the local authority is expected to seek such a bulk transfer agreement between the outgoing and incoming contractors in relation to transferring former local government staff wishing to transfer their accrued credits from the outgoing to the incoming contractor's pension scheme.
- 3.9 Where a service provider transfers staff originally in the employ of the Local Authority to a sub-contractor then the service provider will be responsible for observation of the Code by the sub-contractor. Local authorities will be required to certify in their Best Value Performance Plans that individual contracts awarded in the past year complied with the workforce requirements in the Code where they apply. However Leading Counsel has advised that the Council does not have any statutory duty to certify compliance with the Code in its Performance Plan.
- 3.10 Sections 101 and 102 of the Local Government Government Act 2003 give the Government the power to direct local authorities in the case of outsourcing or retendering of contracts to require the contractor to offer former Council employees a pension scheme which is the same as, broadly comparable to or better than the LGPS. Enquiries made by officers with the ODPM indicate that these directions are likely to be made shortly. Although these sections would also allow the Government to make directions requiring local authorities to comply with the Code as it relates to bulk transfer agreements these enquiries indicate the directions will not cover this part of the Code.
- 3.11 Leading Counsel has advised that the current policy of only using normal cash equivalent transfer values needs to be reconsidered by the Council in the light of what the Code says about bulk transfer agreements. He has advised that :

- (i) The Council need not and must regard not itself as obliged to do what the Code suggests on bulk transfer agreements in every case
- (ii) The Council must give proper consideration to adopting the approach suggested by the Code in any given case. If it decides not to do so, there should be some proper rational basis for that decision , and preferably one which is enunciated at the time.
- (iii) It is clear that the Council can depart from the approach in the Code in circumstances which are genuinely exceptional in some way
- (iv) The Council may be entitled to have a general policy of not entering into bulk transfer agreements provided that it specifically considered the approach in the Code as an option in every case. However it is not clear whether the Council has such an entitlement.

3.12 Given the legal uncertainties Members are asked to agree that the Council's policy concerning bulk transfer agreements be as set out in paragraph 3.6 and that the Director of Finance is authorised to decide whether in any particular case, there are exceptional circumstances justifying the Council departing from the normal approach set out in the Code. In making such a decision the Director would have to have regard to the Council's statutory duty to secure best value. Examples of such exceptional circumstances could include cases where the cost of a bulk transfer agreement was so substantial as to jeopardise the viability of the service or where it was necessary despite a failure to agree on a bulk transfer agreement to proceed with the contractor because it was impossible or highly undesirable to have the contract performed by any other contractor.

3.13 In cases where a contract is being retendered it may be appropriate for the Council to meet the whole or part of the payment to the incoming contractor's pension scheme to secure a bulk transfer, for example where the outgoing contractor has no contractual obligation and is unwilling and/or unable to make such a payment. Such an amount would need to be paid out of the Council's general funds as against out of the Pension Fund. Members are asked to authorise the Director of Finance to decide whether in any particular case such a payment should be made and if so on what conditions.

3.14 Members are also asked to note that effective implementation of the policy set out in paragraph 3.6 will require the development of standard contractual clauses to be included as appropriate in contracts when they are first let or retendered. Example of such clauses could be ones ensuring that an outgoing contractor was required to provide the relevant workforce information required for a bulk transfer and that the outgoing contractor was required to enter into a bulk transfer agreement directly with a future contractor on terms determined by the Council. Such clauses are being developed by the Borough Solicitor.

3.15 Although in the normal course of events the Council would expect to be able to secure from the contractor for transferring Council or ex- Council staff continued membership of the LGPS or of a broadly comparable scheme circumstances can be envisaged where insisting the contractor meets this

requirement would be undesirable and contrary to the Council's duty to achieve best value. For example, transfer to the new scheme may be materially detrimental for only a few individuals and it may be more cost effective for the contractor to pay compensation to those individuals in preference to adjusting the new scheme. Accordingly Members are also asked to agree that :-

- (i) the Council's policy concerning the securing of a pension scheme for former Council staff transferring to a private sector employer should be as set out in paragraph 3.5 and should be reviewed if and when directions are issued by the Government under sections 101 and 102 of the Local Government Act.
 - (ii) the Director of Finance is authorised to decide whether in any particular case there are exceptional circumstances justifying the Council not requiring an alternative pension scheme to the LGPS being offered by a contractor to be broadly comparable to the LGPS.
- 3.16 Instances of public sector partnerships and transfers of staff between public bodies have increased in recent years. Although the Code does not apply to transfers of staff from the Council to other public bodies there would seem no reason in principle why the approach to protecting the pension position of Council staff transferring to other public bodies operating non- local government pension schemes should not be the same as the approach adopted by the Council in the case of staff transferring to private or voluntary sector contractors, and Members are asked to so agree. Where staff transfer to other employers operating the LGPS then the employee's length of service credit is unaffected by the change of employer.

COUNCIL POLICY ON AUGMENTATION OF PENSIONABLE SERVICE

- 4.1 The LGPS and its benefits are prescribed in regulations, but allow the Council some discretions both as Employing and Administering Authority. The Policy and Resources Committee agreed Brent's employer discretions on 16th February 1998, and General Purposes Committee agreed the continuation of these policies on 18th March 2002. The Council's discretionary policies are designed to be fair to scheme members but only where there will not be an undue strain on the pension fund.
- 4.2 Currently Council policy on the augmentation (see annex 1) of service is that "the authority resolves not to award additional years at leaving or joining the LGPS, but specifically resolves to keep this policy under regular review in the case the provision becomes appropriate in the recruitment or retention of scarce personnel".
- 4.3 The current Council policy has caused difficulties in the case of formerly TUPE transferred staff returning to the Council following the service in which they are employed being taken back under the Council's management. It could also cause problems in the future whenever staff are TUPE transferred to the Council as a result of the Council taking over the running of services

from other organisations. Staff who fail to secure the same length of service credit in the LGPS as they had in their former employer's pension scheme may feel they have suffered a loss of pension rights and this may in turn lead to problems caused by low staff morale such as increased turnover of staff and reduced productivity. There is no provision under the LGPS regulations that allows receipt by the Council's pension fund of payment under a bulk transfer agreement for the purpose of securing for transferring in staff day for day service credits. Unless the Council makes a negotiated fund apportionment toward the transfer- at a cost to be borne by the Pension Fund – the outgoing service provider is unlikely to offer preferential terms for individual cash equivalent transfer values (cetv's – see annex 1).

- 4.4 As an alternative the Council has the power under Regulation 52 of the LGPS Regulations 1997 (as amended) to augment (i.e. increase) the scheme membership of the members who are transferring in. This could make good any short fall in service credit provided by the outgoing scheme. This may encourage the outgoing provider to enhance individual c.e.t.v.'s to a mutually satisfactory level. The negotiations for such a transaction are likely to be complex and involve the services of the Council's pension administrators, the London Pension Fund Authority and/or the Council's actuary Hewitt Bacon and Woodrow.
- 4.5 The Borough Solicitor has advised that the decision concerning whether to exercise the power to augment in particular cases needs to be made by the General Purposes Committee given the wording of Regulation 52 and the provisions of the Council's constitution the Borough Solicitor's advice is that the Council should not have a policy which does not appear to permit the exercise of the discretion in any circumstances. Given the potential costs of augmentation the discretion should only be exercised in exceptional circumstances. Members are asked to agree to the discretionary policy to augment service being in future be worded as follows: "the authority resolves not to award additional service under Regulation 52 of the LGPS Regulations 1997 (as amended) save in exceptional circumstances, such circumstances may include where this becomes appropriate to secure improvements in the retention and morale of staff transferring to the Council under TUPE".

5. FINANCIAL IMPLICATIONS

Pension arrangements for staff transferred to contractors or other public sector bodies

- 5.1 Members will be aware that Brent pays 18.6% of members' remuneration as a contribution to the Brent fund under the LGPS regulations. If a service is externalised the cost of pension provision passes to the third party provider whether they offer the LGPS, a broadly comparable scheme or another arrangement.
- 5.2 Contractors may be faced with the following costs as a result of the proposed policies in paragraphs 3.5, 3.6, 3.11 and 3.14 :
- Professional expenses in setting up a broadly comparable pension scheme
 - Legal and actuarial costs for access to the LGPS via an admission agreement
 - Where required, supplying a bond to cover unforeseen eventualities
 - An employer's contribution rate commensurate with the liabilities of the contractor's pension scheme
 - Upon termination the cost of making a payment under a bulk transfer agreement to secure day for day service for transferring former Council employees in the successor contractor's pension scheme
 - Legal and actuarial costs in connection with negotiating and drafting bulk transfer agreements with the Council and/or with successor contractors.
 - Upon the termination of an admission agreement, the cost of meeting liabilities not met by employer contributions as identified by the Council's actuary
- 5.3 A profit-making organisation is likely to request that the Council indemnify it from the potential costs referred to in paragraph 4.2, which may be significant. That indemnity may involve one of the following:-
- (i) An increase in the contract hourly rate to compensate for the employer contribution rate.
 - (ii) Protection against investment loss incurred upon the cessation of an admission agreement
 - (iii) Subsidise any costs suffered by the contractor in connection with the negotiation, drafting or execution of a bulk transfer agreement.
- 5.4 The provision of a bulk transfer in ((iii) above) will be dependent on the demographics of the staff in question, the financial status of the service provider and the position of the pension fund in relation to stock-market fluctuations. In the case of an outsourcing by the Council the bulk transfer agreement will be negotiated between the Council and the receiving scheme and, where terms are agreed, the transfer will normally represent the full value of the past service of those members that have elected to transfer their benefits. Each case will be assessed upon its circumstances however. The bulk transfer discharges the pension liability for those members. Where a bulk transfer has facilitated equivalent benefits in the receiving scheme the

Director of Finance may decide not to subsidise a second-generation transfer as described in paragraph 3.13.

- 5.5 Although the Council must have regard to the Code this must be balanced with its duty to deliver best value to Council Tax payers. It is likely that the provision of a bulk transfer will be more expensive than transfer on a cash equivalent basis (see annex 1).

Council policy on augmentation of pensionable service

- 5.6 Paragraph 3.20 proposes to amend the Council's discretionary policy regarding the award of additional service (augmentation) in exceptional circumstances. The cost of exercising the discretion will depend on the extent of any additional scheme membership awarded and the number of staff involved.

6 STAFFING IMPLICATIONS

It is important that the Council acts as a good employer and has regard to the Code. The loss of pension entitlement is a very serious concern to staff.

7. DIVERSITY IMPLICATIONS

There are no diversity implications arising from the report.

8. LEGAL IMPLICATIONS

These are contained in section 3

9. BACKGROUND INFORMATION

ODPM Code of Practice on Workforce Matters 2003

The Local Government Pension Scheme Regulations 1997

Report to the Policy and Resources Committee 16th February 1998

Report to General Purposes Committee 18th March 2002.

Cabinet Office statement of practice in staff Transfers in the Public Sector and the annex "A fair deal for staff pensions"

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GLOSSARY

Broadly Comparable Pension Scheme. A contractor's provision to transferring staff that offers benefits that are broadly comparable to the Local Government Pension Scheme as certified by an independent actuary.

Bulk Transfer. An actuarially calculated transfer of pension rights for a group of two or more members that can be designed to ensure day for day service (equal benefits) in the receiving scheme.

Cash Equivalent Transfer Value. An individual's transfer of pension membership that does not guarantee day for day membership of the new fund.

Augmentation of Service. Under regulation 52 of the LGPS Regulations 1997 (as amended) employing authorities are entitled to increase scheme membership via a payment from the central fund to the pension fund.