
**Pensions Advice for
Local Government Pensions Committee**

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CONTENTS

Clause	Page
1 BACKGROUND.....	1
2 ADMISSION BODIES	5
3 RESOLUTION/DESIGNATION BODIES	14
4 REGULATION 8 BODIES.....	18

This advice is provided to the Local Government Pensions Committee ("LGPC") of Local Government Group in relation to the Local Government Pension Scheme in England and Wales. All reasonable care and attention has been taken in compiling this advice. However, the questions raised and advice given are generic in nature and do not take into account individual admission agreement drafting, policies or discretions.

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Eversheds LLP

1. BACKGROUND

Administering Authorities and Funds

- 1.1 Administering authorities are the bodies responsible for maintaining funds for the Local Government Pension Scheme ("LGPS") in accordance with the powers contained in The Local Government Pension Scheme (Administration) Regulations 2008 ("Administration Regulations"), The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 ("Benefit Regulations"), The Local Government Pension Scheme (Transitional Provisions) Regulations 2008 ("Transitional Regulations") and The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009 ("Investment Regulations") (together the "Regulations").
- 1.2 The Regulations are made in exercise of the powers conferred by sections 7 and 12 of, and Schedule 3 to, the Superannuation Act 1972.

Admission Bodies

- 1.3 The provisions relating to admission agreements with 'community admission bodies' and transferee admission bodies are set out in Regulations 5 and 6 respectively of the Administration Regulations.
- 1.4 In relation to 6(2)(a) transferee admission bodies, where the admission body and the relevant 'Scheme employer' (the authority letting the service contract) undertake to meet the relevant requirements of Regulation 6 then the administering authority must admit the eligible employees of the transferee admission body designated by that body to the LGPS and where the administering authority does so, the terms on which it does so are the admission agreement for the purposes of the Regulations.
- 1.5 The same applies for a 6(2)(b) transferee admission body when the Secretary of State approves the body for admission to the LGPS and any conditions of approval have been met.
- 1.6 An employee of an admission body (community or transferee) may only be a member if he, or a class of employees to which he belongs, is designated in the admission agreement by the body as being eligible for membership of the LGPS.
- 1.7 An admission agreement must terminate if the admission body ceases to be such a body and may make such other provision about its termination as the parties consider appropriate.
- 1.8 Schedule 3 of the Administration Regulations details certain provisions that must be included in any admission agreement with a transferee admission body.

Paragraph 9 of this Schedule states that any transferee admission agreement must include a clause allowing:

- 1.8.1 automatic termination of the admission agreement, as required by regulation 7(2) of the Administration Regulations, if the transferee admission body ceases to be such a body; and
 - 1.8.2 a minimum period of three months' notice to terminate the agreement.
- 1.9 An administering authority and an admission body may make an admission agreement despite the fact that they do not exercise their functions or provide services or assets in areas that overlap or adjoin each other.
- 1.10 The Administration Regulations (and the Benefits Regulations) apply to employment with an admission body in which the employee is an active member in the same way as if the admission body was a Scheme employer.

Employer Contributions under the LGPS

- 1.11 Under Regulation 39(4) of the Administration Regulations, an 'employing authority' (a body including an admission body employing an employee who is eligible to be a member) is obliged to contribute to its fund in each year covered by a 'rates and adjustments certificate' the amount appropriate for that body as calculated in accordance with the certificate.
- 1.12 During each of those years, the body must make payments to the appropriate fund on account of the amount required for the whole year.
- 1.13 An employer's contribution for any year is the 'common percentage' (the common rate of employer's contributions expressed as a percentage) for that year of the pay on which contributions have, during that year, been paid to the Fund under the relevant regulations by employees who are active members, as increased or reduced by any 'individual adjustment' specified for that employer for that year in the rates and adjustments certificate.
- 1.14 An individual adjustment is any percentage or amount by which contributions at the common rate should be increased or reduced by reason of any circumstances peculiar to that body.

Are contributions only due in respect of active members?

- 1.15 It should be noted that Regulation 39(4) of the Administration Regulations specifically states that employers are only expected to make contributions in respect of employees who are active members of the LGPS. This is supported by Regulation 36(5) of the Administration Regulations which defines the 'common rate', on which the rate of employer contributions is based, as:

“the amount which, in the actuary’s opinion, should be paid to the fund by all bodies whose employees contribute to it so as to secure its solvency, expressed as a percentage of the pay of their employees who are active members”.

Relevant case law

- 1.16 In *South Tyneside MBC v The Lord Chancellor and Secretary of State for Justice and Another*¹, the Court of Appeal held that the Local Government Pension Scheme Regulations 1997 (replicated in the Administration Regulations) only imposed a liability to contribute to the LGPS on those employers whose employees contribute to the fund. The Court of Appeal concluded that the employer in question had no active members in the Tyne and Wear Pension Fund and, therefore, was not liable to contribute to the Fund.
- 1.17 The Court stated *“the purpose of the contribution at the common rate is to secure solvency from all those who employ active members of the fund”.*
- 1.18 The Court considered the possibility of an ‘individual adjustment’ to the rates and adjustments certificate in the absence of active members (and therefore contributions at the common rate). However, the Court did not accept a construction which requires a contribution consisting of an adjustment to a rate which can have no application to an employer with no active members.

Terminating an admission agreement and Regulation 38

- 1.19 Under Regulation 38 when an admission agreement “ceases to have effect” (undefined) the administering authority must obtain:
- 1.19.1 an actuarial valuation as at the date the admission agreement ceases of the liabilities of the fund in respect of current and former employees of the admission body; and
 - 1.19.2 a revision of any rates and adjustments certificate showing the revised contributions due from that body.
- 1.20 Equivalent provisions do not apply to Scheme employers. The term “revised contributions” is not used elsewhere within the Administration Regulations.
- 1.21 Where, for any reason, it is not possible to obtain revised contributions from the outgoing admission body (or from an insurer or any person providing an indemnity or bond on behalf of that body), the administering authority may obtain a further revision of any rates and adjustments certificate for the fund, showing:

¹ [2009] 022 PBLR

- 1.21.1 in the case of a transferee admission body, the revised contributions due from the body which is the Scheme employer in relation to that admission body; and
- 1.21.2 in the case of a community admission body the revised contributions due from each employing authority which contributes to the fund.

2. **ADMISSION BODIES**

2.1 **If the terms of a community or transferee admission body provide that only those employees that the body nominates may be eligible for membership of the LGPS and that body ceases to nominate any new employees, would the admission agreement “cease to have effect” for the purposes of regulation 38 of the LGPS (Administration) Regulations 2008 upon the last active member ceasing active membership, despite the employer continuing to trade and the fact that there are deferred and/or pensioner members?**

2.1.1 Firstly, an admission agreement (community or transferee) must terminate if the admission body ceases to be such a body. In the above scenario, if the admission body continues to trade and meet the basis upon which it was admitted, we do not believe it would cease to be an admission body simply because it ceases to employ any active members (for the time being). Where the admission agreement ceases to have effect for other reasons is a separate question.

2.1.2 An admission agreement may make such other provision about its termination as the parties consider appropriate. Therefore, the express termination provisions of the agreement may potentially cover the above scenario, in which case the agreement would cease to have effect (subject to the drafting of the provision). In our experience, such express provisions are not common, especially in older admission agreements.

2.1.3 If the admission agreement does not automatically cease to have effect, this raises some interesting issues about the administering authority’s power to charge the admission body ongoing contributions in the absence of any active members (without terminating the admission agreement).

2.1.4 As noted at paragraph 1.4 above, in relation to regulation 6(2)(a) transferee admission bodies, the terms of which an administering authority admits the eligible employees of the transferee admission body constitute the admission agreement for the purposes of the Administration Regulations. We do not see why this logic should be different for regulation 6(2)(b) transferee admission bodies and community admission bodies. The admission agreement may therefore contain express provisions dealing with the payment of contributions in the absence of any active members. In our experience, such express provisions in admission agreements are not common. In theory, an admission agreement could be amended to include such provisions (see 2.3.1).

- 2.1.5 In the absence of any express power under the Administration Regulations, the decision in *South Tyneside* would appear to rule out any revision of the rates and adjustments certificate to amend the 'individual adjustment' to a lump sum only contribution. As noted above, the Court did not accept a construction which requires a contribution consisting of an adjustment to a rate which can have no application to an employer with no active members.
- 2.1.6 This would leave the administering authority with the option to terminate the admission agreement (assuming the admission agreement contains a power to terminate by notice or the parties to the admission agreement agree to terminate the agreement) and charge a revised contribution under regulation 38(2). However, such an option would require careful consideration by the administering authority as this could crystallise a liability which the admission body is simply unable to pay. This may not be in the interests of the fund or the other employing authorities in the fund:
- 2.1.6.1 Where the administering authority is unable to recover the revised contributions from an outgoing transferee admission body (or from a body or indemnity provider) then the administering authority can obtain a revision of the rates and adjustments certificate of the relevant Scheme employer.
- 2.1.6.2 Where the administering authority is unable to recover the revised contributions from an outgoing community admission body then the administering authority can obtain a revision of the rates and adjustments certificates of each employing authority which contributes to the fund.
- 2.1.7 Given that regulation 38(2) specifically refers to revised contributions (plural), we believe that an administering authority would have the power to agree a series of revised payments to pay off the crystallised deficit rather than necessarily requiring a single lump sum contribution. However, crystallising a material debt may have other implications for the solvency of the admission body.
- 2.1.8 Where terminating an admission agreement and crystallising the deficit would not be in the interests of the fund or the other employers or is not provided for in the admission agreement, the administering authority may consider relying on powers under section 111 of the Local Government Act 1972 to charge the admission body 'deficit only' contributions.

- 2.1.9 Section 111 gives a local authority² the power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions. This statutory power must be used by linking it to another specific power. There is case law to say the power cannot be relied on to undertake the "incidental to the incidental"³.
- 2.1.10 An administering authority could consider using the power to charge an employer 'deficit only' contributions in these circumstances if it believed it would facilitate or be conducive or incidental to the discharge of its functions as an administering authority under the Regulations. A local authority must always act reasonably in the exercise of its functions
- 2.1.11 Where such an approach is agreed with an admission body (and any Scheme employer underwriting the admission body) and with supporting evidence that the option would provide more money to the fund than terminating the admission agreement, then the risk of the option being challenged appears low.
- 2.1.12 We would recommend that an administering authority should clear such an approach with the fund's auditors and document the arrangement in a legally binding agreement.
- 2.1.13 If the admission body is unwilling to agree to such contributions then the administering authority may be forced to consider terminating the admission agreement where it has the power to do so by notice. Where the admission agreement does not contain a power to terminate by notice then the administering authority would need to seek specific advice, in particular whether a power to terminate can be reasonably implied from the wording of the admission agreement.

² This may not apply to non local authority administering authorities such as LPFA and SYPA. More detailed analysis would be required for such bodies.

³ For example the LAML case

2.2 **If the terms of a community or transferee admission body provide that all employees (under 75) or only a specified class of employees may be eligible for membership of the LGPS and that body wishes to amend the admission agreement to provide that no new employees may join the scheme, can such an amendment only be made with the permission of the other parties to the admission agreement (e.g. the administering authority and, if relevant, the letting authority)?**

2.2.1 An employee of an admission body (community or transferee) may only be a member if he (or a class of employees to which he belongs), is designated in the admission agreement by the body as being eligible for membership of the LGPS.

2.2.2 Often new employees (or a class of new employees) will only be eligible to join the LGPS if nominated by the admission body. In this scenario the admission body could simply cease to nominate new employees without having to amend the admission agreement.

2.2.3 If the admission agreement specified that all new employees (or a class of new employees) are automatically eligible to join the LGPS without being nominated by the admission body then the admission agreement could be amended to close the agreement to new members with the agreement of the original parties (or their successors).

2.3 **If such an amendment is agreed:**

2.3.1 **how is it effected e.g. via an addendum to the agreement or is a new admission agreement required? If the latter, would this mean that the old admission agreement had "ceased to have effect" for the purposes of regulation 38 of the LGPS (Administration) Regulations 2008?**

2.3.1.1 If an amendment to the admission agreement was required then this would need to be made in accordance with any amendment provisions within the existing admission agreement. We do not believe it would be necessary to enter into a new admission agreement. An amendment to the existing agreement would be the most practical solution.

2.3.1.2 If the agreement is silent on amendment then the parties would need to come to an agreement how the agreement, effectively a contract between the parties, is to be varied. We would normally recommend a deed of amendment or an addendum executed by the parties to the original agreement (or their successors).

2.3.2 **what are the implications for the employer, in terms of equality of treatment with those employees who are continuing to be active members of the scheme, and what obligations are there on the employer to provide access to a pension scheme to new employees both now (e.g. stakeholder) and in the future (e.g. NEST or a qualifying scheme)?**

2.3.2.1 The implications for the employer will very much depend on the contractual right to LGPS membership in the contracts of employment of any existing employees who are eligible but have not yet joined the LGPS.

2.3.2.2 The contractual rights are equally, if not more, applicable if LGPS membership was to be removed for existing active members (see 2.5).

2.3.2.3 Where a contractual right to LGPS membership exists, it may be necessary to get the employees' agreement to vary any such provisions before LGPS membership can be withdrawn.

2.3.2.4 Where this is not possible following consultation, it may be necessary to ultimately terminate the contracts and re-engage the employees on new terms. This may also involve collective consultation in accordance with section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (depending on the number of employees affected).

2.3.2.5 In addition to the risk of breaching the contract of employment, there is also the potential risk of unfair dismissal claims. This would be managed by:

(a) effective consultation (and, if required, a fair dismissal process) to show that continued membership of the LGPS was inappropriate; and

(b) the adequacy of the replacement pension benefits to be provided.

Even where there are no express contractual rights to LGPS membership, it may still be advisable to follow an effective consultation process to manage the risk of employees claiming implied rights to LGPS membership.

- 2.3.2.6 Changing the contractual terms for new recruits will be straightforward.
- 2.3.2.7 Closing a pension scheme to new members (and to future accrual) is a tried and tested route for many employers in the private sector and we are not aware of successful challenges on grounds of equality.
- 2.3.2.8 There may be potential risks of indirect sex and age discrimination. Indirect sex discrimination could potentially be an angle if the closure affected a greater proportion of one sex above another. In practice, we would expect the closure is likely to have had a balanced impact if the decision has been applied to all new employees (or a class of new employees) on a blanket basis, rather than being targeted at specific sections of the workforce.
- 2.3.2.9 In addition, to the extent there was any differential impact, the employer should be able to justify this by showing the reasons why the change was implemented.
- 2.3.2.10 In terms of age discrimination then there is a specific exemption in The Equality Act Age Exceptions for Pension Schemes) Order 2010 which allows an employer to close a pension scheme from a particular date to workers who have not already joined it without such closure constituting an age discriminatory act⁴.
- 2.3.2.11 In terms of requirements for replacement provision in the absence of the LGPS, the employer would need to comply with its duties under section 3 of the Welfare Reform and Pensions Act 1999 by facilitating access to a stakeholder pension scheme as a minimum. Requirements relating to auto enrolment and NEST will start to apply from October 2012.
- 2.3.2.12 However, please note the comments at 2.3.2.5 regarding the adequacy of the replacement pension benefits for existing employees.
- 2.3.2.13 Any employer which is subject to the public sector equality duties must carry out an equality impact assessment before commencing any consultation with employees on the proposed changes.

⁴ Schedule 1, paragraph 26.

2.4 **Would the new / amended admission agreement “cease to have effect” for the purposes of regulation 38 of the LGPS (Administration) Regulations 2008 upon the last active member ceasing active membership, despite the employer continuing to trade and the fact that there are deferred and/or pensioner members?**

2.4.1 See 2.1 above.

2.5 **If the terms of a community or transferee admission body provide that all employees (under 75) or only a specified class of employees may be eligible for membership of the LGPS and that body wishes to amend the admission agreement to provide that no new employees may join the scheme and that the scheme should be closed to existing active scheme members, can such an amendment only be made with the permission of the other parties to the admission agreement (e.g. the administering authority and, if relevant, the letting authority)?**

2.5.1 In our experience, closure to new members and accrual for existing members would normally be achieved by terminating the admission agreement in accordance with the termination provisions, typically by notice. In the absence of any express termination provisions, the parties could agree to the termination of the admission agreement.

2.5.2 In particular in relation to transferee admission bodies, the terms of any related service contract will also need careful consideration as the contract may require the contractor to provide a broadly comparable pension scheme if an admission agreement ceases to have effect. This would be in accordance with the requirements of the HM Treasury guidance ‘Staff transfers from central government: A fair deal for staff pensions’ and The Best Value Authorities Staff Transfers (Pensions) Direction 2007 (for service contracts entered into after 1 October 2007). The Best Value Direction has direct application to English local authorities whereas the Fair Deal guidance does not. However, the exact requirements will be written into the terms underlying the service contract. Failure to provide a broadly comparable scheme in these circumstances may put the contractor in breach of contract. In addition, for contracts subject to the Best Value Direction, protected employees should have direct rights of enforcement under the terms of the contract.

2.6 Even if all parties were to agree to such an amendment in principle, is the closure of the scheme to existing active members legally permissible and what are the implications?

2.6.1 Technically it may be possible to achieve closure to future accrual through an amendment to the admission agreement but in the absence of a unilateral power of amendment exercisable by one party (very rare) then all parties to the original agreement would need to agree to the amendment. See also comments at 2.1 and 2.3.2 above.

2.7 If the answer is Yes, and such an amendment is agreed how is it effected e.g. via an addendum to the agreement or is a new admission agreement required? If the latter, would this mean that the old admission agreement had "ceased to have effect" for the purposes of regulation 38 of the LGPS (Administration) Regulations 2008? If the former, would the amended admission agreement "cease to have effect" for the purposes of regulation 38 of the LGPS (Administration) Regulations 2008 (as the last active member will have ceased to participate in active membership), despite the employer continuing to trade and the fact that there are deferred and/or pensioner members?

2.7.1 Any amendment would need to be made in accordance with any amendment provisions within the existing admission agreement. It should not be necessary to terminate the original admission agreement and enter into a fresh admission agreement (although the terms of the original agreement could be amended to introduce more up to date provisions).

2.7.2 If the agreement is silent on amendment then the parties would need to come to an agreement how the agreement, effectively a contract between the parties, is to be varied. We would normally recommend a deed of amendment or an addendum executed by the parties to the original agreement (or their successors).

2.7.3 If an existing admission agreement is amended to close the agreement to future accrual then, subject to the way the amendment is drafted and the agreement's termination provisions, the amendment itself should not automatically cause the admission agreement to cease to have effect. However, the issues at 2.1 above should be considered if future accrual ceases.

2.8 **In any of the above cases where an admission agreement has “ceased to have effect” , and having regard to the wording of regulations 38 and 39 of the LGPS (Administration) Regulations 2008 and [the attached views of DCLG](#), can any revised contributions due be spread over a period of time?**

2.8.1 Given that regulation 38(2) specifically refers to revised contributions (plural) we believe that an administering authority would have the power to agree a series of revised payments to pay off a crystallised deficit rather than necessarily requiring a single lump sum contribution where it is in the interests of the fund to do so.

2.9 **Where an employer has more than one admission agreement in place (either in the same Fund or in different Funds) and wishes to consolidate these so that all members are in the Fund under a single admission agreement, would this mean that the old (terminated) admission agreement had “ceased to have effect” for the purposes of regulation 38 of the LGPS (Administration) Regulations 2008? Would any deficit crystallise and would this have to be paid as a lump sum?**

2.9.1 Typically this will not be available to regulation 6(2)(a) transferee admission bodies as admission agreements are specific to individual service contracts.

2.9.2 However, this may be possible with regulation 6(2)(b) transferee and community admission bodies. It may be possible to close all but one of the existing admission agreements and cover all active members in one agreement for future membership.

2.9.3 In practice this may not be possible to achieve without terminating the existing agreements and crystallising the deficits (see 2.5-2.7 above).

2.9.4 In relation to the transferring active members then there would need to be fund transfers in respect of the active member liabilities transferring to the new fund (but the transfer(s) would need to take account of any fund deficit(s) in relation to existing pensioner and deferred pensioner members of the admitted body in the exporting funds).

3. RESOLUTION/DESIGNATION BODIES

3.1 **Regulation 4(3) of the LGPS (Administration) Regulations 2008 provides that a person who is employed by a body listed in Part 2 of Schedule 2 to those Regulations may only be an active member if he, or a class of employees to which he belongs, is designated by the body as being eligible for membership of the Scheme.**

3.2 **If the terms of the designation / resolution provide that only those employees that the body designates, or all employees, or all employees of a particular class may be eligible for membership of the LGPS, can that body simply amend / change its designation policy or resolution to:**

3.2.1 **(a) debar any new employees from joining the LGPS?**

3.2.1.1 The regulations do not specify the nature of the designation. Under the old Local Government Pension Scheme Regulations 1997 the comparable provisions required a "statutory resolution" by a resolution body. This was not defined within those Regulations but was defined in the prior Local Government Pension Scheme Regulations 1995 as a resolution passed in the manner in which an ordinary resolution of the body may be passed, except that 28 days' notice (a) of the meeting at which the resolution was passed, (b) of the terms of the resolution, and (c) of the fact that it was to be proposed at that meeting, must have been given in the manner in which notice for convening ordinary meetings of the body may be given.

3.2.1.2 This is now largely academic as only 'designation' is required. However, this gives guidance as to the decision making process that may be expected to constitute a change to an existing designation.

3.2.1.3 It is also worth noting that bodies listed in Part 2 of Schedule 2 cover a wide range of legal bodies each with their own structures and governing constitutions which may determine what constitutes a determination for a particular body.

3.2.1.4 Given that regulation 4(3) gives a listed body discretion to make a designation, it can be reasonably implied that the body can change its designation once made and that the designation is that from time to time in place.

3.2.1.5 Therefore, we believe a body could change its designation so that new employees (or a class of new employees) are not eligible for membership of the LGPS.

3.2.2 **(b) debar any new employees from joining the LGPS and debar existing active members from continued participation in the scheme?**

3.2.2.1 Regulation 4(3) states that an employee may only be an active member if he, or a class of employees to which he belongs, is designated by the body as being eligible for membership of the LGPS.

3.2.2.2 The wording "*an employee may only be an active member.....*" rather than "*an employee may only become an active member.....*" suggests the designation must remain in place for the employee to continue to be eligible rather than just be place at the point a member joins the LGPS.

3.2.2.3 Regulation 14 (Ending of membership) goes on to state that a person stops being a member in an employment if he stops being eligible for membership in that employment. This supports the view that an active member can cease to be eligible for LGPS membership (although this could be for a number of different reasons).

3.2.2.4 This would support a view that a body could, in theory, change its designation for an existing active member. However, the consequences of such a decision would need very careful consideration (see 3.4) and the decision is not without risk of challenge.

3.2.2.5 For example, an active member could seek to argue that the relevance of the designation is at the point of joining the LGPS only and once an employee has become a member, a change in the designation would not be relevant. A member could also point to the lack of an express power in Regulation 4 to change a designation (although we believe this can be reasonably implied).

3.3 **In the case of (a), what are the implications for the employer in terms of equality of treatment with those employees who are continuing to be active members of the scheme?**

3.3.1 See 2.3.2 above.

3.4 **In the case of (b), is the closure of the scheme to existing active members legally permissible and what are the implications?**

3.4.1 As noted above, revoking a designation for an existing member will raise far more issues than revoking a designation for new members.

3.4.2 The legal issues are more likely to revolve around the interpretation of regulation 4(3), whether the body's decision making process has been properly adhered to and exercised and the employment law issues around changing contractual entitlements, in particular whether an employee has a contractual right to LGPS membership, the need for effective consultation and the adequacy of any replacement pension benefits. These issues will be employer specific. See 2.3.2 above.

3.5 **Upon the last active member ceasing active membership:**

3.5.1 **how and when is any underfunding liability at that point in time to be determined and paid for in accordance with the LGPS (Administration) Regulations 2008 if**

(a) the employer is continuing to trade at that point in time (i.e. at the date the last active member ceases active membership), or

(b) the employer has ceased to trade at that point in time (i.e. at the date the last active member ceases active membership)?

3.5.1.1 If the *South Tyneside* decision is followed then there would be no power to require employer contributions from the body in the absence of any active members in the fund whether that body is trading or not.

3.5.1.2 For this reason, an administering authority may not be willing to support an argument that a new resolution can be passed to cease future membership of active members in particular where the body is still trading.

3.5.1.3 If the body was voluntarily prepared to make contributions then the use of incidental powers could be considered to enable this (see 2.1 above). If the body is not prepared to make contributions then see 3.5.2.

3.5.1.4 The termination provisions under Regulation 38 do not apply to Scheme employers.

3.5.2 **how and when can any subsequent underfunding that may arise in the future be determined and paid for in accordance with the LGPS (Administration) Regulations 2008 if**

- (a) **the employer is continuing to trade at that point in time (i.e. at the time the subsequent underfunding is disclosed), or**
- (b) **the employer has ceased to trade at that point in time (i.e. at the time the subsequent underfunding is disclosed)?**

3.5.2.1 If the Scheme employer ceases to have any active members then its ongoing status becomes irrelevant. According to the *South Tyneside* decision, the liabilities would fall on those remaining employing authorities with active members in the fund.

4. **REGULATION 8 BODIES**

4.1 **Regulation 8 of the LGPS (Administration) Regulations 2008 says:**

(1) A person may be an active member if he is an employee of the governing body of -

(a) a voluntary school (within the meaning of the School Standards and Framework Act 1998);

(b) a foundation school or foundation special school (within the meaning of that Act) maintained by a local authority ;

(c) any technical institute or other similar institution which is for the time being assisted by a local authority under the Education Act 1996; or ,

(d) a federated school (within the meaning of the Education Act 2002),

and the local authority has, with the consent of his employer, designated him, or a class of employees to which he belongs, as being eligible for membership of the Scheme.

(2) Such a person shall be deemed to be in employment with the relevant local authority and all references in these Regulations to employment by or under a Scheme employer and all similar expressions shall include references to that person.

4.2 **If the terms of the designation / resolution provide that only those employees that the local authority designates, or all employees, or all employees of a particular class may be eligible for membership of the LGPS can the local authority simply amend / change its designation policy or resolution to:**

4.2.1 **(a) debar any new employees from joining the LGPS?**

4.2.1.1 Again, given that regulation 8(1) gives a local authority a discretion to make a designation, it can be reasonably implied that the authority can change its designation once made to stop new employees, or a class of employees, from joining the LGPS.

4.2.1.2 Such a new designation would require the consent of the governing body as the actual employer, which may not necessarily be prepared to agree to the change.

4.2.2 **(b) debar any new employees from joining the LGPS and debar existing active members from continued participation in the scheme?**

4.2.2.1 The drafting of regulation 8(1) does differ slightly from the drafting of regulation 4(3) and states that where:

"A person may be an active member if he is an employee of the governing body of.....and the local authority has, with the consent of the employer, designated him, or a class of employees to which he belongs, as being eligible for membership of the Scheme."

4.2.2.2 Unlike regulation 4(3) the drafting is in the past tense. This may give an active employee more grounds to argue that the relevance of the designation is at the point of joining the LGPS only and once an employee has become a member, a change in the designation would not be relevant. A member could also point to the lack of an express power in Regulation 8 to change a designation.

4.2.2.3 On balance, we think it can be reasonably implied that the authority can change its designation once made but the risk of changing a designation to debar existing active members is a higher risk that under regulation 4(3). Again, any new designation would also require the consent of the governing body as the employer

4.2.2.4 Any change of designation would need careful consideration of the risks and other considerations (see comments at 3.4).

4.3 **and / or can the governing body remove its consent in order to:**

4.3.1 **(c) debar any new employees from joining the LGPS?**

4.3.2 **(d) debar any new employees from joining the LGPS and debar existing active members from continued participation in the scheme?**

4.3.2.1 The actual designation is clearly made by the local authority and not by the governing body.

4.3.2.2 The consent appears to be a requirement at the time of the designation rather than an ongoing condition. We do not think the revocation of consent alone following a

Comment [T1]: Note from LGPC Secretariat: Readers should note that this is a continuation of the question in 4.2

designation would be effective without the appropriate revocation of the designation by the local authority.

4.4 **In the case of (a) and (c), what are the implications for the governing body and the local authority in terms of equality of treatment with those employees who are continuing to be active members of the scheme?**

4.4.1 Please see 2.3.2.

4.5 **In the case of (b) and (d), is the closure of the scheme to existing active members legally permissible and what are the implications?**

4.5.1 As noted above, the drafting of regulation 8(1) raises a greater level of risk for an existing member than revoking a designation for new members.

4.5.2 The legal issues are more likely to revolve around the interpretation of regulation 8, whether the body's decision making process has been properly adhered to and exercised and the employment law issues around changing contractual entitlements. Again, these issues will be employer specific. See 2.3.2 above.

4.5.3 It should also be noted that the employment law implications are a matter for the governing body as the actual employer and not the local authority.

4.6 **Upon the last active member ceasing active membership how and when is any underfunding liability at that point in time to be determined and paid for in accordance with the LGPS (Administration) Regulations 2008 if:**

4.6.1 **the governing body continues to exist at that point in time (i.e. at the date the last active member ceases active membership), or**

4.6.2 **the governing body has ceased to exist at that point in time (i.e. at the date the last active member ceases active membership)?**

4.6.2.1 If a designation under regulation 8 is made then any employee of the governing body shall be deemed to be in employment with the relevant local authority, which will be a Part 1 Scheme Employer for the purposes of the Regulations. Therefore, the liabilities relating to such employees would fall upon the local authority as the deemed Scheme employer. The way the regulation works

the governing body does not appear to be admitted as an employing authority in its own right. We assume the local authority would have its own active members in the fund.

4.7 **how and when can any subsequent underfunding that may arise in the future be determined and paid for in accordance with the LGPS (Administration) Regulations 2008 if:**

Comment [T2]: Note from LGPC Secretariat: Readers should note that this is a continuation of the question in 4.6

4.7.1 **if the governing body continues to exist at that point in time (i.e. at the time the subsequent underfunding is disclosed), or**

4.7.2 **the governing body has ceased to exist at that point in time (i.e. at the time the subsequent underfunding is disclosed)?**

4.7.2.1 See 4.6.2.1 above

**Eversheds LLP
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