



Response to the CLG consultation on the Draft Statutory Ill Health Guidance - Local Government Pension Scheme (England and Wales)

This evidence is submitted by Unite the Union. Unite is the UK's largest trade union with 2 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, financial services, print, media, energy generation, construction, transport and local government, agriculture, education, health and not for profit sectors.

Unite welcomes the chance to submit evidence and would be willing to make further written and verbal submissions about any of the issues raised.

Unite is being asked to consider its response to the draft statutory guidance issued under Regulation 56(3) of the Local Government Pension Scheme (administration) Regulations 2007 whose purpose is to advise employers and independent medical practitioners about what they must take into account when carrying out their functions under the new three tier ill health arrangements that came into effect on 1st of April 2008.

This response is recognition that many of these ill health retirement provisions were not adequately consulted on in the first place and that particularly in respect of the third tier cessation of benefit after 5 years this was not part of the previous consultation. It has now been accepted following on from a challenge in the House of Lords that these regulations are now in place with retrospective effect from the 22nd of April 2008 backdated to the 1st of April 2008. Unite accepts that the task now is to work with the CLG and other Stakeholders with a view to ensuring that the regulations as currently drafted and consistently understood by those who have to operate them and that we

will work with other to achieve that end to that extent this response to the draft statutory guidance is set out with that aim in mind. Nevertheless there are areas where we feel that an amendment to the regulations remains justifiable.

Unite in common with other stakeholders was then in a difficult position of their being insufficient clarity over some of the proposals of the new scheme design mainly as a result of insufficient dialogue and discussion.

As of the 1st of April 2008 a three tier ill health provision is in place. Tier 1 is restricted to those who meet the eligibility criteria and who are seen as having no reasonable prospect of obtaining any gainful employment before their normal retirement age. Tier 2 applies to those who meet the criteria but who though they cannot obtain gainful employment within three years of leaving their employment are likely to obtain gainful employment before their normal retirement age and tier 3 applies to those likely to obtain gainful employment within three years of leaving their employment. However, common to all three levels is the proviso set out in the guidance and in the regulations that it is for the employer to terminate their employment before any of the eligibility criteria apply.

Prior to April 2008 there was an option for an ill health pension to be paid where employment *ceased* as a result of ill health. Unite does not believe that it was a deliberate policy to make this change and we would suggest that the regulations be amended to allow for member eligibility on grounds of resignation as a result of ill health. Unite is very concerned that there are those suffering from recognised mental health illnesses such as depression (where there is a statically recognisable pattern of people resigning their employment) who will otherwise not qualify for any ill health benefit except as a deferred member on inferior terms. This is a change from the previous regulations which we do not believe came from any deliberate change in policy and we would suggest that any easy remedy would be for the regulations to be amended to allow for a member to instigate an application for medical ill health retirement without first having to await their employment being terminated by their employer.

Part IV role of the independent registered medical practitioner

A central problem Unite has had with the 1997 regulations was the problem about doctors certifying 'permanency'. Whilst for many occupational health doctors the issue of saying , on a balance of probabilities, that someone will not be capable of discharging efficiently the duties of their local government employment was relatively straightforward the fact that they were being asked to do so on a 'permanent' basis was not so. Many illnesses such as M.E. were not easily capable of being certified permanent and it was very clear that the rules were being applied inconsistently geographically and with much different treatment from one authority to another and a lack of consistency was evident. This is in marked contrast to the Civil Service Pension Scheme where a

greater degree of uniformity of decision making has been in place for some time.

Unite felt that this 'first hurdle' of permanency should have been revisited in the current regulations but unfortunately it still remains.

It is to be welcomed that the guidance makes it clear at paragraph 19 that it is for the IRMP (Independently Registered Medical Practitioners) doctor to make decisions solely on the medical criteria as to entitlement to an ill health pension and it is for the employer to decide both whether the member satisfies the rules of the scheme generally as for access and for deciding which Tier of benefit the member should be assigned.

We note though that there is a debate under **Regulation 20(5)** as to the role of the IRMP in determining an individual's capability of **obtaining** gainful employment which is what the regulation says. IRMPs cannot give a view as to an individual's capability of obtaining gainful employment as we would hope that statutory guidance will make it clear that it is not an unreasonable view that the regulations be read in this way. This is certainly the view put forward on behalf of the IRMPs themselves through their organisation ALAMA. (Association of Local Authority Medical Advisers)

Paragraphs 20 – 27

Whereas the doctors should not be in a position of determining who can 'obtain' gainful employment the employers can make such a judgement. The word 'obtain' has a distinct and different meaning from the word 'undertake'. This has been the subject of much unresolved debate between Unite and the CLG and other parties. It is a crucial issue as it may well be possible for a member to be capable of 'undertaking' a job but not necessarily of 'obtaining' one. Obtaining gainful employment is a differing consideration from the first hurdle that one must jump over that of being permanently incapable on medical grounds. The two factors have to be considered together. In order to gain an ill health pension one has to be both permanently incapable and have a reduced likelihood of **obtaining** gainful employment. The two criteria are to be read together conjunctively that is why there is the word 'and' between regulation 20(1) (a) and 20(1) (b). the wording of 20(1) (b) shows that factors such as an individual's circumstances must be taken into account.

At Paragraph 23 the term 'gainful employment' is defined. Regulation 20(14) defines gainful employment as 'paid employment for not less than 30 hours in each week for a period of not less than 12 months.

It is Unite's view that this should be a straightforward test and that a person does not become ineligible for a Tier 3 pension **until** such time as they have been in employment for a full year and have been paid for a full year. It is with great concern therefore that we see in the FAQ's issued by the CLG in August 2008 that there is a suggestion that gainful employment of 30 hours a week for a year is obtained on the renewal of a six months fixed term contract. That

can not be right in Unite's view and we would wish this statutory guidance to clarify this point.

Part VIII- Third Tier

This paragraph is insufficiently detailed it should be made clear that a third tier pension is paid for a maximum period of three years subject to a review mechanism at 18 months.

Paragraph 39

This is another area where we believe the regulations should be amended.

Currently the protections provide that for those aged 45 and over, until the 1st of October 2008, if any member would be better off in financial terms on an ill health retirement under the 1997 rules then they be paid the greater amount

Unite is of the view that restricting the transitional protections only to those aged 45 and over is potentially age discriminatory.

Paragraph 41

The position of a member on the cessation of a third tier pension is still far from clear. This paragraph refers to members as that they are a 'pensioner member with deferred benefits' does this mean that they can apply for voluntary early retirement or access their benefits under Regulation 31 i.e. an ill health retirement pension from deferment on inferior terms, can they transfer their pension entitlements to another scheme and if they die before their normal retirement age is this treated as a death in retirement or a death in deferment? There is some real confusion over this phrase and in general pension terms one is either a pensioner or a deferred member and not both. They are normally very distinct and differing categories with differing rules and terms of reference.

Paragraph 43

Unite can see no logical reason as to why a 3rd tier member on a review can only be uplifted to a 2nd Tier pension. As any uplift still requires the certification of an IRMP it can only be logical that if the member now meets the criteria for a 1st Tier pension they should be eligible. We note that the guidance reflects the wording of the regulations but again this is an area where the regulations need amending and it should be possible for a Tier 3 member to be reassessed by a IRMP and uplifted to a tier 1 if the employer believes that is right following on from their medical reports. It is also the case that payment of the uplift should be from the date of the occurrence of the incapacity and not just from the date of the actual review.

Appeals

In the CLG Aide Memoire supporting the LGPS Ill Health Statutory Guidance at Q31 **what happens if the member is unhappy with the employer's decision about an ill health retirement application?** It is stated that a member who has left local government employment but was not awarded an ill health retirement pension, can appeal against this decision in writing. Much more can be put into this current statutory ill health guidance to ensure that the relevant Internal Disputes Resolution Procedures are used and to show how they may apply to the numerous decisions taken under this new ill health retirement procedures.

For example what happens if there is a dispute about the issue of the stopping of a 3rd Tier ill health pension at the employers request either before or after a review? With these kinds of decisions being made it is inevitable in Unite's view that a substantial number of disputes will arise.

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