

## **Technical Issues in Recognising Past Service with NHS Bodies and PHE**

### **An LGA Guidance Note, February 2015**

**This note sets out how local authorities may be able to agree to recognise past service with NHS bodies or PHE where an individual voluntarily takes up a local authority post. In a document published in 2014 entitled *Public Health in the 21st Century: Organising and managing multidisciplinary teams in a local government context*, *Public Health England* the Local Government Association, the Association of Directors of Public Health and the Faculty of Public Health recommended that employers should make every effort to recognise past service.**

**In such cases local authorities will need to consider the equalities implications of recognising such service, as it may result in the individual obtaining enhanced terms and conditions compared with other employees in the authority. However, it is anticipated that authorities will in many cases be able to justify recognising such past service, for example where it is appropriate to ensure a suitably qualified candidate can be recruited to fill the post.**

#### Statutory rights

Local authorities cannot agree to recognise service for the purposes of statutory rights, such as the two years' service normally required to bring a claim of unfair dismissal. However in some cases the authority may be able to treat the individual as if they have the necessary service to qualify for the right in question. For example, an employer could agree to treat the employee as having the necessary 26 weeks' service to qualify for the right to take parental leave or to make a request for flexible working.

#### Contractual rights

In local government a number of contractual rights accrue with service, such as holiday (above the 28 days' statutory entitlement), occupational sick pay and occupational maternity pay. Authorities can voluntarily agree to treat the individual as having the necessary service to qualify for those contractual benefits. Therefore, they could agree to recognise past service with an NHS body or PHE for the purpose of those benefits.

However, if occupational maternity pay was provided, authorities should note that the employee may not have the necessary service to qualify for Statutory Maternity Pay (SMP), so SMP could not be offset against the occupational maternity pay.

## Redundancy

Following the Court of Appeal's decision in *Allsop v North Tyneside MBC* [1992] ICR 639, local authorities can only make severance/redundancy payments in accordance with statute and the specific powers granted to local government. Payments made outside of those powers are unlawful.

### *Statutory redundancy payments*

Statutory redundancy payments being payments under Employment Rights Act 1996 (the ERA) can be made, but the right to such payments does not accrue until the employee has two years' continuous service with the authority, and any other Modification Order body if relevant<sup>1</sup>. Past service with NHS bodies and PHE cannot count and therefore be recognised by authorities for the purpose of a statutory redundancy payment under the ERA.

### *Payments for those entitled to join / are a member of the Local Government Pension Scheme*

Where an employee is entitled to join / is a member of the Local Government Pension Scheme (LGPS) then the 2006 Discretionary Compensation Regulations<sup>2</sup> provide authorities with the power to make a discretionary lump sum compensation payment of up to 104 weeks' actual pay, inclusive of any statutory redundancy payment under the ERA (although such lumps sums cannot be paid if augmented membership of the LGPS has previously been granted by the employer or additional annual pension has been awarded by the employer).

Importantly however such discretionary lump sum compensation payments must be made in accordance with the relevant authority's policy on discretionary payments. That policy could be amended to incorporate recognition of continuous service with NHS bodies and PHE. The authority could also amend the policy to allow it to provide a different weeks' pay/multiplier for certain groups of employees, such as those working in public health. However the equalities implications of such a practice would need to be considered, and when formulating and reviewing its policy the local authority must:

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<sup>1</sup> [The Redundancy Payments \(Continuity of Employment in Local Government etc.\) \(Modification\) Order 1999](#) (log into [www.local.gov.uk](http://www.local.gov.uk) required) makes local authorities and other local government family bodies covered by the Order associated employers for the purposes of the redundancy provisions of the ERA 1996.

<sup>2</sup> The Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006

- a) have regard to the extent to which the exercise of its discretionary powers, unless properly limited, could lead to a serious loss of confidence in the public service; and
- b) be satisfied that the policy is workable, affordable and reasonable having regard to foreseeable costs.

Ultimately though even if the policy is amended to recognise NHS and PHE service, the policy must be a discretionary one that can be changed on one month's notice. Therefore authorities cannot make advance guarantees that certain redundancy compensation payments will be paid, as such commitments would amount to an unlawful fetter of discretions.

If the employee is aged 55 or over at the time of the redundancy and is a member of the LGPS, then subject to certain conditions, the employer must pay an immediate pension.

For further information on this see the summary of severance/compensations payment provisions at appendix A.

*Payments for those who are in the NHS Pension Scheme (NHSPS) under the terms of a Direction Order*

If the employees are in the NHSPS under a Directions Order the authority will need to check whether the terms of the Direction Order means they can pay redundancy benefits under the NHSPS. The NHS Business Services Authority may be able to help with this (see <http://www.nhsbsa.nhs.uk/>), which has a dedicated employer telephone helpline (0300 3301 353) and email address ([nhsbsa.pensionsemployers@nhs.net](mailto:nhsbsa.pensionsemployers@nhs.net)).

The employees will not however be entitled to any redundancy benefits under the 2006 Discretionary Compensation Regulations as they only apply to employees who are eligible to be a member of the LGPS. As the employees in question are members of the NHSPS they are not, by reason of regulation 4(1)(a) of the LGPS Regulations 2013<sup>3</sup>, eligible for membership of the LGPS and so the 2006 Discretionary Compensation Regulations and the authority's associated policy do not apply to them.

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<sup>3</sup> The Local Government Pension Scheme Regulations 2013

## Appendix A

This section summarises the powers employers have to make compensation, severance and redundancy payments in respect of employees who are in or are entitled to join the LGPS (including the additional annual pension provisions under the LGPS).

- Employers must pay a statutory redundancy payment in accordance with the ERA<sup>4</sup> to a redundant employee who has, in aggregate, at least two years' continuous service under the Modification Order and any other service transferred in under a Statutory Transfer Order (STO) or the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and may base the calculation of the redundancy payment on a figure up to the employee's actual week's pay in accordance with regulation 5 of the 2006 Discretionary Compensation Regulations.
- Employers may pay an employee up to 104 weeks' pay as a lump sum compensation payment in accordance with regulation 6 of the 2006 Discretionary Compensation Regulations where employment is terminated on the grounds of redundancy or efficiency of the service or upon the cessation of a joint appointment, but they cannot do so if, in respect of that cessation, the employee can count augmented membership of the LGPS which was granted under regulation 12 of the Benefits Regulations 2007<sup>5</sup> or has been awarded additional annual pension under regulation 13 of the Benefits Regulations 2007 or under regulation 31 of the LGPS Regulations 2013<sup>6</sup>. Any lump sum compensation payment awarded under regulation 6 of the 2006 Discretionary Compensation Regulations must be reduced by the amount of any statutory redundancy payment paid and by any increase in the redundancy payment under regulation 5 of the 2006

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<sup>4</sup> But a redundant employee offered a job before leaving by another Modification Order body which starts within four weeks of the date of redundancy is not entitled to a redundancy payment.

<sup>5</sup> Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007

<sup>6</sup> Regulation 6(1)(b) of The Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 will need to be amended to add a further sub-paragraph i.e.:

(iii) an additional pension under regulation 31 of the LGPS Regulations 2013.

In the meantime it is considered that section 17 of the Interpretation Act 1978 can be relied upon to enable regulation 6(1)(b) to be read as if it already incorporated a reference to regulation 31 of the LGPS Regulations 2013.

Discretionary Compensation Regulations (increase in redundancy payment by using an actual week's pay where this exceeds the statutory week's pay limit)

- Employers may, under regulation 31 of the LGPS Regulations 2013, grant additional annual pension of up to £6, 500<sup>7</sup> pa to an active member of the LGPS or, within 6 months of leaving, to a member who was dismissed by reason of redundancy, or business efficiency, or whose employment was terminated by mutual consent on grounds of business efficiency. Employers cannot make an award if, in respect of the cessation of employment, the employee has been / is to be awarded a lump sum compensation payment in accordance with regulation 6 of the 2006 Discretionary Compensation Regulations.

Note: to ensure consistency of approach, employers will need to consider pro-rating the award for part- time employees.

- Employers must pay an immediate pension to an employee:
  - a) who is a member of the LGPS,
  - b) who is aged 55 or over,
  - c) whose employment terminates on grounds of redundancy or business efficiency, and
  - d) has 2 years qualifying membership.

A person has 2 years qualifying membership if:

- they have spent two years as an active member in the LGPS;
- a transfer has been received in from a different occupational pension scheme (or from a European pensions institution) and the length of service in respect of benefits in that scheme was two or more years;
- the aggregate of the period the person has spent as an active member of the LGPS and of a different occupational pension scheme or European Pensions Institution in respect of which a transfer value payment has been accepted, is two years;
- a transfer value payment has been received in respect of rights accrued in a pension scheme or arrangement that does not

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<sup>7</sup> The additional pension limit is £6,500 from 1st April 2014 and that figure is increased on 1st April 2015, and each subsequent 1st April, by the rise in inflation (as currently measured by the Consumer Prices Index).

permit a refund of contributions to the member (for example, from a personal pension or stakeholder scheme);

- the member has paid National Insurance contributions whilst an active member and ceases active membership after the end of the tax year preceding that in which the member attains pensionable age (i.e. age 60 for a female or age 65 for a male if the member has a Guaranteed Minimum Pension or, in any other case, State Pension Age);
- the member already holds a deferred benefit or is in receipt of a pension from the LGPS (other than a survivor's pension or pension credit member's pension);
- a transfer value payment has been made from the LGPS to a qualifying recognised overseas pension scheme; or
- the member ceases active membership at age 75.

NB: In the above bullet points, references to "LGPS" are references to the LGPS in England and Wales.