



PUBLIC SECTOR PENSIONS AUTHORITY

Response to Consultation relating to the draft Public Sector Pensions (Admission) Regulations 2014 and the Isle of Man Government Unified Scheme (Amendment) Scheme 2014

July 2014

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Part 1 – Introduction

The Public Sector Pensions (Admission) Regulations 2014 and the Isle of Man Government Unified Scheme (Amendment) Scheme 2014 seek to provide, where appropriate, for continued public sector pension provision for those public sector employees who may move to the private or third sector should the services they provide be transferred and thereafter their employment to an external commercial organisation.

The United Kingdom operates a “Fair Deal” policy which sets out how pension issues are to be handled when staff working for UK central government departments and agencies or other public sector bodies are compulsorily transferred under the TUPE legislation to a non-public sector employer.

The Isle of Man does not currently have “Fair Deal” or an equivalent policy on the transfer of public sector pension scheme members to a private sector employer and nor does it have TUPE legislation. However, given the current considerations under the Isle of Man Government’s “Scope of Government” agenda, the transfer of Government workers into the private or third sector may be a future possibility.

Following discussions with Employing Authorities, Treasury and the Office of Human Resources, the PSPA considers it is appropriate that a similar policy to “Fair Deal” should be available to negotiators of potential future outsourced contracts, to form part of any future contracts. This does not necessarily mean that ongoing membership of a public sector pension scheme will always be offered to workers transferring to the private or third sector, but rather that the facility should exist for this to be considered, along with other terms and conditions of employment, as part of the overall contract negotiations between Isle of Man Government, unions and the external employer.

Under the proposed policy, public sector staff transferred in this manner may retain a contractual right to continued access to the relevant public sector scheme. This will be affected via an “Admission Agreement” (or equivalent document) which will set out the terms on which the transfer is given effect and will include how the external contractor participates in the public sector pension scheme.

It is anticipated that the Policy will include the following, which formed the basis of the consultation:

- That all staff transferring from a public sector employer will be able to retain membership of their public sector scheme for a period of five years, reviewable at the end of the five year period;
- The PSPA will decide with Treasury consent what the process will be for determining new employer contributions into the scheme;
- That the new employer will be required to make contributions to the relevant public sector scheme which will generally reflect the contribution rate paid by current employers participating in that scheme or an appropriate rate to provide the benefits under the scheme;
- Active membership of the public sector scheme will cease after a defined period or when staff stop working on the outsourced contract, whichever occurs first, and employers will be required to inform the PSPA when staff are no longer eligible for “Fair Deal” participation.

If ongoing public sector pension scheme membership was to be offered, issues around employer contributions, meeting any administration costs, the impact of future actuarial and cost sharing valuations and re-tenders of contracts etc. would all form part of these negotiations and therefore require a framework to work within.

The two relevant pieces of legislation are as follows:

The Public Sector Pensions (Admission) Regulations 2014

In order to facilitate this framework, the eligibility for Public Sector Schemes membership needs to be made available to prospective external organisations. Eligibility for the Unified Scheme (and to other public service schemes) requires members to be "Public Sector Employees", which for the purposes of the Unified Scheme means a person in respect of whom the Public Sector Pensions Authority may make a scheme under section 6(1)(c) of the Public Sector Pensions Act 2011 ("the Act").

Section 6(1)(c) of the Act sets out that the PSPA must make schemes providing for the superannuation of public sector employees, subject to the approval of Tynwald. The Act defines a Public Sector Employee as a person in respect of whose superannuation this Act applies in accordance with Section 3 of the Act.

Currently, if workers are transferred to a private sector employer they would no longer be Public Sector Employees as defined under Section 3 of the Act. Therefore, in order for such employees to remain superannuable by the PSPA, as permitted under Section 3(4)(a) of the Act, the PSPA has drafted the Public Sector Pensions (Admission) Regulations 2014 to amend Section 3 (3) of the Act to apply to former public service employees who would be employed in the private sector.

The Isle of Man Government Unified Scheme (Amendment) Scheme 2014

The second element of this policy is to amend the Unified Scheme to allow for the terms under which affected staff participate within the Scheme and the requirements of the external provider in relation to the Scheme. In summary this includes:

- defining an Admissions Agreement;
- revising the definition of Employee to include those staff whose employment has been transferred to an external organisation;
- amending the definition of Employing Authority to include external providers,
- amending the definition of Pensionable Service to accommodate those staff transferred to an external provider; and
- adds a requirement for external providers to pay Employing Authority Contributions.

Proposal

In preparing the draft legislation, the PSPA viewed the proposed changes as facilitating in nature to allow for discussions to take place and if necessary, for public sector pension provision to remain available to affected employees. The PSPA is aware that these provisions may or may not be utilised, but has prepared them so that no undue delays occur during contract negotiations because of any uncertainties over pension provision.

Part 2 - The Consultation Exercise

Detailed information was provided on the PSPA website in the form of draft Regulations and a draft Scheme together with a summary of the provisions. The consultation period commenced on 16 April 2014 and at the request of the trade unions, was extended for a further 4 weeks and ended at 12 noon on 27 June 2014.

Part 3 – The Responses

The PSPA wishes to thank those who responded to the consultation for their suggestions and comments.

There were 9 responses to the consultation, 2 from scheme members, 3 from Government Departments and 4 from trade union representatives. Three responses were also received after the stated deadline.

Key themes which emerged in response to the consultation.

These can be summarised as follows:

What will happen to my pension if my job is outsourced?

"I would like to know that if after the five years we have to sort out our own pensions what happens to the money that we have already paid into the superannuation scheme?"

"Will it be released to us so we can have the benefits of interest and we can have the choice of what to do with it?"

"Given the choice I would gladly continue paying into the superannuation scheme but the choice is being taken away from me so I feel it is only fair that I choose what to do with my money rather than it just being frozen." (member);

"...I am concerned that my pension will be frozen once we are taken over by whoever. I would like to continue to pay into a the scheme once we are taken over to improve my final payout. Please can you let me know what will happen..." (member).

No time limit on membership of a public sector scheme for outsourced employees.

By far the most common theme highlighted by all of the unions and by the Director of Adult Social Care Services was that active membership of a public sector pension scheme should continue for as long as the employee was working on the outsourced contract.

"There is no time limit needed on this , former public sector employees who are in the scheme pre transfer to an external provider should be able to enjoy the benefits of the scheme for an unlimited time period as in the UK, it is recognised that they are still delivering services on behalf of the public sector, even if the employer is an external contractor..." (Unison union);

"...The policy should be clear in requiring that actions will be taken to ensure that public service staff who are contracted-out will be given a right to retain a comparable pension for as long as they remain employed wholly or mainly in carrying out the public service work which is out-sourced. Contractual obligations will be used to ensure the private sector contractors comply with this..." (Unite union);

"...The draft Regulations should be amended to remove the provision whereby the continuation of the admission agreement is reviewed after five years and to make clear that admission agreements can be arranged where a contract is re-tendered and members are subject to a further compulsory transfer..." (Unite union);

"...The ATL believe that there should be no five-year limit and strongly object to the inclusion of section 3(ii) of the Public Sector Pensions (Admission) Regulations 2014..." (Association of Teachers and Lecturers (ATL) union);

"...This legislation also provides no 'guarantee' for IOM public sector employees, as there is no ability to specify continued membership of pension schemes as a condition of future employment with services outsourced to non public sector employers..." (Prospect union);

"...In short, the legislation does not mean outsourced staff will automatically have any pension protection. Only staff transferred under Admission Agreements will have protection, and even this may in effect be limited to 5 years maximum, although it is acknowledged this may be 'extended'..." (Prospect union);

"...And, from the perspective of Adult Social Care Services, there are genuine concerns that the five year limit proposed threatens the sustainability of some proposed outsourcing of services..." (Adult Social Care Services).

In addition a joint response was received from the trade unions listed below asking for section 3(ii) of the Public Sector Admission Regulations 2014 to be removed (i.e. the stipulation that continued membership of a public sector scheme would only continue for 5 years after which time the position would be reviewed) and for the PSPA and trade unions to work together to develop the necessary legislation:

- Unite
- Whitley Council (Employees' Side)
- Unison
- Royal College of Nursing
- Society of Chiropractors and Podiatrists
- Association of Teachers and Lecturers
- The Association of UK Dieticians
- Prison Officers Association
- Prospect
- Chartered Society of Physiotherapists

The response was received approximately 90 minutes after the consultation deadline and was delivered by hand to the PSPA but was taken into account by the PSPA in its deliberations.

Other comments received are summarised below in Part 4 together with the PSPA's view.

Part 4 – Conclusions

The broad themes raised via the consultation responses are highlighted below with the PSPA's comments on each point raised:

- i) General approval for the adoption in principle of UK Fair Deal, with various provisos;
- ii) A lack of detailed and equivalent protection in the Isle of Man regulations when compared with the UK e.g. Fair Deal is an option as part of the negotiations rather than an enforceable right as it is in the UK; if Fair Deal is rejected as part of the outsourcing negotiations, there is no obligation on the contractor to provide comparable pension provisions; the legislation does not cover re-tender situations at the end of the contract period;

PSPA response: it was always considered that Fair Deal would be an option rather than a right in the Isle of Man given that the Island has no TUPE or current Fair Deal legislation nor has it previously outsourced employees to the private or third sector with pension rights retained. It was considered that any Fair Deal terms would be negotiable for each contract and where circumstances warranted it, ongoing public sector pension provision would be offered as part of the contract to transferring staff to be considered along with other terms and conditions of employment. It could be that for smaller contracts with limited numbers of transferees, individuals would prefer some other compensation rather than continuation of pension. Therefore, the legislation as drafted is not prescriptive in this respect.

- iii) A lack of detail in the proposals;

PSPA response: The draft legislation was always meant to be enabling in nature to allow for discussions to take place and where required, for public sector pension provisions to remain available to affected employees, a facility which may or may not be used in each individual contract negotiation. The proposed method of agreeing the exact pension terms, including re-tenders of contracts at the end of the contract period, contractors being subject to PSPA requirements (including future cost sharing provision) etc would be incorporated into the Admission Agreement and therefore subject to separate negotiation.

- iv) No requirement for the contractor to agree the content of specific Admission Agreements at the negotiation stage and before a transfer of staff which includes agreement with the PSPA;

PSPA/OHR response: the PSPA does not fundamentally disagree with this and notes that where practicable, employees will want to be aware of what pension terms, if any, are being offered as part of their transfer of employment before the transfer goes ahead.

- v) Transferred staff will not have basic legal protections for terms and conditions and pay (as there is no TUPE legislation in the Isle of Man) and no legal rights to using collective bargaining or representation to counter any downturn in terms and conditions to include pensions;

PSPA/OHR response: whilst there are no TUPE Regulations in force, the legal position in respect of transferring staff in the Isle of Man (i.e. the joint effect of schedule 5 paragraph 8 of the Employment Act 2006, section 11 of the Redundancy Payments Act 1990 and the common law position) in very basic terms is that:

- When a business is transferred from one employer to another, the employment contracts are terminated at common law thus there is a dismissal;
- Such a dismissal is by way of redundancy but section 11 of the RPA provides that if the new owner offers fresh employment on the same terms or suitable alternative employment to the dismissed employee then, subject to trial period rights, this extinguishes the right to receive a redundancy payment from the original employer;
- If the new employer elects to re-engage staff then continuity of employment for employment law protection purposes (such as redundancy, unfair dismissal) is preserved;

Furthermore, the Office of Human Resources has received expert legal advice which confirms that pensions would also likely be considered as part of the employment package for determining suitable alternative employment, in addition to standard terms and conditions.

Therefore, it is incorrect to say that transferred staff do not have basic legal protections for terms and conditions and pay. It is accepted however that staff do not have a legal right to continuation of collective bargaining on transfer whereas they do in the United Kingdom.

- vi) No mention of a continued link to the Isle of Man public service Injury Benefit or Redundancy Compensation schemes;

PSPA/OHR response: whilst these schemes are non-contractual, it is likely that they too would be considered as part of the employment package for determining suitable alternative employment. As such, these provisions would need to be considered as part of the transfer negotiations.

- vii) Condemnation of the inclusion in the draft legislation of a maximum five year period under which participation of outsourced employees in a public service scheme would be reviewed.

PSPA/OHR response: this was always likely to be the most contentious provision of the draft legislation and is the key area where the Isle of Man legislation differs with UK Fair Deal, where no time limit is placed on the transferring employees' membership of the public sector scheme provided they continue to work at least 50% of their time on that contract and that contract remains outsourced from government. The five year period was included in the draft legislation on the basis that outsourced contracts will generally run for a five year period. As there is no guarantee that the contractor will retain the work at the end of the period, nor what might subsequently happen to that contract or the service provided, it was considered that to give an open ended guarantee of future pension scheme membership may be inappropriate within the Isle of Man and therefore, the position should be reviewable at the end of the contract term. Despite assurances given by the PSPA and OHR to members and unions that this provision means exactly what it says (it is reviewable by all parties at the end of five years), the PSPA acknowledges the perceived uncertainty that this gives to employees, that their pension provision may be ceased after five years.

- viii) Signed union letter dated 18 June but submitted shortly after the consultation end deadline: the unions do not agree with the outsourcing of public sector jobs and as such, the proposals for Fair Deal type legislation in the Isle of Man are unfair as they do not grant the same non-negotiable rights as in the UK and there are serious omissions in the draft regulations. Therefore, the joint unions recommended that the proposed legislation is shelved and that the issue is revisited jointly in order to collectively develop appropriate revised legislation.

PSPA response: As outlined above, the proposed legislation is enabling and the exact terms on which pension provision would be maintained for transferring employees would be contained within each individual Admission Agreement, which would be made available to staff in advance of a transfer and would be negotiable as part of each individual contract.

Conclusions

The PSPA having considered the consultation responses made has determined that:

- i) The assertion that the legislation shouldn't now be progressed is rejected;
- ii) Each individually negotiated Admission Agreement should contain the detail requested as far as practicable and the details should be made available to transferring employees ideally before they move to the new employer and

- should be enforceable on the contractor once agreed either by the PSPA or Treasury;
- iii) Continued membership of a public sector pension scheme is negotiated as part of each individual contract and is not granted as of right as it is in the UK;
 - iv) Transferring staff will have some employment protections via the Employment Act 2006 and the Redundancy Payments Act 1990 and therefore this should not stop the progression of the legislation;
 - v) The ongoing availability of the Injury Benefits Scheme and the Public Sector Compensation Scheme 2013 will be subject to consideration as part of the transfer negotiations;
 - vi) However, in acknowledgement of the uncertainty perceived by trade unions and their members, that pension provision may be ceased after five years the PSPA has determined that:
 - a) The term for employees remaining in a public sector pension scheme which was set as initially five years, reviewable at the end of the five year period, should be removed from the final legislation; and
 - b) that each individual Admission Agreement should cover in detail, as far as practicable, how the pensions part of the contract should operate including payment of employer and employee contribution, membership being subject to future PSPA cost sharing and actuarial reviews, what happens on subsequent re-tendering of contracts, that employees will only remain able to participate provided they continue to work at least 50% of the time on that contract etc. and that contractors must sign up to these terms.

List of respondents to the Consultation

2 individuals

Association of Teachers and Lecturers

Unison

Unite

Government Officers' Association / Prospect

Social Security Division, Treasury

Department of Infrastructure

Adult Social Care Services supported by Department of Health and Social Care

In addition the following responses were received after consultation had closed from:

Association of School and College Leaders

Department of Home Affairs

Joint Trade Union letter