

27 June 2007

To: Local Authority Chief Executives in England

Dear Chief Executive

**SECTION 101 & 102 LOCAL GOVERNMENT ACT 2003
STAFF TRANSFER MATTERS (PENSIONS)**

I attach a copy of *The Best Value Authorities Staff Transfers (Pensions) Direction 2007* which comes into force on the Common Commencement date of 1 October 2007.

The intention of the Direction is to provide pension protection for employees of English best value authorities (and Welsh Police authorities) where the provision of services are contracted out, and staff transferred under TUPE.

Briefly, the Direction provides that:

- where an authority enters into a contract with a person for the provision of services and those services are, in the period immediately before the contract is entered into, provided by the authority and carried out by employees of the authority
- the contract between the authority and the contractor must require the contractor to secure pension protection for each transferring employee and provide that the provision of pension protection is enforceable by the employee; and,
- pension protection is secured if the transferring employee, after change in employer, has rights to acquire pension rights that are the same as or are broadly comparable to or better than those he had as an employee of the authority

The Direction also requires similar pension protection in relation to those former employees of an authority, who were transferred under TUPE to a contractor, in respect of any re-tendering of a contract for the provision of services.

In the case of employees who are members of the *Local Government Pension Scheme*, it will be possible for the new employer, if they wish, to seek admitted body status within the LGPS so that transferred staff continue to have access to that pension scheme for their future service. This would appear to satisfy the requirements contained in the Direction.

Yours faithfully

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BACKGROUND

Cabinet Office: *Statement of Practice for Staff Transfers in the Public Sector (2000)*

1. The Cabinet Office, *Statement of Practice on Staff Transfers in the Public Sector* (January 2000) sets out a framework for public sector organisations to implement the Government's policy on the treatment of staff transfers where the public sector is the employer or the client in a contracting situation. The *Statement of Practice* provides that contracting exercises (including retendering) should be conducted on the basis that the *Transfer of Undertakings Regulations* (TUPE) should apply unless there are genuinely exceptional reasons why this should not be the case (see note on TUPE at paragraphs below).

Best Value Review

2. The Best Value Review (announced on 1 October 2001) was established to find ways to improve the quality of local services whilst ensuring fair treatment for employees working on local authority contracts. On 26 March 2002, the then Secretary of State announced details of a package which the Government had decided constituted the most appropriate way of dealing with this issue. The details of the package included the commitment to legislate to make statutory within local government the provisions 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*.

Local Government Act 2003

3. Sections 101 and 102 of the *Local Government Act 2003* confer powers on the Secretary of State (and equivalent powers on the National Assembly for Wales and Scottish Ministers) to require best value authorities to deal with matters affecting who the local authority's staff are employed by and on what terms, following contracting out of services, in accordance with directions. Section 101 also requires authorities to have regard to guidance on such staff matters issued by the Secretary of State, the National Assembly for Wales or Scottish Ministers. *Section 102* provides that the Secretary of State (the NAW and Scottish Ministers) shall exercise their powers under section 102 to give directions so as to ensure that local authorities, in contracting for the provision of services, secure specified pension benefits.

4. In May 2004 (and again in June 2005) we consulted the Local Government Association and Trade Unions on draft Directions under section 101 of the 2003 Act. There were 2 draft Directions:

- *The Best Value Authorities Staff Transfers (General) Direction*
- *The Best Value Authorities Staff Transfers (Pensions) Direction*

TUPE Regulations

5. In broad terms, *The Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended)* ("TUPE") protected employees' terms and conditions

when the business in which they work was transferred from one employer to another, and the business retained its identity. These Regulations have been revoked by *The Transfer of Undertakings (Protection of Employment) Regulations 2006* (S.I. 2006 No 246).

6. In March 2005, DTI issued a consultation document concerning revision of the TUPE Regulations. The New Regulations were laid before Parliament and came into force on 6 April 2006.

7. The principal provisions of the Regulations provide that:

- a transfer to which these Regulations apply (described as a relevant transfer). The two categories of relevant transfer (which are not mutually exclusive) are the transfer of an undertaking or business to another person and a service provision change
- a relevant transfer shall not operate to terminate the contract of employment of a person employed by the transferor and assigned to the organised grouping of resources or employees subject to a relevant transfer but that any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee
- the transferor's powers, duties, rights and liabilities under or in connection with that employment contract shall transfer to the transferee
- a variation to that employment contract by reason of the transfer is prohibited but that shall not prevent the employer and his employee from agreeing a variation to the contract for a reason unconnected with the transfer or a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce
- the dismissal of an employee by reason of the transfer is unlawful but that a dismissal for a reason connected with the transfer that is an economic technical or organisational reason entailing changes in the workforce is potentially lawful
- the Regulations do not apply to so much of a contract of employment or as relates to any provision of an occupational pension scheme relating to old age, survivors or invalidity benefits
- the Regulations apply to a relevant transfer that takes place on or after 6 April 2006 whilst the 1981 Regulations will apply to a transfer to which the 1981 Regulations applied that took place before 6 April 2006.

8. Following consideration of consultation responses and a review of the need for these Directions in the light of the new TUPE regulations, it was concluded that no general staff transfer Direction under section 101 of the 2003 Act was needed. However since TUPE does not cover occupational pensions, a pension direction to secure a broadly comparable pension for transferring staff is needed to secure pension protection for employees of best value authorities where the provision of services are contracted out, and staff transfer under TUPE, to a new service provider.

The Best Value Authorities Staff Transfers (Pensions) Direction 2007

1. The Secretary of State makes this direction under section 101 of the Local Government Act 2003¹.

Application

2. This direction applies to best value authorities in England and police authorities in Wales.

Definitions

3. In this direction:

(i) “best value authorities” are those listed in section 1 of the Local Government Act 1999²;

(ii) references to “authority” are to authorities to which this direction applies;

(iii) “The TUPE regulations” means the Transfer of Undertakings (Protection of Employment) Regulations 2006³ or any regulations replacing those regulations, as from time to time amended;

(iv) any expression used which is also used in the TUPE regulations, has in this direction the meaning that it has in the TUPE regulations.

Pension protection for authority employees where the provision of services are contracted-out

4. Paragraph 5 applies where an authority -

(i) enters into a contract with a person for the provision of services, and

¹ 2003 c.26.

² 1999 c. 27

³ S.I.2006/246

(ii) those services are, in the period immediately before the contract is entered into, provided by the authority and carried out by employees of that authority.

5. The contract must provide –

(i) that the contractor shall secure pension protection for each transferring employee and

(ii) that the provision of pension protection is enforceable by the transferring employee.

6. For the purposes of paragraph 5 –

(i) “transferring employee” means an employee of the authority whose contract of employment becomes, by virtue of the application of the TUPE regulations in relation to what is done for the purposes of carrying out the contract between the authority and the contractor, a contract of employment with someone other than the authority; and

(ii) “pension protection” is secured for the transferring employee if after that change in employer he has, as an employee of his new employer, rights to acquire pension benefits and those rights –

(a) are the same as, or

(b) count as being broadly comparable to or better than,

those that he had, or had a right to acquire, as an employee of the authority.

Pension protection for an employee of the authority in respect of a subsequent contract for the provision of services

7. Paragraph 8 applies where-

(i) an authority has contracted with a person (“the first contractor”) for the provision of services,

(ii) the application of the TUPE regulations or the Transfer of Undertakings (Protection of Employment) Regulations 1981⁴ in relation to what was done for the purposes of carrying out the contract between the authority and the first contractor resulted in employees of the authority becoming the employees of someone other than the authority, and

(iii) the authority is contracting with a person (“the subsequent contractor”) for the provision of any of the services.

8. The contract between the authority and the subsequent contractor must provide-

(i) that the subsequent contractor secure pension protection for any transferring original employees; and

(ii) that the pension protection provided is enforceable by the employee.

9. For the purposes of paragraph 8-

(i) “transferring original employee” means an employee of the authority –

(a) whose contract of employment becomes, by virtue of the application of the TUPE regulations in relation to what is done for the purposes of carrying out the contract between the authority and the subsequent contractor, a contract of employment with someone other than the authority; and

(b) whose contract of employment on each occasion when an intervening contract was carried out became, by virtue of the application of the TUPE regulations or the Transfer of Undertakings (Protection of Employment) Regulations 1981 in relation to what was done for the

⁴ S.I.1981/1794

purposes of carrying out the intervening contract, a contract of employment with someone other than the existing employer;

(ii) “pension protection” is secured for the transferring original employee if after the change in his employer referred to in paragraph (i)(a) he has, as an employee of his new employer, rights to acquire pension benefits and those rights –

(a) are the same as, or

(b) count as being broadly comparable to or better than,

those that he had, or had a right to acquire, before that change of employer.

10. For the purposes of paragraph 9(i)(b) an “intervening contract” means a contract with the best value authority for the provision, at times after they are provided under the contract with the first contractor and before they are provided under a contract with the subsequent contractor, of the services to be provided under the contract with the subsequent contractor.

Timing

11 This direction takes effect from 1 October 2007.

Signed by authority of the Secretary of State.

Date