

HM Treasury: consultation on the Fair Deal policy – treatment of pensions on compulsory transfer of staff from the public sector

Response from Thompsons Solicitors

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About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Introduction

We welcome the opportunity to respond to the further consultation in relation to the Fair Deal.

We note from paragraph 3.23 of the government's response to the first consultation that "The Government believes that good quality pension provision should be promoted and that public service pension provision should set a benchmark for others to follow." We share that belief and the policy objectives behind it and welcome the government's clear commitment to them.

Turning to the further questions raised we respond as follows.

Question 1

The Government welcomes views on the proposed application of the Fair Deal policy to staff previously transferred under the existing Fair Deal. In particular, the government would welcome views on:

a) whether organisations employing these staff should be able to continue to offer a broadly comparable pension scheme to staff already transferred out under Fair Deal

We agree, subject to expert actuarial advice being obtained to demonstrate that the schemes are indeed broadly comparable.

or ; b) whether access to the relevant public service pension scheme should be a term of business for potential bidders for retendered contracts (including incumbent providers) and;

Yes it should, subject to whether the employer chooses instead to provide a broadly comparable scheme. That itself should be a term of the contract, if the employer chooses that option instead of the option of providing access to the relevant public sector scheme.

c) at what stage in the contracting process employers should be required to set out how they will offer pension provision for transferred staff – through access to the public service scheme or through offering a broadly comparable scheme.

At the tender stage. It should be a clear condition for acceptance of a tender that one of the two options must be offered. Further, the contractual documentation must make it a condition of the contract that the pension provision put forward in the tender document will subsequently be offered. Further, it should be a term of the contract that individual employees can enforce their right

to the relevant pension provision, and not just the contracting authority. We are aware of instances where enforcement of pension provision has been difficult for individual employees. The possibility of direct enforcement by employees would be an effective way of ensuring that contractual obligations are followed, rather than placing the entire onus on the contracting authority to enforce pension provisions in public sector contracts.

Question 2

The Government welcomes views on whether there are any other situations that may arise when contracts covered by Fair Deal are retendered.

Sometimes, companies undertaking public sector contracts can become insolvent. The administration of Jarvis plc / Jarvis Rail Ltd / Fastline Ltd in the rail industry in March 2010 is a classic example. Well over a thousand employees lost their jobs as a result and their pension rights have been badly affected.

The Southern Cross insolvency in the care sector is another example. The contracts between contracting authorities and outside contractors should make provision for protection of pension provision, as well as job security, where companies become insolvent.

Question 3

The Government welcomes views on which scheme employees returning before 2015 should be able to access. This could be the one they originally left, the contracting authority's currently open scheme, or the scheme most broadly comparable to the one they originally left.

Access should be provided to the scheme employees had access to, immediately prior to the transfer, bearing in mind their continuity of employment date if relevant to that question.

Question 4

The Government welcomes views on how bulk transfers for employees covered by the existing Fair Deal will work when those contracts are retendered under the new policy.

The value of the pension provision which the employee is entitled to at the point of transfer should be calculated and the option given for the employee to defer those pension rights, or to transfer those rights into a different scheme.

Where the latter option is taken up, the benefits the employee should be entitled to under the new scheme should be equated to the transfer value of the accrued pension rights in the previous scheme / schemes.

Question 5

The Government welcomes views on whether the proposed approach to the Fair Deal policy for employees that have already been transferred out of the public sector will have differential impacts on people with protected characteristics.

Without the relevant statistics, we are not able to comment.

Question 6

The Government welcomes views on this draft guidance and suggestions for further areas that need to be covered

A.13: The position of employees in local government is far from satisfactory. We believe that the promotion of good quality pension provision is best achieved by having one guidance document covering all outsourcing by the public sector. Further, the applicability of that guidance should not depend on whether or not the employees initially worked for the contracting authority that is currently letting out the contract, rather than some other public sector body (because responsibility can move from e.g. local government to the NHS and vice versa).

This possibility is clearly envisaged by COSOP 2007 which states at paragraph 6 that:

“This Statement of Practice sets out a framework to be followed by public sector organisations to implement the Government’s policy on the treatment of staff transfers where the public sector is the employer when contracting out or the client in a subsequent retendering situation.” (our emphasis)

The Two Tier Codes were not always so clear, and nor is the Best Value Authorities Staff Transfers (Pensions) Direction 2007 since the applicability of this depends first on the contracting authority being a Best Value Authority and second on the employees being employees of that Best Value Authority before the transfer.

Enforceability is also an issue, hence our response at 1 c) above. We therefore urge the Government to provide one Fair Deal policy document, applicable to all public sector outsourcing. Failing that, the DCLG should simply direct, pursuant to S. 101 Local Government Act 2003 that the Fair Deal should apply to all local government out-sourcing. This would have the advantage of simplicity and clarity.

Further, we understand that there is a separate Pensions Direction covering Wales; again we urge the same approach as suggested in relation to local government out-sourcing.

The position of employees of academies also needs to be carefully considered.

A.21: This says that the new policy will only apply to staff “that have not turned down their Fair Deal entitlement and are currently receiving a broadly comparable pension to the one that they left” (our emphasis). This ignores the possibility (which we know from experience is a reality for some employees involved in previous public sector out-sourcing) that staff have not been given the option of comparable pension provision on transfer.

We therefore recommend that the underlined words above are deleted from the draft guidance, so that staff who should have had their pension rights protected on transfer in the past are not further disadvantaged in relation to future transfers.

A.31 and **A.32:** We remain concerned about the government’s abolition of the Two Tier Codes, which allows unfair competition by the private sector. We believe that competition should take place on a level playing field.

We ask the government to reconsider the abolition of the Two Tier Codes and to consult about their re-instatement, with a view to comparable pension provision having to be made available for all employees working on public sector contracts alongside employees who originally worked in the public sector. This is the best way to ensure “good quality pension provision should be promoted and that public service pension provision should set a benchmark for others to follow”.

Further information
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