

**Bath & North East
Somerset Council**



CLG Statutory Guidance on Ill Health Retirement

The Local Government Pension Scheme



LOCAL GOVERNMENT PENSION SCHEME (LGPS)

GUIDANCE ON THE APPLICATION OF THE LOCAL GOVERNMENT PENSION SCHEME ILL HEALTH REGULATIONS WHICH TOOK EFFECT FROM 1 APRIL 2008

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THIS ILL HEALTH GUIDANCE REFLECTS THE REGULATORY PROVISIONS OF THE LOCAL GOVERNMENT PENSION SCHEME (BENEFITS, MEMBERSHIP AND CONTRIBUTIONS) REGULATIONS 2007 (STATUTORY INSTRUMENT 2007/1166), AS AMENDED BY THE LOCAL GOVERNMENT PENSION SCHEME (AMENDMENT) REGULATIONS 2008 (STATUTORY INSTRUMENT 2008/1083) ALSO BY THE LOCAL GOVERNMENT PENSION SCHEME (MISCELLANEOUS) REGULATIONS 2010 (STATUTORY INSTRUMENT 2010/2090) AND BY THE LOCAL GOVERNMENT PENSION SCHEME (BENEFITS, MEMBERSHIP AND CONTRIBUTIONS) (AMENDMENT) REGULATIONS 2011 (STATUTORY INSTRUMENT 2011/561)¹



GUIDANCE ON THE LGPS ILL HEALTH RETIREMENT PENSION PROVISIONS

Introduction

1. This guidance is issued, under Regulation 56(3) of the Local Government Pension Scheme (Administration) Regulations 2008, to all administering authorities, employing authorities, other employers who are admitted to the Local Government Pension Scheme, Independent Registered Medical Practitioners and other relevant interested parties in England and Wales with regulatory responsibilities under the new Local Government Pension Scheme that came into effect on 1 April 2008.

2. Employers and Independent Registered Medical Practitioners must have regard to this guidance when carrying out their functions under:

- Regulation 20 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (Statutory Instrument 2007/1166) as amended by the Local Government Pension Scheme (Amendment) Regulations 2008 (Statutory Instrument 2008/1083), by the Local Government Pension Scheme (Miscellaneous) Regulations 2010 (Statutory Instrument 2010/2090), by the Local Government Pension Scheme (Benefits, Membership and Contributions) (Amendment) Regulations 2011 (Statutory Instrument 2011/561)²; and

- Regulation 56 of the Local Government Pension Scheme (Administration) Regulations 2008.

3. In this guidance, the term 'employer' relates to local authority employing authorities and other employers participating in the Scheme.

4. This guidance includes details of the relevant regulatory provisions and an explanation of the operation of the new ill-health retirement benefit provisions as they apply from 1 April 2008. Two model ill health certificates are provided at Annexes A and B to assist employers participating in the scheme, and independent doctors will need to complete a certificate for each ill health retirement case.

5. The Ill Health Monitoring Group has been set up to evaluate the effectiveness of the new Local Government Pension Scheme ill health framework, and the Group will, from time to time, ask for relevant data about the application of the new regulations to inform their work. The Ill Health Monitoring Group is able to make recommendations for changes to the regulatory framework in the light of experience of implementing the new ill health provisions.

6. The Secretary of State will keep the content of the guidance under review and will update it as necessary, in the light of recommendations from the Ill Health Monitoring Group, or experience of administering authorities, employers, Independent Registered Medical Practitioners and others, in the application of this guidance. The Guidance was updated in June 2011 as a result of changes to the regulations contained in the Local Government Pension Scheme (Miscellaneous) Regulations 2010 (SI 2010/2090). The Guidance will be reviewed again in 2015.

7. Unless a specific reference is made to regulations by another title, the reference is to a regulation of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (Statutory Instrument 2007/1166), (“the Benefits Regulations”) as amended by the Local Government Pension Scheme (Amendment) Regulations 2008 (Statutory Instrument 2008/1083), by the Local Government Pension Scheme (Miscellaneous) Regulations 2010 (Statutory Instrument 2010/2090) and by the Local Government Pension Scheme (Benefits, Membership and Contributions) (Amendment) Regulations 2011 (Statutory Instrument 2011/561).

Section 1 - The Legal Framework

8. The regulatory provisions governing ill health retirements under the Local Government Pension Scheme with effect from 1 April 2008 are set out in regulations 20 and 31 of the Benefits Regulations and in regulation 56 of the Local Government Pension Scheme (Administration) Regulations 2008 (Statutory Instrument 2008/239), (“the Administration Regulations”), as amended by the Local Government Pension Scheme (Amendment) Regulations 2008 (Statutory Instrument 2008/1083), by the Local Government Pension Scheme (Miscellaneous) Regulations 2010 (Statutory Instrument 2010/2090) and by the Local Government Pension Scheme (Benefits, Membership and Contributions) (Amendment) Regulations 2011 (Statutory Instrument 2011/561)² :-

A: Entitlement on ceasing employment early owing to ill health:- (Regulation 20 of the Benefits Regulations)

20.—(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5

(a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and

(b) that he has a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age,

they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2), (3) or (4), as the case may be.

(2) If the authority determine that there is no reasonable prospect of his being capable of undertaking any gainful employment before his normal retirement age, his benefits are increased—

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date the whole of the period between that date and the date on which he would have retired at normal retirement age.

² Also paragraph 15 (2)(K) of Schedule 3 to The General Specialist Medical Practice (Education, Training and Qualification) Order 2010 (Statutory Instrument 2010/234)

(3) If the authority determine that, although he is not capable of undertaking gainful employment within three years of leaving his employment, it is likely that he will be capable of undertaking any gainful employment before his normal retirement age, his benefits are increased—

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date 25% of the period between that date and the date on which he would have retired at normal retirement age.

(4) If the authority determine that it is likely that he will be capable of undertaking gainful employment within three years of leaving his employment, or before reaching normal retirement age if earlier, his benefits—

(a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and

(b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(5) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine ("IRMP") as to whether in his opinion the member is suffering from a condition that renders him permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition he has a reduced likelihood of being capable of undertaking any gainful employment before reaching his normal retirement age.

(6) A person who receives benefits under paragraph (4) shall—

(a) inform the authority if he obtains employment; and

(b) answer any inquiries made by the authority as to his current employment status, including as to his pay and working hours.

(7) (a) Subject to sub-paragraph (c), once benefits under paragraph (4) have been in payment to a person for 18 months, the authority shall make inquiries as to his current employment.

(b) If he is not in gainful employment, the authority shall obtain a further certificate from an independent registered medical practitioner as to the matters set out in paragraph (5).

(c) Sub-paragraph (a) does not apply where a person reaches normal retirement age.

(8) (a) The authority shall discontinue the payment of benefits under paragraph (4) if they consider—

(i) that the person is in gainful employment; or

(ii) in reliance on the certificate obtained under paragraph (7)(b), that he is capable of undertaking such employment

and may recover any payment made in respect of any period before discontinuance during which they consider him to have been in gainful employment.

(b) Subject to sub-paragraph (bb), the authority shall in any event discontinue the payment of benefits under paragraph (4) after they have been in payment to a person for three years.

(bb) Paragraph (b) does not apply where a person reaches the age of 65.

(c) The authority shall forthwith notify the appropriate administering authority of any action they have taken under this paragraph.

(9) A person in respect of whom the payment of benefits is discontinued under paragraph (8) shall be treated as a pensioner member with deferred benefits from the date the suspension takes effect, and shall not be eligible to receive benefits under paragraph (4) in respect of any future period.

(10) If a person in respect of whom the payment of benefits is discontinued under paragraph (8) subsequently becomes an active member of the Scheme, his earlier period of active membership in respect of which benefits were paid under paragraph (4) shall not be aggregated

with his later active membership.

(11) (a) An authority which has made a determination under paragraph (4) in respect of a member may make a subsequent determination under paragraph (3) in respect of him.

(aa) A subsequent determination under paragraph (3) must be made within three years of the date that payment of benefits is discontinued under paragraph (8), or before the member reaches the age of 65 if earlier.

(b) Any increase in benefits payable as a result of any such subsequent determination is payable from the date of that determination.

(11A) Where an authority makes a determination of benefits under paragraph (2) or (3) (“the subsequent determination”) in the case of a person—

(a) for whom a retirement pension had already been determined under paragraph (2) or (3) (“the initial determination”), and

(b) who subsequently became an active member of the Scheme,

his earlier period of active membership (calculated under the initial determination) shall not when aggregated with his later period of active membership (calculated under the subsequent determination), exceed the total membership he would have had, were the initial determination to have been made under paragraph (2).

(12) (a) Subject to sub-paragraph (b) and to paragraph (13), in the case of a member in part-time service, the period to be added under paragraph (2)(b) or (3)(b), as the case may be, is calculated in accordance with regulation 7(3) as if he had remained in such part-time service until his normal retirement age.

(b) If the certificate obtained under paragraph (5) states that, in the medical practitioner’s opinion, the member is in part-time service wholly or partly as a result of the condition that has caused him to be incapable of discharging efficiently the duties of the relevant local government employment, no account shall be taken of such reduction in his service as is attributable to that condition.

(13) But in the case of a person who is an active member before 1st April 2008 and who—

(a) has reached the age of 45 before that date;

(b) has had continuous membership; and

(c) has not received any benefits in respect of that membership,

his benefits are increased by adding the period that would have been added had regulation 28 of the 1997 Regulations applied if such period is greater than the period to be added under paragraph (2)(b) or (3)(b).

(14) In this regulation –

“gainful employment” means paid employment for not less than 30 hours in each week for a period of not less than 12 months;

“permanently incapable” means that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday; and

“an independent registered medical practitioner qualified in occupational health medicine” means a practitioner who is registered with the General Medical Council and —

(a) holds a diploma in occupational medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an European Economic Area State; and for the purposes of this definition, “competent authority” has the meaning given by section 55(1) of the Medical Act 1983; or

(b) is an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an European Economic Area State.

(15) Where, apart from this paragraph, the benefits payable to a member in respect of whom his employing authority makes a determination under paragraph (1) before 1st October 2008 would place him in a worse position than he would otherwise be had the 1997 Regulations continued

to apply, then those Regulations shall have effect in relation to him as if they were still in force instead of the preceding paragraphs of this regulation.

**B : Entitlement after ceasing employment early owing to ill health:-
(Regulation 31 of the Benefits Regulations)**

31.—(1) Subject to paragraph (2), if a member who has left his employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body he may ask to receive payment of his retirement benefits, whatever his age.

(2) Before determining whether to agree to a request under paragraph (1), an employing authority must obtain a certificate from an independent registered medical practitioner as to whether in the independent registered medical practitioner's opinion the member is suffering from a condition that renders the member permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition the member has a reduced likelihood of being capable of undertaking any gainful employment before reaching normal retirement age, or for at least three years, whichever is the sooner.

(3) In this regulation, "gainful employment", "independent registered medical practitioner" and "permanently incapable", have the same meaning as given to those expressions by regulation 20 (14).

**C : First instance determinations: ill-health :-
(Regulation 56 of the Administration Regulations)**

First instance determinations: ill-health

56.—(1) Subject to paragraph (1A), an independent registered medical practitioner ("IRMP") from whom a certificate is obtained under regulation 20(5) of the Benefits Regulations in respect of a determination under paragraph (2), (3) or (4) of that regulation (early leavers: ill-health) must be in a position to declare that—

(a) he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested; and

(b) he is not acting, and has not at any time acted, as the representative of the member, the employing authority or any other party in relation to the same case,

and he must include a statement to that effect in his certificate.

(1A) Paragraph (1)(a) does not apply where a further certificate is requested for the purposes of regulation 20(7) of the Benefits Regulations.

(2) If the employing authority is not the member's appropriate administering authority, it must first obtain that authority's approval to its choice of registered medical practitioner for the purposes of regulation 20 and 31 of the Benefits Regulations.

(3) The employing authority and the independent registered medical practitioner must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation, and—

(a) in the case of the employing authority, when making a determination under regulation 20 of the Benefits Regulations; or

(b) in the case of the independent registered medical practitioner, when expressing an opinion as to the matters set out in regulation 20(5) and regulation 31(2) (early payment of pension: ill health) of those Regulations.

Section 2 - General Guidance

Part I - Role of the employer

9. In the context of ill health retirements, the role of the employer begins a long time before employment has been terminated and the question of entitlement to an ill health retirement benefit arises. The management of ill health in the work force and, in particular, during the period leading up to termination of employment, is outside the scope of this guidance. The “prevention and management of sick absence” replaced the “management of ill health handbook” and was published by the Local Government Employers in 2007. An updated version of the Local Government Employers’ guide is, as at June 2011, in the process of being updated.

Change in process for the employer in the 2008 ill health provisions

10. Under the 1997 Scheme regulations, any question concerning entitlement to an ill-health retirement benefit could only be decided when a member had left local government employment on the grounds of permanent ill health. Whilst this did not prevent an employer and medical advisers from looking into the question of entitlement to an ill health pension and grant beforehand, in regulatory terms, the actual decision about entitlement and any appeal arising from the determination of that question could only have been made on or after the member left employment. Concerns have been raised in the past about the effect that certain decisions made by the Courts and the Pensions Ombudsman might have on this separation between the “leaving employment” and the “entitlement to pension benefit” question that has been part of the scheme’s regulations for a considerable time. The ill health provisions in Regulation 20 now require the employer to commence medical processes prior to any termination of employment on ill health grounds.

11. Responsibility for deciding the grounds on which the employment of a scheme member has been terminated rests solely with the employer (Regulation 20 (1)). But an employer cannot make a determination under Regulation 20 unless they have obtained a certificate from an independent registered medical practitioner qualified in occupational health medicine (Regulation 20 (5) and (14) (a) and (b)).

12. It is also important to note that all the regulations referred to in this guidance are subject to the civil law burden of proof. As such, the determination of questions is based on the “balance of probabilities” test and not on the stricter criminal law test of “beyond reasonable doubt”.

Part II - Questions for the employer to determine

13. Under Regulation 20, the appropriate employer is required to consider and decide a number of questions before entitlement to an ill health retirement benefit under that regulation can be awarded. These include:-

- a) is the length of total membership at least three months, or has a transfer value been credited to the member, or does the member already hold a Local Government Pension Scheme deferred benefit in the Local Government Pension Scheme in England and Wales? (Benefits Regulations 5 (1) and 20(1)); and
- b) does an independent registered medical practitioner consider that the member's ill health or infirmity of mind or body render him permanently incapable of discharging efficiently the duties of his current employment? (Regulation 20(1)(a) and 20 (5)); and
- c) does the member have a reduced likelihood of undertaking gainful employment (whether in local government or elsewhere) before his normal retirement age? (Regulation 20(1)(b)).

(Note: see explanations concerning 'gainful employment' and 'reduced likelihood' at paragraphs 24 and 28 below)

14. If the answers to all three questions are in the affirmative, there is a prima facie entitlement to payment of an ill-health benefit under Regulation 20. To decide the level of benefit, the employer must further decide which of the following three situations applies:-

- a) is there no reasonable prospect of the member being capable of undertaking any gainful employment before reaching his normal retirement age. In these circumstances, the member receives benefits based on his accrued rights up to the date of termination and enhancement equal to all his prospective service from that date to his normal retirement age. (Regulation 20(2)); or
- b) is the member judged to be incapable of undertaking gainful employment within three years of leaving local government employment, but is thought likely to be able to do so before reaching his normal retirement age? In these circumstances benefits equal to his accrued rights and an enhancement of 25% of his prospective service to normal retirement age will be awarded, (Regulation 20(3)); or
- c) Is the member likely to recover sufficiently from his incapacity to enable him to be capable of undertaking gainful employment within three years of leaving local government employment or before reaching normal retirement age if earlier? In these circumstances, benefits equal to his accrued rights, with no enhancement, will be awarded. (Regulation 20(4)).

15. Additional questions concerning part time employment and the protection of rights of certain members fall to be considered by virtue of Regulations 20(12), (13) and (15) respectively.

Entitlement to payment of deferred benefits on the grounds of ill health

16. Under Regulation 31 of the Benefits Regulations, an ill health benefit can also be paid to a member who has left local government employment with an entitlement to a deferred benefit and becomes permanently incapable of discharging efficiently the duties of their former employment before becoming entitled to payment of that deferred benefit. The member has to apply for the early release of the deferred benefit and the employer should notify the administering authority to release unenhanced benefits from the date they determined that the member became permanently incapable of discharging efficiently the duties of the relevant employment. By virtue of regulation 31(2), the early payment of deferred benefits can only be

made in circumstances where the independent registered medical practitioner has certified that the member's condition is likely to prevent him from undertaking gainful employment, whether in local government employment or elsewhere, before reaching his normal retirement age or for at least three years, whichever is the sooner. In other words, the authority must undertake the same parallel process as that required for active members under regulation 20(5) and the deferred member would have to satisfy the criteria set out in regulation 20(2) or (3).

Payments

17. Ill health retirement benefit payments are made by the relevant Local Government Pension Scheme administering authority following notification of the determination by the employer (regulation 64 of the Administration Regulations).

Part III - The role and status of the independent registered medical practitioner

18. The introduction of the certification of ill health retirements by an independent registered medical practitioner qualified in occupational health was one of the 35 recommendations made in the HM Treasury review. It has been a feature of the 1997 scheme regulations for a number of years and is carried forward into the new scheme arrangements in Regulations 20(5) and 31(2). These regulations set out the questions that the independent registered medical practitioner must address in his certificate but provisions relating to the doctor's certification are also set out in the Administration Regulations. In particular, regulation 56(1) of those regulations requires the independent registered medical practitioner to include a statement confirming his independent status in his certificate under regulation 20 (5) but note that where 3rd tier benefits have been awarded and there is a review at 18 months, the same independent registered medical practitioner can make the certification at the review as well as at the initial referral. The independent registered medical practitioner may be asked to sign the certificate required under regulations 20 (5) or 31 (2) and it is recommended that the independent registered medical practitioner complies with this request. There is nothing in the regulations to preclude the independent registered medical practitioner from adding a narrative report to the certificate should this be considered appropriate.

19. Regulation 20(14) of the Benefits Regulations defines what is meant by "an independent registered medical practitioner qualified in occupational health medicine".

Part IV - Questions for the independent registered medical practitioner

20. In many respects, these reflect the questions that the employer is ultimately responsible for deciding but it is important to bear in mind that the independent doctor is not being asked to confirm the termination or otherwise of the member's employment. Under Regulation 20(5), the role of the independent registered medical practitioner is to certify whether or not, in his opinion, on the balance of probabilities, the criteria for entitlement to an ill health benefit are satisfied in any individual case. On this basis, the questions to be considered by the independent registered medical practitioner doctor are:-

- a) is the member **permanently** incapable of discharging efficiently the duties of the relevant local government employment because of ill health or infirmity of mind or body (**Regulation 20(5)**) and, if so –

- b) whether this has resulted in a reduced likelihood of being capable of **undertaking any gainful employment** and, if so :-
 - whether there is no reasonable prospect of his being capable of undertaking any gainful employment before his normal retirement age (**Regulation 20(5) when read in conjunction with Regulation 20(2)**), or
 - whether, although there is no prospect of his being capable of undertaking gainful employment within three years, there is a reasonable prospect of his being capable of undertaking gainful employment before reaching his normal retirement age. (**Regulation 20(5) when read in conjunction with Regulation 20(3)**);or
 - whether there is a reasonable prospect of his being capable of undertaking gainful employment within three years of leaving local government employment, or before normal retirement age if earlier (**Regulation 20(5) when read in conjunction with Regulation 20(4)**).
- c) in the case of a member who is wholly or partly in part-time service (following a reduction in hours of employment), was this as a result of the condition that had caused him to be permanently incapable of discharging efficiently his current employment? (Regulation 20(12)(b)).
- d) under regulation 20(5), the independent registered medical practitioner is also asked to consider whether or not the member has a reduced capability of undertaking gainful employment. But, in the context of regulation 20(8)(a)(ii) (action at the review) and the definition of “reduced likelihood” below, it is clear that if the independent registered medical practitioner says there is no reduced capability of undertaking gainful employment, then this means that regulation 20(8)(a)(ii) is satisfied. This means that a 3rd tier benefit should be discontinued following the 18 month review, if the employer, based on the opinion of the certifying doctor, determines that the member is now capable of undertaking gainful employment.
- e) regulation 20(15) provided that for determinations made by the employer in the transitional period up to and including 30th September 2008, the employer needed to consider a member’s entitlement under both the current provisions of regulation 20 and the former ill-health provisions of the 1997 Scheme regulations (see para. 48 below). This meant that, for this limited period, independent registered medical practitioners needed to consider the permanency question both in relation to a member’s actual local authority employment and any comparable employment for the purposes of regulation 27 of the 1997 Scheme regulations. Under those regulations, the term “comparable employment” was defined as any other comparable employment with his employing authority ie:-

"comparable employment" means employment in which, when compared with the member's employment;

(a) the contractual provisions as to capacity either are the same or differ only to an extent that is reasonable given the nature of the member's ill-health or infirmity of mind or body; and

(b) the contractual provisions as to place, remuneration, hours of work, holiday entitlement, sickness or injury entitlement and other material terms do not differ substantially from those of the member's employment.

21. It is important at this stage to highlight the fact that both regulations 20(1) and (5) restrict entitlement considerations to medical factors. Although regulation 20(1) enables the authority to make an award where a member, amongst other things, "...has a reduced likelihood of being capable of any gainful employment", it is important to note that by virtue of the conjunctive "and" at the end of regulation 20(1)(a), any "reduced likelihood" for the purposes of regulation 20(1)(b) must be as a direct result of the permanent incapacity referred to in regulation 20(1)(a). On this basis, non-medical factors such as the availability of gainful employment in a particular area, are not relevant factors for the purposes of regulation 20(1). The same rule applies to regulation 20(5), except here, the relevant conjunctive is "and, if so, whether as a result of that condition".

Part V - Definitions

22. It is important that all parties are clear about the meanings behind the terms used in either the regulations or this guidance. The examples given below expand on the definitions given in regulation 20(14), but others refer to words or phrases that are not defined but which merit explanation.

23. The term "**permanently incapable**" is defined in regulation 20(14) as meaning "that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday". This definition is amended by Benefits Regulation 16A to refer to age 60 (instead of age 65) in the case of some protected members who transferred to local government on 1 April 2010 from the Learning and Skills Council for England. In addressing questions about permanent incapacity, whether in terms of the local government employment or gainful employment elsewhere, consideration must therefore be given not to the immediate or foreseeable future, but to the date when the member attains their normal retirement age.

24. The term "**gainful employment**" is defined by Regulation 20(14) as "paid employment for not less than 30 hours in each week for a period of not less than 12 months". This term is **not** to be confused with the concept of "comparable employment" which was a feature of the 1997 Scheme from 1999. From 1 April 2008, the independent registered medical practitioner will be required to judge the member's capability of undertaking any gainful employment - rather than one based on the type of local government post formerly held by the member. This reflects government policy whereby public service ill health pensions are to be paid not only on the basis of ability to undertake the member's current employment, but also other employment in the general workforce. The "gainful employment" test is applied regardless of whether the member is working full or part-time. The assessment is being made as to whether the member would be capable of undertaking gainful employment and not whether the member would actually want to.

25. **Significance of '3 years'**. The level of benefits payable under regulation 20 are dependant upon the duration of the "reduced likelihood" of being capable of undertaking gainful employment, having taken into account the medical condition at the time when the employer determines to terminate a member's employment. Originally, the view was taken that the regulations should rely on the concept of a "reasonable period" to distinguish 2nd tier from 3rd tier cases. In the light of representations made by interested parties, the decision was taken that any reference to a reasonable period should be replaced with a fixed period of time, applied consistently across all cases. Three years represents a "reasonable period" distinction for the purposes of considering either a 2nd or 3rd tier award (respectively Regulations 20 (3) and (4)). The regulations also provide for a limit of 3 years for payment of 3rd tier benefits (Regulation 20 (8)(b)), except where a person reaches the age of 65 before then.

26. **“Undertaking”**. It is important to highlight the fact that both regulations 20(1) and (5) restrict entitlement considerations to medical factors, taking into account the full medical effects of the condition which gave rise to the retirement on the grounds of permanent ill health. In some cases, the condition may comprise certain medical or physical impediments which have a bearing on the individual’s capacity to undertake gainful employment.

27. Non-medical factors, such as the general availability of gainful employment in a particular area or the attitude of employers to certain conditions, **would not be material factors and should not be part of the independent registered medical practitioner’s consideration**, while the effect a medical condition would have on their practical ability to undertake gainful employment would. The same would apply to the individual’s own attitude towards their condition, which could be a limiting factor to undertaking gainful employment, although it is recognised that in some cases, the member’s attitude may constitute a medical condition in itself and the independent registered medical practitioner could be asked to make a judgement about this.

28. **“Reduced likelihood”**. From the outset, the policy objective has always been to encourage a return to work for those people who have left their local government employment because of ill health but who are otherwise capable of carrying out a wide range of employment elsewhere. Regulation 20 does not, therefore, provide an ill health retirement benefit to any member whose employment was terminated on the grounds of ill health or infirmity of mind or body which renders him permanently incapable of discharging efficiently the duties of his current employment, but who does not have a reduced likelihood of undertaking gainful employment Regulation (20(1)). In such circumstances, the member would be regarded as immediately capable of undertaking gainful employment as defined in regulation 20(14). “Immediately” means at the point the member’s employment is terminated. It follows that a 1st, 2nd or 3rd tier pension can only be awarded to a member whose likelihood of undertaking gainful employment is reduced because of that permanent incapacity.

Section 3 – The Regulations in practice

Part VI – The first tier

29. Regulation 20(2) provides for payment of a first tier ill-health retirement pension where:-

- a) the member has a qualifying period of at least 3 months, or a transfer value has been credited to the member, or the member already holds a LGPS deferred benefit in the LGPS in England and Wales (Benefits Regulation 5 (1));
- b) a certificate has been obtained under regulation 20(5);
- c) based on that certificate, the employer has decided to terminate the member’s employment on the grounds that his ill health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment and, because of that condition, he has a reduced likelihood of undertaking any gainful employment before normal retirement age (regulation 20(1) (a) and (b)), and
- d) the authority determines that there is no reasonable prospect of him undertaking any gainful employment before normal retirement age (regulation 20(2)).

30. Where a first tier pension is awarded under regulation 20(2), the member's normal benefits are increased as if the date on which he left local government employment was his normal retirement age and by adding to the total membership at that date the whole of the prospective service up to normal retirement age. Regulation 20(12) makes provision for a different calculation in the case of a member in part-time service and Regulation 20(11A) places a limitation on benefits if the member has previously retired with a first or second tier pension. A first tier pension is not subject to any review mechanism.

Part VII – The second tier

31. Regulation 20(3) provides for payment of a second tier ill health retirement pension where the circumstances are the same as those described in the first three bullet points in paragraph 29 above, but the employing authority determines it is likely that the member will become capable of undertaking gainful employment before their normal retirement age, although they cannot undertake gainful employment within three years of their leaving local government employment.

32. Where a second tier pension is awarded under regulation 20(3), the member's benefits are increased by adding to the member's total membership at the time of leaving, 25% of their prospective service to normal retirement - subject to the provisions of regulation 20(12) if the service in question was part-time and to Regulation 20(11A) if the member has previously retired with a first or second tier pension. A second tier pension is not subject to any review mechanism.

Part VIII – The third tier

33. The 3rd tier provides retirement benefits for a member who is judged by an independent registered medical practitioner to be permanently incapable of their local authority employment and has a reduced likelihood of being capable of undertaking gainful employment before his normal retirement age, but is also medically considered capable of undertaking gainful employment within three years of leaving employment, or before his normal retirement age, if earlier. The member would be entitled to their accrued Local Government Pension Scheme pension benefits, with no enhancement, and payments are made until such time as the member undertakes gainful employment. Payments would be discontinued if, following a review, under regulations 20 (7) (a) and (b), the independent registered medical practitioner certificate is to the effect that the member is now capable of gainful employment. 3rd tier payments cannot, in any event, continue beyond three years (regulation 20 (8) (b)).

34. All ill health payments are made by the relevant Local Government Pension Scheme administering authority following notification of the determination by the employer (regulation 64 of the administration regulations).

Good Practice over the use of Benefits Regulation 30A and “rule of 85” rights

35. The new Benefit Regulations 30A provision allows a “pensioner member with deferred benefits” ie one who has received tier 3 ill health retirement benefits which have been paid and ceased, to access their deferred benefits before age 65 but with an actuarial reduction. Access on or after age 55 and before 60 is only with employer permission. This means that members with suspended ill health benefits have the same right to access deferred benefits before age 65 as other deferred members in the Scheme. However, whilst the “rule of 85” rights contained with the LGPS Transitional Regulations apply to active members and re-joiners including flexi-retirees, it should be noted that the current regulatory framework does not provide for “rule of 85” where a suspended tier 3 pension is brought back into payment before age 65*.

Requirement to obtain a certificate from an Independent Registered Medical Practitioner qualified in occupational health medicine

36. Regulation 20(5) requires an employer to obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine.

Return to gainful employment

37. The member with 3rd tier benefits is required to notify the previous employer when employment is obtained and provide details, including the pay and working hours, of that employment. The employer considers the details regarding that employment and, if they decide this is gainful employment as defined in paragraph 20 (14) of the Benefits Regulations, payments are discontinued. The employer should notify the relevant administering authority without delay when payments are to be stopped, and payments should be stopped from the date when gainful employment commenced (see paragraph 39 concerning the treatment of overpayments).

The Review mechanism

38. 1st and 2nd tier ill health benefits are not reviewable but 3rd tier benefits are subject to a review. Under regulation 20(7)(a), the previous employer needs to undertake a review when 3rd tier payments have been made for 18 months. The employer should write to the 3rd tier member asking for details of their employment status. If, from the information provided, the employer decides that gainful employment had been obtained, the 3rd tier payments are discontinued.

Repayment of overpaid payments

39. The date of return to gainful employment will determine the date payments should be stopped and the employing authority is required to notify the relevant administering authority without delay when 3rd tier payments should be discontinued and from what date (regulation 20 (8) (c)). If payments have continued when gainful employment has been found, the employer has powers to recover any overpayment from the 3rd tier member under regulation 20(8)(a). Employers are recommended to pass the amount of the recovered 3rd tier payments, without delay, to the relevant pension fund.

* DCLG is considering whether this position should remain.

3rd tier member returns to local government employment

40. Regulation 20(10) requires that, when benefits are stopped and the 3rd tier member subsequently becomes an active member of the Local Government Pension Scheme, the earlier period of membership which resulted in 3rd tier benefits is not aggregated with the later active membership.

Status of member when payments cease

41. The status of a 3rd tier member whose benefits are stopped is 'a pensioner member with deferred benefits', and he is not eligible to receive 3rd tier payments for any future period (regulation 20(9)).

Seeking a further opinion from an independent registered medical practitioner

42. If, as a result of the employer's enquiry at the review, it is found that a 3rd tier member has not found gainful employment, the employer is required by regulation 20(7)(b) to seek a further opinion from an independent registered medical practitioner concerning the condition which resulted in the 3rd tier membership (unless the member has already attained normal retirement age).

43. The same independent registered medical practitioner who signed the certificate that resulted in the first determination can sign the certificate at the 3rd tier review (Regulation 56(1A) of the Administration Regulations). There is no requirement that the independent registered medical practitioner has to be able to certify at a 3rd tier review that they have not previously advised, given an opinion on, or otherwise been involved in the case.

Employers' ability to uplift the member from 3rd tier to 2nd tier following the review (Regulation 20 (11))

44. The employer can determine that a member with 3rd tier benefits can receive the enhanced 2nd tier benefits upon the certification by the independent registered medical practitioner following the review or at any time up to 3 years after the payment of the 3rd tier benefit has been discontinued. The employer must take the same steps when determining the 2nd tier concerning certification by an independent registered medical practitioner. The date of the second determination will decide the date from which the uplift to 2nd tier will be put into payment and the enhancement is calculated by adding 25% of membership between the date of that subsequent determination and normal retirement age (see Benefit Regulation 20(11)(b)). There is no provision to make a determination for a 1st tier payment at the review or a subsequent occasion. If at the 3rd tier review or subsequently, the independent registered medical practitioner judges that the member is, because of the condition resulting in 3rd tier benefits, now permanently incapable of their local authority employment and has no prospect of undertaking gainful employment before normal retirement age, the employer only has powers to award a 2nd tier enhanced pension from the date of the later determination and can do this where the medical certification justifies it. The 2nd tier determination may be considered when 3rd tier payments are ongoing or up to three years after having have been discontinued. Also, the employer is not prevented from seeking a medical reassessment during the three year period should this be requested by the member.

Part IX – Special considerations

Member reduces their hours because of the ill health condition which subsequently results in ill health retirement

45. Where a member is awarded ill health retirement benefits but, prior to their leaving employment, they have had to reduce their hours as a result of the condition that lead to the ill health retirement award, no account is taken of the reduction in hours. The member's reduction in service which is accrued between the date of the reduction in hours and the date they leave employment, is ignored for the purposes of calculating his ill health benefits. The independent registered medical practitioner has to certify that the reduction in hours is as a result of the condition that causes him to be permanently incapable of the relevant local government employment and have a reduced likelihood of undertaking gainful employment, in accordance with regulation 20 (12) (b). If this is certified, the employer can make a determination, and the ill health pension will be calculated based on accrued service with no reduction in service because of the reduction in hours; this applies to past service and, where appropriate, any future service enhancement for a 2nd or 1st tier award.

46. If a member who is employed at the outset on a part time basis because of an ill health condition, further reduces their hours as a result of that ill health condition, and this is certified to be the case by an independent registered medical practitioner, no account is taken of that further reduction when calculating an ill health retirement award. This applies for both past service and, where appropriate, any future service enhancement for a 2nd or 1st tier award. The calculation is based on the pre-reduction part time service.

47. If, where a member has part-time employment, there is no subsequent reduction in the member's part time hours as a result of the ill health condition that is being assessed for ill health retirement, regulation 20 (12) (b) will not apply as there has been no reduction in the current service as a result of the condition resulting in ill health retirement.

Treatment of those aged 45 before 1 April 2008 - 1st and 2nd tier determination

48. Under regulation 20(13), protection is given for a person who was both a member and aged 45 before 1 April 2008, and where there is entitlement to enhanced ill health retirement benefits (i.e. a 1st or 2nd tier award). This protection means that the member should be in no worse a position than they would have been had Regulation 28 of the 1997 Regulations applied and the conditions of that regulation were met. The employer will be required to establish entitlement under the 1997 regulations and the 2007 Benefit Regulations as amended, and award the greater of the benefits.

Transitional protections

49. Under regulation 20 (15), transitional protections applied for determinations made before 1 October 2008 to provide that if the benefits payable to a member under the amended regulation 20 would have placed him in a worse position than he would have otherwise been had the 1997 Regulations continued to apply, then those Regulations shall apply as if they were still in force. For all practical purposes, Regulation 27 of the 1997 Regulations remained in force in the transitional period.

50. This meant that the employer needed to consider whether the employee would be entitled to ill health benefits under Regulation 20 of the Benefit Regulations (as amended). The employer also needed to consider whether the member was entitled to ill health benefits under the 1997 Regulations. A calculation of any benefits payable, under the two sets of regulations, would have been required and any enhancement of prospective service for both calculations was at the 1/60th accrual rate. A comparison was then made and the member awarded the greater amount.

51. Until the end of September 2008, the ill health certificate to be completed by the independent registered medical practitioner needed to include questions about whether the member would meet the ill health definition in the Local Government Pension Scheme Regulations 1997 as well as ill health questions relating to the Benefits Regulations 2007 (as amended).

52. For example, in the transitional period, a member who qualified for a 3rd tier pension and would also have qualified for an enhancement of 6 2/3 under the 1997 Regulations, would have received a 1997 Regulation non reviewable, permanent pension with the enhancement calculated at 1/60th accrual.

How to assess 'gainful employment' if a member in receipt of a 3rd tier pension informs the employer, prior to the 18 month review, that they have a short term contract.

53. It would be unreasonable for an employer to assume that a person is in gainful employment having notified them, prior to the 18 month review, that they have just entered a short term contract of employment for, say, six months. Whether that contract will be renewed or not, would be pure conjecture and should not, therefore, fall to be considered. Even if a 3rd tier member had served two months of the six month contract, it follows that the definition of gainful employment has not been satisfied. Neither would it be reasonable to make any assumption that four months on, the contract might be reviewed for a further six months which could arguably bring it within the gainful employment definition.

54. Where the employer is notified of a member's employment showing contract details of 30 hours or more in each week, for a period less than 12 months, the 3rd tier payments should not be stopped but the employer should check the current employment status with the member at the point the contract is due to end. If it is found that a further contract has been obtained, and this was again for 30 hours or more in each week, for a period less than 12 months, it will be reasonable to stop payments when a continuous 12 month period has been undertaken, as the gainful employment test will have been satisfied.

55. Under some contracts, the hours may be variable and this may cause some difficulty in deciding whether, over the future, the 30 hour test is satisfied over a 12 month period. If employment was obtained some time ago, it should be possible to ascertain a pattern of working from the variable hours worked up to that point and to base a decision on that evidence. A better way forward would be to defer any decision until later in the employment when evidence about working hours has been established.

56. In other words, taking short term contracts may avoid the 3rd tier pension being suspended in the short term, but once the employment in individual contracts for 30 hours or more in each week have been undertaken over a continuous 12 month period, the definition of gainful employment would be satisfied.

57. In any event, if it is clear from the outset that the member has obtained employment with a specified period of less than 12 months, the employer will wish to ask the member in receipt of a 3rd tier pension, to let them know their employment status at the end of the period of the first short term contract, and subsequent contracts until the gainful employment test has been met.

58. The view is also taken that the words “in each week” where they appear in the definition of “gainful employment” in regulation 20(14) means in each week throughout the 12 month period, rather than in each week where there is a contract of employment. Otherwise, the definition would be satisfied by a person taking just a one month contract of employment for 35 hours a week.

59. Where a member notifies the previous employer that they have obtained employment, for example, 37 hours a week on an open contract ie one that has no specified end date, it would be reasonable for the employer to take the view that the gainful employment test was met and to discontinue payment of the 3rd tier benefits.

Additional awards of ill health benefits and limits put on the subsequent award

60. It is not the intention that a member should, at any time, receive retirement benefits greater than those that could be awarded for a tier 1 benefit. As such, should a pensioner member in receipt of a tier 1 or tier 2 ill health pension return to local government employment and subsequently be entitled to a further award of tier 1 or tier 2 ill health retirement benefits, the total amount of benefits will be limited to the amount that would have been awarded had tier 1 benefits been determined initially (regulation 20 (11A)) refers.

Resolution of disagreements and Internal Dispute Resolution Procedure (IDRP)

61. Regulation 58 of the Administration Regulations enables a scheme member to make an application for any disagreement, between themselves and an employer or an administering authority, to be resolved about a matter in relation to the scheme. This includes any decision taken by an employer or administering authority under the Local Government Pension Scheme ill health regulations regarding entitlement to an ill health retirement benefit at the date employment ends (regulations 55 (6) and (7)), or the early payment of deferred retirement benefits on ill health grounds having already ceased that employment (regulation 31 of the Benefits Regulations). The Internal Dispute Resolution Procedure arrangements also apply in cases where an employer or administering authority has failed to make a decision within any period prescribed by the scheme’s regulations.

62. Other decisions which fall within the scheme’s Internal Dispute Resolution Procedure provisions include:-

- a) any disagreement with the entitlement level of 1st, 2nd or 3rd tier pension (regulations 20(2), (3) and (4) of the Benefits Regulations);
- b) whether a certificate has been obtained from an independent registered medical practitioner in compliance with the Scheme’s regulations (regulation 20(5) of the Benefits Regulations and regulation 56 of the Administration Regulations);
- c) whether the employing authority has had regard to guidance in carrying out their functions under regulation 56 of the Administration Regulations or regulation 20 of the Benefits Regulations; and

d) whether a 3rd tier pension should be suspended because the member has obtained gainful employment or, if not, is judged to be capable of undertaking such employment (regulation 20(8)) of the Benefits Regulations.

63. This list is by no means exhaustive and is only given as an illustration of some of the main decisions on ill health retirement pensions that fall within the Scheme's Internal Dispute Resolution Procedure arrangements. It is also important to note that these arrangements do not apply directly to the opinions given by the independent registered medical practitioner because their role is to give an opinion on whether or not the medical criteria for entitlement to an ill health pension is satisfied. It is the Scheme employer that has the regulatory responsibility to decide the entitlement question based on the certificate and/or report submitted by the independent registered medical practitioner and against whom any Internal Dispute Resolution Procedure dispute regarding entitlement to benefit rests.

64. Detailed guidance for both scheme employers and scheme members on the scheme's Internal Dispute Resolution Procedure arrangements can be found at:

<http://www.clg.heywood.co.uk/views/archive>

The guides also refer to the role of the Pensions Ombudsman.

Exchange of information by authorities

65. Regulation 64 of the Administration Regulations requires employers to provide the relevant administering authority with such information as it needs to discharge its Scheme functions.

Section 4 – Documentation

66. The regulations themselves do not prescribe the precise format of the certificate that the independent registered medical practitioner is required to provide under Regulation 20(5), although the overall content is set out in the regulation itself. To assist practitioners in this process, examples of pro-forma certificates are included at **Annex A and B**. Individual employers, in consultation with their medical advisers, and independent registered medical practitioner, may wish to adapt the example to reflect local circumstances and procedures provided that the content complies fully with the Scheme's regulatory requirements. In addition, a complete suite of forms including action at the review, reapplication by a 3rd tier member whose benefits are discontinued, etc, can be provided for employers from their administering authority.