



Somerset Council Employment Policies for Approval

Executive Member: Cllr Theo Butt Philip Lead Member on Human Resources

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<i>Please complete sign off boxes below prior to submission to Community Governance</i>			
Report Sign off	Seen by:	Name	Date
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	Executive Member	Theo Butt Philip	
	Monitoring Officer	David Clark	
Summary:	<p>This report provides details of two additional non-mandatory pension discretions under the Local Government Pension Scheme (LGPS) which it is recommended by LGPS that employer's state their position on and include in their Pensions Discretions Policy. The Pensions Discretions policy is due to be brought to the HR Committee on 11 July 2023.</p>		
Recommendations:	<p>The members of the HR Committee are asked to:</p> <ol style="list-style-type: none"> 1) Consider whether to apply the LGPS Pensions Discretion R21(4)(a)(iv), 21(4)(b)(iv) and 21(5) under the Council's Pensions Discretions Policy. 2) Consider whether to apply the LGPS Pensions Discretion R21(5A) and 21(5B) under the Council's Pensions Discretions Policy. <p>It is recommended that both discretions are applied as set</p>		

	out in 4.6 and 5.7 below.
Reasons for Recommendations:	All employers who participate in the Local Government Pension Scheme (LGPS) are required to draw up a discretions policy in accordance with Regulation 66 of the Local Government Pension Scheme (Administration) Regulations 2008, and Regulation 60 of the Local Government Pension Scheme Regulations 2013. The discretions include mandatory and non-mandatory. Scheme employers <u>must</u> have a written policy on all mandatory discretions but are not required to have a written policy on the non-mandatory discretions. However, there are 8 non-mandatory discretions that Scheme employers are advised to have a written policy on so that members can be clear on the Council's policy on these matters. Of the 8 non-mandatory discretions the two set out in this report are the only ones that are not incorporated into the Pensions Discretions Policy that is being brought to HR Committee on 11 July 2023 for approval.
Links to Priorities and Impact on Service Plans:	Part of the People Workstream for Local Government Reorganisation.
Financial, Legal and HR Implications:	<p>Financial – the financial implications of applying the two further pensions discretions are impossible to calculate or model. However, it is considered that any financial impact would be negligible as the discretions would only be considered for application in a very small number of instances.</p> <p>HR – The decision taken on the additional discretions would be incorporated into the Pensions Discretions Policy that is before the HR Committee on 11 July 2023. The Council would therefore have a written policy on the 8 non-mandatory discretions that the LGPS recommends are included in any discretions policy.</p> <p>Legal – there is no legal requirement to have a stated position on non-mandatory pensions discretions under the Local Government Pension Scheme Regulations.</p> <p>Changing terms and conditions can create risks of legal challenges particularly where employees are affected who have transferred under TUPE due to the protection afforded by the TUPE Regulations. To mitigate any such risks, consultation and</p>

	negotiations will be carried out with Trade Unions to seek agreement to any changes.
Equalities Implications:	The Council's duty under Section 149 of the Equality Act 2010 is to have "due regard" to the matters set out in relation to equalities when considering and making decisions. It is impossible to complete an Equality Impact Assessment for the two additional discretions as there is no data available by which to complete an assessment.
Risk Assessment:	N/A
Scrutiny comments / recommendation (if any):	N/A

1 Background

- 1.1 Two additional non-mandatory discretions (details below) have existed within the LGPS Regulations for some years; however, these were brought to the attention of Somerset County Council (prior to Vesting Day) following a change to one of the standard forms used by Peninsula Pensions.
- 1.2 Whilst there is a requirement under the LGPS Regulations for an employer to have a Pensions Discretions Policy, there is no requirement for an employer to set out its position in relation to all the non-mandatory discretions within the LGPS.
- 1.3 However, there are eight non-mandatory discretions where it is recommended for Scheme members to have a written policy in order that both members and the Pension Fund administering authority (Peninsula Pensions) can be clear on the Scheme employer's policy on these matters. The Council's position on six of the eight non-mandatory discretions are already set out in the Pensions Discretions Policy that is being brought to HR Committee on 11 July 2023.
- 1.4 Discussions have taken place with the trade unions on whether Somerset Council applies or makes a formal declaration with regards to the two additional non-mandatory discretions.
- Discretion 1** - Reg 21(4)(a)(iv), 21(4)(b)(iv) and 21(5) and

Discretion 2 - R21(5A) and 21(5B) in Somerset Council's Pensions Discretion Policy.

- 1.5 The trade unions have requested that a decision is taken by the HR Committee on whether to apply and include these two additional non-mandatory discretions in the Pensions Discretions Policy.

2 Pensions Discretions Policy

- 2.1 Under the Local Government Pension Scheme 2014, all employers who participate in the LGPS are required to formulate, publish, and keep under review a discretions policy. The LGPS is largely governed by statutory regulations set out in legislation however there are certain discretions that the employer can make to enhance member's benefits, these are set out in the Council's Employer Discretions Policy with Peninsula Pensions who administer the LGPS on behalf of Somerset Council. There are mandatory and non-mandatory discretions.
- 2.2 The Pensions Discretions Policy for Somerset Council is being brought before the HR Committee on 11 July 2023.
- 2.3 The decision taken by the HR Committee on these two additional discretions will be incorporated into the finalised and published Pensions Discretions Policy (subject to the approval of the Policy by the HR Committee).

3 Additional Pensions Discretions

- 3.1 This report covers two non-mandatory pensions discretions that Somerset County Council and all, apart from South Somerset District Council have **not** considered before. Both relate to the calculation of assumed pensionable pay and are non-mandatory.
- 3.2 South Somerset District Council had taken the decision **not** to apply either of the two discretions that are covered in this paper. It is not known why or when this decision was taken by South Somerset District Council.
- 3.3 Assumed pensionable pay is a notional pay figure that is used to ensure that an individual's pension is not affected if their pensionable pay reduces due to an absence from work. Normally the calculation is based on the average of the pensionable pay received in the three months before the pay reduced.

3.4 The details of the two additional discretions for consideration are set out below.

4. Discretion 1 - Reg 21(4)(a)(iv), 21(4)(b)(iv) and 21(5)

Whether to include a regular lump sum payment when calculating assumed pensionable pay.

4.1 When calculating assumed pensionable pay, employers can decide to include the amount of any 'regular lump sum payment' received by the member in the 12 months preceding the date the absence began or the ill health retirement or death occurred.

4.2 A 'regular lump sum payment' is a payment for which the employer determines there is a reasonable expectation that such a payment would be paid on a regular basis.

4.3 All regular lump sum payments will usually be included in the assumed pensionable pay calculations.

4.4 The advice is to state that Somerset Council will apply this discretion where there is evidence that someone will suffer a detriment due to a protected characteristic, to allow flexibility and so as not to fetter the discretion (i.e., policies should not be so rigid or restrictive as to prevent flexibility where a (possibly unanticipated) situation requires it).

4.5 Costs – it is difficult to estimate the costs of applying this discretion as it is impossible to report on those that the discretion might affect. Our assumption is that the monetary cost to the Council would not be great. However, to calculate such costs, it would cause more administration a) to identify individuals it applies to and b) to calculate average total earnings. It is worth noting that the total cost to the Council would not be as significant as the potential impact on the individual and the amount of pension they might receive.

4.6 Recommendation – based on the advice provided by LGPS it is recommended that the Council applies the discretion (Reg 21(4)(a)(iv), 21(4)(b)(iv) and 21(5)) and include a regular lump sum payment when calculating assumed

pensionable pay where there is evidence that someone will suffer a detriment due to a protected characteristic as defined under the Equality Act, 2010.

5 Discretion 2 - R21(5A) and 21(5B) backdated to 1 April 2014 by A7 2018

Whether to substitute a higher level of pensionable pay when calculating assumed pensionable pay.

- 5.1 When calculating assumed pensionable pay, an employer can decide to substitute a higher level of pensionable pay if, in their opinion, the pensionable pay received in the 3 months/12 weeks before the commencement of assumed pensionable pay, is materially lower than the level of pensionable pay the member would have normally received.
- 5.2 Situations where this may apply could include where an employee is in a no pay situation for example because of a long-term sickness absence. In this situation any additional payments earned through additional hours, bank holiday or unsocial hours enhancements or overtime, etc that the employee would have been able to claim had they been at work would not be included in the assumed pensionable pay calculation.
- 5.3 It is reasonable to assume that those that claim overtime and other additional payments are generally on lower salaries. In addition, those on long-term sickness absence may also have a disability as defined under the Equality Act, 2010.
- 5.4 This discretion could also be applied to employees on the unpaid part of family leave (maternity, adoption, and shared parental leave).
- 5.5 Therefore, to not apply this discretion could potentially disadvantage lower earners and groups with a protected characteristic under the Equality Act, 2010.
- 5.6 Costs – it is difficult to estimate the costs of applying this discretion as it is impossible to report on those that the discretion might affect. The assumption is that the monetary cost to the Council would not be great. However, to calculate such costs, it would cause more administration a) to identify individuals it applies to and b) to calculate average total earnings. It is worth noting that the total cost to the Council would not be as significant as the potential impact on the individual and the amount of pension they might receive.

- 5.7 Recommendation - it is recommended that the Council applies the discretion R21(5A) and 21(5B) to substitute a higher level of pensionable pay when calculating assumed pensionable pay, where an employee has been absent from work because of a long-term sickness or family leave prior to retirement and would have normally claimed additional hours, overtime, and other additional payments had they been at work.

6 Consultations Undertaken

- 6.1 Consultations have taken place informally with trade union representatives.
- 6.2 Trade union representatives requested that the Council through the HR Committee took a decision on the two non-mandatory discretions detailed above.

7 Implications

- 7.1 The recommendations are made to ensure that Somerset Council has a set of employment policies in place which are legally compliant, fair, affordable, and consistent with the values and culture of the new Council. In the event that approval is not achieved for an employment policy, Somerset County Council's existing policy would be used post vesting day, due to Somerset County Council being the continuing authority. This is with the exception of employees who TUPE transfer in from the District Councils and for whom existing terms and conditions are protected under the TUPE Regulations.

5 Background Papers

- 5.1 Appendix A - Summary table of the existing Council's Pension Discretions
Appendix B - Somerset Council Pensions Discretions Policy
Appendix C - Somerset Council Pension Policy and Process.