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

Response from Thompsons Solicitors June 2011

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.

Response to Questions

Question 1: The Government welcomes views on whether there are any people or organisations who may be affected by this consultation other than those listed in 1.7.

We are not aware of any.

Question 2: The Government welcomes views from respondents on how the Fair Deal policy operates in their experience, where this is considered relevant to future policy.

The Fair Deal Policy (Fair Deal) is an essential guidance document which provides a more level playing field for the private sector and the public sector than would otherwise be the case. It prevents unfair competition from the private sector in public sector pensions.

If protection on pensions was not provided, the private sector would be able to undercut the public sector by between 10% and 20% of the wage bill. For example, it is estimated in the Employment Tribunal Guidelines, *Compensation for Loss of Pension Rights* that a final salary scheme is worth on average about 20% of gross income for each employee.[1] In the Local Government Pension Scheme (LGPS), where employees currently pay a 6% contribution to their pension, their membership of the LGPS therefore has a value of 14% of their gross salary, over and above their monthly wage.

Allowing the private sector to offer inferior pension provision would therefore simply allow it to obtain public sector contracts by cutting the overall wage bill. We understand that the policy objective of increasing private sector involvement in public sector contracts is to drive up productivity through private investment and innovation; this is not achieved by simply allowing the private sector to reduce costs by cutting the overall wage bill for ex-public sector staff. See also 6 (b) below.

[1] Third Edition, TSO, 2003. See paragraph 3.3, page 8

We note the comments elsewhere about the protection of pensions leading to some parts of the private sector having to pay more for the same pension provision in some circumstances.

However, given that a major re-structuring of public sector pension provision is being planned, it is surely sensible to await the outcome of that process, before amending or removing the Fair Deal policy? The changes to public sector pensions may radically change the public sector pension provision landscape. To amend or abolish Fair Deal now is putting the cart before the horse.

Question 3: The Government welcomes views on whether there are any objectives which should be taken into account other than those set out in 3.2 when developing future policy.

Yes. The objectives that should be taken in to account are:

(1) Maintaining a high quality, effective, and motivated workforce.

(2) Avoiding the storing up of problems for the future by short term financial gains now. - please also see our response to 6 a) below.

Question 4: Is there a case for changing the current Fair Deal policy?

The current Fair Deal policy provides essential protection for public sector employees on their transfer to the private sector; and on the subsequent letting of the contract. Without such pension protection, public sector employees can become demoralised and disillusioned. Since motivated and committed employees are at the heart of any business, whether public or private, abandoning the Fair Deal policy will be counter-productive.

Any changes to Fair Deal should await the outcome of public sector pension reform. The eventual outcome of that process could radically change the pension landscape. Until we know what that landscape will look like, it is impossible to say whether any parts of the private sector will remain disadvantaged by the Fair Deal. Changing the Fair Deal at this stage is therefore premature.

Question 5: If so, what should the policy cover, including:

a) what (if any) stipulations should be made regarding the level and type of future pension provision following transfer to be provided for future accrual;

Future pension provision should be at least equivalent to that provided pre-transfer. The Government Actuary's Department GAD or equivalent should be the arbiter of such questions. The application of the Fair Deal policy should be made compulsory for all public sector contracts. The option of transferring existing rights into the new employer's final salary scheme should be given.

Alternatively, private sector employers should be granted admitted body status to public sector schemes. Wage rises affecting future pension provision can be controlled, as with the Teachers Pension Scheme, by providing that the new employer will grant wage rises in line with wage rises collectively agreed by the transferor public sector employer and recognised trade unions (for example, the National Joint Council (NJC) in local government and the Fire Service; Agenda for Change in the NHS). [2]

[2] That was of course the position prior to the ECJ decision in *Werhof v. Freeway Traffic Systems GMBH and KG [2006] IRLR 400*. See for example *Whent v. T Cartledge [1997] IRLR 153* and *Glendale Managed Services v. Graham [2003] IRLR 465*. The Court of Appeal's decision i*n Parkwood Leisure Limited v. Alemo-Herron [2010] IRLR 298* has been

b) what should be the treatment of previously accrued benefits? For example should CETV's be the norm or should bulk transfer agreements continue to be used and, if so, in what form;

The most important issue from the point of view of employees is that there isn't a loss of enhancement of accrued pension rights. That can only be avoided by ensuring that current rights are transferred into a new equivalent pension scheme in a way which gives credit for future earnings growth, where relevant. This will be the case for example for membership of the LGPS or Principal Civil Service Pension Scheme (PCSPS) but not membership of career average schemes such as Nuvos. Again, this question only serves to illustrate the importance of resolving the issue of public sector pension reform first. At that point, these questions will be easier to answer.

By way of example, an employee aged 40 with 20 years service in the public sector and who is a member of the relevant final salary pension scheme, who earns £20,000 per annum and is due to retire at age 60 and who is then transferred to the private sector will, <u>even if she is granted membership of an equivalent final salary pension scheme on transfer, which she remains a members of for the next 20 years</u>, will suffer a loss of enhancement of her public sector pension of £21,500. [3] If no pension provision is provided, the loss is much greater of course, at £94,700. [4]

c) what should the requirements be on subsequent compulsory transfer to an independent provider or return to the public sector?

See 5 (a) above.

Question 6: In setting out a proposal for future policy, respondents are asked to set out:

a) how it would deliver against the objectives set out in Chapter 3 and any others considered relevant;

There are clearly tensions between delivering value for money, providing an appropriate level of protection to public sector employees' pension provision, and removing barriers to plurality of public service provision. It is impossible to square the circle. Further, all of these objectives are dependent on the nature of public sector pension provision. The questions raised by the LGPS are different to those raised by Nuvos. A sensible, workable, and fair solution to such tensions in the future is therefore clearly dependent on the outcome of public sector pension reform.

Keeping the Fair Deal for now will continue to protect employees, helping to maintain a motivated and committed workforce and therefore the continuing provision of high quality effective public services. Allowing reform now to the detriment of employees will lead to employees being worse off in their old age, which simply stores up problems for the future in the form of more poverty in old age leading to a greater need for top-up state benefits, and greater ill health associated with poorer living standards and increased inequality.

b) the impacts on those involved, including employers and employees;

The Fair Deal policy, whilst not perfect, provides much more of a level playing field by ensuring that since pension provision must be the same, private sector companies that bid for public sector contracts must have a clear and deliverable plan for increasing productivity through investment and

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appealed to the Supreme Court and its decision is awaited.

[3] See chapter 5 of the ET Guide to Pension Loss, op cit and Table 4.4. The calculation is 20/80 x £20,000 x 4.31 = £21,550.

[4] The calculation is (40/80 x 20,000 x 14.56 (table 5.4)) – (20/80 x £20,000 x 10.18 table 6.4) = £94,700.

innovation in order to successfully compete with the public sector, rather than competing at employees' expense through cutting terms and conditions of staff.

If the price of encouraging more involvement by small and medium sized businesses in public sector contracts is to drive down terms and conditions for staff, it will be counter-productive by leading to the loss of motivated staff and by simply storing up financial problems for the medium and long-term future for the reasons set out in a) above.

c) if possible, how much the proposal would cost or save the taxpayer compared to the current Fair Deal arrangements;

This question is misconceived. The current policy is fair and reasonable and should be kept until we know what the public sector pension provision landscape is going to look like.

d) any past experience, whether in the public sector or otherwise, which informs these proposals.

The Fair Deal policy is an essential tool in protecting employees' final salary pension rights on transfer, since such rights are not adequately protected under TUPE or the Pensions Act 2004.

We are aware of instances where the Fair Deal has not been followed, to the detriment of employees. For example, the privatisation of the Drug and Alcohol Treatment Programme to Addaction in April 2008 by Sheffield PCT led to legal proceedings by UNISON against the transferor employer, the South Yorkshire Probation Trust (SYPT) and Addaction, the transferee employer, causing legal costs for all concerned.

It was the lack of consultation over pension provision that was UNISON's main complaint. SYPT refused to act as guarantor for Addaction, thereby preventing Addaction offering membership of the LGPS to employees.

As a result, since the transfer nearly two thirds of the previous workforce has left in a three year period, leading to the loss of a skilled and motivated workforce.

Question 7: The Government welcomes views on what approach should be taken when previously transferred public services involving compulsory Fair Deal staff transfers are re-tendered. The Government also welcomes details of any past experience informing respondents' proposals.

Fair Deal should continue to apply, for the reasons previously given. We refer to 6 d) above re previous experience. Whilst this does not relate to second generation out-sourcing, the lessons from that experience are just as relevant. New employees joining an employer post transfer to the private sector should enjoy the same level of pension provision as transferred employees, as well as on any contracting back in house.

A failure to do so could lead to resentment between employees, and potential equal pay claims with the legal costs and risks that involves for any employer.

Question 8: The Government welcomes views on what approach should be taken for employees returning to the public sector having been transferred out in the past under the Fair Deal policy. The Government also welcomes details of any past experience informing respondents' proposals.

A seamless transition of pension rights is essential to ensure fairness both between the public and private sector and for employees. Contracting out and second and further generation contracting out / contracting back in should not be done at the expense of employees' terms and conditions, including pensions.

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