

**LOCAL GOVERNMENT PENSION SCHEME
("LGPS")**

**ADMINISTERING AUTHORITIES
("AAs")**

POTENTIAL TRANSFER OF BUSINESS

O P I N I O N

INTRODUCTION

1. I am instructed by the Local Government Association. My advice is sought on behalf of AAs.

BACKGROUND

2. AAs are required to provide access to an in-house Additional Voluntary Contribution ("AVC") arrangement for their members. All AAs have entered into arrangements with one or more AVC providers.

3. Many AAs appointed Equitable Life as their sole or joint AVC provider.

PRESENT POSITION

4. On 15 June 2018 Equitable Life announced that it has entered into an agreement to transfer its business to Utmost Life and Pensions (“Utmost”).

This requires the approval of the High Court and regulatory approval.

5. In August 2019, Equitable Life wrote to the AAs affected by the proposed transfer to advise them as to their rights to:-

- (1) Object to the transfer; and
- (2) Vote upon consequential and incidental matters.

6. The deadline for receipt of votes is 30 October 2019.

LEGISLATIVE FRAMEWORK

7. Part 1 of the Local Government Pension Scheme Regulations 2013, S.I. 2013/2356, made pursuant to the Superannuation Act 1972, relates to Membership, Contribution and Benefits. Within Part 1, Regulations 9-21 inclusive relate to Contributions. Part 2 relates to Administration, and the responsibilities of AAs. These are broad responsibilities.

8. Regulation 17 is concerned with Additional Voluntary Contributions.

Subsections (1) and (2) of Regulation 17 state:

- “(1) An active member may enter into arrangements to pay additional voluntary contributions (“AVCs”) or to contribute to shared cost additional voluntary contribution arrangements (“SCAVCs”) in respect of an employment.
- (2) The arrangements mentioned in paragraph (1) must be a scheme established under an agreement between the appropriate administering authority and a body approved for the purposes under the Finance Act 2004 (“the AVC provider”), registered in accordance with that Act and administered in accordance with the Pensions Act 2004.”

ADVICE SOUGHT

9. The advice sought is with respect to the three questions set out in a paper before me and an e-mail dated 3 September 2019. I address these questions in the order in which they are raised.

FIRST QUESTION

10. I am asked whether an AA is entitled to vote.
11. My answer is: “Yes”.
12. This is because, in my opinion:-
- (1) It is policy holders who are entitled to vote; and
 - (2) The AAs are policy holders.
13. In my opinion, the AAs are policy holders for this purpose because:-
- (1) The AVC arrangements are established by an arrangement between the AAs and Equitable Life as an AVC provider; and
 - (2) This is indeed pursuant to a statutory requirement.

SECOND QUESTION

14. I am asked whether the AAs have a duty to secure that the value of the additional benefits from AVCs is “reasonable”, having regard to the amount of the voluntary contributions and the value of other scheme benefits.

15. My answer is: “Yes”.

16. This is because, in my opinion:-

- (1) AAs owe fiduciary duties; and
- (2) These duties are owed both to employers and to members.

17. In my opinion, AAs owe fiduciary duties because they administer the financial affairs of others.

18. Further, or alternatively, in my opinion, AAs owe the full range of public law duties. These include to act reasonably, in a Wednesbury sense. See the decision of the Court of Appeal in Charles Terence Estates Ltd v Cornwall County Council (2012) EWCA Civ 143, (2013) LGR 97, (2013) 1 WLR 466, in which I appeared for the County Council.

THIRD QUESTION

19. In relation to AAs exercising their votes, I am asked what risk, if any, they take, in four specified circumstances.

20. In my opinion:-

- (1) It is for AAs as such and as the policy holders to determine how they exercise their votes;
- (2) They cannot and must not abdicate their responsibility in this regard;
- (3) In particular, they must not allow themselves to be dictated to by scheme members;
- (4) They may be liable if they act unreasonably;
- (5) They will not however generally be liable if they act reasonably.

21. That, however, leaves the question whether there are any processes that they should follow before they determine how to vote and in order to assist that determination.

22. Communication with scheme members would in my view be prudent, because:-

- (1) Wednesbury reasonableness includes having regard to all relevant considerations and/or the Tameside public law duty may apply; and
- (2) Scheme members may have something relevant to contribute.


23. There is not, however, in my opinion, any legal basis for a duty going beyond the foregoing to consult with scheme members.

GENERALLY

24. I shall be happy to discuss any point that may arise.

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JAMES GOUDIE QC
6 September 2019

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OPINION

SG
06/09/19

Thelma Stober

Local Government Association