

# **Extraordinary** React Bulletin

6 August 2010

## **Reductions in Area-Based Grant for local authorities and staffing issues**

As mentioned in the last Bulletin, there have been a number of queries from colleagues about the in-year reductions in Area-Based Grant. Some key staffing issues are emerging as a consequence of the cuts in grant aid which LG Employers have developed into 'Frequently Asked Questions and Answers'. Although the majority of the questions concern ex-Learning and Skills Council (LSC) staff, the in-year Area-Based Grant cut also catches Connexions and a variety of other local authority staff funded through this route. Therefore, this advice will be equally relevant to them.

The Secretary of State for Education wrote on 16 June to Directors of Children's Services and Chief Executives about reductions in government spending on education. In relation to the £311m reduction in Area-Based Grant for 2010-11, that letter set out that it will be for local authorities to manage the reduction across all their funding sources to protect frontline services, and details the measures taken to protect formula grant and remove ring-fences in order to give local authorities increased flexibility to do so.

This Extraordinary Bulletin answers most of the questions that local authorities have raised. We have also taken into account the requirement to consult service users as that has been a recurring theme. Some uncertainties remain, and this Bulletin, though it has been checked by colleagues in LG Employers, should not be relied upon by itself when taking decisions about the workforce; local authorities should take their own legal and human resources advice as usual.

Please direct any questions about this Bulletin to Joan Seaton at [joan.seaton@local.gov.uk](mailto:joan.seaton@local.gov.uk) or Phil Bundy at [philip.bundy@local.gov.uk](mailto:philip.bundy@local.gov.uk). If you have any queries about 16 – 19 education and training current or future work, please contact Alison Miller at [alison.miller@local.gov.uk](mailto:alison.miller@local.gov.uk) in the first instance. Individuals with concerns around their own positions should contact their human resource departments in the first place. All editions of the React Bulletin, and a wide range of other correspondence and documents, will remain on the React website at [www.lga.gov.uk/react](http://www.lga.gov.uk/react) from September 2010.

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## **Education for young offenders**

Colleagues will also have received a note from the Ministry of Justice delaying the implementation of the offender learning provisions of the ASCL Act. A copy of that note is **attached** with this Bulletin.

Best wishes

John Freeman CBE  
Director, React Programme

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## **Reductions in Area-Based Grant for local authorities and staffing issues**

### **Frequently Asked Questions and Answers (complete to 6 August 2010)**

#### **Ex- LSC employees and the pay freeze**

**Q.1. LSC staff have transferred with one year of a pay deal outstanding - is the final pay rise mandatory in the light of government pronouncements relating to a pay freeze?**

According to the terms of the transfer document it appears that the pay rise is contractually binding and does not allow the local authority to withdraw the promised pay rise in circumstances such as these. The local authority will have a legal obligation to honour the pay rise.

After that point, the arrangements for any salary increase will be in line with the employer's pay offer to staff generally.

### Changes to terms and conditions

**Q. 2. Staff from the LSC transferred to local authorities on terms and conditions typically much more favourable than existing local authority staff on the understanding that this would be maintained for a 3-year period through the grant aid from the Department for Education; this has now been reduced and the position for 2011 onwards depends on the outcome of the Comprehensive Spending Review (CSR). Therefore, can the local authority make changes to the terms and conditions of LSC staff in line with those of their existing staff?**

It may be possible to change the terms and conditions of LSC staff in line with those of existing council staff. This will depend on whether the exercise was one driven by the withdrawal of the grant aid entailing changes in the workforce, or one merely driven by the desire to achieve harmonisation. If the former, the change might be possible.

However, the process would not be quick and would carry substantial legal risks, in view of the fact that the transferred employees transferred to local authorities under the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector 2007 ('COSOP'). Therefore, the provisions of TUPE were applied to those transfers.

TUPE places restrictions on making changes to affected employees' terms and conditions, and even where employees have 'agreed' to changes, it is possible for that agreement to be void and for the employees to insist on the benefit of the original terms and conditions.

However, TUPE does not prevent the new employer and its employees agreeing to a variation in terms and conditions in circumstances that is not related to the transfer or it is economic, technical or other (ETO) reason entailing changes in the workforce.

Therefore, to agree a lawful change a local authority must be able to point to an ETO reason, entailing changes in the workforce. A potential ETO reason would be the cut in Area-Based Grant which is a general purpose grant out of which ex-LSC staff are paid. The question then is whether that is an ETO reason meaning that the employer must change the overall number or the job function of employees making up the workforce i.e. make redundancies.

If a decision were taken to accept the risks and to go ahead and change terms and conditions it would be necessary to consult with trade union or elected employee representatives (see Q.8 below) as well as being required to consult with individuals.

Further advice on these issues is available in LG Employers [e-guide on TUPE](#).

### Exceptions to the rule on variation of contracts post-transfer

#### **Q.3. What if employees did not agree to the changes, what can a council do to change terms and conditions?**

The council could in extreme circumstances, consider terminating the existing contracts of the transferred employees and offer instant re-engagement to them on the new terms. However, this gives rise to a risk of claims for unfair dismissal, especially in a TUPE transfer context. The council will have to be clear that the reason that the changes are being made is not connected to the transfer or that it has a defence for its actions under TUPE (“an ETO reason”). Trade unions and individuals must be informed and consulted.

This is not an easy process. The local authority would need to show that there was genuine business need (not just a financial one); that the change is reasonable and no more than is necessary to achieve a specific business objective and that there has been unreasonable refusal of all other offers to reach an agreement / outcome. Further advice on these issues is available in LG Employers e-guides on [TUPE](#) and [Variation of contracts](#)

### Reduction in funding and redundancy selection

#### **Q.4. Local authorities currently get funds to support the employment of one or more officers in the authority to work with schools on issues relating to deployment of the schools' workforce to deliver and maintain fit-for-purpose staffing structures. This year the grant will end on 30 November 2010 and will not be paid to local authorities in the future. Therefore, after November it is inevitable that some of the staff who have been funded by this grant will have to be made redundant. Can the pool for selection for redundancy be restricted to those staff?**

If the staff that are funded by this grant are not interchangeable with any other staff employed by the local authority, the pool for selection can be confined to the staff funded by this grant. If the staff funded by this grant are capable of carrying out the roles of other staff employed by the local authority, and there is an ongoing need for those other roles, the local authority would need to consider whether the pool for selection should be widened to include the occupants of those other roles. LG Employers have produced well-developed advice which will assist you. Please refer to the [Redundancy](#) webpage.

## LGPS and any proposed redundancies

### **Q.5. On redundancy how will the protections built into the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 be applied to the transferred LSC staff?**

Transferred LSC staff who joined the Local Government Pension Scheme on 1 April 2010 could choose to leave their existing civil service pension rights behind as a deferred pension or transfer those rights into the LGPS. In order to help them make a decision, the staff should have received, or will receive, information packs setting out the implications of both options.

As far as benefits under the LGPS are concerned, the courts have confirmed that rights under early retirement provisions transfer over under TUPE (regardless of whether or not the employee has decided to transfer their civil service pension rights to the LGPS). Consequently, for transferring staff who joined the LGPS on 1 April 2010, the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 have been amended to provide that the transferred LSC staff retain the right to voluntarily retire at age 60 on an unreduced pension (compared to the normal pension age of 65 in the LGPS).

The earliest age that benefits can be paid (unreduced) on redundancy is age 55 for any staff.

On redundancy there may also be rights to compensation benefits equivalent to those that could have been payable under the Civil Service Compensation Scheme, unless the local authority's own compensation arrangements provide a greater benefit.

## The Civil Service Compensation Scheme

### **Q.6. When the legislative change to the Civil Service Compensation Scheme (CSCS) comes into force for civil service employees, will they also apply to ex-LSC staff who were transferred under TUPE/COSOP? That is, would the local authority have to apply the CSCS arrangements in force at the date of the redundancy if a redundancy situation is declared, or apply arrangements in force at the date of the transfer?**

The Government intends to reduce the terms of the CSCS through the Superannuation Bill ('the Bill'), which was introduced in Parliament on 15 July 2010. The Bill caps awards for compulsory exits at 12 months' pay, and 15 months' pay for voluntary exits. If brought into force, then, provided the Employment Appeal Tribunal's (EAT) decision in the case of Worrall (see below) stands, the cap on payments under the CSCS applied by the Bill would apply to staff who have transferred into local government with the CSCS forming part of their transferred terms. We expect that this Bill will become law in the late autumn this year. Accrued pension rights will not be affected by the new legislation.

In *Worrall and others v Wilmott Dixon Partnership Ltd and another*, the EAT held that where legislation put in place after a TUPE transfer affected the terms of a collective agreement which had transferred, the new employer was required to operate the agreement as affected by the legislation. Therefore, we are of the view that future legislative change to the CSCS are likely to be binding on ex-LSC staff.

### Externalised companies and redundancy costs

#### **Q.7. Some local authorities run Connexions in-house; others have an externalised service but the funding is being cut for all. Will external Connexions companies have a claim against the local authority for redundancy costs?**

Assuming the local authority terminates or changes any contractual agreement with an external Connexions company lawfully, there would normally be no reason why the local authority would be liable for any redundancy costs which that company might have to pay. The external Connexions company remains the employer of the staff who are being made redundant and as such it is primarily liable for any redundancy payment.

The only likely exception to this would be if the local authority had agreed in its contract with the Connexions company that the local authority would be responsible for some or all of the company's redundancy costs in circumstances such as these. Local authorities will therefore need to review their contracts with such companies in order to establish their individual positions with regard to this question.

### Funding cuts and scope for the local authority to consult and act

#### **Q.8. When the Area Based Grant is cut, in theory it is for local authorities to make their own choices as to where to make reductions; does that affect the ways in which local authorities have to consult and act in relation to employees?**

Yes. The obligations on the local authority may vary according to how they respond to the funding cuts.

For example, if a local authority proposed to save money by making redundancies, it would not have a statutory obligation to consult collectively with representatives of affected employees if it proposed fewer than 20 redundancies. (Although it could still have obligations to consult collectively under arrangements made with trade unions – and it must still consult individuals.)

Alternatively, if a local authority does propose 20 or more redundancies, the 'pool' of employees put at risk could have a bearing on which representatives need to be consulted and the nature of the consultation process to be followed. For example, a local authority may have agreed different consultation processes with different trade

unions. Consigning the 'pool' of affected employees to one where only one trade union was recognised could therefore affect the process which a local authority is required to carry out.

If a local authority proposed to save money by making changes in relation to employees which stopped short of dismissals, this might remove the statutory obligation to consult collectively with representatives. For example, if staff were asked to accept pay cuts that would not, in itself, trigger an obligation to carry out collective consultation. However, if employees who refused to accept pay cuts were dismissed and offered new employment at the lower rate of pay, this would give rise to a statutory collective consultation obligation where 20 or more employees could be dismissed. Again, even if no statutory collective consultation obligation arose, local authorities would need to check their agreements with trade unions to see if any separate collective consultation obligation arose under those arrangements.

Finally, we would add that, even where no collective consultation obligation exists, a proposal to make employees redundant or reduce their remuneration would still give rise to a need to consult the affected employees individually.

Further information on the consultation process is in LG Employer's e-guide, [Redundancy: the 39 steps](#).

### **Duty to consult service users and consulting employees**

**Q.9. The local authority is under a statutory requirement to consult service users if they have to withdraw a service. Can this service consultation run in parallel with the statutory requirement to consult staff and their representatives as otherwise the authority will not have sufficient time to consult?.**

Yes. However, any suggestion in the service user consultation that a decision to make redundancies has already been made would be very dangerous. The purpose of the employee consultation is to consult employee representatives at a point at which redundancies are proposed, rather than decided upon. Therefore, it is best to consult at the earliest possible opportunity when redundancies are proposed to avoid employment claims.

### **Risk of judicial review and service consultation**

**Q.10. What is the risk of aggrieved service users seeking a judicial review against the local authority on the basis that the consultation it carried out with them was clearly a sham as the council also carried out statutory consultation with its own staff and representatives at the same time it was purporting to ask for their views?**

For the reasons set out at Q.9 above, consultation with employees should take place when there is a proposal that redundancies are made. If employment consultation

starts at this point alongside parallel consultation with the service users, the fact that parallel consultation is taking place need not result in any finding that the consultation with service users was a sham on those grounds alone. The fact of service consultation should not result in a finding that a decision to make redundancies has been taken because employment consultation should properly start before this point.

There are many requirements on local authorities who are consulting with service users and these may arise from specific provisions relating to the service or general principles. These need to be satisfied to avoid a challenge. In particular, local authorities need to show that the consultation was genuine, that when the consultation took place the proposal was still in a formative stage that they did not have a closed mind and that they were genuinely planning to consider the results of the consultation results before taking a final decision. For there to be a proper consultation, sufficient information should be provided to those consulted and sufficient time given for them to respond and for any views received to be taken into account. Local authorities are required to take account of all relevant considerations when making decisions and to disregard irrelevant considerations; these may vary for different services/decisions.

Whilst the consultation on a decision to withdraw a service may be a separate matter requiring only certain issues to be taken into account, it may be sensible to run the employment consultation at the same time as the consultation with the service users. This is because of the local authority's overall fiduciary duty to its constituents, and one consideration relevant to this duty may be the impact on staffing and the potential costs of redundancies of any proposal.

### Funding cuts and contractual and statutory duties

#### **Q.11. If the funding for a specific function is cut, how does that affect the contractual and statutory duties of the local authority with respect to employees and service users?**

With respect to service users the short answer is that it depends on the nature of the services being cut. If the service is a discretionary service, it may be legally acceptable to cut the discretionary service providing the local authority can show that it has exercised its discretion in accordance with relevant legislation and its public law decision making functions. The local authority will also need to consider whether there is anyone with a legitimate expectation of continuing to receive the benefit of that service before cutting it.

If the service is mandatory, to cut the service on the grounds of cost alone is going to be problematic. For some mandatory services the lack of funds alone is not sufficient reason to cut the service which the authority may be required to maintain under statute. The position will depend on the specific legislation concerned as to how and when resources can be taken into account and new legislation may of course provide for local authorities to no longer be under a duty to provide services.

With regard to employees, the funding cuts will not remove any of the statutory and contractual duties which the local authority owes to the affected employees. However, the local authority may lawfully respond to the funding cuts by proposing redundancies or by seeking employees' agreement to change terms and conditions of employment to find savings (see Q.2 above).

### **Future transfers and reorganisations within the public sector**

#### **Q.12. When a function transfers from the local authority to an agency run by central government should the staff not transfer as well?**

If employees are assigned to the function that is going to be transferred to the government agency then it is likely that the principles of COSOP would be applied, as was the case with the transfer of LSC staff to local authorities, and the assigned employees would transfer as if TUPE applied. However, the question of whether COSOP would apply would depend on the particular nature of the transfer in question, as would the question of who was assigned to the transferring function.

COSOP provides that TUPE can apply to the transfers of a function from one part of the public sector to another where there is a change of employer. This for example, can include transfers between local government and Non Departmental Public Bodies.

The 'test' of whether an employee is 'assigned' to the part transferring will depend on factors including:

- the amount of time the employee spends working in the relevant part of the organisation
- the amount of value that the employee provides to the relevant part of the organisation
- what the employee's contract says about they may be required to do, and
- where relevant, how the costs of the employee are allocated within the transferor employer between the different parts of the organisation.

(For details of COSOP see [http://www.civilservice.gov.uk/Assets/stafftransfers2\\_tcm6-2428.pdf](http://www.civilservice.gov.uk/Assets/stafftransfers2_tcm6-2428.pdf))

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*The React Programme end on 31 August 2010; for 16-19 education and training issues please contact Alison Miller from 1 September 2010.*