

# Points for employers to consider when setting policies

## Costs

This may go without saying, but exercising discretionary powers comes at a price. An employer is required to formulate policies that do not lead to loss of confidence in public service; it follows, therefore, that these policies should be affordable.

Exercising the major discretions (such as "pension strain" as it is commonly called) may result in a cost to the employer. However, an employer can obtain an estimate of the strain cost from Peninsula Pensions before making a decision about whether to apply a particular discretion, or not.

## Fettering discretions (restricting or limiting)

Care should be taken when constructing a discretionary policy to ensure that it does not fetter the employer's discretion.

One approach is for the policy to state that each case will be treated fairly based on its circumstances and merits with, if relevant to the discretion in question, up to a maximum of "X" being awarded.

The policy should still set out the criteria upon which the discretion will be based. Constructing a policy in this way helps to satisfy the requirements of the "no loss of confidence" clause in the appropriate regulations.

The second type of approach is for an employer to adopt standard policies (such as all redundancy payments being based on an actual week's pay where this exceeds the statutory week's pay for redundancy payments).

It should be made plain in the policy statement that:

- The policy confers no contractual rights, and
- The employer retains the right to change the policy at any time, and
- Only the version of the policy which is current at the time that a relevant event occurs to the employee/scheme member will be the one applied to that employee/member.

This means that the employer is not fettering its discretion because it is conferring no contractual rights and it retains the right to amend/change the policy at any time. Such policies are seen to be applied fairly and consistently across all employees, but it can be argued that such policies may not adequately take into account the requirements of the "no loss of confidence" clause in the appropriate regulations.

## Anti-discrimination laws

In drafting any policy, employers should have regard to the "Age Regulations", whether it is on an "each case on its merits" policy, one that applies a standard approach, or even one that utilises either approach depending on the circumstances.

The policy will need either to be free of age influence or, if age-related criteria or criteria that could be indirectly age discriminatory are used, the employer should be reasonably assured that the policy falls within the exceptions provided by the "Age Regulations". If not, the employer would need to be able to defend any claim of age discrimination by satisfying a tribunal that its policy is objectively justified.

In order to do so, the employer would have to demonstrate that the policy pursues a legitimate aim and that it is proportionate (in other words, it is an appropriate and necessary means of achieving that aim.) Employers will need to provide real evidence to support any claim of objective justification. Assertion alone will not be sufficient and each case must be considered on its individual merits.

Age discrimination is not the only form of discrimination that must be avoided but it is the forefront of most policy-makers' minds. Care needs to be taken, also, to ensure the criteria do not discriminate on other grounds, such as gender, race, disability, sexual orientation, religion or belief.

## Why 'follow my leader' isn't necessarily sensible

Some employers play "follow my leader" and wait for the lead authority that holds the pension fund for their area to issue their employer discretions policy. A simple "copy and paste" procedure then follows, with a little "top and tail" to make it their own.

Quite often, the lead authority is the biggest employer in the local fund. It is thought of as the local expert in the LGPS and that it's sensible to follow its lead. However, the membership demographics and funding levels of one employer are unlikely to match that of another, so following the lead authority may not be appropriate.

Each employer is advised, therefore, to consider the issues outlined in these notes and formulate their own policies based on their membership base and budgetary constraints.

### **Remember your policy needs to be:**

**Workable** = easy and definitive

**Affordable** = fits in with your budget

**Reasonable** = fair or "not unreasonable"

**Foreseeable** = affordable for the future budget (2/3 years)