Association of Local Authority Chief Executives and Senior Managers

ALACE EMPLOYMENT GUIDANCE NOTES

NOVEMBER 2019 – FIFTEENTH EDITION

CONTENTS

1. PREFACE

1.1 From time to time ALACE has issued *Guidance Notes*, and this is the fifteenth edition (re-titled since the eleventh edition *Employment Guidance Notes*) collated into this form for distribution to all members through the website. Apart from the speed with which this kind of information becomes outdated, it can only provide pointers to what are increasingly complex areas of law. The aim is to give members some idea of the existence and scope of relevant topics, and every effort has been made to be accurate and up to date, but of course it should not be relied upon on its own, and is no substitute for individual legal or other relevant advice. That may be provided either by a lawyer, by one of the ALACE Consultants, or by someone else: in any case anyone who feels that they may need advice should seek that help as soon as possible. In the case of the ALACE Consultants, access is through me except in emergencies, when direct contact is encouraged with your nominated Consultant.

1.2 This new edition builds on material originally written by several previous advisers and Consultants, to whom the current authors acknowledge their debt. It has been revised from time to time by Roger Morris with the assistance of Peter Bounds, Peter Morris, Richard Penn and John Schultz, and is issued with the confirming authority of the ALACE Council. It is confidential to members and is not intended for wider publication; ALACE owns the copyright. Although ALACE has members throughout the U.K., the references here are primarily to England and Wales. Sometimes the position in Northern Ireland or Scotland is analogous, but increasingly it is not, or the statutory sources of law are different. Where possible those differences are noted; in any event I hope that members in those jurisdictions will still find the principles discussed here valuable, but I shall also welcome comments and materials which will help to make these *Employment Guidance Notes* more inclusive generally for all ALACE members – including the significant number who, since the ALACE constitution was broadened in 2007 to include other senior managers, are not heads of paid service.

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2. BEFORE APPOINTMENT

2.1 Many members will already have signed and started their contracts of employment before joining ALACE and so having access to these *Employment Guidance Notes*. Nevertheless a significant number of previously serving officers are appointed to second or subsequent such positions, and any opportunity to benefit from past experience of entering into a contract is valuable. Similarly other senior managers often come from previous local government experience, and many will hope subsequently to further their careers by seeking chief executive appointments.

2.2 The short period between accepting a job verbally and signing a written contract may offer a unique opportunity to influence the terms that will not recur. It remains a not uncommon experience for appointees to find that full written details of what is on offer are not immediately readily available.

2.3 A draft contract of employment should be read from two different points of view. The first is whether it correctly expresses what you have believed was on offer, deals appropriately and clearly with all the issues that need to be covered, and also deals with the implications of any foreseeable situations. If the contract either incorporates, or significantly departs from, the standard employment terms this fact should be clear and a copy of the requisite terms supplied. These standard terms (comprised in a Handbook) are set out either in the Conditions of the Joint Negotiating Committee (JNC) for Chief Executives – the latest edition of which is updated to October 2016, superseding that of September 2009 – or the parallel JNC for Chief Officers (whose latest equivalent is dated August 2017, and supersedes that of January 2001), or alternatively the National Joint Council for Local Government Services (NJC), whose latest 'Green Book' is dated December 2016. In Scotland, the relevant handbook is the Scheme of salaries and conditions of service for chief officials of the Scottish JNC for Chief Officials, adopted in 2014. This document is not further referred to in these Guidance Notes, but ALACE consultants are able to advise on it,.

2.4 In the case of Chief Executives the Employers' Side Secretary and the Employees' Side Secretary (who is customarily the ALACE Honorary Secretary) together comprise "the Joint Secretaries" referred to in these *Employment Guidance Notes*, and they are available to help resolve any difficulties over the Conditions of Service that may arise. The law and associated structures differ somewhat in Wales; there is no separate edition of the JNC Conditions for Wales, but Appendix 5

provides different model disciplinary procedures and guidance for England and Wales. **If you are being offered a chief executive or head of paid service post, you should check that the council understands that it is the October 2016 JNC Conditions for Chief Executives that are current and relevant.** You will then have the benefit of terms and conditions specifically negotiated for chief executives, including contractual processes and protections built into those conditions now that take account of the relevant form of statutory protection (see paragraphs 6.18 – 6.29 below).

2.5 The second point of view is that of the next most likely time when you may be reading the small print. That is when something has gone wrong, or you are in some sort of trouble. It makes sense to check at the outset how the contract terms would envisage handling problem situations, to gauge what rights or expectations you would have. This is not to be pessimistic: it is simply common sense, and there are regrettably plenty of cases handled by ALACE where members who are not in any significant way at fault, or lacking energy and competence, have found themselves at threat of being ousted by their employers. The limitations on what authorities are legally able, or in the current financial climate can be persuaded, to pay by way of termination payments or compensation make it desirable to have as much as possible written into the contract from the outset – for example, three months' notice is common, but six months is not unknown, and the difference represents a large sum of money. Refer to section 8 of these *Employment Guidance Notes* on *negotiating a termination* for a list of potentially relevant settlement headings as a checklist of issues, some of which (like a commitment to make a tax-free outplacement payment) if something goes wrong later, you may wish you had thought about before signing your contract. See also section 4 of these *Employment Guidance Notes* on fixed term contracts.

2.6 We are aware that some chief executives are appointed on conditions of service other than those laid down by the Chief Executives' JNC and, if this is so in your case, you may wish to pursue this point in negotiation. The Chief Executives' JNC Handbook contains the only set of conditions of service which is designed particularly for the distinctive role and context in which chief executives operate: they reflect the view shared by both employers and chief executives that such provision is necessary. The statutory definition of the role of the head of paid service, and the postholder's statutory protection in that role, apply regardless of whether the JNC for Chief Executives' conditions are incorporated into the contract of employment, but most of the procedures set out in the Handbook would not necessarily apply. ALACE

is also aware of occasions when councils have changed the conditions of service from those laid down by the Chief Executives' JNC to the 'Green Book' or to Chief Officers' JNC conditions. This change cannot be made without the chief executive's agreement, but colleagues have not always felt it appropriate or desirable to resist such a change. ALACE, however, strongly advises its members not to agree to the Chief Executives' JNC Conditions being disapplied in their case, and will support any member wishing to resist such a change.

2.7 If the possibility of the use of the new disciplinary procedures should arise in your case, it is in your interests to have ensured that those colleagues likely to be involved in supporting or advising council members in their use (probably the monitoring officer and/or the head of human resources) are aware of the existence of the Handbook, and of its nature and scope. ALACE has become aware of many members over the years whose difficulties have been compounded by their Council's failure to follow the agreed procedures from the start.

2.8 While many chief executives are also returning officers for their councils, this is not required (and the role of electoral registration officer may also be distinct). Unless the arrangements are well settled, you may wish to explore whether it is appropriate for the role to be transferred to you. It is, however, a separate appointment (with separate pension arrangements), and if you undertake it you should ensure that you are able to oversee it properly **and that you understand the personal accountability involved**. (See also paragraphs 3.25 – 3.31 below.) Having adequate personal insurance cover for the role (and with no policy excess) is also vital, and is something **you should take particular care to check**. In some authorities, chief executives may also have other associated but legally separate employments, for example as clerk to a joint committee.

2.9 ALACE is willing to advise current or prospective members who have received a chief executive or other senior manager job offer on the terms of their potential contract. While these *Notes* primarily refer to chief executive positions or their equivalents, who still comprise the majority of the ALACE membership, many aspects do apply similarly to other senior managers, whose circumstances are also covered where appropriate.

3. THE STATUTORY ROLE

FORMAL BACKGROUND

3.1 Section 4(1) of the Local Government and Housing Act 1989 introduced a requirement that authorities should appoint a head of paid service, and designate "one of their officers" for this. This is technically not the same as requiring there to be a chief executive. The head of paid service post is not defined (although some of its functions are prescribed – see the next paragraph): the classic definition of the two key attributes of a chief executive of being both head of paid service and also principal policy officer – is not incorporated, for instance, even though it still forms the basis of the definition for the purposes of the JNC (and hence for most of the chief executive ALACE membership) and is (presumably) repeated in most job descriptions. The post is politically restricted under section 2(1) of the 1989 Act. So too where applicable is the post of 'head of staff' for those analogous authorities set out in the Local Authorities (Exemption from Political Restrictions) (Designation) Regulations 2012, S.I. No. 1644. Because the appointee must be one of the authority's officers, it follows that there must be a direct contract of employment as an officer, even if part-time or nominal.

3.2 In essence, section 4(3) requires the head of paid service to co-ordinate the way the authority delivers its services, and to be concerned with numbers and grades of employees needed, with their organisation, and with their appointment and "proper management." Whenever considered appropriate, the head of paid service must "prepare a report to the authority" on what is proposed, and as soon as practicable send it not just to the executive or to the responsible committee or sub-committee under the council's constitution but to "each member of the authority" under section 4(4). The authority must consider it within three months and, although the report may of course be considered at a lower level, the section 4(5) duty on the authority explicitly to consider the report itself cannot be delegated under section 101 of the Local Government Act 1972.

3.3 Section 4 of the 1989 Act should not be read as requiring that the head of paid service should in effect report virtually every employment or human resources matter to the full council. Under section 4(2) such reports are necessary only where the postholder "considers it necessary to do so" – there is no reason why everyday business of this kind should not be done and reported in the authority's usual way.

3.4 This is in itself simply, as section 4(3)(d) expresses it, part of the "proper management" of the authority's employees. Nevertheless, it is usually read as giving the head of paid service not only the formal statutory duty but also a power to bring to the attention of all the authority's councillors (and thereby also of the public) something fundamentally important concerning the council's workforce in respect of which his or her recommendations are being thwarted by one or more of those councillors.

3.5 Paragraph 5 of the Local Authorities (Standing Orders) (England) Regulations 2001, S.I. No. 3384, stipulates that the appointment or dismissal of a head of paid service "shall be exercised by the authority itself" and cannot be delegated. Paragraphs 43 and 44 of paragraph I of schedule 1 to the Local Authorities (Functions and Responsibilities) (England) Regulations 2000, S.I. No. 2853 (substituted by paragraph 2(b) of the amending S.I. 2001 No. 2212), provide that appointing to the posts of head of paid service and monitoring officer, and providing their staffs, cannot be the responsibility of an authority's executive. Nor may the appointment of the section 151 officer (referred to as "Duty to make arrangements for proper administration of financial affairs etc.") or the appointments of proper officers (paragraphs 39 and 40).

3.6 The same rules apply in Wales under paragraphs 12 and 13, 16 and 11 respectively of Part I of schedule 1 to the similarly titled S.I. 2007 No. 399. (So-called "alternative arrangements" in Wales were abolished following section 35 of the Local Government (Wales) Measure 2011, nawm 4. Section 8(1) of that Measure, the duty to designate a head of democratic services, cannot by section 20 be delegated by the local authority.) These rules, and others similarly in those S.I.s relating to employees generally, effectively take most human resources matters outside the remit of such executives and boards, leaving them to be dealt with by traditional 1972 Act committees or (where appropriate and not unlawful) officer delegated powers. Further amendment of the rules about standing orders relating to staff was made by the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2014, S.I. No. 165, while in Wales the Local Government (Committees and Political Groups) (Amendment) (Wales) Regulations 2014 are S.I. No. 476 (W.56). Further amendments in Wales were made by the Local Authorities (Standing Orders) (Wales) (Amendment) Regulations 2017, S.I. No. 460 (W. 98).

3.7 As referred to in section 6 of these *Employment Guidance Notes*, paragraph 4(2) in both cases of Parts I and II of schedule 1 to the Local Authorities (Standing

Orders) (England) Regulations 2001, S.I. No. 3384 – authorities respectively with mayor and cabinet executives or with leader and cabinet executives – requires that at least one member of the executive must be a member of any committee or sub-committee considering the appointment or dismissal of a head of paid service (and certain other officers). In Wales the equivalent paragraph 4(2)(a) of Parts 1 and 2 of schedule 3 to the Local Authorities (Standing Orders) (Wales) Regulations 2006, S.I. No. 1275 requires the same, but paragraph 4(2)(b) also stipulates in addition that "not more than half the members of that committee or sub-committee are to be members of the executive of the relevant authority."

3.8 The role of most chief executives will be supplemented by being designated as the so-called "proper officer" for a variety of functions where the council must appoint a particular postholder to be responsible for a given statutory function, but has a choice about who that postholder shall be. The concept of the proper officer is contained in section 270(3) of the Local Government Act 1972, and is used in a variety of individual contexts. A working (but not necessarily exhaustive) list of these is set out in the Appendix to these *Employment Guidance Notes*.

3.9 Local authorities have been required since the passing of the Local Government (Access to Information) Act 1985 to publish lists of empowered officers under section 100G of the Local Government Act 1972. Today such lists are usually incorporated in the council constitutions required under section 37 of the Local Government Act 2000. It is important to check them on appointment to a chief executive post. Check also whether the constitution includes references to the latest (2016) edition of the JNC Conditions, and to any other similarly relevant documents.

3.10 Section 151 of the 1972 Act requires the appointment of someone generally described as the chief financial officer, who (unlike heads of paid service) must hold one of the formal qualifications specified by section 113 of the Local Government Finance Act 1988. Section 5 of the Local Government and Housing Act 1989 similarly requires the appointment of a monitoring officer, who cannot also be either the head of paid service or the chief financial officer (on the former, see section 5(1A), inserted by paragraph 24 of schedule 5 to the Local Government Act 2000). There are no specific statutory provisions covering the inter-relation of their formal duties, though mutual consultation will of course usually be appropriate. Section 18 of the Children Act 2004 requires the appointment of a director of children's services with education and children's services functions; similarly, in authorities in Wales under section 27 there is to be a lead director for children and young people's

services. Also in Wales, the person designated as the head of democratic services under section 8 of the Local Government (Wales) Measure 2011, nawm 4, cannot be the head of paid service, the monitoring officer or the section 151 chief financial officer: section 8(4).

3.11 Regulation 10(4) of the Local Authorities (Committee System) (England) Regulations 2012, S.I. No. 1020 provides that the person required to be designated under regulation 10(1) as an authority's scrutiny officer cannot be the head of paid service, monitoring officer or section 151 officer. (Under regulation 10(5), however, "The duty in paragraph (1) does not apply to a district council for an area for which there is a county council.") In Wales there is no direct equivalent of this provision. For monitoring officers, however, there are specific additional provisions in the Local Government Investigations (Functions of Monitoring Officers and Standards Committees) (Wales) Regulations 2001, S.I. No. 2281 (W. 171).

3.12 Relevant local authorities must since April 2013 appoint directors of public health. Department of Health guidance on their role is issued under section 73A(7) of the National Health Service Act 2006 (inserted by section 30 of the Health and Social Care Act 2012), and is currently dated April 2013. The associated NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012 are S.I. No. 3094.

3.13 It is important to note too that there are other statutory officeholders; there are likely to be several different holders of proper officer designations; and there will of course also be additional personal authorisations in any authority (for example, to enter premises or carry out different kinds of inspections). Some people will be appointed or authorised for certain purposes in a personal, not just postholder, capacity because only holders of certain professional qualifications can be empowered to perform certain functions. In addition, there are likely to be ranges of delegated powers given to the chief executive (and of course to others) for particular activities or statutory provisions which are not 'proper officer' provisions as such, but which would otherwise fall to be decided by an executive mayor, by another form of executive or board, or by a committee or sub-committee.

3.14 Powers or duties given to other officers may by implication curtail or limit those given to you, so thoroughly checking the formalities and scope given to accompany your job description on appointment is obviously very important – the fact that something is in your job description does not necessarily mean that you have

been appointed or given the requisite personal authority in the technical, statutory sense!

3.15 The duties and responsibilities of the Health and Safety, etc at Work Act 1974 remain very important, with criminal sanctions possible against a senior officer. An additional consideration is the potential personal liability arising under the Corporate Manslaughter and Corporate Homicide Act 2007. A charge of corporate manslaughter can arise if there is considered to have been a gross breach of a duty of care owed to someone whose death is caused by the way an organisation is managed. Being able to demonstrate *personal* concern for, and leadership of, health and safety issues and the risk assessments required across the wide range of your employing authority's activities is essential. The relevant duty of care is defined in section 2 of the 2007 Act.

3.16 Also essential is the chief executive's role in relation to children's services, not least children's safeguarding. Statutory guidance revised in 2013 under sections 18(7) and 19(2) of the Children Act 2004 set out the expectations of a council's chief executive in relation to leadership of the director of children's services (*Statutory guidance on the roles and responsibilities of the Director of Children's Services and the Lead Member for Children's Services*). It is the Government's intention that this guidance be *reviewed*, but not necessarily *revised*, annually; referring to the Director of Children's Services and the Lead Member for Children's Services, it states that "Together with the Chief Executive and Leader or Mayor, the DCS and LMCS have a key leadership role both within the local authority and working with other local agencies to improve outcomes for children and young people." Key paragraphs from the statutory guidance include the following –

> "9. …The DCS and LMCS should report to the Chief Executive and to the Council Leader or Mayor respectively as the post holders with ultimate responsibility for the political and corporate leadership of the Council and accountability for ensuring that the effectiveness of steps taken and capacity to improve outcomes for all children and young people is reflected across the full range of the Council's business.
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> 11. The DCS should report directly to the Chief Executive, so it is not appropriate for the Chief Executive also to hold the statutory role of DCS (except possibly as a temporary measure whilst the Council actively takes steps to fill a vacant DCS post and an alternative interim DCS appointment is

not considered appropriate).

19. It is the responsibility of the Chief Executive (Head of Paid Service) to appoint or remove the LSCB [Local Safeguarding Children Board] Chair, with an appointment panel involving Board members and lay members. The Chief Executive, drawing on other Board partners and, where appropriate, the Lead Member will hold the Chair to account for the effective working of the LSCB."

The LGA published a helpful document in February 2019 entitled *Chief executives' 'must know' for children's service*. The key messages set out its page 2 merit careful heeding.

JOINT APPOINTMENTS

3.17 There are many cases now where two (or even more) authorities have discussed or implemented joint arrangements (although the numbers of new occurrences seem to have diminished recently). Typically two districts in the same county may have the same head of paid service, but other cases have included a county and a district, and even two districts across a county boundary. The extent to which authorities have merged their management and other service arrangements also varies. Legally the authorities in each case remain distinct legal entities: there is no explicit provision for a formal merger into a single council, although some authorities are understood to be exploring the possibility following the coming into force of the Cities and Local Government Devolution Act 2016.

3.18 ALACE will consider these cases on their merits where members affected ask for advice or assistance. If the employment or prospects of any serving ALACE member are threatened or worsened by joint proposals – a risk of redundancy, perhaps, or a national advertisement for a post the current local equivalent of which a member already occupies – then ALACE will endeavour to negotiate acceptable terms that will allow the joint authorities to meet democratically chosen objectives without unlawful or unfair treatment of the member's rights under the terms of their existing employment contract. Members affected by such proposals are advised to seek advice through the Hon. Secretary as early as possible in the process. (Where more than one ALACE member in an authority is affected by a joint proposal, arrangements are made for each to be separately assisted by a different consultant, with proper observation of respective confidentialities accordingly.)

3.19 The ALACE Council has on 5 October 2016 agreed a policy statement on shared chief executive appointments, as follows –

"***Shared Chief Executives***

An increasing number of cases where Councils are considering sharing a chief executive (C.Ex.) has led ALACE to consider how such circumstances should be viewed in relation to ALACE members (especially C.Exs.) who may be affected by such proposals.

The position is contrasted with local government reorganisations which have occurred since the mid-1990s in several parts of England. In these cases, Parliament took the view that the new council should not only be at liberty to advertise nationally for the appointment of their C.Ex., but should indeed be required to do so. ALACE accepted this approach at the time as being in the best interests of the new councils, notwithstanding that ALACE members in existing authorities could thereby be disadvantaged.

The position relating to moves towards a shared chief executive appointment is, however, quite different. There is no new authority being created by Parliament: it is simply a case of two or more existing authorities making different internal arrangements. The principle of internal ring-fencing is widely accepted in reorganisations, both in the interests of authorities in retaining skills, knowledge and experience and avoiding unnecessary severance and recruitment costs, and in the interests of employees by not putting their employment in jeopardy any more than is necessary.

An added factor applying to C.Exs. (and also monitoring officers and S151 officers) in England and Wales is that they cannot be dismissed by their authorities except in accordance with statutorily defined processes – the 'independent panel' procedure of S.I. 2015 No. 881 in England and the designated independent person (DIP) procedure of S.I. 2006 No. 1275 in Wales. Like any trade union, ALACE is anxious to minimise the risk of its members being exposed to redundancy, particularly as this is a route to dismissal which does not require the statutory processes to be invoked.

The members affected by particular shared C.Ex. discussions may for various reasons not wish the appointment of the shared C.Ex. to be made on a ring-

fenced basis, and ALACE will obviously take the views of such members into account. ALACE's view, however, is that, in the absence of special circumstances, an appointment of a shared C.Ex. should be made from a ring-fenced group of the C.Exs. of the authorities intending to share the C.Ex."

JOINT APPOINTMENTS WITH THE NHS

3.20 It is becoming increasingly common for local authority chief executives and senior managers to be asked (or expected) to take on NHS appointments as a part of joint working arrangements. Circumstances vary significantly, but there are several factors which should be borne in mind:

- *Your principal contract of employment.* This requires whole-time service to the work of the council, and prohibits taking up any other additional appointment without express consent. The NHS appointment would require the express approval of the council – that would need to be validly agreed under its constitution, as it cannot just be decided by the mayor, leader or executive as may apply.

- *Your NHS contract of employment.* This will need to specify, among other things, whether this appointment carries separate pay or other remuneration.

- *Remuneration.* If the political circumstances are such that the parties are willing to increase your remuneration and take public responsibility for so doing – recognising that you are taking on new, important and considerable additional responsibilities, perhaps associated with some economies elsewhere – then it would be reasonable for the NHS body to pay the cost of the increase. This may be paid to you directly under your NHS contract, or paid as a part of your council salary, with the council being reimbursed by the NHS. If there is no additional remuneration, there may be a case for the NHS body to become responsible for paying a proportion of your salary to the council to reflect its stake in your joint appointment. Bear in mind also the pay accountability provisions referred to in paragraph 3.22 below.

- *Pensions.* You must check, if you receive separate remuneration for your NHS appointment, what are the separate pensions arrangements involved – and that the correct employer and employee contribution rates are being paid in each case. Remember too that if you want to pay additional contributions,

or seek early or flexible retirement, or require ill-health assessment, etc., the rules, processes and discretions will differ in the NHS from the LGPS.

- *Job description.* It is important to understand clearly the extent of the statutory responsibilities and accountabilities involved in the joint appointment. If the NHS appointment is as accountable officer, this could carry accountabilities all the way up to the Public Accounts Committee. Also, check the deliverability of responsibilities assigned to you, e.g. if you are to 'ensure' something, satisfy yourself that this does not depend on the decisions of decision-makers other than you.

- *Conflict of interest and loyalty.* This is endemic in joint governance and appraisal. If you carry out, or are understood to carry out, the job as a part (or an extension) of your chief executive role (and particularly if not separately or additionally remunerated), this may carry the risk that, if relationships between the partner agencies deteriorate or views on priorities begin to differ, the council, as the body that primarily employs you, may feel that it has the greater claim to direct you in respect of the areas of disagreement. This will hinder the joint effort. If differences emerge between the two agencies, you might wish to claim something akin to having an interest in the issue by reference to your joint appointment, and arrange for another colleague in each agency to lead for their side, while you support the joint body in finding a way forward. Such pressure from the council may perhaps be a lesser factor if both sides contribute to your remuneration.

- *Appraisal by the council.* One or more appropriate NHS office-holders should join with elected members in your appraisal process. This will reinforce the shared nature of your appointment, and will provide a context in which any issues of differing expectations of you from the two sides can be managed, and where practical issues – like your control of your own time – can be shared. If shared appraisal is not practical for whatever reason, or indeed either of these kinds of issues arises between appraisals, you will need to ensure that some shared facility for resolving them is established.

- *Appraisal by the NHS.* Appraisal (and assurance) may involve other organisations as well as the relevant NHS body (e.g. a clinical commissioning group), and go further up the NHS structure through the sustainability and transformation partnership. The arrangements should be set out in your NHS

contract of employment, or your job description. It is appropriate for council representation to be incorporated into the process.

3.21 Although the above factors are specific to joint appointments with the NHS, equivalent considerations will apply in the case of joint appointments with other bodies. ALACE consultants can advise on appropriate contractual and practical arrangements in individual cases.

PAY ACCOUNTABILITY

3.22 Sections 38-43 of the Localism Act 2011 require councils to publish their pay policies. Regulations 7(2)(c) and (3) of the Accounts and Audit (England) Regulations 2011, S.I. No. 817 set out the requirement to publish the categorised remuneration of senior employees. Such remuneration includes any exit payments negotiated with an authority when an employee leaves. (Misreporting this explains some of the hugely inflated individual annual salaries and settlements reported in the media, and published by pressure groups such as the TaxPayers' Alliance.) See also paragraph 7.43 below.

CONTINUOUS SERVICE

3.23 Local government recognises 'continuous service' if you move directly from one qualifying post to another without any break. This is particularly significant for accrual of final salary pension benefits relating to service prior to April 2014 when the reformed Local Government Pension Scheme (LGPS) was introduced, as your benefits prior to that date are normally calculated on whatever is your final salary at the time you retire. It can also be important for any other statutory entitlement (such as a redundancy payment), or condition of service (such as sick pay entitlement) where the level of benefit depends to any extent on the length of service.

3.24 Paragraph 9 of the JNC Conditions (October 2016) provides for continuous service as one of a list of conditions where the chief executive "shall enjoy terms and conditions in other respects no less favourable than those accorded to other officers employed by the council." The provisions about continuous service are contained in paragraph 14 of Part 2 of the December 2016 NJC 'Green Book', so these are considered thereby imported into chief executive contracts. A similar provision appears in the August 2017 JNC Chief Officers Conditions: see paragraph 1 of Part 2.

ELECTION APPOINTMENTS

3.25 Authorisation for elections is particularly important because of the personal nature of the duties and liabilities. (It is also very important to have those liabilities adequately insured, and without any policy excess that could still imply considerable personal exposure to risk.) Elections are not always the same as polls or referendums; electoral registration must also be distinguished from elections/polling duties.

3.26 It is vital to check carefully the various 'proper officer' or other appointments required for elections, electoral registration and related duties – there are different provisions for different aspects of the various appointments, and though they may in practice usually be held by the same person, this does not always have to be the case. Dealing with the process for a mayoral election petition, for instance, is not really an *election* function in itself, while electoral registration duties are traditionally viewed – and budgeted – separately.

3.27 In London returning officer appointments are defined by reference to the proper officer function: see section 35(3) of the Representation of the People Act 1983, and paragraph 7(4) of the Local Authorities (Mayoral Elections) (England and Wales) Regulations 2002, S.I. No. 185. Elsewhere than in London section 35 requires the relevant council to appoint an officer "to be the returning officer…." etc. This makes little or no practical difference to the outcome, but it is important to express the appointment correctly in the official record.

3.28 For mayoral election petitions, the proper officer publishes the verification number under S.I. 2000 No. 2852 (as amended). For any such ensuing referendum, the counting officer is the returning officer for local elections under paragraph 1(1) of S.I. 2001 No. 1298. Then for an actual mayoral election itself, the returning officer is again the returning office for local elections under S.I. 2002 No. 185. In each case, the authorising provisions are slightly differently drafted.

3.29 A returning officer should always appoint at least one deputy. This is a personal, and not a council, responsibility, and should cover or be specific to each election: you never know when you may be ill, incapacitated, or out of the office for whatever reason. For the statutory background of each of the fifteen types of

election, referendum and poll in England and Wales, and of the appointments of the various returning officers, see chapters 4 and 5 of *Running Elections 2013* by Roger Morris and Mark Heath (published by SOLACE Ltd.).

3.30 Section 67 of the Electoral Administration Act 2006 is misleadingly entitled *Performance of local authorities in relation to elections etc.* The duties (about meeting standards prescribed by the Electoral Commission) are in fact all laid on officers – registration, returning and counting officers – as local authorities have no responsibility for the actual running or management of elections. It follows – and has been supported by counsel's opinion obtained by ALACE – that a returning officer's employing authority has no power to give directions about such matters; has no standing to investigate allegations of election failings; and has no authority to invoke the statutory processes (see section 6 of these *Employment Guidance Notes*) to take disciplinary action directly in consequence of any such matters.

3.31 Nevertheless, if difficulties have arisen with the election process – and perhaps have been widely publicised, as has the case in some constituencies in recent general elections – it is unlikely to be practical for a returning officer to maintain that their employer has no right to follow up what has happened. It will be prudent for a returning officer in that position, so far as possible on their own terms, to undertake a review or effect remedial action (if possible), and so try to acknowledge fully the concerns that exist while not allowing the independence of the role to be undermined in a way which in the longer term is likely to lead to further difficulties. In any event a returning officer's employer has surely a general interest in that particular function being competently fulfilled, and this is not incompatible with the returning officer's independent responsibility for all the detailed process requirements of managing elections prescribed by Parliament.

4. FIXED TERM APPOINTMENTS

INTRODUCTION

4.1 Most chief executives are still appointed on contracts incorporating the JNC Conditions and terminable by three or more months' notice on either side. Where termination is instigated by the employing authority, both the law and the conditions of service contain agreed procedures which need to be followed. In particular, except in cases of redundancy or ill-health, there are statutory processes (on which see section 6) relating to termination of employment before such action can be taken. In a minority of cases, however, chief executives are appointed on fixed term contracts ('FTCs') which include those JNC Conditions that are not inconsistent. FTCs became more popular for a period from the late 1980s, but their use has more recently declined considerably to the point where they may be considered unusual. See also the Fixed-term Employment (Prevention of Less Favourable Treatment) Regulations 2002, S.I. No. 2034 (as amended by S.I. 2008 No. 2776).

4.2 This section's purpose is to draw important issues to your attention if you are contemplating or being offered an FTC. ALACE does not advise for or against FTCs in principle, but if you accept one you need to be fully aware of the implications. FTCs often contain unenforceable provisions. If you want to leave your job before the fixed term ends, the authority will neither be able to secure 'specific performance' – legally enforced compliance – of your contract nor, in general terms, be able to sue you for damages for breach of that contract (except perhaps for the cost of recruiting a successor). Local authorities cannot lawfully commit themselves in advance in the terms of an FTC – should they not renew the term – either to retire you in the interests of the efficiency of the service (see section 7) or on redundancy grounds. They can only so decide at the end of the fixed term or when that is soon approaching, and in the light of the circumstances then applicable. Otherwise they would be fettering their discretion by purporting to make the decision in advance, and that is unlawful. For the same reason it is unlawful for authorities to agree in an FTC to make an award of additional pension, or to make compensatory payments. Depending on circumstances, the inclusion of unlawful provisions such as these may render the whole contract invalid, rather than allowing them to be simply ignored as individually unenforceable.

4.3 Even when both you and your authority signed the FTC in good faith at the time, it is likely that circumstance will change during its term. So may the authority's

political control or policies, or your own career or personal circumstances. Accordingly it makes no sense for either side to rely on a covenant by the other which is unenforceable. The level of compensation (if any) payable by the authority if they do not renew your FTC is likely to be determined by reference to the statutory policy statement which they must have made under regulation 7 of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006, S.I. No. 2914.

ISSUES

4.4 An FTC will normally be for between three and five years. If less than three, potential applicants who are neither internal nor local are likely to be deterred from moving home. If more than five, it may bind both sides for longer than circumstances are foreseeable, although there may be special factors to be taken into account such as a particular business target, a structural reorganisation, or your reaching a relevant age like 55 (the pension minimum), 65 or your other 'normal pensionable age'.

4.5 It is usually seen as an advantage for the authority that renewal of an FTC is uncertain – because it means that renewal must be earned by good performance – and as a particular disadvantage for a chief executive because he or she loses their statutory protection on non-renewal. If you are also required (see below) to waive unfair dismissal rights and redundancy payments, an FTC may seem unattractive and one-sided, and this can only be offset to some degree by a better salary or overall compensation package. Depending on circumstances a salary increased by 10-20% would be appropriate.

4.6 During the FTC term you ought to be subject to the same provisions about ill-health and the same disciplinary and capability procedures as someone on a normal open-ended contract terminable by notice. The statutory protection provisions (see section 6) also apply. If the FTC can lawfully be terminated by the authority for disciplinary, capability, redundancy or ill-health reasons during the currency of the term then (except in the case of gross misconduct) three months' notice ought to be paid. The most serious of the three grades (in England and Wales) of ill-health retirement (see section 7) will entitle you to immediate payment of pension regardless of age. The question of redundancy should not normally arise during an FTC, especially in the earlier part of the term, but if it does it should likewise be

subject to the JNC procedures. Of course, it is always open to an employer and employee mutually to agree to end the contract early.

4.7 The FTC should also set out how the decision whether to renew is to be made. It might, for example, provide that at least a year before the expiry date the authority should consider whether to renew on no less favourable terms and tell you their decision, giving you six months thereafter either to accept any new offer or during which both sides could negotiate different renewal terms, a temporary extension or perhaps early retirement. If the authority decides not to renew you should be free to seek alternative employment before the expiry date, and it would be reasonable for the authority to help that process by meeting the costs of career or outplacement counselling. Such payments are tax-free if qualifying under the provisions of section 310 if the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA'). (See also below on the effect of regulation 8 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, S.I. No. 2034.)

4.8 A requirement to waive the right to bring unfair dismissal proceedings at an Employment Tribunal if an FTC lasting for more than a year is not renewed is unlawful and unenforceable (section 18 of the Employment Relations Act 1999 and S.I. 1999 No. 2830). In FTCs lasting two or more years, you can be asked to opt out in advance of your right to a statutory redundancy payment if the contract is not renewed for redundancy reasons, but such opt-outs cannot apply to circumstances arising during the fixed term. Clearly the employer gains in principle by having required the opt-out and the employee loses. This is essentially a matter for negotiation: you may be reluctant to forego what otherwise you consider an attractive job offer, and inclined to take your chance in what is becoming an increasingly mobile market; the authority may not want to deter a good applicant from accepting the post and may be inclined to leave any problem for whoever is in charge at the time.

4.9 If your FTC expires without renewal you will have few rights, and usually no access as of right to compensation or (unless you are then at the requisite retirement age) to pension. Unless you have waived the right you can, however, pursue an Employment Tribunal unfair dismissal claim. The compensation award and other limits applicable from 6 April 2019 were prescribed by the Employment Rights (Increase of Limits) Order 2019, S.I. No. 324. (The maximum is usually the lesser of £86,444 or one year's pay; there is no limit, however, if either your unfair dismissal or your selection for redundancy is for reasons connected either with health and safety matters, or with public interest disclosure – 'whistleblowing' – or for reasons of

discrimination: see section 124(6) of the Equality Act 2010.) The limit on weekly pay was raised to £525 from 6 April 2019 by the same Order (and from 6 April 2019 is £547 in Northern Ireland, where the maximum compensation award is £86,614: S.R. 2019 No. 63).

4.10 Costs are seldom awarded. As already stated, the statutory protection procedures referred to in section 6 are not applicable where an FTC is not renewed and contractual terms purporting to grant early retirement and added years are unenforceable. Unless you have reached your normal pensionable age, or the failure to renew is on redundancy, business efficiency grounds, or a mutual agreement to terminate on business efficiency grounds, you cannot retire with your full earned pension benefits as of right. The Local Government Pension Scheme does allow retirement from age 55 but, unless you have reached your normal pensionable age, your benefits will be significantly actuarially reduced. (See ALACE's website paper on *Pensions – Frequently Asked Questions*.) An authority that is not obliged to retire you in the interests of the efficiency of the service is unlikely to be willing to incur the significant additional actuarial costs of doing so, and would be required to justify any such decision to the Auditor.

4.11 The risk of your FTC expiring without renewal and leaving you with neither job, nor compensation, nor pension is likely to make it unattractive unless you will then be either confident enough of your prospects in the employment market or old enough to retire as of right. In any case it is vital to assess the risks realistically before deciding whether or not to accept an FTC, and to make your decision with as full information as possible about the terms and the likely implications. In some cases authorities have to some extent overcome the problems by adding into an FTC an additional provision whereby the contract, instead of expiring at the end of the fixed term, then continues as an ordinary JNC Conditions contract terminable by notice on either side. This approach gives fairer balance between the interests of employer and employee in some respects, though in that case the authority will need to be clear why they want to specify a fixed-term element at all.

4.12 The effects of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, S.I. No. 2034 must also be noted. Regulation 3 makes it unlawful to treat a fixed-term employee less favourably than a permanent employee, and if fixed-term employees have their contracts renewed, or if they are re-engaged on a new fixed-term contract when they already have four or more years of continuous employment, the renewal or new contract takes effect as a permanent

contract unless either the employer can show that the fixed-term can be objectively justified or the four-year period has been lengthened under a collective agreement.

INTERIM APPOINTMENTS

4.13 FTCs must be distinguished from *interim appointments*, which are temporary and often do not involve an employment relationship at all, as the appointee is working under a contract for services on either a self-employed or other independent contractor basis. It is in the interests of an ALACE member accepting any contract of this kind to ensure that the contract specifies clearly all matters such as payment, associated issues like pensionability if applicable, notice of termination and so on. Areas like holiday and sick pay may also be important – particularly if the interim arrangements last for a considerable period of time.

CONCLUSION

4.14 FTCs raise issues of considerable legal complexity, and it is important that both sides, having thought through what they want to achieve, understand their implications before signing. At national level neither the Employers' Side nor ALACE actively promotes their use. If you are willing in principle to enter into an FTC, remember that each side should be prepared to negotiate with a view to meeting so far as possible the legitimate concerns of the other. The Joint Secretaries are available to act impartially to facilitate that process if requested by either party. ALACE Consultants are available to advise ALACE members personally.

5. PENSIONS ISSUES

5.1 These *Employment Guidance Notes* formerly contained a long section covering the principal rules about how Local Government Pension Scheme benefits are built up, paid and taxed. Recently, however – and particularly since the LGPS was re-structured with different accrual rates in England and Wales in 2008 and again in 2014 (2009 and 2015 respectively in Northern Ireland and Scotland) – the material had been increasingly duplicated by the ALACE pensions paper *Frequently Asked Questions*, and the crucial (and extremely complicated) significance of the current tax treatment of pensions contributions and benefits has added to the difficulty of presenting key information in a summary form without the danger of misleading members, or of raising more questions than a paper of this kind can answer. It is important for all ALACE members to have a basic understanding of the pensions tax rules relating to the annual allowance (AA) and lifetime allowance (LTA).

5.2 Accordingly this section was discontinued here, and members are referred to the latest edition of the *FAQs* paper also available on the ALACE website, where a more technically structured discussion is provided. There is of course no substitute for seeking appropriately qualified legal and taxation advice – particularly for the increasing proportion of the ALACE membership who have not spent all their career to date in local government, and must therefore consider the inter-relation of pensions benefits and contingent benefits built up though other employments.

5.3 ALACE provides two pensions services –

- First, support from ALACE Consultant Pete Morris, who specialises in pensions issues. He will review your personal pension position, take you through the issues you need to consider, and help you to request appropriate information from – or put the most useful questions to – your own LGPS fund or to ALACE's second 'Individual Pensions Calculations Service' (see below), which is supplied by Hymans Robertson. From 1 September 2019 this has become a chargeable service.
- Secondly, where your own LGPS fund will not, or cannot, provide the information you need, you can be put you in touch with ALACE's pensions experts at Hymans Robertson who, for a fee payable by you, provide an individual 'Individual Pensions Calculations Service' which

will do those calculations for you.

Note that Close have ceased to offer to ALALCE members their Financial Planning and Investment Service (and tax return service), although the service continues to be provided to existing clients.

Information about how to access these services can be found on the ALACE website and in the *Pensions – FAQs* document. In complex cases, it may still be necessary or prudent to take your own separate legal and financial advice.

5.4 You can use up to £500 from your pension 'pot' to pay towards the cost of receiving retirement financial advice and/or the cost of implementing such advice: see regulation 21 of the Registered Pension Schemes (Authorised Payments) Regulations 2009, S.I. No. 1171, added by regulation 5 of S.I. 2017 No. 397, which introduced the pension advice allowance payment ('PAAP').

6. DISCIPLINARY, AND CAPABILITY AND GRIEVANCE PROCEDURES

STATUTORY PROTECTION

6.1 Since the operation of the Local Authorities (Standing Orders) Regulations 1993, S.I No. 202, made under the Local Government and Housing Act 1989, heads of paid service in England and Wales have had statutory protection against arbitrary disciplining or dismissal. This provision followed the 1986 Widdicombe Report *The Conduct of Local Authority Business*, Cmnd. 9797. Similar protection had existed in some cases before, but the 1993 Regulations introduced it anew in a rather different – and generally applicable – form (involving the use of a designated independent person – the 'DIP'). They were considerably augmented by the Local Authorities (Standing Orders) (England) Regulations 2001, S.I. No. 3384, and the similar (but not identical) provisions that were separately enacted for Wales in the Local Authorities (Standing Orders) (Wales) Regulations 2006, S.I. No. 1275 (W.121). (There are, however, no similar statutory provisions in Northern Ireland and Scotland, although in the former there are Northern Ireland Staff Commission procedures, and in the latter there are contractual provisions involving the use of a DIP in certain circumstances.) Statutory protection from arbitrary dismissal covered heads of paid service, monitoring officers and chief finance ('section 151') officers under regulation 7(1)(a), (b) and (c) respectively of the 2001 Regulations in England, and similarly these officers, together with the head of democratic services (and also previous occupants of these posts) in Wales under regulation 9(1A) of the 2006 Regulations in Wales as amended by the Local Authorities (Standing Orders) (Wales) (Amendment) Regulations 2014, S.I. No. 1514 (W. 155) (which revoked the above 1993 Regulations in Wales except so far as relating to national park authorities).

6.2 The original DIP procedures were revoked in England by the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015, S.I. No. 881, which introduced new independent panel ('IP') provisions. The 2015 Regulations amend, and now form part of, the 2001 Regulations. Unlike the previous provisions, which included potential disciplinary action falling short of dismissal, the 2015 Regulations are applicable only to potential dismissal cases. The existing provisions for Wales remain unaffected.

6.3 The new form of statutory protection in England (like that remaining in Wales) of course is not absolute, and anyway does not apply if your contract is to be terminated for reasons of either redundancy; ill-health; where a fixed term contract

expires without being renewed (on which see section 4 above); or of course if you agree voluntarily to leave. Its core is the requirement that no decision to dismiss a head of paid service, chief financial officer or monitoring officer, can be taken by an authority without first taking into account "any advice, views or recommendations" of an independent panel ('IP'), as well as "the conclusions of any investigation into the proposed dismissal" and "any representations from the relevant officer." This is set out in the new paragraph 7 of schedule 3 to the 2001 Regulations in England. The continuing DIP procedures for Wales are contained in regulation 9 and paragraph 2 of schedule 4 to the 2006 Regulations. Neither of these provisions is subject to any age limits. They provide different forms of safeguard from the standard dismissal and disciplinary procedure requirements of regulation 3(1) of the Employment Act 2002 (Dispute Resolution) Regulations 2004, S.I. No. 752.

6.4 The other statutory posts – director of children's services, director of public health, and in Wales lead director for children and young people's services – do not have any form of statutory protection, and nor does the scrutiny officer required to be designated in England under section 21ZA of the Local Government Act 2000 (following section 31 of the Local Democracy, Economic Development and Construction Act 2009).

6.5 Another important point to note is about how the authority can validly take decisions, including procedural decisions, about staffing matters generally. Where the authority is operating so-called "executive arrangements" under the Local Government Act 2000, then the power "to appoint staff, and to determine the terms and conditions on which they hold office (including procedures for their dismissal)" must be exercised either by the authority itself in full council or by a properly delegated person or politically balanced committee or sub-committee, and not by the authority's executive. (Such councils are therefore effectively on a similar basis in this respect to those operating so-called "alternative arrangements.") This is prescribed for England by regulation 2(1) of, and paragraph 37 of Part I of schedule 1 to, the Local Authorities (Functions and Responsibilities) (England) Regulations 2000, S.I. No. 2853 (as amended by regulation 2(b) of, and paragraph 2 of Part I of the schedule to, S.I. 2001 No. 2212). Furthermore, by Regulation 5 of the 2001 Standing Orders Regulations S.I No. 3384 (as amended), a decision to dismiss a head of paid service, monitoring officer or chief finance officer can only be taken by the council itself, and **'dismissal' in this context does not exclude cases of redundancy, ill-health or non-renewal of a fixed-term contract.**

6.6 For Wales the equivalent provisions (which in each case just refer to "appointment and dismissal of staff") are regulation 3(1) of, and paragraph 6 of Part I of schedule 1 to, the Local Authorities (Functions and Responsibilities) (Wales) Regulations 2007, S.I. No. 399 (W.45).

6.7 The Local Authorities (Standing Orders) (England) Regulations 2001, S.I. No. 3384 also contain in schedule 1 alternative provisions (unamended by the 2015 Regulations) to ensure that there must be proper approval in advance of any arrangement whereby a committee, sub-committee or officer is to consider the appointment or dismissal of a chief executive on an authority's behalf – and in any event the authority must approve any recommendation made. Paragraph 4(1) of Part I of schedule 1 refers to an authority with a mayor and cabinet executive; paragraph 4(1) of Part II refers to an authority with a leader and cabinet executive. In both these cases paragraph 4(2) also requires that at least one member of the executive must be a member of any relevant committee or sub-committee. Paragraph 4 of Part IV refers similarly to approval in advance by any authority operating alternative arrangements. In each of the foregoing cases there are supplementary rules about the process in those Parts. In Wales the equivalent provisions are set out in schedule 3 to the 2006 Regulations. See also the Local Authorities (Standing Orders) (Wales) (Amendment) Regulations 2014, S.I. No. 1514 (W.155).

6.8 **Neither the power to appoint proper officers, nor the duties to designate officers as head of paid service, monitoring officer, or chief financial ('section 151') officer can be the responsibility of an authority's executive or board.** See paragraphs 40, 43 and 44 of section I of schedule 1 to S.I. 2000 No. 2853 (substituted by S.I. 2001 No. 2212 in England) and paragraphs 11,12 and 13 of section I of schedule 1 to S.I. 2007 No. 399 in Wales for the head of paid service and monitoring officer. For the chief financial officer see paragraph 39 of schedule 1 to S.I. 2000 No. 2853 (that schedule being substituted as already stated by the 2001 Regulations).

6.9 In Wales the 2006 Regulations S.I. No. 1275 include a preliminary stage in the investigation of alleged misconduct. Regulation 9(1) of S.I. 2006 No. 1275 requires the appointment of a politically balanced investigation committee of at least three members if "it appears to the relevant authority that an allegation of misconduct which may lead to disciplinary action has been made." The powers of such a committee are contained in regulation 9(3), and there is a time limit of one month from appointment within which to reach a decision. If the committee decides that the

misconduct allegation should be further investigated, a DIP must then be appointed: regulation 9(4). Unlike in England, these procedures apply even where the anticipated disciplinary outcome is expected to fall short of dismissal.

6.10 The JNC Conditions helpfully set out in paragraph 1.2 of section A (England) and B (Wales) of Appendix 5 the committee structures etc. required for the different parts of the disciplinary process.

6.11 ALACE has also considered the scope of statutory protection in recent years (before the 2015 change in the law in England) in the light of attempts by a few authorities to circumvent the statutory provisions whereby a head of paid service, monitoring officer or section 151 officer could only lawfully be dismissed for misconduct or lack of capability following the statutory protection requirements. The following is understood to still be the position in law for both jurisdictions (though such protection does not extend to redundancy or ill-health situations).

6.12 An employee acquires statutory protection automatically by being designated by their employer in one of the protected roles – head of paid service, monitoring officer, chief financial officer, or (in Wales) head of democratic services – referred to above. The employer cannot lawfully appoint someone to any one of these roles without that statutory protection applying. Some authorities have accordingly argued that, as they can designate, so also they can (so to speak) de-designate, and thereby remove the statutory protection from the individual. This may be done either with the aim of changing for the worse the pay or other conditions of service, or of dismissal. There is, however, no automatic right to revoke or undo something previously done under an explicit statutory power, and none of the provisions about designating statutory officers includes any explicit power to revoke that designation. Nor can an employer simply modify an employment contract by offering new terms and requiring an employee to accept them. The requisite notice of termination would have to be given, in which case the requisite statutory protection procedure should be followed before the notice can be given. In England, an authority would be in breach of its required standing orders if a relevant officer were purportedly dismissed without observance of the required IP procedure, with the same true in Wales if the DIP procedure were not followed.

6.13 The situation where someone's designation is nonetheless supposedly removed in favour of another employee, but they remain employed in another capacity, may depend on why the re-designation is done. It should be expected that

a court would grant an injunction if an IP or a DIP (as appropriate) had not been involved unless a particularly cogent reason for not granting were advanced, and this would particularly be the case if it appeared that the re-designation or removal of protected status was effected wholly or primarily in order to side-step the statutory protection. For example, if the time between re-designation and dismissal of an employee were short, that could well result in a court striking down as false and invalid the removal of the protected designation.

6.14 Where an authority wants to dismiss, but has no credible disciplinary or capability reason for doing so, the usual justification given is about a breakdown in trust and confidence in, or in working relations with, the employee. This may be a plausible reason, and in the case of chief executives it is explicitly recognised under the JNC Conditions (but only where the fault lies wholly or substantially with the chief executive – paragraph 5.4.10 (c) of Appendix 5 – both for England and for Wales – says that "Where the issue is breakdown of trust and confidence, the council will need to be able to establish that the fault for the breakdown could reasonably be regarded as resting solely or substantially with the chief executive."). If the fault for the breakdown is found by the investigator, the IP or DIP (as applicable) to lie wholly or substantially with the authority, it will be that much harder for the circumstances to amount to "some other substantial reason" (to quote section 98(1)(b) of the Employment Rights Act 1996) justifying dismissal – though in principle they could do so, and Appendix 5d also contains a column headed not *Trust and Confidence* but *Some other Substantial Reason*.

6.15 A common feature of recent allegations, no doubt in part reflecting today's enhanced performance culture, is that a chief executive lacks the requisite capabilities to do the job as the authority wishes it to be done. Allegations of this kind, although they would not normally be regarded as 'disciplinary' or involving 'misconduct' in the everyday sense of those words, are treated as coming within the common definition of "disciplinary action" in paragraph 2 of both the 2001 and 2006 Regulations, and are provided for in the JNC Conditions. The notion of inadequate capability has been further extended in one or two recent cases where authorities have alleged that their protected officer should be dismissed because their "trust and confidence" in that employee has broken down. ALACE has sought vigorously to rebut this further extension, on the basis that Parliament enacted statutory protection precisely to counter this kind of situation or political pressure where there has been no conventional misconduct or failure to manage the authority's business properly. In one important case the DIP decided that the authority had to show that the

breakdown was the responsibility of the employee. He concluded that the employee in that case had done all that could have been expected to maintain trust and confidence in difficult circumstances, and that the breakdown was the fault of the authority. The employee was exonerated. In contrast, in a 2011 Employment Tribunal decision *Baker v. Salford City Council* (case ref. 2402322/2010, but not involving an employee with statutory protection) the fact of a loss of trust and confidence occasioned by the employee's conduct (based on reasonable evidence) was held to be capable of being "some other substantial reason" justifying a dismissal as fair. In *Perkin v. St George's Healthcare NHS Trust* [2005] EWCA Civ. 1174 the Court of Appeal held that the dismissal of a finance director because of his difficult personality was justified on the grounds of "some other substantial reason" even though he was technically good at his job. Every such case turns on its facts. ALACE will resist the use of grounds that attempt to negate the effect of the protection which Parliament and/or the National Assembly for Wales intended.

6.16 Note what paragraph 1.3.6 of Appendix 5A (for Wales paragraph 1.3.7 of Appendix 5B), *Model Disciplinary Procedure and Guidance,* says about the desirability of an objective performance appraisal system for chief executives to counter performance shortcomings. The appraisal process is the subject of Appendix 2 to the JNC Conditions.

6.17 The 2016 edition of the Chief Executives' Conditions sets out procedures applicable in England and Wales which incorporate the relevant statutory requirements in each jurisdiction. The August 2017 edition of the Chief Officers' JNC Conditions contains a somewhat modified procedure for monitoring officers and section 151 officers, indicating that the relevant provisions of the Chief Executives' Handbook "can be used as a reference guide" in such circumstances. The Chief Officers' JNC had some concerns about imposing a prescriptive model when, for instance, these officers might be rather less senior in some authorities, and/or the chief executive's role in the management and discipline of the management team means that there might be lesser recourse to members than is necessarily required under the chief executives' conditions. (There may also be a few cases where other officers not covered by statutory protection also have contracts that incorporate similar protective terms. It appears to be the case – based on counsel's opinion taken by ALACE when the 2015 Regulations came into effect – that where anyone in England has a contract incorporating the former DIP procedures, that term continues to have effect unless and until it is either over-ridden or changed by mutual agreement, depending obviously on the precise wording of their contract.)

DISCIPLINARY PROCESS

6.18 The 1993 Regulations were hardly used in their first few years (though their existence sometimes was a deterrent to authorities potentially considering disciplinary action), but in the last decade or so there have been many cases of DIP and IP processes under the relevant Regulations involving chief executives, monitoring officers and section 151 officers, and ALACE Consultants have accumulated significant experience of their intricacies.

6.19 The JNC for Chief Executives revised the Conditions of Service in October 2016 so that they take account of the amended statutory rules incorporated in the 2001 and 2006 Standing Orders Regulations. Appendix 5 to the JNC Conditions provides separate model disciplinary procedures for England and for Wales. Regard should be had to the extensive advice and guidance, comprising flow diagrams and the *Potential reasons for termination table* which Appendix 5 also contains. That material cannot all be set out again here, but it bears repeating that anyone who thinks they may become subject to this process should seek advice and support as soon as possible. Authorities sometimes embark on action of this kind without themselves having regard to the statutory and contractual requirements; relationships and reputation alike can deteriorate very quickly where there are suggestions or allegations of a disciplinary or capability nature. In a Circular dated 7 May 2019, the JNC Joint Secretaries gave advice on the *Structures required to manage model disciplinary procedure*, which drew attention to the fact that some councils had failed to establish the procedure and standing committees that the JNC Handbook requires.

6.20 Under general employment law principles, an essential part of a fair dismissal is that a fair and objective investigation is carried out. So in England the removal of the requirement for an investigation to be carried out by a prescribed individual (the DIP) does not remove the need for an independent investigation. The Employers have also accepted that, in the case of chief executives, such an investigation needs to be carried out by someone outside the Council. A panel of independent investigators has been set up, and they are engaged broadly on a ‘cab-rank’ basis.

6.21 For Wales, regulation 7 refers to its “appearing to the local authority that an allegation of misconduct ... requires to be investigated” before requiring that a DIP must then accordingly be appointed for that investigation. Such a requirement can only formally come to appear necessary to the authority by the taking of a legally

valid decision to that effect. That decision in itself must comply with the provisions set out above; accordingly the authority may well carry out, or appoint someone to carry out, a preliminary investigation or inquiry to help them decide if the test of regulation 7(1) is met. Any such person carrying out such preliminary inquiries is not a statutory DIP, but must still take care not to act in a prejudicial manner. The Welsh Regulations have formalised this stage in the light of experience in England.

6.22 The JNC Conditions procedure for England follows this principle: the Council must make a deliberate and properly considered decision to commission an investigation (indeed some authorities in England too have commissioned a preliminary investigation for this purpose), and in respect of both countries, a number of factors which should be taken into account in making such a decision are set out.

6.23 The Local Government Employers and ALACE have agreed guidance which, while it cannot be formally binding, is intended to help DIPs in Wales to carry out their function. That stand-alone guidance now comprises Appendix 6 to the October 2016 update of the JNC Conditions: it is not technically part of those Conditions.

6.24 If a decision in principle has been made that there are matters requiring an investigation:

- In England, an independent investigator ('II') should be appointed following the procedure in the JNC Conditions (appointing from a list maintained by the Joint Secretaries). The costs of the investigation fall on the Council.

- In Wales, a DIP should be appointed, either by the authority and the chief executive (through the Joint Secretaries) agreeing the appointment, or by the Welsh Ministers making an appointment in default. The authority must pay the DIP's reasonable remuneration and costs (regulation 9(10)). Regulation 9(7) provides that the council and the chief executive "must, after consulting the designated person, attempt to agree a timetable within which the designated person is to undertake the investigation." In default the DIP must set an appropriate timetable: regulation 9(8).

6.25 An authority considering disciplinary allegations may well decide that their chief executive should be suspended. Section 3 of Appendix 5 to the JNC Conditions covers formal suspension and considerations to be borne in mind in making decisions in relation to suspension are set out there. There must be proper lawful authority given to whoever imposes the suspension. In Wales, under paragraph 3 of schedule 3 to the 2001 Regulations (schedule 4 to the 2006

Regulations) suspension must be "for the purpose of investigating the alleged misconduct occasioning the action" and must be on full pay; suspension may last for no longer than two calendar months from the date it takes effect and cannot be extended by the authority, or re-imposed after a short interval; and only a DIP can extend or vary the terms of such a suspension. In England, the JNC Conditions prescribe that a suspension is to be reviewed by the council after (or if applicable every) two months.

6.26 Other points relating to the DIP regime in Wales include:

- While it is common practice in local government for disciplinary processes to be held in private, there is no statutory bar to DIP hearings being held in public should the DIP decide that this would be appropriate. DIPs have rights to inspect documents and to require councillors and other employees to answer questions (although they cannot enforce this without court backing).
- There is no explicit DIP power to award costs to anyone cleared of allegations, and there is no implied power to do so either. If you find yourself in that position, you may be able to argue that the Council should reimburse your costs – regulation 9(10) of the 2006 Regulations is drafted in general terms to refer to the Council paying "any costs incurred by, or in connection with, the discharge of functions under this regulation"; it doesn't say incurred by whom!

- At the conclusion of the investigation the DIP must make a report to the authority (regulation 9(6)(d)) first stating whether, and if so to what degree, the evidence supports any allegation of misconduct, and secondly recommending any disciplinary action considered appropriate. A copy of the report must also be sent to the accused officer no later than it is sent to the authority.

- If the DIP decides to recommend disciplinary action, the authority, or a properly delegated representative person or body, must formally consider the report. Any decision could not be "other than in accordance with a recommendation in a report" made by the DIP (paragraph 2 of schedule 4 to the 2006 Regulations). This clearly means that any penalty cannot be more severe than recommended, but it implies that a lesser penalty may be imposed. Regulation 9(9) contains an additional requirement that the authority must consider the DIP's report within one month of receipt.

6.27 In England, if the investigating and Disciplinary Committee recommends dismissal, that recommendation must first (that is, before being submitted to the council) be considered by an IP, as described in paragraph 6.3 above. The IP is constituted as a Local Government Act 1972 section 102(4) committee "for the purposes of advising the authority on matters relating to the dismissal of relevant officers of the authority." At least two "relevant independent persons" must be appointed from those invited to serve – an independent person in this context is someone appointed under section 28(7) of the Localism Act 2011. Paragraph 5 sets out the priority for appointment of those accepting the invitation. A panel must be appointed at least twenty days before any council meeting at which a proposal for dismissal is to be considered. The JNC Conditions refer to the importance of training for the role the IP is required to undertake, and this is available on an agreed basis through the LGA (see the relevant JNC Circular dated 24 April 2017). (For a more detailed discussion of the detailed implications of the 2015 regulations, please see the note entitled *Revised Conditions of Service – October 2016* on the ALACE website www.alace.org.uk.)

6.28 Paragraph 6.3 refers to the matters to be taken into account by the authority at what the Regulations term a "relevant meeting." The views of the IP are not binding on the council, but they must be "taken into account."

6.29 Where no disciplinary action has been recommended, but it is considered that the interests of all concerned would anyway be best served by a change of chief executive, DIPs have sometimes recommended that authorities reach an early retirement or termination settlement. This may be persuasive: it refers to an outcome which in any event is within the authority's power to achieve (although an authority's power to offer a settlement sufficiently attractive to appeal to the employee has been reduced, and is further threatened). The Regulations make no reference to this, so accordingly it seems that any such view expressed by a DIP can be personal and informal at best – and in any event the exercise of discretions in relation to early retirements and similar matters have been given by Parliament to the authority, and not to the DIP. No disciplinary or other form of sanction can be imposed, however, in such a case if such an outcome is not agreed. Equally an authority could decide not to impose any disciplinary sanction were it to disagree with a DIP recommendation that one should be imposed.

GRIEVANCES

6.30 Appendix 7 of the JNC Conditions sets out a model procedure for handling grievances taken out against a chief executive personally or submitted by a chief executive in his/her capacity as an employee. Particular attention is drawn to the provisions about initial filtering of a grievance (paragraphs 2.5-2.8) to avoid the use of the procedures in inappropriate cases. Paragraph 5 of the model also deals with the situation where a chief executive raises a grievance during the process of a disciplinary or capability investigation. It should be noted that, except where an informal resolution is achieved, a grievance by or against a chief executive can only be resolved by a committee of the council.

7. REDUNDANCY, BUSINESS EFFICIENCY AND EARLY RETIREMENT

GENERAL

7.1 Everyone will be aware of the increasingly difficult pensions climate of recent years; that during 2006 the Government had already significantly amended the local government scheme; and that major reforms took effect from 1 April 2008 (2009 in Northern Ireland and Scotland), and then again from 1 April 2014 (2015 in Northern Ireland and Scotland). This section must be read accordingly, and just as there is no right to receive non-actuarially-reduced pension benefits following early retirement (except in cases of redundancy, business efficiency, or a mutual agreement to terminate on business efficiency grounds, all of these at over age 55, or certificated permanent ill-health), it is also becoming very difficult indeed to persuade authorities to grant any enhanced benefits at all – even though only a few years ago they were relatively commonplace in equivalent circumstances. This is because of the costs and other pressures – such as increased media and public interest, the campaigns of pressure groups such as the TaxPayers' Alliance, adverse comment from Government, and statutory guidance that full council meetings should be given the opportunity to vote on all termination payments exceeding £100,000. General pension issues, and the ways in which pensions and lump sums are calculated, are discussed in the additional ALACE website document *Pensions – Frequently Asked Questions*. Very relevant also now are rules and further proposals to cap redundancy and other termination payments at £95,000, on which see paragraphs 7.60-63 below. Where a pension becomes payable early, the amount of 'pension strain' associated with such a retirement may by itself materially exceed the exit cap particularly when it is associated with a retirement significantly below state pension age.

7.2 Where you have left your chief executive (or chief officer/director) post either because you have been made redundant *or* in the interests of business efficiency, *or* you and your employer have mutually agreed to terminate your contract on business efficiency grounds, *and* you have both reached the age of 55 and served for at least two reckonable years, you are entitled to (and must take) your pension benefits based on your actual reckonable service and pensionable pay: regulation 30(7) of the Local Government Pension Scheme Regulations 2013, S.I. No. 2356. Pension benefits are paid out of the pension fund, and even without the cost of any enhancement are likely to be very expensive for the employing authority, which must make up to the fund the additional costs which your early retirement creates. It is

worth emphasising here that "retirement on the grounds of business efficiency" is drafted to come within the definition of redundancy, even though in itself it has nothing to do with redundancy, and a resolution to the effect that you have retired on business efficiency grounds confers no implied right to a redundancy payment. A simple mutual agreement that you terminate your employment, without the business efficiency element, does not imply any similar automatic immediate pension entitlement.

7.3 Chief executives' retirements are nowadays always scrutinised by the external auditor (as often are those too of other departing senior officers), and authorities have to be able to show that the benefits to the authority are lawful, reasonable and outweigh the extra costs that they will thereby incur. Such benefits may not always be easy to express in cash terms, but any such cost benefit analysis is bound to focus significantly on the direct financial implications (see also the part of this section below on statements of policy). They also have to show that the terms are within the authority's established policies in respect of the various discretions open to them under the Regulations. It needs to be borne in mind that regulation 60 of the 2013 Regulations, dealing with policy statements to be published about the exercise of discretionary functions, requires consideration of whether a particular policy "could lead to a serious loss of confidence in the public service."

7.4 In the following parts of this section we consider first redundancy and then early retirement generally. For many people already aged 55 and threatened with the possible loss of their job, there will be inevitable overlap between the various conditions involved. Early retirement below the age of 55 with immediate access to pension benefits is only possible in the case of permanent incapacity because of ill-health. Local authorities can only retire employees, or pay them any form of compensation for ending their employment, where they have statutory or implied powers to do so.

REDUNDANCY

7.5 If you are made redundant whether aged above or below 55, and have the minimum two years' continuous qualifying service in that employment, you will be entitled under the general law to a redundancy payment under sections 155 and 162 of the Employment Rights Act 1996, calculated with reference to the Employment Rights (Increase of Limits) Order 2019, S.I. No. 324 (currently £525 per week). (The equivalent Order in Northern Ireland is S.R. 2019 No. 63, stipulating £547.) In local

government the requirement is to count the length of all your continuous qualifying service, including any service with an associated employer, rather than just service with your last employer as under the general law (see the Redundancy Payments (Continuity of Employment in Local Government etc.) (Modification) Order 1999, S.I. No. 2277). Authorities' powers to pay benefits following redundancy at ages both below and above 55, were restated in regulations 5 and 6 of the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006, S.I. No. 2914. Regulation 5(2)(b) (see paragraph 7.6 below) allows redundancy pay to be calculated using actual weekly pay, rather than the otherwise prescribed statutory maximum. It must be noted that (beyond the basic statutory redundancy payment under the 1996 Act) these are *powers*, and not mandatory payments, even though it has been considered usual practice in local government for payments under these Regulations to be made. These powers have no application where a short fixed term contract has come to an end and there had been a lawful prior agreement to exclude redundancy payments on its expiry (see also section 4 of these *Employment Guidance Notes*). **It is also very important to note that if you are made redundant aged over 55 with at least two years' reckonable local government service, you are entitled to immediate pension and lump sum as of right, in addition to any redundancy payment.**

7.6 Regulation 5 of S.I. 2006 No. 2914 provides for a redundancy payment if the chief executive or other employee is entitled to a payment under the 1996 Act. The authority may in effect increase the payment above the statutory level as though the limit on the amount of weekly pay applicable under that Act (which as stated above is currently £508) did not apply. The basis of calculation, however, is the same: the maximum is twenty years' service, counted as half a week's pay for every year of service from age 18 to 21; one week's pay for every such year from age 22 to 40; and one and a half weeks' pay for every such year from age 41 onwards. The higher-rated weeks are counted first, so that someone aged 48 with local government service since age 18 would receive 24 weeks' pay (i.e. eight years' worth at one and a half weeks and the remaining twelve years at one week). As to what counts as continuous service, see paragraphs 3.23-24 above.

7.7 Regulation 6 allows for a *discretionary* lump sum to be payable on the cessation of employment, whether or not the employee is eligible for compensation under regulation 5, and irrespective of age. The maximum is 104 weeks' actual pay. It is not additional to payment under regulation 5: the value of any other redundancy payment received must be deducted from anything payable under this power to

comply with regulation 6(5). (Regulation 6 is not available if you have less than two years' qualifying employment.) Many authorities will no doubt – separately from any legislative maximum – have 'capped' the number of weeks that they are willing to pay as part of an approved (and published) policy about how they will exercise their discretions.

7.8 Where you are over 55 and made redundant you are (as noted above) entitled, in addition to a redundancy payment, to your pension and any due lump sum immediately under regulation 30(7) of the principal Local Government Pension Scheme Regulations 2013, S.I. No.2356 ("the LGPS Regulations"). The equivalent provisions in Northern Ireland and Scotland are respectively regulation 31(7) of S.R. 2014 No. 188 and regulation 29(7) of S.S.I. 2014 No. 164. See the next part of this section below on early retirement provisions generally.

7.9 Can a chief executive logically be made redundant, when section 4 of the Local Government and Housing Act 1989 requires that a local authority must have a head of paid service? In the improbable case of an employee whose job description was confined only to the formal statutory status and associated statutory powers and duties, it might indeed be invalid. In practice, however, chief executives usually have a range of ancillary or additional responsibilities; the authority will probably be asserting that the redundancy exists in terms of that actual job description, and that once it is effected they will be re-appointing someone with a different range of duties (or indeed of skills), one of which will be to act as the statutory head of paid service. For a case where these issues were considered, see *Lock v. Leicester City Council* [2012] EWHC 2058, where the former chief executive had unsuccessfully sought a judicial review of a decision to dismiss her on the grounds of redundancy following the creation of an elected mayor role. Written notice of redundancy only takes effect when either the employee becomes aware of it or has had a reasonable opportunity of so doing: *Haywood v. Newcastle upon Tyne Hospitals NHS Foundation Trust* [2018] UKSC 22.

7.10 Note that if you are made redundant, and within four weeks take another "suitable" job as defined in section 141(3) of the Employment Rights Act 1996, you will lose your redundancy payment entitlement: see section 138(1)(b) of the 1996 Act and the Redundancy Payments (Continuity of Employment in Local Government, etc) Order 1999, S.I. No. 2277. Paragraph 1 of Part 1 of schedule 2 to that Order adds a linked provision, section 146(1A), into the Employment Rights 1996. The 1999 Order has been amended by S.I. 2010 No. 903 and by S.I. 2015 No. 916. If you finish work

on a Friday, “four weeks” is defined as slightly longer, as that first weekend is disregarded. See also paragraph 7.60 below referring to additional regulations awaited under sections 154-157 of the Small Business, Enterprise and Employment Act 2015 that are expected to claw back redundancy payments above £80,000 for applicable re-employment within a year.

7.11 Worth noting here is an important new provision inserted into the Employment Rights Act 1996 by section 14 of the Enterprise and Regulatory Reform Act 2013. Section 111A of the 1996 Act provides for negotiations, before termination, about ending the employment relationship on agreed terms to be inadmissible as evidence in any subsequent unfair dismissal claim. There are detailed rules for so-called ‘protected conversations’ in these circumstances, which may be distinguished from ‘without prejudice’ stipulations, any protection for which only arises where there is already an employer-employee dispute subsisting before the relevant conversation starts.

BUSINESS EFFICIENCY

7.12 The definition of redundancy in the 2006 Regulations (S.I. No. 2914) referred to in the preceding part of this section also includes circumstances where your employing authority decides to terminate your employment for business efficiency reasons. This is expressed in regulation 4(1)(a)(ii) as being “in the interests of the efficient exercise of the employing authority’s functions”. Accordingly the authority’s powers to make a termination payment, and your right if aged 55 to claim immediate payment of full and unreduced pension benefits under regulation 30(7) of the 2013 LGPS Regulations, apply similarly as described elsewhere in this section. The rules about forfeiting a *redundancy* payment if another suitable employment is taken within four weeks, however, do not apply in the case of S.I. 2006 No. 2914 regulation 6 *termination* payments.

EARLY RETIREMENT

7.13 In terms of the statutory powers available, there is more than one route to early retirement. As noted above in paragraph 7.8, if you are made redundant (including being retired on business efficiency grounds, or a mutual agreement to terminate on business efficiency grounds) at age 55 or more, early retirement is compulsory on the part of the authority; you also have a right without needing consent to retire early from age 55 but only on an actuarially reduced pension. Apart

from the special case of ill-health, which is dealt with later in this section, either you or your employing authority will (depending on whether they retire you or you exercise the right to retire early), in all except ill-health cases, have to pay the additional costs – the 'pension strain' – which that retirement incurs for the pension fund. The younger you are, and so the longer the time before you would have had the right to retire in the normal way, the higher the cost. There are two separate questions: whether to grant retirement in the interests of efficiency, and if so whether to do so with any level of enhancement.

7.14 The calculation for 'simple' early retirement is based on the accumulated length of pensionable service, the relevant accrual rate, for service prior to 1 April 2014 the relevant final year's pay, and for service since then the succeeding 'career average' calculation. If the authority decides to enhance that position for the purpose of improving your pension benefits, they may now only do so lawfully by an award of additional pension under regulation 31 of the LGPS Regulations. To increase pay for the purpose of increasing pension (or indeed any redundancy payment) is unlawful: see *Hinckley and Bosworth Borough Council v. Shaw* [2000] LGR 9. (The long-service award, however, questioned in *Barking and Dagenham London Borough Council v. Watts* [2003] EWHC 263; [2004] LGR 48 was upheld.) It is also unlawful to provide for early retirement, redundancy or pension enhancement at the outset in any employment contract, or before such considerations properly arise – to do so fetters council discretion and is accordingly invalid.

7.15 The Local Government (Early Termination of Employment) (Discretionary Compensation) Regulations 2006, S.I. No. 2914 apply not only in redundancy cases as described in the previous section above, but also as set out above where employment is terminated "in the interests of the efficient exercise of the employing authority's functions" (and also where a joint appointment ends because the other joint holder has left it): regulation 4(1). The maximum payment is 104 weeks' actual pay: regulation 6 (3) and (4).

7.16 In the case of redundancy at age 55 or over, as noted in the previous part of this section, regulation 30(7) of the LGPS Regulations 2013 makes immediate access to pension benefits compulsory. This regulation includes not only dismissal "by reason of … business efficiency" but also the situation where employment is "terminated by mutual consent on grounds of business efficiency." Any report presented should set out the ways in which the efficient exercise of the authority's functions will be served by the ending of the employment concerned; it is clearly

important that this is done in terms that are not damaging to your reputation. The reputational difference between an enforced termination and one occurring by mutual consent is obvious.

7.17 Employment as a returning officer (if you are so designated) is a separate employment from that of chief executive or other postholder (see section 9 of these *Employment Guidance Notes*), just as is, for example, being a clerk to a local joint committee. Additional pension can in principle be separately awarded in respect of each employment.

ELECTION FOR EARLY PENSION: THE FORMER 'RULE OF 85'

7.18 The LGPS reforms of 2008 and 2014 (2009 and 2015 respectively in Northern Ireland and Scotland) enacted transitional protection provisions to the former 'rule of 85.' Before April 2008, if you left local government employment without otherwise being entitled to immediate payment of pension benefits, and you were aged at least 50, you could elect to receive them immediately although if you were aged from 50 to 59 you needed the consent of your former authority to do so. If consent was given, you found the value of your benefits reduced according to Government Actuary (GAD) guidance – the younger you were the greater the reduction obviously. **The principle was, and remains, that paying benefits early should not normally impose additional costs on pension funds. If you retire very early the abatement of your benefits is very significant indeed**; your employer can agree to your receiving unabated benefits, but the additional cost will then be borne by the authority. (See the Government Actuary's guidance *The Local Government Pension Scheme (England and Wales): Early Payment of Pension* dated 18 April 2016, and updated actuarial factors dated 26 November 2018.)

7.19 Formerly under the so-called 'rule of 85', however, the actuarial reduction would not be made if the sum of your age, plus your length of pensionable service, plus any period since you left local government employment (all in whole years), was at least 85. The rule (which is set out in paragraph 3 of schedule 2 to the LGPS (Transitional Provisions) Regulations, SI 2008 No 238) was withdrawn after 30 September 2006 (30 November 2006 in Scotland), but with protection for some scheme members at that date, although the minimum age was also increased to 55. Under the current rules, even though you satisfy the rule of 85, you will still suffer actuarial reductions if you retire on a voluntary basis before 60.

7.20 For employees in England and Wales who were members of the Scheme at 30 September 2006 the complex protection rules are now contained in schedule 2 to the Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014, S.I. No. 525. These protections are carried over from the previous 2008 LGPS reforms.

- **If you were aged 60 or over by 31 March 2016** and choose to retire at age 60 mor later then, provided you satisfy the rule of 85 when you start to draw your pension, the benefits you built up to 31 March 2016 (or your earlier retirement date) will not be reduced.

- **If you were under age 60 on 31 March 2016** and choose to retire before age 65 then, provided you satisfy the rule of 85 when you start to draw your pension, the benefits you built up to 31 March 2008 will not be reduced. Also, if you will be aged 60 before 31 March 2020 and will meet the rule of 85 by 31 March 2020, some of the benefits you have built up from 1 April 2008 to your retirement date will be reduced by a lesser tapered amount.

7.21 For employees in Scotland (where similar pre-1998 exceptions apply as in England and Wales above) who were Scheme members on 30 November 2006 —

- **If you will be aged 60 or over by 31 March 2020** and choose to retire before age 65 then, provided you satisfy the rule of 85 when you start to draw your pension, the benefits you build up to 31 March 2020 will not be reduced.

- **If you will be under age 60 by 31 March 2020** and choose to retire before age 65, then, provided you satisfy the rule of 85 when you start to draw your pension, the benefits you built up to 31 March 2008 will not be reduced

7.22 If you retire from your principal employment under the rule of 85, and thereby also before your normal retirement age leave a secondary employment role (such as being a returning officer, or clerk to a joint committee) for which you do not qualify under the 85 rule, you will – unless your authority agrees to the contrary and bears the cost – suffer an actuarial reduction in your secondary pension depending on any degree to which you are protected by the relevant date rules involving your age in 2016 referred to above: see paragraph 2 of schedule 2 to the 2008 Transitional Provisions Regulations, S.I No. 238. For the Government Actuary Guidance on such required reductions, see the document referred to in paragraph 7.18 above dated 18

April 2016 and/or your pension fund's website. These reductions are very significant – retiring ten years early will reduce your pension by 37.7%, and your lump sum by 21.1%. **These percentage reductions are permanent**: you do not recover the position you otherwise would have had when you reach your normal retirement age. The alternative is not to take the pension until your normal retirement age, in which case the reduction rules will not apply. A technical guide on the rule of 85, published on 10 August 2018, is available at www.lgpsregs.org under *Guides and sample documents*.

FLEXIBLE RETIREMENT

7.23 If you are 55 or over, you can take flexible retirement under regulation 30(6) of the 2013 LGPS Regulations. This involves reducing your hours or lowering your pay grade, but without leaving your employment altogether. Employer consent is not required, and your choice may be to take all or only part of your accrued pension benefits. Your employer will have a policy on flexible retirement. (When you are 55 you do not need your employer's consent to retire fully.)

7.24 If you retire before your normal pensionable age (usually 65, 66 or 67 depending on your date of birth), regulation 30(6) also provides that your benefits will be actuarially reduced in accordance with Government Actuary guidance, although under regulation 30(8) your employer may agree to waive all or part of this reduction. Pension earned before April 2008 is likest to have the smallest reduction (if any). Again, refer to the Government Actuary's document published on 18 April 2016 and cited in paragraph 7.18 above. There is also Government Actuary guidance relating to retiring after your normal pension age, issued on 28 June 2019 and entitled *Local Government Pension Scheme (England and Wales): Late Retirement*.

ILL-HEALTH RETIREMENT

7.25 In principle there is no lower age limit below which you cannot retire on ill-health grounds, although very short service will greatly affect the position. Where a local government employee's employment is terminated on the grounds that their ill-health or infirmity of mind or body renders them permanently incapable of discharging efficiently the duties of their current employment, and that they have a reduced likelihood of being capable of undertaking any gainful employment before their normal retiring age, they are immediately entitled under regulation 35 of the 2013 LGPS Regulations to (and must take) payment of a pension (and any lump sum

accrued before 1 April 2008). For a chief executive, and anyone else whose statutory role in the authority is unique, there will not be any comparable employment in this context. Nevertheless the impact of the Disability Discrimination Act 1995, whereby an employer has to make reasonable adjustments to assist an employee affected by a disability, may well make it harder to be adjudged permanently or temporarily incapable in future. There are three tiers of ill-health retirement (but only two in Northern Ireland and Scotland), and regardless of age there can be no ill-health retirement below three months' pensionable service.

7.26 The first test is that the LGPS member is "as a result of ill-health or infirmity of mind or body, permanently incapable of discharging efficiently the duties of the employment the member was engaged in." Then there is a second test about the likelihood of being able to undertake future gainful employment.

- An LGPS member is entitled to **Tier 1 benefits** if "unlikely to be capable of undertaking gainful employment before normal pension age" (regulation 35(3) and (5)). Tier 1 benefits are calculated under the provisions of regulation 39(1).

- The second tier is that the member "as a result of ill-health or infirmity of mind or body, is not immediately capable of undertaking any gainful employment." Someone not entitled to Tier 1 benefits will be entitled to **Tier 2 benefits** if unlikely to be capable of undertaking any gainful employment within three years of leaving their present employment, but likely to be able to do before reaching normal pension age (regulation 30(4) and (6)). The calculation of the respective pension amounts is made under the rules in regulation 39(2).

- **Tier 3 benefits** are payable to someone likely to be capable of undertaking gainful employment within three years of leaving the employment, or before normal pension age if earlier, and are payable for up to three years (regulation 35(7), with regulation 37 making special provisions about Tier 3 benefits, including what happens if the member reaches normal pension age while in receipt of them. Regulation 39(3) provides that "Tier 3 benefits are the retirement pension that would be payable to the member if that member had reached normal pension age on the date from which benefits are awarded."

See also on Tier 1 and Tier 2 benefits regulation 12 of the LGPS (Transitional Provisions, Savings and Amendment) Regulations 2014, S.I. No. 525.

7.27 Certification from an "independent registered medical practitioner qualified in occupational health medicine ("IRMP")" is required in each case: regulation 36. The IRMP must not have previously been involved in the case. There appears to be no direct appeal against the finding of a medical practitioner, although equally nothing to prevent the seeking of further opinion from someone else. If an employer terminates employment, however, and does not award ill-health benefits (or award them at the tier the member considers appropriate), the member may appeal through the internal dispute resolution process and ultimately to the Pension Ombudsman.

7.28 Regulation 38 makes provision for deferred (i.e. former) Scheme members who suffer ill-health after leaving local government employment but before reaching normal retirement age.

7.29 If the relevant ill-health conditions are met, the appropriate pension (and any lump sum and ill-health enhancements) become payable. Usually an employee will have consented to the medical examinations necessary before a certificate can be issued to the authority. Often also employees in this position have already been off sick for a substantial time – perhaps most or all of the periods of up to six-months' periods of full pay and then half pay provided for in the Conditions of Service. Sometimes, however, there will be exceptions – the employee may resist the prospect of being retired on such grounds, so will not consent (in which case the employer might seek to dismiss alternatively on capability grounds); or it will become apparent suddenly that the employee is unfit to continue; or the authority will use their discretion for some substantial reason to extend the sick pay periods.

7.30 It will nevertheless most often be the case that the employee will have been actively seeking, and will therefore readily accept, retirement or leaving early on ill-health grounds. Technically this is regarded as having been mutually agreed, and if an employer and employee mutually agree they can of course thereby end their contract, which would otherwise require notice to be given on either side. It is, however, usual practice not to disregard the employee's contractual right to notice in such a case, and the employee is regarded as having consented subject to it. As chief executive or other senior officer your notice period is likely to be at least three, and perhaps as long as six, months. The employer takes two decisions – one to terminate employment, and another to award ill-health benefits, and will take account

of the IRMP's report in reaching that latter decision.

7.31 Clearly you cannot be at work if you are certified as sick and/or certified as permanently incapable (and the authority's insurance would probably be invalidated if you were), so you should expect to be paid for that period either in real time, with your contract expiring some months later accordingly, or compensated for immediate termination by pay in lieu of notice (PILON). In either case such pay is at your full rate, even if you were otherwise contractually into or beyond your half-pay period because of your long-term sickness. Prior to 6 April 2018 PILON had usually been tax-free (because it was deemed to be compensation for loss of office rather than pay as such) up to the statutory limit of £30,000, above which income tax was payable at your usual rate. The statutory £30,000 limit is contained in section 403 of the Income Tax (Earnings and Pensions) Act 2003. See also paragraph 7.51 below on the treatment of PILON.

7.32 In *Société Générale (London Branch) v. Geys* [2012] UKSC 63, a case involving a Belgian banker, the Supreme Court considered the effect of providing PILON on the date of termination. An employee's contract does not end in these circumstances until the money has been paid, and unless it has been made clear that the payment is to buy out the notice period.

WORK-RELATED INJURY AND DISEASE ALLOWANCES

7.33 Under regulation 3 of the Local Government (Discretionary Payments) (Injury Allowances) Regulations 2011, S.I. No. 2954 someone who "in the course of carrying out his or her work" sustains an injury or contracts a disease and consequently suffers a reduction in their remuneration will be entitled to an allowance. The amount of any such allowance is for the employer to decide, but will not exceed the shortfall in remuneration suffered, will take into account national insurance contributions, and will not count as pensionable pay. Loss of employment through permanent incapacity may entitle the former employee to an annual allowance of as much as 85% of their annual rate of remuneration.

7.34 Regulations 5-8 provide for the certification of the injury or disease, allowances for pensioners, death benefits, and the considerations to be taken into account in determining the amount of allowances.

PAYMENT FOR UNTAKEN LEAVE

7.35 Where there is an express or implied (e.g. by local custom and practice) provision in your contract of employment, the authority may pay you for the value of any leave untaken on the date your contract ends. Such a payment will not lead to a clawback deduction from lump sum compensation derived from a credited pension period (see the part of this section above on early retirement generally). There needs to be clarity about whether leave payment is being calculated on the basis of fifths or sevenths – this can make a significant difference.

7.36 In *Commissioners of Inland Revenue v. Ainsworth* [2005] EWCA Civ. 441, the Court of Appeal had originally ruled that employees who have been absent from work since the start of an annual leave year have exhausted their entitlements to contractual and statutory sick pay, and have either not returned to work or been dismissed, are not entitled to holiday pay under the Working Time Directive (now Directive 2003/88/EC). The House of Lords, however, following a preliminary ruling from the European Court of Justice favourable to the employees, finally decided in their favour, so that non-payment of holiday pay may now be claimed as an unlawful deduction from wages: [2009] 4 All E.R. 1205.

7.37 The Court of Justice for the European Union (CJEU, formerly known as the European Court of Justice) has decided that it is not a requirement of the EU Working Time Directive that an employee on long-term sick leave be allowed to carry over annual leave on an indefinite basis; it is lawful for the national law and/or collective bargaining agreements to place a time limit on carrying over: *KHS AG v. Schulte* [2011] EUECJ C-214/10; [2012] IRLR 156.

COMPENSATION FOR 'COMPROMISED' OR SETTLED CLAIMS

7.38 Where, in an agreement to terminate your employment, you waive a claim which you would otherwise have for unfair dismissal or discrimination, it is lawful for an authority to pay reasonable compensation – in addition to whatever other compensation headings there may be – to settle or 'compromise' that claim. This will normally be effected through a statutory settlement agreement. (Settlement agreements were formerly termed 'compromise agreements', as they still are in Northern Ireland. See also the next following part of this section on costs.)

7.39 The word "reasonable" is of course crucial here: an agreement entered into for improper purposes and purporting to confer unreasonably generous compensation

terms will be void: see *Eastbourne Borough Council v. Foster* [2002] ICR 234. Accordingly an authority proposing to pay compensation to compromise any potential claims will need to identify the heads of those claims, and take into account the potential maximum statutory awards where applicable.

7.40 As noted in section 4 above, the compensation award and other limits applicable from 6 April 2019 were prescribed by the Employment Rights (Increase of Limits) Order 2019, S.I. No. 324. (The maximum is usually the lesser of £86,444 or one year's pay, though there is no limit if either your unfair dismissal or your selection for redundancy is for reasons connected either with health and safety matters, or with public interest disclosure – 'whistleblowing' or discrimination.) The limit on weekly pay was raised to £525 from 6 April 2019 by the same Order (and from 6 April 2019 is £547 in Northern Ireland, with a compensatory award maximum of £86,614: S.R. 2019 No. 63).

7.41 For contracts starting on and after 6 April 2012, the minimum employment period before you can make an unfair dismissal claim under section 108 of the Employment Rights Act 1996 is usually two years under the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012, S.I. No. 989. Section 92 of the Employment Rights Act 1996 gives employees the right to a written statement of the reasons for dismissal. The two-year period is only one year in Northern Ireland, and there is no minimum elsewhere if you are unfairly dismissed for political or affiliation reasons.

7.42 A settlement agreement will usually be signed on the basis that the employment contract is, in law, being terminated by mutual consent. That will usually mean that state benefits cannot be claimed immediately, as the employment is deemed to have ended voluntarily. Similarly, for the same reason no claim may be possible on any form of loan insurance, for example connected to a mortgage.

LOCALISM ACT 2011 SECTION 40 GUIDANCE

7.43 In February 2013 the Department for Communities and Local Government issued Supplementary Guidance on *Openness and accountability in local pay: Guidance under section 40 of the Localism Act 2011*. Paragraph 13 states that ".... Authorities should…offer full council (or a meeting of members in the case of fire authorities) the opportunity to vote before large severance packages beyond a particular threshold are approved for staff leaving the organisation. As with salaries

on appointment, the Secretary of State considers that £100,000 is the right level for that threshold to be set."

INDEPENDENT ADVICE – COSTS

7.44 Where your employment is ended by agreement for the authority's benefit, it is lawful for the authority to meet your reasonable costs in reaching that agreement. If the authority want a formal settlement agreement, which to be effective statutorily requires under section 203(3)(c) of the Employment Rights Act 1996 that the employee has obtained independent advice from a "relevant independent adviser" before signing it, they should be expected to pay the direct costs of that advice. Usually it will be legal advice; section 203(3)(c) is cited as amended by the Employment Rights (Dispute Resolution) Act 1998. ALACE can assist in arranging this advice for members.

7.45 The Registered Pension Schemes (Authorised Payments) (Amendment) Regulations 2017, S.I. No. 397, allow you to use up to £500 from your pension 'pot' to pay towards the cost of receiving financial retirement advice, and/or the cost of implementing such advice. While you may not be able to take this sum from your principal accrued LGPS benefits, you may be able to do so from any AVC or alternative pension fund that you have.

OUTPLACEMENT AND COUNSELLING ADVICE

7.46 It is lawful and reasonable for authorities to pay in appropriate cases for outplacement or counselling advice to help people who, often unexpectedly or in circumstances not of their own choosing find themselves – particularly of course if below pension age – needing to change career direction. SOLACE Ltd. offers such advice particularly tailored to the needs of chief executives through their *'Career Matters'* product.

7.47 This heading is not only used to provide for career counselling; where someone wishes to set themselves up to work in a different field they may well need accountancy and legal advice, or the resources to buy IT equipment and software and the like. Sometimes it is also used to cover authorised retention by the former chief executive of incidental personal Council equipment like laptop computers, mobile phones and suchlike which, while of limited cash value in themselves, represent considerable investment and uncertainty if you have to buy them anew for

yourself in order, for example, to be able to work effectively from home. Sometimes authorities will pay a specific sum, which may be termed resettlement or outplacement costs or similar, while others will only pay against authorised invoices. The total involved is usually relatively small in proportion to an overall termination deal, and will not normally count against other heads of compensation, or for clawback (on which see the part of this section above on early retirement generally). The argument that it is unlawful for an authority to give any item of equipment to an employee without payment can be countered by regarding the value of any such items to be in furtherance of outplacement or resettlement costs, or by the employee paying a small sum equivalent to that value.

7.48 Income tax will not be payable on counselling and outplacement services if conditions A to D (and in the case of travelling expenses, condition E) in section 310 of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA') are met. The decision on this is of course a matter for HMRC, and not the employer.

7.49 Condition A is about adjusting to the loss of one job and finding another; B is about receiving advice and guidance, the improving of skills and providing office facilities; C essentially requires a minimum of two years' service in the job being lost; and D is that the opportunity to receive the counselling or outplacement services is available either generally to all the employer's (former) employees or to a class or classes of them.

TAXATION

7.50 Income tax will be payable on compensation which is paid in lieu of notice ('PILON'), and on most payments you receive for termination of employment once they exceed £30,000 in total: see Chapter 3 of Part 6 of the Income Tax (Earnings and Pensions) Act 2003, and in particular sections 403 and 404. These include –

(i) a redundancy payment;

(ii) discretionary lump sum derived from compensation under regulation 6 of S.I. 2006 No. 2914 - but *not* a pension lump sum derived from actual service, or from an enhancement for ill-health reasons under regulation 20 of the Benefits Regulations 2007, or from an increase of total membership under regulation 12 thereof (on all of which see the part of this section on early retirement generally);

(iii) a payment for untaken leave.

Note that since 6 April 2018 *national insurance* is also payable on PILON payments (see paragraph 7.31 above). It is the first £30,000 compensation *after such deductions have been made* that is exempt from income tax.

7.51 **Since 6 April 2018 PILON payments are treated as if received in 'real time' with income tax and national insurance deductions made accordingly.** This change was made by section 5(3) of the Finance (No. 2) Act 2017, which inserted sections 402A-402E into the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA'). Even if an employer does not allocate part of a compensation payment to what would have been the notice period, HMRC are entitled to assess what would have been the notice period and to deduct the appropriate level of tax. This is the position even if the parties agree that none of the money being paid actually equates to notice pay.

7.52 An annual pension itself, however originally derived, is of course taxable as income in the normal way through PAYE. Take care to distinguish between this liability to income tax and any other tax liability referred to above on settlement sums received in excess of £30,000. You also need to bear in mind the additional tax charges (up to 55%) that are applied to pension benefits (from all sources other than the state pension) exceeding the lifetime allowance (currently £1.055 million for 2019-20, unless you have one of the types of personal protection from HMRC).

7.53 HM Treasury had published a consultation paper on 24 July 2015 on *Simplification of the Tax and National Insurance Treatment of Termination Payments*, relating to the rules referred to in this section. ALACE responded to these proposals. Changes based on these proposals and consultations are referred to in paragraph 7.31 above.

STATEMENTS OF POLICY

7.54 As made clear at the start of this section, local authorities have no powers to retire employees, or to pay them any form of compensation, termination or severance payments for loss of employment, except where either statutory regulations allow or there is a previous and valid employment contract. Any such payments will otherwise be unlawful as *ultra vires*, or beyond the authority's powers.

7.55 Where authorities have discretion as to what they may do, that discretion must be exercised reasonably, in accordance with any procedural or timetabling

requirements, and must take into account all the lawfully relevant considerations while disregarding those that are irrelevant. Usually discretions will need to be exercised just before, or within a short period after, the employment ends. They must also be exercised consistently in equivalent circumstances, but at the same time not in a predetermined fixed way, since what lawyers call "fettering the discretion" will invalidate it anyway because the decision has not been made at the proper time having regard to both the policy on such matters but also to the particular circumstances, and how that policy does or does not relate closely to them. It is for this reason that attempts at the outset of an employment contract to commit in advance to the way in which a given discretion will be exercised at its end are held void, because they seek to fetter the authority's ability to exercise their discretion in the proper way at the proper time.

7.56 The law requires authorities formally to consider and publish their policies on how they will exercise their pension discretions – see regulation 60 of the 2013 LGPS Regulations. Policies must also be published about the exercise of termination payment discretions under regulation 7 of the Early Termination Regulations (S.I. 2006 No. 2914).

7.57 Publishing such policies is not to be considered as fettering discretion, because each individual employee's case must still be considered on its merits at the proper time to check whether or not a decision consistent with the published policy is also consistent with the particular facts of that case. (In any event it is a statutory duty to publish the policies.) Authorities must consider whether the making of discretionary payments in exercise of the policies "could lead to a serious loss of confidence in the public service": regulation 60(5). The Early Termination Regulations express it more fully in regulation 7(3) – that "In formulating and reviewing their policy the authority must – (a) have regard to the extent to which the exercise of their discretionary powers (in accordance with the policy), unless properly limited, could lead to a serious loss of confidence in the public service; and (b) be satisfied that the policy is workable, affordable and reasonable having regard to the foreseeable costs."

7.58 The unique nature of the chief executive's position may well make it exceptional in that policy context. Key differentiating factors include the fact that the working relationship between the chief executive and leading councillors is of over-riding importance for the good management of the authority; that the chief executive as head of the paid service has statutory duties which the authority as employer

cannot withdraw; and that the chief executive has the form of statutory protection contained in the independent panel (England) and designated independent person ('DIP') (Wales) procedures described in section 6. If a council's policy or decision is based on the unique circumstances of the chief executive position, however, care must be taken not to infringe equality legislation in the context of age – for instance where the 'rule of 85' (see paragraphs 7.18-22 above) applies.

7.59 Regulation 61 of the 2013 LGPS Regulations also requires pensions authorities to publish statements of policy and practice about communicating with their Scheme members, and with Scheme employers.

RECOVERY OF EXIT PAYMENTS

7.60 On 25 June 2014 the Government published consultation proposals on the *Recovery of public sector exit payments*, to which both ALACE and SOLACE responded. Sections 154-157 of the Small Business, Enterprise and Employment Act 2015 provide for regulations (yet to be made) requiring the repayment of some public sector exit payments. These are generally applicable provisions, not specific to local government, stipulating that most payments exceeding the prescribed limit or 'cap' shall be repayable if the recipient returns to public sector or associated contractor employment within a year. The Secretary of State has power to waive the repayment obligation in certain circumstances set out in section 157; the expected cap has been reduced since the original consultation proposal to cover those earning in excess of £80,000 – down from £100,000.

7.61 These provisions are in addition to the existing one-month 'clawback' rules described in paragraph 7.10 above.

LIMIT ON TERMINATION PAYMENTS

7.62 On 31 July 2015 the Government published a *Consultation on a Public Sector Exit Payment Cap*, proposing legislation to restrict the amount of all so-called 'exit payments' to £95,000 except where special dispensations are appropriate. This sum would include 'pension strain' where an employer must pay a pension fund to compensate for the early payment of full pensions entitlements. ALACE strongly objected to these proposals, and did so again in response to the subsequent consultation.

7.63 The proposals were given effect by section 41 of and schedule 6 to the Enterprise Act 2016, inserting sections 153A-153C into the Small Business, Enterprise and Employment Act 2015. In particular, the provisions intend to bring pension strain costs into account in calculating the cap, principally by proposing a new regulation 68A to be added to the LGPS Regulations 2013, S.I. No. 2356. Section 41 was brought into effect ("commenced") on 1 February 2017 by regulation 2 of S.I. 2017 No. 70, but actual introduction of the £95,000 cap (previously anticipated on 1 October 2016) has still not occurred.

GOVERNMENT ADVICE

7.64 On 1 February 2015 was published *Cabinet Office Guidance on Settlement Agreements, Special Severance Payments and Confidentiality Clauses on Termination of Employment*. This was followed in March 2015 by the Department for Communities and Local Government publication *Use of severance agreements and 'off payroll' arrangements: Guidance for local authorities*. ACAS also published *Settlement Agreements: A Guide* in July 2013.

8. NEGOTIATING A TERMINATION

POTENTIAL SETTLEMENT HEADINGS

8.1 This section sets out possible issues or headings to be considered where an ALACE member may be leaving post. They are in no particular order, but they bring together the headings or sources of possible compensation to which reference is made in the other sections of these *Employment Guidance Notes* and some other factors that may be relevant at that time. Clearly some may potentially be of great monetary value and others not, and regard must be had in any case to special or local circumstances as well as to what is both lawful and reasonable. A settlement which will not stand up to scrutiny is not only of no value at all, but is extremely damaging if by the time the invalidity is exposed you have left office and the original starting point is irretrievable. You cannot assume that, because all or part of your supposed settlement has been found to be unlawful, that will also mean that your resignation or acceptance of termination will also be regarded as null and void – so in such circumstances you may find yourself with no employment and less compensation than you had expected. Anticipated legislation capping public sector exit payments at £95,000 (see paragraphs 7.62-63 above) will clearly have a major impact on the parties' freedom to negotiate any termination settlement.

8.2 An important new provision was inserted into the Employment Rights Act 1996 by section 14 of the Enterprise and Regulatory Reform Act 2013. Section 111A of the 1996 Act provides for 'protected conversations' – negotiations, before termination, about ending the employment relationship on agreed terms to be inadmissible as evidence in any subsequent unfair dismissal claim (see also paragraph 7.11 above).

8.3 The following headings are meant as no more than prompts for detailed discussion and negotiation. They do, however, cover the kinds of issues that an ALACE Consultant acting on your behalf will need to consider with you to establish what is relevant and most significant in the particular circumstances of your case. Liability to tax must not be overlooked – see the part of section 7 of these *Employment Guidance Notes* referring to taxation, as well as the ALACE website document *Pensions – Frequently Asked Questions*. Take note that in some cases – such as 2. and 5. below – authorities are required to have published policies that will set the permissible parameters for discretions to be exercised.

1. Access to pension, and under which powers. The number of reckonable years. Whether any actuarial reduction of benefits is applicable, or 'pension strain' payable by the employer. 'Pension strain' is the amount an employer must pay to the pension fund to make up for the additional cost that the fund will bear because benefits are to be paid to an individual LGPS member before their normal retirement date.

2. Any award of additional pension. What used to be known as 'added years' are no longer possible, but if you leave on grounds of redundancy or business efficiency awards of additional pension up to a maximum of £7,026 may be made under regulation 31 of the 2013 LGPS Regulations. This is the original £6,500 limit increased as at 1 April 2019.

3. The level of pensionable pay (as defined), including any pending or unpaid award, increments, etc.

4. Election (or any other separate) pensions, and the appropriate reckonable years and averaged pensionable pay.

5. Compensation for loss of office (usually an early termination payment under regulation 6 of S.I. 2006 No. 2914), and/or redundancy payment (possibly enhanced under regulation 5(2)(b) of the 2006 Regulations) if appropriate.

6. Compensation for any other claim — such as stress, discrimination, whistleblowing disclosure, or some other breach of contract by the Council (taking account of those circumstances referred to in section 7 where the ordinary limit on the maximum sum payable can be exceeded).

7. Payment for the contractual notice period, or pay in lieu of notice (PILON). (PILON had before 6 April 2018 been tax-free up to £30,000 because it was regarded as compensation for what would otherwise be a breach of the contractual entitlement to notice. **Since 6 April 2018 PILON payments are treated as if received in 'real time' with income tax and national insurance deductions made accordingly.** This change was made by section 5(3) of the Finance (No. 2) Act 2017, which inserted sections 402A-402E into the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA'). Even if an employer does not allocate part of a compensation payment to what would have been the notice period, HMRC are entitled to assess what

would have been the notice period, and to deduct the appropriate level of tax. This is so even if the parties agree that none of the money being paid actually equates to notice pay.

8. Paying the value of any outstanding annual leave, or customary or contractual time off in lieu.

9. Cancelling any Council claims to recover relocation, training or other expenses – other threatened claims affecting the departing employee.

10. The value of any car, including cancelling of any penalty for early lease termination.

11. The value of any health or other contractual benefits, and the payment of any subscriptions within contractual or customary entitlements.

12. Outplacement or career resettlement costs (tax free under section 310 of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA').

13. Support for a secondment where appropriate.

14. Support for a pre-retirement course where appropriate.

15. The observing of any customary courtesies to departing Chief Officers/Directors.

16. Cessation of any outstanding issues, claims, complaints etc. against the postholder.

17. The retaining (or purchase for a nominal sum) of any miscellaneous Council equipment, like a laptop, iPad, mobile or car phone, or similar smartphone device. (It is unlawful for an authority to give these away where they retain any monetary value.)

18. Consultation on any report setting out the proposed settlement terms to ensure so far as possible that they are lawful, acceptable to the Auditor, and fairly expressed.

19. The issuing of an agreed press and media statement, with no further comment to be made by either side (other than in accordance with any legal requirements).

20. The issue of an agreed statement about the termination to employees, partners and stakeholders with no further comment to be made by either side (other than in accordance with any legal requirements).

21. The provision of an agreed employer's reference.

22. The payment of the legal costs of any settlement agreement or similar required by the Council.

23. The recovery of ALACE's costs and any other relevant costs in reaching a settlement.

24. The maintenance of confidentiality in the negotiations and, so far as possible bearing in mind public disclosure requirements, as to the agreed terms; and agreeing that both the Council, their employees and agents and the departing officer concerned will not criticise, disparage or make derogatory remarks about the other.

25. Any other local or special issues, factors or contractual terms.

9. RETURNING OFFICER PENSIONS

ELECTION PENSIONS

9.1 The rules about which election payments or fees are pensionable and which are not frequently cause confusion. This section sets out the principles. A Cabinet Office paper *Pensions Guidance Notes for Returning Officers* was published in June 2016.

9.2 In summary –

A senior officer is appointed returning officer by the council. This is normally treated as a separate employment, so that under the LGPS regulations a returning officer has a separate employment, and accrues separate benefits from their principal local authority role. Under the LGPS regulations only fees paid to formally designated elections roles are pensionable. All other electoral payments, such as to deputy returning officers and election staffs are not pensionable. A returning officer may opt out of paying pension contributions in this role if they wish.

The fees earned as a returning officer or acting returning officer are variable reflecting the type and number of elections. Some election fees are non-pensionable – because Parliament did not make them pensionable – such as those received for police and crime commissioner elections and the 2016 EU referendum. Employee contributions should be based on the pension banding that reflect the pensionable income earned in the year from these fees, and not that applicable to the officer's principal role.

For determining pre-1 April 2014 benefits a different approach is adopted to calculating pensionable remuneration to take account of the variable fees earned. This is based on:

· the average pensionable qualifying elections pay per year in the period of three years ending on the anniversary of the leaving date; or

· with the employer's consent, any such annual average pensionable pay in any consecutive three-year period ending on 31 March such that the whole of that period falls within ten years of leaving.

Having determined the average pensionable pay, benefits are then calculated in the usual way by determining service from the date appointed to calculate pension earned *for the period to 2008* (1/80th annual pension and 3/80^{ths} lump sum for each

year's service) and *for the period 2008 to 2014* (1/60th pension). For *post-2014* pension benefits, the CARE basis makes the calculation simpler, and it is based on the member's actual pay for the year, i.e. the same basis as used to calculate benefits for the principal employment (with a 1/49th pension build up rate revalued annually in line with inflation). The following paragraphs now consider these rules in more detail.

9.3 Any pension entitlement derived from elections work is calculated separately from whatever entitlements you may have from your regular local government employment(s): see the definition of 'pensionable pay' in regulation 20 of the 2013 LGPS Regulations, S.I. No. 2356. The same basic approach applies, however, in that the eventual election pension due will be obtained by calculating the number of reckonable years divided by sixty for the years 2008-2014 (divided by eighty, for any years prior to 1 April 2008) as a proportion of the applicable level of pensionable (or reckonable) pay, *plus* the relevant amount accrued since 1 April 2014. Service may accrue as a returning officer even if no elections or polls are held, or fees received, during the requisite period; the person concerned is still holding office. The accruing entitlement to an election pension starts from the day when you are first appointed a returning officer (and not, for instance, when you publish your first notice of election).

9.4 Pensionable payments or fees received from different kinds of elections and polls (since referendums must also now be included) are aggregated together as a single basket of receipts and pension contributions. The appropriate employer contributions must of course also be paid (just as with regular employment contracts) in addition to your banded employee contributions (you can take out AVCs on this employment too). For European, national or regional elections or polls the employer contributions can be reclaimed as an expense from the Ministry of Justice like any other election cost or overhead. Since 2011, appointments in relation to referendums and the elections of police and crime commissioners have not been pensionable. Nor was the EU referendum held on 23 June 2016, nor combined mayoral elections (S.I. 2017 No. 67).

9.5 Pension contributions cannot be made on payments received as a deputy returning officer, but only on fees for which you are the principal office-holder (including being acting returning officer for Parliamentary elections) or the proper officer appointed by your local authority. That is because of the rule in regulation 3 of the 2013 LGPS Regulations: to be eligible to pay pension contributions and receive benefits, you must be employed by a "Scheme employer" as defined in schedule 2 to

the 2013 Regulations. Essentially here that means employed by a local authority: it does not mean and does not include being employed by an individual returning officer. So a deputy, appointed individually by their returning officer, cannot qualify. Nor can an Elections Manager who receives extra payments at election time (for example, from a share of their returning officer's fees passed on, or out of Part B of the fee scale including the clerical pool, or from their employer for overtime). On the other hand, a regional returning officer for the European elections, or for a regional referendum, though in reality appointed by the Secretary of State for Justice, is actually designated by reference to the holder of an office to which the individual appointment is ultimately made by a local authority (see for instance the European Parliamentary Elections (Returning Officers) Order 2013, S.I. No. 2064).

9.6 Once you have established that both employer and employee pension contributions can be and have been paid on relevant personal fees, two further numbers are needed to complete the calculation: the number of reckonable years, and the applicable pensionable pay. The number of reckonable years is how long you have been serving as a returning officer in the relevant positions, and have been paying pension contributions accordingly. A separate (or additional) award of additional pension may be given under regulation 31 of the 2013 Regulations.

9.7 Against the resulting total of reckonable years must be put your pensionable pay, divided by eighty prior to 1 April 2008 and sixty for the period following up to 1 April 2014, since each reckonable year served has earned an eightieth or sixtieth (as appropriate) just as in other local government pension calculations for those years. As election fees overall are earned at irregular intervals, including by-elections, an average is required. This was provided for in regulation 11(1) of the 2007 Benefits Regulations, S.I. No. 1166 as the average of the three years ending with the final pay period *plus* any other regulation 4(1) benefits other than fees received during the final (i.e. last year) pay period. With your employer's consent you may choose the average fees for any three consecutive years ending on 31 March (during which you have been a returning officer) within the period of ten years ending with the last day of active membership. Regulation 8(4) provides that any reduction or suspension of pay during the final pay period owing to illness or injury shall be disregarded. The average, from whichever period calculated, is then used in relation to the applicable accrual rates, eightieths or sixtieths, for the pensionable years served. These provisions remain in force for returning officer service prior to 1 April 2014, notwithstanding the career average approach following that date, under the saving

regulation 3(1) of the Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014, S.I. No. 525.

9.8 Suppose therefore – by way of simplified example – that you had been a returning officer for ten years, you and your authority have both paid all the requisite pension contributions, and you retired on 31 March 2019. You received, shall we say, in total £6,000 in election fees in the three years to 31 March 2019, but received £7,200 in the three-year period ending on 31 March 2012. Fees in the three-year period up to your actual retirement date of 31 March 2019 averaged £2,000 per year, but the earlier period averaged at £2,400 per year. With your employer's consent you could have elected for the earlier period from 1 April 2009 to 31 March 2012. Five sixtieths from 1 April 2009 to 31 March 2014 based on an annual average of £2,000 would yield an election pension of £166.67, but based on an annual average of £2,400 that sum would instead be £200 per year. To either calculation four more 'career average' years will be added, based on one 49th of the pensionable fees earned in each of the five years 2014-15 to 2018-19 inclusive. (In this example, there will be no additional lump sum on retirement based on three-eightieths of final pensionable pay for every reckonable year, since that accrual ended on 31 March 2008, before you were appointed as a returning officer.)

9.9 Accordingly, had you not made, and been given consent for, that choice of an earlier three-year period, your pension would have been £33.33 less annually, plus four 'career average' years at one 49th accrual. The option remains to convert some of your election pension into a lump sum.

9.10 It is lawful for councils to consolidate certain election fees into basic salary. Consolidation was agreed in principle as part of the 1997 JNC chief executives' pay award – recorded in paragraph 3(f) of Appendix 1 to the Joint Secretaries' letter of 5 November 1997. Depending on the annual consolidation pay figure agreed, and the number of pensionable years of overall local government service you have, this can be beneficial: the higher salary will be used in calculating your pension over all your years of pensionable service, and not just the usually shorter period when you were a returning officer.

9.11 While councils can, strictly speaking, lawfully only consolidate fees which they pay directly to you - that is, for local elections and polls – they may set a salary at the outset of employment or in subsequent re-negotiation which is calculated to reflect the assumed worth of *all* elections and polls fees, on the basis that the employee will

not of course then receive any of those fees separately. Under the statutory scales, European, national and regional election or referendum fees are payable directly to the appropriate regional, local or acting returning officer (with the associated tax and pension contribution implications) and not to that returning officer's employing authority. So strictly speaking these payments cannot directly be consolidated as such by the authority into an employee's basic pay, unless some arrangement can be made which lawfully recovers the 'national' fees payable for the authority without either any tax liability for the employee or any inappropriate avoidance of tax.

9.12 Whether, given the choice, it is in your interest to have relevant election and poll income consolidated depends on your circumstances. If you have long LGPS active membership (that is, long local government service), you will want to consider whether the element of your overall salary actually or notionally attributable to the consolidation yields more in pension benefits than the averaged fees earned during the presumably shorter period for which you have been a returning officer. Other factors include what mechanism applies for pay and/or election fees increases and, perhaps, the impact that the income involved may have on your tax liability under the new provisions for restricting tax relief on employer pension contributions.

9.13 Note also that if you retire early from your principal employment, whether or not still protected under the 'rule of 85', and thereby also before your normal retirement age you leave your secondary election role as a returning officer, you will suffer an actuarial reduction on your returning officer pension – unless your authority agrees to the contrary and bears the cost. See the Government Actuary Guidance on such reductions dated 18 April 2016. These reductions can be very significant. (See also paragraph 7.22.) **These percentage reductions are permanent**: you do not recover the position you otherwise would have had when you reach your normal retirement age. The alternative is not to take the returning officer pension until your normal retirement age, in which case the reduction rule will not apply. There is also Government Actuary guidance relating to retiring after your normal pension age, issued on 28 June 2019 and entitled *Local Government Pension Scheme (England and Wales): Late Retirement*.

9.14 If the total valuation of your pension funds is at or close to the statutory lifetime allowance threshold at which 55% tax becomes payable on the amount in excess of it (£1.055 million for 2019-20), you will need to take particular account of your options and liabilities by obtaining specialist advice before making any relevant

retirement decisions. Do not overlook that the amounts involved in separate election pensions also count towards both the lifetime allowance and annual allowance limits.

9.15 Deputy returning officers and others whose election receipts are accordingly not pensionable may consider investing them in a stakeholder or other pension option. Qualified financial advice should of course be sought on this possibility.

9.16 For notes on the individual returning officer statutory rules and descriptions, see chapter 5 of *Running Elections 2013* by Roger Morris and Mark Heath (SOLACE Ltd.).

10. FINDING THE SOURCES

10.1 Not everyone will be readily familiar with the wide variety of legal sources referred to in these *Employment Guidance Notes*. There is no substitute for appropriate professional advice in any case, and you should not rely simply on these *Employment Guidance Notes*, as your circumstances may be different, or the applicable rules may have altered since they were written. Nevertheless it may be difficult to know what questions to ask if you do not yourself have a general awareness of the provisions and pitfalls involved in your case, and it is prudent to read the statutory rules involved for yourself.

10.2 In addition to traditional hard-copy sources, the texts of all recent legislation, both Acts and statutory instruments, and for all parts of the U.K., are available online. The principal website of the National Archives is now www.legislation.gov.uk and this is in the process of replacing earlier provision. For the time being, however, material can also be accessed via the website of the Office of Public Sector Information, which comes under the Cabinet Office. All statutes in England and Wales, for example, are available from 1988 and statutory instruments from 1987. (Many additional statutes from 1837-1987 are also available in pdf. format.) Enactments of the Northern Ireland Assembly (2000), the Scottish Parliament (1999) and the National Assembly for Wales (1999 for statutory instruments, 2008 for measures) are available from their respective dates of inauguration given in brackets. A search facility is also available both for particular enactments and also for words and phrase contained in them. New legislation, mainly statutory instruments, is added daily to each category of the website. Legislation as currently amended rather than as originally enacted can now be found at www.legislation.gov.uk as noted above.

For the texts and tabled amendments to public Bills currently before Parliament, go to www.publications.parliament.uk/pa/pabills.htm.

APPENDIX
PROPER OFFICER APPOINTMENTS

The relevance of this Appendix is primarily for new appointees to be able more readily to check to which posts and therefore individuals the following statutorily required appointments attach.

The term "proper officer" is defined in section 270(3) of the Local Government Act 1972 and in effect refers to an employee appointed by a local authority or equivalent body for a particular statutory purpose. Under the Local Government Act 2000 the appointment of proper officers is not to be the responsibility of an authority's executive; see respectively paragraph 40 of Part I of schedule 1 to the Local Authorities (Functions and Responsibilities) (England) Regulations 2000, S.I. No. 2853 (as substituted by regulation 2(b) of, and paragraph 2 of Part I of the schedule to, S.I. 2001 No. 2212); and paragraph 11 of Part I of schedule 1 to the Local Authorities Executive Arrangements (Functions and Responsibilities) (Wales) Regulations 2007, S.I. No. 399 (W.45).

The following list comprises many of the key statutory provisions incorporating the functions of a proper officer. The abbreviations are –

NAA 1948	National Assistance Act 1948
LGA 1972	Local Government Act 1972
LG (MP) A 1976	Local Government (Miscellaneous Provisions) Act 1976
RPA 1983	Representation of the People Act 1983
LGHA 1989	Local Government and Housing Act 1989

Access to and Freedom of Information

LGA 1972	section 100B(2)	circulation of reports and agendas
	section 100B(7)(c)	supply of agendas and reports to the press
	section 100C(2)	preparation of summaries of exempt minutes
	section 100D(1)(a)	compilation of lists of report background papers
	section100D(5)	identification of background papers
	section 100F(2)*	determination of papers not open to the public (England)
	section 100F(2A)*	determination of papers not open to the public (Wales)

*as amended by the Local Government (Access to Information) (Variation) Order 2006, S.I No. 88

Local Authorities (Executive Arrangements) (Decisions, Documents and Meetings) (Wales) Regulations 2001, S.I. No. 2290 (W.178)		various provisions about admission to and recording of meetings of local authority executives, and ancillary rights
Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, S.I. No. 2089		
regulation 7(2)		exclusion of reports in private meetings
regulation 10		exceptions relating to publicity for key decisions
regulations 12-15		recording of and inspection of key decisions
regulation 16		additional rights of access to documents for members
regulation 20		confidential and exempt information, or that relating to a political adviser or assistant

Charities

LGA 1972	section 210(6) and (7)	charity function created before 1972 and inherited by council on 1 April 1974

Council Meetings

LGA 1972	schedule 12, paragraph 4(2)(b)	signature of summons for council meeting
LGA 1972	schedule 12, paragraph 4(3)	receipt of notice of addresses to which summons to be sent

Documents and Minutes

LGA 1972	section 225(1)	deposit of documents
	section 229(5)	certification of photocopies
	section 234(1) and (2)	authentication of LGA 1972 documents
	section 236(9) and (10)	sending copies of byelaws to county, parish and community councils
	section 238	certification of byelaws
LG (MP) A 1976	section 41(1)	certification of resolutions, orders, reports and minutes

LGHA 1989	section 2	preparation and holding of register of politically restricted posts
Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, S.I. No. 2089		
regulation 7(2)		exclusion of reports in private meetings
regulation 10		exceptions relating to publicity for key decisions
regulations 12-15		recording of and inspection of key decisions
regulation 16		additional rights of access to documents for members
regulation 20		confidential and exempt information, or that relating to a political adviser or assistant

Elections, etc.

LGA 1972	section 83(1) and (4)	witness and receipt of declarations of acceptance of office
	section 84(1)	acceptance of resignation
	section 88(2)	convening council meeting to fill casual vacancy in office of chairman
	section 89(1)(b)	receipt of notices of casual vacancies
RPA 1983	section 8	appointment of registration officer
	section 35	returning officer for borough, mayoral and parish elections and counting officer for mayoral and other referendums and parish or community polls
Neighbourhood Planning (Referendums) Regulations 2012, S.I. No. 2031,		
regulation 16		duties relating to neighbourhood referendums under paragraphs 14-16 of schedule 4B to the Town and Country Planning Act 1990 not arranged by the local planning authority

Financial

LGA 1972	section 115(2)	receipt of monies due from officers
	section 146(1)(a)	declarations and certifications for council securities

Miscellaneous

NAA 1948	section 47	people in need of care and attention
LGA 1972	section 13(3) and (5)	parish trustees

Ordnance Survey

LGA 1972	section 191	Ordnance Survey duties

Parishes

Local Government (Parishes and Parish Councils) (England) Regulations 2008, No. 625		parish reviews and community governance petitions

Political Groups

LGHA 1989	sections 15-17 and the Local Government (Committees and Political Groups) Regulations 1990, S.I. No. 1553 (as amended)	membership of political groups and proportional allocations

Standing Orders

Local Authorities (Standing Orders) (England) Regulations 2001, S.I. No. 3384,	Schedule 1, Parts I and II	standing orders relating to staff (authorities with either mayor and cabinet executive or mayor and leader executive)
Local Authorities (Standing Orders) (Wales) Regulations 2006, S.I. No. 1275,	Schedule 3, Parts I and II*	standing orders relating to staff (authorities with either mayor and cabinet executive or mayor and leader executive)

* See also section 10 of the Local Government (Wales) Measure 2011 (nawm 4)

The term “proper officer” is also used in other contexts – for instance, paragraph 10 of the Model Disciplinary Procedure and Guidance comprising Appendix 5A to the

Conditions of the Joint Negotiating Committee (JNC) for Chief Executives (October 2016 edition, page 49).

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