

The Local Government Pensions Committee  
Secretary: Terry Edwards

## **CIRCULAR**

Please pass on sufficient copies of this Circular to your Treasurer/Director of Finance and to your Personnel and Pensions Officer(s) as quickly as possible

**No. 244 – FEBRUARY 2011**

### **THE LGPS IMPLICATIONS OF SALARY SACRIFICE SCHEMES, ETC**

#### **Purpose of this Circular**

1. This Circular has been issued to provide authorities with updated guidance on the pension implications (under the LGPS) of salary sacrifice schemes and other arrangements. The information in the Circular represents the views of the LGPC Secretariat, with input from PricewaterhouseCoopers LLP. The disclaimers at the end of this Circular apply.

#### **Background**

2. A number of authorities have approached the LGPC for updated information on the pension implications of salary sacrifice schemes and other arrangements since the publication of Circular 187 in July 2006. The salary sacrifice schemes and other arrangements that have been raised with the LGPC and which are covered in detail in this Circular are shown in the following brief overview table.

Local Government House, Smith Square, London SW1P 3HZ T 020 7664 3000 F 020 7664 3030 E [info@local.gov.uk](mailto:info@local.gov.uk) [www.local.gov.uk](http://www.local.gov.uk)  
Local Government Employers is the business name of Employers Organisation for Local Government  
Registered Office Local Government House, Smith Square, London SW1P 3HZ

<b>Type</b>	<b>Can salary sacrificed be pensionable?</b>	<b>Comments</b>
<a href="#"><u>Child care - workplace nursery provision.</u></a>	Yes.	Value of the child care benefit (i.e. the amount of salary foregone) should be specified in the employee's contract as being a pensionable emolument.
<a href="#"><u>Child care vouchers.</u></a>	Yes.	Value of the child care vouchers (i.e. the amount of salary foregone) should be specified in the employee's contract as being a pensionable emolument. If the vouchers are treated as pensionable, then there is an added twist that employee and employer pension contributions are automatically payable during the period of the "unpaid" AML period during which the employee is entitled to child care vouchers.
<a href="#"><u>Green schemes – provision of a cycle or cyclist's safety equipment.</u></a>	Yes.	Value of the employer provided cycle or cyclist's safety equipment (i.e. the amount of salary foregone) should be specified in the employee's contract as being a pensionable emolument.
<a href="#"><u>Green schemes – support for public bus services.</u></a>	Potentially yes.	The value of the whole, or the relevant part, of the benefit should be specified in the employee's contract as being a pensionable emolument.

<b>Type</b>	<b>Can salary sacrificed be pensionable?</b>	<b>Comments</b>
<a href="#">Mobile phones.</a>	Yes.	The value of the mobile phone (i.e. the amount of salary foregone) should be specified in the employee's contract as being a pensionable emolument.
<a href="#">Canteen arrangements.</a>	N/A from 6 April 2011.	Tax breaks removed from 6 April 2011.
<a href="#">Workplace parking.</a>	Potentially yes.	The value of the benefit should be specified in the employee's contract as being a pensionable emolument.
<a href="#">Cars.</a>	No.	
<a href="#">Shared Cost AVC.</a>	Yes.	<p>The employer contribution to the SCAVC (i.e. the amount of salary foregone) should be specified in the employee's contract as being a pensionable emolument.</p> <p>For those employers in the LGPS who trade and have taxable profits, a salary sacrifice SCAVC contribution will be allowable as a deduction in arriving at the employer's taxable profits.</p> <p>A SCAVC salary sacrifice could result in tax implications for the scheme member if the member breaches the Annual Allowance or, until 5 April 2011, if the member is a high earner with relevant income of £130,000 or more.</p>

Type	Can salary sacrificed be pensionable?	Comments
<a href="#">Salary sacrifice equivalent to employee's pension contributions.</a>	No.	
<a href="#">Salary sacrifice for professional subscriptions.</a>	No.	
<a href="#">Salary sacrifice for work-related training.</a>	No.	
<a href="#">Sacrificing a pension in payment.</a>	No.	

3. The effect on pension contributions of any other forms of salary sacrifice or other arrangements not covered in this Circular would need to be considered by employers based on the circumstances of each case, the rules of the Local Government Pension Scheme and the relevant tax legislation.
4. Employers will, of course, need to assure themselves that any salary sacrifice arrangements they offer to employees are effective from an HM Revenue and Customs perspective.
5. Useful background information is available on the following websites and on the various websites mentioned throughout this Circular: <http://www.hmrc.gov.uk/manuals/eimanual/eim42750.htm>  
[http://www.hmrc.gov.uk/specialist/salary\\_sacrifice.htm](http://www.hmrc.gov.uk/specialist/salary_sacrifice.htm)
6. Employees will need to consider the possible effects of salary sacrifice on other benefits (see paragraphs 84 to 89).
7. Information is also provided in this Circular on the buying and selling of annual leave (see paragraphs 90 to 95).

## Child care - salary sacrifice for workplace nursery provision<sup>1</sup>

8. The workplace nurseries exemption exempts an employee from tax on the benefit of a place in a workplace provided nursery, subject to specified conditions being met. Section 318 of the Income Tax (Earnings and Pensions) Act 2003 states that “no liability to income tax arises<sup>2</sup> in respect of the provision for an employee of care for a child if [specified] conditions ... are met.” The conditions are set out in section 318.
9. Regulation 4(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>3</sup> states that “no sum may be taken into account in calculating pensionable pay unless income tax liability has been determined on it.”
10. So, how do section 318 of the Income Tax (Earnings and Pensions) Act 2003 and regulation 4(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>4</sup> interact? Are pension contributions payable on the gross pay (prior to the salary sacrifice) or only on the reduced pay after the salary sacrifice?
11. Her Majesty’s Revenue and Customs (HMRC) have confirmed that, in their view, the salary sacrificed is assessable to income tax under section 203 in Chapter 10 of Part 3 of the Income Tax (Earnings and Pensions) Act 2003. Section 318(1) then operates to remove the liability to income tax. Thus, income tax liability has been determined and the gross salary that would have been pensionable prior to the salary sacrifice can remain the amount to be subject to pension contributions.
12. DCLG have also given their informal view which concurs with that provided by HMRC.
13. Regulation 4(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>5</sup> defines pensionable pay as:
  - (a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment; and

---

<sup>1</sup> More information about employer supported childcare can be found at <http://www.hmrc.gov.uk/childcare/>

<sup>2</sup> i.e. arising by virtue of Chapter 10 of Part 3 of the Income Tax (Earnings and Pensions) Act 2003 (taxable benefits: residual liability to charge)

<sup>3</sup> Regulation 5(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>4</sup> Regulation 5(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>5</sup> Regulation 5(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

- (b) any other payment or benefit specified in his contract of employment as being a pensionable emolument.

The benefit of the provision of a workplace nursery does not fall within (a) above. Thus, in order to ensure the employee's pensionable pay and, hence, pension benefits are not reduced on account of the salary sacrificed, it is recommended that the value of the child care benefit (i.e. the amount of salary foregone) should be specified in the employee's contract as being a pensionable emolument in accordance with (b) above.

**Child care vouchers (whether via salary sacrifice or paid in addition to normal salary)**

- 14. Regulation 4(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>6</sup> states that "no sum may be taken into account in calculating pensionable pay unless income tax liability has been determined on it."
- 15. Childcare vouchers are "earnings" that are assessable to tax but, subject to specified conditions being met, section 270A(1) of the Income Tax (Earnings and Pensions) Act 2003 then operates to remove the liability to income tax on the first £55 of childcare vouchers. Thus, tax liability has been determined on the whole value of the childcare vouchers; it's just that no tax is payable on the first £55 per week (£243 per month) – but note that the tax free values change from 6 April 2011 for non-basic rate tax payers who join a child care voucher scheme on or after that date<sup>7</sup>. As income tax liability has been determined, the gross salary that would have been pensionable prior to the salary sacrifice can remain the amount to be subject to pension contributions.
- 16. Regulation 4(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>8</sup> defines pensionable pay as:
  - (a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment; and
  - (b) any other payment or benefit specified in his contract of employment as being a pensionable emolument.

In order to ensure the employee's pensionable pay and, hence, pension benefits are not reduced on account of the salary

---

<sup>6</sup> Regulation 5(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>7</sup> See <http://www.hmrc.gov.uk/thelibrary/employer-qa.pdf> and the draft clauses for the Finance Bill 2011 at [http://www.hm-treasury.gov.uk/d/financebill2011\\_draft\\_clauses\\_explanatory\\_notes.pdf](http://www.hm-treasury.gov.uk/d/financebill2011_draft_clauses_explanatory_notes.pdf) for more information.

<sup>8</sup> Regulation 5(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

sacrificed, it is recommended that the value of the child care vouchers (i.e. the amount of salary foregone) should be specified in the employee's contract as being a pensionable emolument in accordance with (b) above.

17. It should be noted that, by virtue of regulation 9 of the Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312), any contractual child care vouchers are, as a non-cash benefit, to be provided during the full period of Ordinary Maternity Leave (OML) and Additional Maternity Leave (AML). This obligation continues to apply even though the employee may not be receiving any salary or wages that can be sacrificed. Please see <http://www.hmrc.gov.uk/employers/sml-salary-sacrifice.pdf> and <http://www.hmrc.gov.uk/employers/sml-sal-benefits.pdf> for further information.
18. The fact that contractual child care vouchers are, as a non-cash benefit, to be provided during the full period of Ordinary Maternity Leave (OML) and Additional Maternity Leave (AML) has an impact on pension contributions. Normally, no employee or employer pension contributions are payable during the period of unpaid AML, unless the employee opts to pay pension contributions to cover the unpaid period in which case the employer also has to pay employer pension contributions for the unpaid AML period. The employee contributions would be based on the pensionable pay the employee received or was entitled to receive before the unpaid period began (ignoring any increase in pay due to a Keep in Touch day) and the employer contributions would be based on the employee's notional full pensionable pay. However, if the vouchers are treated as pensionable then, for the purposes of the LGPS, they are not on "unpaid" leave. Employers need to be aware that employee and employer pension contributions would, therefore, automatically be payable for the whole period of maternity leave (during which child care vouchers are provided)<sup>9</sup>. This is a potential cost that employers need to be aware of.

### **Green schemes – provision of a cycle or cyclist's safety equipment**

19. Regulation 4(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>10</sup> says that an employee's pensionable pay does not include "any travelling, subsistence or other allowance paid in respect of expenses incurred in relation to the employment". [Note: in former LGPS regulations this was expressed as "expenses incurred *by him for the purposes of his employment*".]

---

<sup>9</sup> Employee contributions would be payable on the pay received and the value of the vouchers received. Employer contributions would be due on notional full pay.

<sup>10</sup> Regulation 5(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

20. The view is taken that the provision, by the employer, of a cycle or associated safety equipment, does not constitute “any travelling, subsistence or other allowance paid in respect of expenses incurred in relation to the employment”.
21. Regulation 4(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>11</sup> states that “no sum may be taken into account in calculating pensionable pay unless income tax liability has been determined on it.”

Subject to specified conditions being met, section 244 of the Income Tax (Earnings and Pensions) Act 2003 provides that “no liability to income tax arises in respect of the provision for an employee of a cycle or cyclist’s safety equipment if [specified] conditions .... are met”. This prevents an employee being chargeable to income tax under section 154 in respect of the provision, by the employer, of a cycle or associated safety equipment.

22. If a salary sacrifice arrangement is entered into in respect of the provision, by the employer, of a cycle or associated safety equipment, income tax liability will have been determined i.e. no tax is due by virtue of section 244 of the Income Tax (Earnings and Pensions) Act 2003. Thus, the gross salary that would have been pensionable prior to the salary sacrifice can remain the amount to be subject to pension contributions.
23. Regulation 4(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>12</sup> defines pensionable pay as:
  - (a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment; and
  - (b) any other payment or benefit specified in his contract of employment as being a pensionable emolument.

In order to ensure the employee’s pensionable pay and, hence, pension benefits are not reduced on account of the salary sacrificed, it is recommended that the value of the employer provided cycle or cyclist’s safety equipment (i.e. the amount of salary foregone) should be specified in the employee’s contract as being a pensionable emolument in accordance with (b) above.

24. More information on cycle to work schemes can be obtained at <http://www.dft.gov.uk/pgr/sustainable/cycling/> and

---

<sup>11</sup> Regulation 5(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>12</sup> Regulation 5(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<http://www.dft.gov.uk/pgr/sustainable/cycling/cycletoworkguidance/>  
and additional information on the salary sacrifice aspects can be  
found at [http://www.hmrc.gov.uk/specialist/cycles\\_bus\\_passes.pdf](http://www.hmrc.gov.uk/specialist/cycles_bus_passes.pdf)

### **Green schemes – support for public bus services**

25. Section 243 of the Income Tax (Earnings and Pensions) Act 2003 excludes from the tax charge under section 154 the benefit arising from any financial or other support provided by one or more employers for a public bus service that their employees use for journeys to and from the workplace, or between workplaces.
26. It may be that the employer would wish to recover the cost of the financial support from the employee. This could be done through a salary sacrifice arrangement, but would the sum sacrificed be pensionable under regulation 4 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>13</sup>?
27. Regulation 4(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>14</sup> defines pensionable pay as:
  - (a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment; and
  - (b) any other payment or benefit specified in his contract of employment as being a pensionable emolument.
28. But regulation 4(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>15</sup> says that an employee's pensionable pay does not include "any travelling, subsistence or other allowance paid in respect of expenses incurred in relation to the employment". The question, therefore, is whether a travel benefit would be an "*allowance*" and whether the allowance is "*paid in respect of expenses incurred in relation to the employment*".
29. If the travel benefit is, for example, in the form of a season ticket it could be argued that it is not an allowance i.e. it is either a voucher, a credit token, or a symbol of authority to use the bus. If this view is taken, then the value would not be excluded by regulation 4(2)(b) of

---

<sup>13</sup> Regulation 5 of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>14</sup> Regulation 5(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>15</sup> Regulation 5(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>16</sup> and so could be pensionable.

30. If, however, one were to take the view that there is an allowance, one would need to decide whether the allowance is "*paid in respect of expenses incurred in relation to the employment*". [Note: in former LGPS regulations this was expressed as "expenses incurred by him for the purposes of his employment"]
31. ODPM appeal determination LGS333 concerned a payment made to an employee who was compulsorily re-deployed and as a result of which he was paid money for extra travelling expenses. The payment was made to cover additional travelling costs incurred as a result of travelling to a new work base. The ODPM took the view that the term "for the purposes of his employment" related to the tasks which an employee is required to carry out in the cause of his service with a local authority. It follows therefore that an allowance for travelling incurred when an employee is not actually fulfilling the purpose of his employment cannot be regarded as an allowance paid to cover expenses incurred for the purposes of his employment. The conclusion was therefore reached that the payment did not fall within the travelling expenses exclusion and would be regarded as pensionable pay.
32. Thus it would appear from the appeal determination that any allowance paid for travelling to work and back home is not an expense incurred in relation to the employment and so could be pensionable.
33. However, if the travel benefit is deemed to be an allowance and has duality of purpose (e.g. it can be used to travel to / from work but can also be used to travel between workplaces whilst at work) it would seem that only that part of the benefit that relates to travel to / from work could be pensionable.
34. If the travel benefit (in whole or in part) could be pensionable, regulation 4(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>17</sup> would also need to be satisfied. This states that "no sum may be taken into account in calculating pensionable pay unless income tax liability has been determined on it."
35. If a salary sacrifice arrangement is entered into, income tax liability will have been determined i.e. no tax is due by virtue of section 243 of the Income Tax (Earnings and Pensions) Act 2003 and so regulation 4(3) of the Local Government Pension Scheme (Benefits,

---

<sup>16</sup> Regulation 5(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>17</sup> Regulation 5(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

Membership and Contributions) Regulations 2007<sup>18</sup> would be satisfied.

36. Assuming that the employer has satisfied itself that the travel benefit could be pensionable (in whole or in part) under the foregoing paragraphs then, in order to ensure the employee's pensionable pay and, hence, pension benefits are not reduced on account of the salary sacrificed, it is recommended that the value of the whole, or the relevant part, of the benefit should be specified in the employee's contract as being a pensionable emolument (under regulation 4(1)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>19</sup>).
37. More information on support for public bus services via salary sacrifice can be found at [http://www.hmrc.gov.uk/specialist/cycles\\_bus\\_passes.pdf](http://www.hmrc.gov.uk/specialist/cycles_bus_passes.pdf)

### **Mobile phones**

38. Regulation 4(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>20</sup> states that "no sum may be taken into account in calculating pensionable pay unless income tax liability has been determined on it."
39. Section 319 of the Income Tax (Earnings and Pensions) Act 2003 provides that "no liability to income tax arises by virtue of section 62 (general definition of earnings) or Chapter 10 of Part 3 (taxable benefits: residual liability to charge) in respect of the provision of one mobile telephone for an employee without any transfer of property in it". This prevents an employee being chargeable to income tax in respect of the provision, by the employer, of a mobile telephone.
40. If a salary sacrifice arrangement is entered into in respect of the provision, by the employer, of a mobile telephone then income tax liability will have been determined i.e. no tax is due by virtue of section 319 of the Income Tax (Earnings and Pensions) Act 2003. Thus, the gross salary that would have been pensionable prior to the salary sacrifice can remain the amount to be subject to pension contributions.

---

<sup>18</sup> Regulation 5(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>19</sup> Regulation 5(1)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>20</sup> Regulation 5(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

41. Regulation 4(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>21</sup> defines pensionable pay as:

- (a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment; and
- (b) any other payment or benefit specified in his contract of employment as being a pensionable emolument.

In order to ensure the employee's pensionable pay and, hence, pension benefits are not reduced on account of the salary sacrificed, it is recommended that the value of the mobile telephone (i.e. the amount of salary foregone) should be specified in the employee's contract as being a pensionable emolument in accordance with (b) above.

### **Canteen arrangements**

42. Some employers have put in place arrangements that combine salary sacrifice with the provision of meals at the workplace, typically in a staff canteen. These arrangements seek to make use of the exemption in section 317 Income Tax (Earnings and Pensions) Act 2003 for free and subsidised meals provided in a canteen or on the employer's business premises, subject to the satisfaction of certain conditions.
43. This Circular does not consider the pension implications because, as a result of section 60 of the Finance Act 2010, the section 317 exemption will, with effect from 6 April 2011, be prevented from applying to meals which are provided as part of salary sacrifice arrangements. There would therefore be no benefit to entering into a salary sacrifice arrangement for the provision of meals at the workplace.

### **Workplace parking**

44. Section 237 of the Income Tax (Earnings and Pensions) Act 2003 excludes workplace parking from the tax charge under Chapter 10 of Part 3 of that Act (taxable benefits: residual liability to charge). Section 237 says that :
- (1) No liability to income tax arises in respect of the provision of workplace parking for an employee.
  - (2) No liability to income tax arises by virtue of the payment or reimbursement of expenses incurred in connection with the provision for or the use by an employee of workplace parking.

---

<sup>21</sup> Regulation 5(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

45. An employer might wish to provide workplace parking via a salary sacrifice arrangement. For example, a local authority might wish to provide parking in a council owned car park with the employee meeting the cost of this provision via salary sacrifice.
46. But would the sum sacrificed for workplace parking be pensionable under regulation 4 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>22</sup>?
47. Regulation 4(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>23</sup> defines pensionable pay as:
- (a) all the salary, wages, fees and other payments paid to him for his own use in respect of his employment; and
  - (b) any other payment or benefit specified in his contract of employment as being a pensionable emolument.
48. However, regulation 4(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>24</sup> says that an employee's pensionable pay does not include "any travelling, subsistence or other allowance paid in respect of expenses incurred in relation to the employment". The question, therefore, is whether workplace parking would be an "allowance" and whether the allowance is "*paid in respect of expenses incurred in relation to the employment*".
49. If the workplace parking is, for example, in the form of a season ticket it could be argued that it is not an allowance i.e. it is either a voucher, a credit token, or a symbol of authority to use the car park. If this view is taken, then the value would not be excluded by regulation 4(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>25</sup> and so could be pensionable.
50. If, however, one were to take the view that an allowance is paid, one would need to decide whether the allowance is "*paid in respect of expenses incurred in relation to the employment*". [Note: in former LGPS regulations this was expressed as "expenses incurred by him for the purposes of his employment"].

---

<sup>22</sup> Regulation 5 of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>23</sup> Regulation 5(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>24</sup> Regulation 5(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>25</sup> Regulation 5(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

51. ODPM appeal determination LGS333 concerned a payment made to an employee who was compulsorily re-deployed and as a result of which he was paid money for extra travelling expenses. The payment was made to cover additional travelling costs incurred as a result of travelling to a new work base. The ODPM took the view that the term "for the purposes of his employment" related to the tasks which an employee is required to carry out in the cause of his service with a local authority. It follows therefore that an allowance for an expense incurred when an employee is not actually fulfilling the purpose of his employment cannot be regarded as an allowance paid to cover expenses incurred for the purposes of his employment. The conclusion was therefore reached that the payment did not fall within the travelling expenses exclusion and would be regarded as pensionable pay.
52. Extrapolating from the above, it would appear from the appeal determination that any allowance paid for workplace parking would not be an expense incurred in relation to the employment and so could be pensionable. Regulation 4(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>26</sup> does not require that the allowance has to be paid direct to the employee e.g. it could potentially be read to mean "paid by or in respect of" the employee. This interpretation would chime with regulation 4(1)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>27</sup> which does not prevent the cost of a benefit being paid for by the employer direct to the benefit provider.
53. If the workplace parking can be pensionable, regulation 4(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>28</sup> would also need to be satisfied. This states that "no sum may be taken into account in calculating pensionable pay unless income tax liability has been determined on it."
54. If a salary sacrifice arrangement is entered into, income tax liability will have been determined i.e. no tax is due by virtue of section 237 of the Income Tax (Earnings and Pensions) Act 2003 and so regulation 4(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>29</sup> would be satisfied.

---

<sup>26</sup> Regulation 5(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>27</sup> Regulation 5(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>28</sup> Regulation 5(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>29</sup> Regulation 5(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

55. Assuming that the employer has satisfied itself that the workplace parking could be pensionable under the foregoing paragraphs then, in order to ensure the employee's pensionable pay and, hence, pension benefits are not reduced on account of the salary sacrificed, it is recommended that the value of the benefit should be specified in the employee's contract as being a pensionable emolument (under regulation 4(1)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>30</sup>).

## Cars

56. The Local Government Pensions Committee wrote to DCLG on 21 August 2009 seeking clarity on whether salary foregone for a lease car can be pensionable – see <http://www.lge.gov.uk/lge/core/page.do?pagelId=2047009>
57. CLG responded on 4 June 2010 - see Bulletin 71 at <http://www.lge.gov.uk/lge/aio/6423115#CLGresponse> – saying “*Our judgement is that it is too early in the life of the new Government to be clear about what their views would be but we are very doubtful if there would be support for a potential loss of tax revenue..... At this stage I would say that if the LGE and Scheme interests wish to press for a relaxation of paragraph 4(2) of the Benefits Regulations, you would need to evaluate carefully the potential cost to the Scheme at local level. In particular, it would need a much clearer impression of the potential claims of LGPS members who have since the mid-1990's been denied the possibility of a salary sacrifice relating to the provision of a car, being made pensionable.*”
58. The above response would appear to confirm that salary sacrificed for a car cannot be pensionable (apart from some historical cases – see below). This seems logical for the following reasons. Firstly, making it pensionable could create an anomaly. Let's say that the employee gives up £1,000 a year in salary sacrifice for a car and the taxable value, based on the emissions category is, say, £800. As, by virtue of regulation 4(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>31</sup>, only pay upon which income tax liability has been determined could be pensionable, the maximum pay that could be pensionable (assuming that it could be) would be £800, even though the employee had given up £1,000. Secondly, and more importantly, the wording of the LGPS Regulations does not appear to support salary sacrificed for a car as being treated as pensionable. Regulations 13(2)(f), (8) and (9) of the LGPS

---

<sup>30</sup> Regulation 5(1)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>31</sup> Regulation 5(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

Regulations 1997<sup>32</sup> are protected regulations by virtue of regulation 2 of, and Schedule 1 to, the LGPS (Transitional Provisions) Regulations 2008<sup>33</sup>. The protected regulations say:

### **Meaning of "pay"**

**13.-** (2) But an employee's pay does not include-

(f) any amount treated as the money value to the employee of the provision of a motor vehicle or any amount paid in lieu of such provision (but see paragraphs (8) and (9));

(8) Where-

(a) a member's contribution under regulation C2 or C3 of the 1986 regulations for a period including 31st December 1992 was based on pay which for the 1986 regulations as then in force included an amount representing the money value to him of the provision of a motor vehicle or an amount in lieu of such provision and immediately before the commencement date his remuneration for the 1995 regulations included such an amount, or

(b) immediately before the commencement date his remuneration for the 1995 regulations included an amount in lieu of the provision of a motor vehicle as referred to in paragraph 7(2)(b) of Schedule C2 to the 1995 regulations,

then his pay includes such an amount.

(9) But paragraph (8) shall cease to apply if-

(a) he leaves employment with the employing authority who were employing him on-

(i) 31st December 1992; or

(ii) where appropriate under the provisions of paragraph 7 of Schedule C2 to the 1995 regulations, on the commencement date of the 1995 regulations,

otherwise than as a result of a transfer to another Scheme employer which is beyond his control; or

(b) he is neither provided with a motor vehicle nor receives an amount representing the money value to him of the provision of such a vehicle.

---

<sup>32</sup> Regulations 12(2)(f), (8) and (9) of the LGPS (Scotland) regulations 1998.

<sup>33</sup> Regulation 2 of, and Schedule 1 to, the LGPS (Transitional Provisions) (Scotland) Regulations 2008.

59. So, as presently written, the money value to the employee of the provision of a motor vehicle or any amount paid in lieu of such provision cannot be pensionable (apart from some historical cases).
60. If (apart from the historical cases) the salary sacrificed is not pensionable, then this could have a long term impact on the employee's pension position as not only is the money value of a car not pensionable but neither is the amount of money paid in lieu of a car. So, if an employee opts to sacrifice part of their salary for a car and then subsequently reverts back to full pay, the extra pay they get is itself not pensionable (because it is pay in lieu of a car). By opting to sacrifice pay for a car the employee's pensionable pay would drop, thereby reducing the value of their pension benefits - a danger for the employee.
61. There are some counter arguments that are proffered by some as a potential means to get around this. These are:
  - a) the employee does not simply give up the car and takes pay instead. Rather, the employer issues the employee with a new contract of employment under which the employee is no longer given the choice of a car or pay. The new contract is for pay only and the employee is not eligible for the lease car arrangement. The argument forward is that the employee is only receiving pay and there is no element of it which is pay in lieu of a car (as there is no car that would otherwise be available to the employee)
  - b) the employer scraps the lease car scheme in its entirety for all employees and reissues all affected staff with new contracts for salary only. Again, the argument put forward is that the employee is, for the future, not receiving pay in lieu of a car. There is no scheme under which a car can be provided anymore and the employer is now simply engaging the employee under a new contract that specifies a rate of pay for the job.

Would either approach hold up under scrutiny (or if District Audit challenged why all the pay was now pensionable)? Perhaps one way of looking at it would be to say "What would happen if an employee with a leased car (employee A) applied for a new job with the same authority which only offered pay (and did not offer the option of a lease car)?" Employee A would not be getting pay in lieu of a car in the new job; he / she would simply be getting the pay for the job and it would all be pensionable. If we are prepared to accept this, is it be right to argue that a person who gets a new contract for doing the same job (as set out in scenarios (a) or (b) above) should not have all the pay pensionable? The difference is that in scenarios (a) and (b), the system is simply being "rigged" to arrive at an outcome without the employee having to go through a competitive process to obtain a job, whereas employee A has had to do so. Furthermore, if an employer were to allow employee A to take the salary sacrifice and treat it as non pensionable then, say 12

months before retirement, allow the employee to revert to his / her original salary and treat it all as pensionable, employee A would boost his / her final salary for pension purposes without having paid pension contributions on the full amount during the years he / she had been in receipt of a leased car. This pension underfunding would then have to be met by the employer. From the employer's perspective, this is not an attractive proposition.

62. One final point to mention is that if a scheme member takes non-pensionable salary sacrifice for a lease car and retires, say, two years later, the member can use the best one of the last three years pensionable pay under regulation 8(2) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>34</sup>. However, the member cannot utilise regulation 10 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007. This is because salary sacrificed does not appear to fall within any of sub-paragraphs (1)(a) to (1)(e) in that regulation. Although sub-paragraph (1)(d) might appear to apply, the wording used in that sub-paragraph is believed to be a reference to the reduction or restriction of a payment or benefit under regulation 4(1)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007, not a reduction or restriction of salary (due to a salary sacrifice) which is covered by regulation 4(1)(a) of those Regulations.

### **Shared cost AVCs**

63. Where an employee opts to pay Additional Voluntary Contributions (AVCs) under regulation 25<sup>35</sup> of the Local Government Pension Scheme (Administration) Regulations 2008, an employer can decide to also contribute to that employee's AVC arrangement. This is known as a shared cost AVC (SCAVC).
64. This could be done under a salary sacrifice arrangement.
65. How would this work? Well, let's assume that an employee is paid £20,000. The employer says to the employee:

"If you give up £1,000 of your salary, I'll put that £1,000 into a Shared Cost AVC and all you'll have to do is put in a direct contribution of £1 a month. You'll save tax and National Insurance (NI) and I, as your employer, will save NI too."

---

<sup>34</sup> Regulation 9(2) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>35</sup> Regulation 22 of the Local Government Pension Scheme (Administration) (Scotland) Regulations 2008

"Sounds good", says the employee. "I could have got the tax relief anyway by paying that same £1,001 into the AVC pot myself, without doing it via salary sacrifice, but via salary sacrifice I'll get the bonus of saving on NI contributions too. HOWEVER, I'm only prepared to do this if my final salary benefits are not affected. If I and the employer only contribute LGPS contributions on the post sacrifice salary, the resultant benefits from the SCAVC would be uncertain (as they are based on investment returns and, upon retirement, on the scheme or open market annuity rates), so why would I wish to forego salary and thereby potentially reduce my pension benefits?"

"Hmm", thinks the employer, "I can see the employee's point, but if I agree to make the pre salary sacrifice level of pay pensionable will this add to my costs? Well, pre salary sacrifice I'd have paid £20,000 salary, plus Employer's NI and Employer's LGPS contributions on that £20,000 salary. Post sacrifice, I'll pay £19,000 salary, £1,000 into the SCAVC, Employer's NI on the £19,000 and Employer's LGPS contributions on £20,000. So I'll save Employer's NI on £1,000. Sounds good, so if the LGPS Regulations and the tax rules allow it, and the administration costs don't outweigh the Employer's NI saving, I think I'll offer this as an option."

66. So, do the LGPS Regulations and tax rules allow this? Yes, they appear to do so.
67. As already stated, regulation 25 of the Local Government Pension Scheme (Administration) Regulations 2008<sup>36</sup> permits an employer to contribute to a shared cost AVC.
68. Employer and employee LGPS contributions can continue to be paid on the pre salary sacrifice level of pay provided the employer specifies in the employee's contract of employment that the contribution the employer makes to the SCAVC will be a pensionable emolument (in accordance with regulation 4(1)(b) of the LGPS (Benefits, Membership and Contributions) Regulations 2007<sup>37</sup>).
69. The requirement in regulation 4(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>38</sup> which states that "no sum may be taken into account in calculating pensionable pay unless income tax liability has been determined on it" appears to be satisfied as:

---

<sup>36</sup> Regulation 22 of the Local Government Pension Scheme (Administration) (Scotland) Regulations 2008

<sup>37</sup> Regulation 5(1)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>38</sup> Regulation 5(3) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

- a) section 307 of the Income Tax (Earnings and Pensions) Act 2003<sup>39</sup> (death or retirement benefit provision) says:
- (1) No liability to income tax arises by virtue of Chapter 10 of Part 3 (taxable benefits: residual liability to charge) in respect of provision made by an employee's employer under a registered pension scheme or otherwise for a retirement or death benefit.
  - (1A) Subsection (1) does not apply to provision made for insuring against the risk that a retirement or death benefit under an employer-financed retirement benefits scheme cannot be paid or given because of the employer's insolvency.
  - (1B) In subsection (1A) "employer-financed retirement benefits scheme" has the same meaning as in Chapter 2 of Part 6 (see section 393A).
  - (2) In this section "retirement or death benefit" means a pension, annuity, lump sum, gratuity or other similar benefit which will be paid or given to the employee or a member of the employee's family or household in the event of the employee's retirement or death.

and

- b) section 308 of the Income Tax (Earnings and Pensions) Act 2003<sup>40</sup> (exemption of contributions to registered pension scheme) says:
- (1) No liability to income tax arises in respect of earnings where an employee's employer makes contributions under a registered pension scheme.

"Earnings" are defined in section 62 of the Income Tax (Earnings and Pensions) Act 2003 as:

- (1) This section explains what is meant by "earnings" in the employment income Parts.
- (2) In those Parts "earnings", in relation to an employment, means—
  - (a) any salary, wages or fee,

---

<sup>39</sup> S.307 exempts an employee from tax (under s.201 ITEPA) on employer contributions as a benefit in kind

<sup>40</sup> s.308 exempts an employee from tax (under s.62 ITEPA) on the employer contributions as earnings

- (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
    - (c) anything else that constitutes an emolument of the employment.
  - (3) For the purposes of subsection (2) "money's worth" means something that is—
    - (a) of direct monetary value to the employee, or
    - (b) capable of being converted into money or something of direct monetary value to the employee.
  - (4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7)).
70. So, it seems that an employer contribution to a SCAVC is initially a benefit that is taxable but is then exempted from tax by section 307 and 308 of the Income Tax (Earnings and Pensions) Act 2003.
71. For those employers in the LGPS who trade and have taxable profits, a salary sacrifice SCAVC contribution will be allowable as a deduction in arriving at the employer's taxable profits – see <http://www.hmrc.gov.uk/manuals/bimmanual/bim46075.htm>
72. One last, but important, point to mention about a SCAVC salary sacrifice is that it could result in tax implications for the scheme member if the member breaches the Annual Allowance – see <http://www.hmrc.gov.uk/pensionschemes/annual-allowance/index.htm> - or, until 5 April 2011, if the member is a high earner with relevant income of £130,000 or more – see the anti-forestalling provisions in the high earners leaflet at <http://www.lge.gov.uk/lge/core/page.do?pagelId=4261338>.

### **Salary sacrifice equivalent to employee's pension contributions**

73. In certain areas of the private sector, employees are given the option to forego an amount of salary equivalent to their normal pension contributions (thereby reducing the pay on which both the employee and employer pay NI contributions). The employer then pays the equivalent of the salary foregone as a contribution into the pension scheme.
74. Whilst this may be possible in private sector schemes it is not legally possible in relation to the LGPS. This is because under the statutory provisions of the LGPS Regulations, where an employee is a Scheme member, the employee and the employer must pay

their respective contributions into the LGPS – see regulation 3(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>41</sup> and regulation 39 of the Local Government Pension Scheme (Administration) Regulations 2008<sup>42</sup>. There is no power under the LGPS Regulations that would permit an employer to pay the employee's foregone salary (being the equivalent of the employee's normal pension contributions) into the main LGPS on behalf of the employee.

### **Salary sacrifice for professional subscriptions**

75. There have been a number of appeals over the years claiming that an employer paying professional subscriptions on an employee's behalf should be pensionable. All of these claims were dismissed by the Secretary of State on appeal.
76. Regulation 4(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>43</sup> excludes from pensionable pay "any travelling, subsistence or other allowance paid in respect of expenses incurred in relation to the employment". That regulation does not require that the "other allowance" has to be paid direct to the employee (as, equally, the cost of a benefit under regulation 4(1)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>44</sup> can be paid by the employer direct to the benefit provider). So if the payment is made to another body on behalf of the employee but it can be argued that the payment is in respect of expenses incurred in relation to the employment, then it would be excluded from being pensionable.
77. Given the above and the appeal history, such payments should not be pensionable (through salary sacrifice or otherwise).

### **Salary sacrifice for work-related training (including the home training initiative)**

78. Section 250 of Chapter IV of Part IV of the Income Tax (Earnings and Pensions) Act 2003 sets out the tax exemption on work-related training provision (as defined in section 251 of the Act). If work-related training falls under those sections, the tax on the benefit in kind (training) is removed (i.e. is nil).

---

<sup>41</sup> Regulation 4(1) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>42</sup> Regulation 35 of the Local Government Pension Scheme (Administration) (Scotland) Regulations 2008

<sup>43</sup> Regulation 5(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>44</sup> Regulation 5(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

79. Work-related training (as defined in the Act) might typically fall into three categories – (i) that which the employer pays for as the training is a requirement of the job; (ii) that which the employer pays for as it wishes to provide the training to the employee due to the benefits to both the employee and the employer; (iii) that which the employer is not prepared to pay for, or not prepared to pay for in full, but recognises that there will be a benefit to the employee and to the employer if the employee undertakes the training. It is the third category which might be funded via a salary sacrifice arrangement.
80. If work-related training is provided via a salary sacrifice arrangement, the value of the training (equivalent to the salary foregone) can only be specified in the employee’s contract as a pensionable emolument under regulation 4(1)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>45</sup> if it is not excluded from being pensionable by virtue of regulation 4(2) of those Regulations. Regulation 4(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>46</sup>. This excludes from pensionable pay “any travelling, subsistence or other allowance paid in respect of expenses incurred in relation to the employment”. [Note: in former LGPS regulations this was expressed as “expenses incurred *by him for the purposes of his employment*”].
81. So, is the payment made to the training provider by the employer an “allowance paid in respect of expenses incurred in relation to the employment”? Regulation 4(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>47</sup> does not require that the allowance has to be paid direct to the employee e.g. it could potentially be read to mean “paid by or in respect of” the employee. This interpretation would chime with regulation 4(1)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007<sup>48</sup> which does not prevent the cost of a benefit being paid for by the employer direct to the benefit provider. So one can say that it is an allowance that is paid. Is it paid in respect of expenses incurred in relation to the employment? Well, it is certainly arguable that it is an expense incurred in relation to the employment as it is an expense and must, by its very nature, be in relation to the employment as the salary sacrifice tax break can only apply under

---

<sup>45</sup> Regulation 5(1)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>46</sup> Regulation 5(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>47</sup> Regulation 5(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

<sup>48</sup> Regulation 5(2)(b) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

section 250 of the Income Tax (Earnings and Pensions) Act 2003 if the training is work-related training.

82. So, on balance, it would appear that the amount of salary sacrificed for work-related training cannot be pensionable.

### **Sacrificing a pension in payment**

83. It is not possible for a pensioner in receipt of an LGPS pension to sacrifice part of that pension. Regulation 53(1) of the Local Government Pension Scheme (Administration) Regulations 2008<sup>49</sup> (and the equivalent in earlier LGPS regulations) makes it quite clear that "Every benefit to which a person is entitled under the Scheme is payable to or in trust for him." The benefit is payable to the pensioner and cannot be payable in kind.

### **Possible effects of salary sacrifice schemes on other benefits**

84. With salary sacrifice an employee gives up the right to receive part of the cash pay due under their contract of employment in return for the employer's agreement to provide an equivalent non-cash benefit, the value of which is exempt from tax and National Insurance Contributions (NICs). The advantage for the employee is a benefit equivalent to the tax and NICs otherwise payable on the sum sacrificed.
85. However, the benefits of salary sacrifice need to be balanced by the employee against the possible consequences.
86. Paying a reduced amount of NI contributions, even for a limited period of time, can affect future benefits to which the employee could be entitled. For example, the State pension and other benefits such as Statutory Sick Pay and Statutory Maternity Pay can be affected by the level of NICs the employee makes. For example, Statutory Maternity Pay (SMP) is available if an employee earns above the Lower Earnings Limit (£5,044 in 2010/11) prior to going on maternity leave. Salary sacrifice might reduce the level of SMP payable and, if salary sacrifice brings the salary below this the LEL level, entitlement to SMP may be lost. The State Second Pension (S2P), the additional part of the state pension, is calculated with reference to earnings. Any reduction in earnings between the Low Earnings Threshold (£14,100 in 2010/11) and the Upper Accrual Point (£40,040 in 2010/11) may affect this entitlement. Also, as with SMP, if salary sacrifice brings the salary below the Lower Earnings Limit, entitlement to S2P may be lost. See HMRC guidance at: [http://www.hmrc.gov.uk/specialist/salary\\_sacrifice.htm](http://www.hmrc.gov.uk/specialist/salary_sacrifice.htm)

---

<sup>49</sup> Regulation 49(1) of the Local Government Pension Scheme (Administration) (Scotland) Regulations 2008

87. Tax credits depend on a number of personal factors including the number of hours worked, the number of children and whether eligible childcare costs are paid. Salary sacrifice for childcare vouchers / benefit schemes can reduce relevant pay for tax credit purposes and this may increase the Working Tax Credit award. However this award could be reduced by the cost of the childcare voucher / benefit met by the employer. Employees will need to consider their own circumstances carefully in deciding whether to agree to a salary sacrifice for childcare vouchers / benefit schemes. They can contact the Tax Credits Helpline on 0845 300 3900 (text phone 0845 300 3909) and there is a useful calculator at <http://www.hmrc.gov.uk/calcs/ccin.htm> to help them decide whether, overall, they would be better off taking the childcare vouchers or not.
88. Refund of contributions – if an employee leaves with an entitlement to a refund of pension contributions the contribution paid by the employer as part of the salary sacrifice arrangement is not an employee contribution so will not be refunded.
89. Mortgage borrowing - mortgage lenders usually calculate the maximum borrowing level as a multiple of salary. As the salary is lower under salary sacrifice, a person's mortgage borrowing may be affected.

## **Other arrangements**

### **Purchasing / selling annual leave**

90. With regard to the buying and selling of annual leave there are two possible scenarios. Firstly, an employee could forego, say, 5 days salary in order to purchase 5 additional days leave. Conversely, an employee could forego, say, 5 days leave and receive 5 days additional salary instead.
91. The starting point should be that an employee should not be able to influence their pay or final years pay for pension purposes. To achieve this result, the following logic applies.
92. An employee who foregoes 5 days salary in return for 5 days additional leave is, in effect, on unpaid leave of absence for those 5 days and so the provisions of regulation 21 of the Local Government Pension Scheme (Administration) Regulations 2008<sup>50</sup> would apply i.e. the employee and the employer would be required to pay contributions on notional full pay for those 5 days (as the regulation requires contributions to be paid on unpaid leave of absence of up to 30 days).

---

<sup>50</sup> Regulation 18 of the Local Government Pension Scheme (Administration) (Scotland) Regulations 2008

93. Conversely, an employee who foregoes 5 days leave in order to receive 5 extra days pay is receiving pay in consideration for the loss of holiday and so the 5 days extra pay is not pensionable by virtue of regulation 4(2)(c) of the Local Government Pension Scheme (Benefits, membership and Contributions) Regulations 2007<sup>51</sup>. Regulation 4(2)(c) says that “any payment in consideration of loss of holidays” is not pensionable. It does not specify that this has to be a compulsory loss of holiday. It can be argued, therefore, that it covers voluntary as well as enforced loss of holiday.
94. The above approaches achieve the desired result of ensuring that pay and final pay for pension purposes are not affected by an employee's decision to purchase or forego annual leave in return for a reduction or addition to pay.
95. On a general point, the ECJ ruling in the joined cases of Robinson-Steele v RD Retail Services Ltd (C-131/04); Clarke v Frank Staddon Ltd; and Caulfield v Hanson Clay Products Ltd (C-257/04) which was announced on 16 March 2006 indicated that "rolled-up" holiday pay is unlawful even if it is clear in the contract of employment what proportion or amount of the rolled-up pay is holiday pay i.e. pay in lieu of holiday. Having considered the judgment, it is considered that it does not have any implications where an employee chooses to forego annual leave in return for additional pay. This is because, essentially, the judgment concerned cases where an employee was not given holiday leave and their pay rate was automatically adjusted to reflect this. In the scenario described in paragraph 93 above, the individual is entitled to holiday leave; they are simply volunteering to give some up in return for some other benefit. Thus, it is considered there would be no issues resulting from the ECJ ruling, provided the employee does not reduced their holiday leave to below the minimum Working Time Directive amount of 4 weeks (including Bank Holidays) [for a whole time employee].

Terry Edwards  
Head of Pensions  
Local Government Employers  
email: [terry.edwards@local.gov.uk](mailto:terry.edwards@local.gov.uk)  
tel: 020 7187 7346 or 01954 202787

Gary Hull  
Director  
Pricewaterhouse Coopers LLP  
email: [gary.j.hull@uk.pwc.com](mailto:gary.j.hull@uk.pwc.com)  
tel: 0161 245 2067

---

<sup>51</sup> Regulation 45(2)(c) of the Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

## **Distribution sheet**

Local authorities who have registered for notification of Circulars  
Pension managers (internal) of administering authorities  
Pension managers (outsourced) and administering authority client managers  
Officer advisory group  
Local Government Pensions Committee  
Trade unions  
DCLG  
COSLA  
SPPA  
Regional Directors  
Private clients

## **Website**

Visit the LGE's website at: [www.lge.gov.uk](http://www.lge.gov.uk)

## **Copyright**

Copyright remains with Local Government Employers (LGE). This Circular may be reproduced without the prior permission of LGE provided it is not used for commercial gain, the source is acknowledged and, if regulations are reproduced, the Crown Copyright Policy Guidance issued by OPSI is adhered to.

## **LGE Disclaimer**

The information contained in this Circular has been prepared by the LGPC Secretariat, a part of LGE. It represents the views of the Secretariat and should not be treated as a complete and authoritative statement of the law. Readers may wish, or will need, to take their own legal advice on the interpretation of any particular piece of legislation. No responsibility whatsoever will be assumed by LGE for any direct or consequential loss, financial or otherwise, damage or inconvenience, or any other obligation or liability incurred by readers relying on information contained in this Circular. Whilst every attempt is made to ensure the accuracy of the Circular, it would be helpful if readers could bring to the attention of the Secretariat any perceived errors or omissions. Please write to:

LGPC  
Local Government House  
Smith Square  
London  
SW1P 3HZ

or email: [terry.edwards@local.gov.uk](mailto:terry.edwards@local.gov.uk)  
Tel. 020 7187 7346 or 01954 202787

## **PwC Disclaimer**

This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, PricewaterhouseCoopers LLP, its members, employees and agents do not accept or assume any liability, responsibility or duty of care for any consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.

In this document, "PwC" refers to PricewaterhouseCoopers LLP (a limited liability partnership in the United Kingdom), which is a member firm of PricewaterhouseCoopers International Limited, each member firm of which is a separate legal entity.