Staff & Pensions Committee

Briefing note for £95K exit cap regulation change

14 December 2020

Recommendation(s)

1. That the Committee note and comment on the report.

1. Background

1.1 The Restriction of Public Sector Exit Payments (RPSEP) Regulations 2020 apply a cap on exit payments that may be made to employees in most public sector organisations. This cap applies not only to money paid directly to the employee on exit, but also other payments due, such as pension strain payments. In some situations, the pension strain payments can be well in excess of the cap on their own. The cap may be disapplied only in very narrow circumstances and with the consent of HM Treasury.

1.2 The RPSEP Regulations were approved by Parliament on 30 September 2020 and came into force on 4 November 2020. In spite of strong representations from the local government sector, this was before corresponding changes have been made to Local Government Pension Scheme (LGPS) Regulations. Consequently, in taking decisions regarding leavers aged 55 and over, local authorities will be forced into non-compliance with either one set of regulations or the other.

1.3 A consultation by the MHCLG on changes to the LGPS Regulations (together with the redundancy payments legal framework), closed on 9 November 2020. WCC responded to the technical consultation as part of West Midlands Employers (WME). WCC has also submitted a separate response highlighting key overarching concerns (see appendix A).

2. Implications for Warwickshire Pension Fund

2.1 Local authorities are awaiting guidance on how to deal with affected individuals aged 55 or over, who will now be impacted by the new RPSEP Regulations.

2.2 The RPSEP Regulations and regulatory changes are likely to make early retirement / voluntary redundancy significantly less attractive for employees, who may now have to choose between:

i.) forgoing some or all of their non-statutory redundancy payment;
ii.) foregoing an element of their pension benefits;

iii.) deferring their pension to normal pension age; or
iv.) making an up-front payment to offset reduced pension benefits.

2.3 This in turn is likely to impact on future reorganisations, where we can expect greater resistance to change, less flexibility in terms of acquiring volunteers for redundancy and increased potential for legal challenges in the employment tribunal or civil courts. In addition, there may be a spike in legal challenges in the short term, if employees are offered an exit package which then has to be retracted.

2.4 Further, the advent of the cap on exit payments will lead to a review of our current discretionary redundancy payments policy which was implemented in 2011. The scheme currently applies a taper in terms of the multiplier applied to a week's pay, according to age, for LGPS members over 55. Any discriminatory impact of this taper has previously been offset by the immediate access to unreduced pension for those members and the taper is intended to avoid a windfall in those circumstances. A cap on pension strain costs which affects a member's pension will need to be taken into account in considering the proportionality of the taper.

2.5 Currently Pension Funds are advised by their own actuaries on the factors to apply to calculate pension strain costs. The new Regulations will require a consistent national set of factors to be applied, and Funds' pension system software will need to be updated for these new factors. The Government Actuary's Department (GAD) has issued draft national pension strain factors.

3. Immediate Proposed Actions

3.1 Until the LGPS Regulations have been altered in line with the Exit Cap Regulations there is no clear way forward either on the sums to be paid to members aged 55 and over who are impacted by the exit pay cap, or on the pension strain costs payable by employers to the Pension Fund. In any event, there is a risk of challenge.

3.2 Following discussions with the Pension Fund's actuaries, it is now proposed that the following interim arrangements are put in place:

- As a default position, where a member exceeds the £95,000 exit pay cap, they will be offered either a deferred pension or paid a fully reduced pension under LGPS regulation 30(5);
- If there are specific circumstances that need to be taken into account, these will be dealt with on a case by case basis.
- Pension strain costs will be calculated using the draft pension strain factors as issued by (GAD). As soon as the new LGPS Regulations come into force, any cases dealt with under the interim arrangements will be reviewed to ensure compliance and accuracy, and adjustments made as required.
- These interim arrangements will be communicated to all Scheme Employers immediately to ensure they understand the issues and how they are being managed.

3.3 The driver for the proposed approach is that it brings prudence to the amounts paid out such that once there is certainty around the required treatment, where there are amendments required to be made it is easier for the Fund to control and make good corrections where additional benefits are required to be paid as opposed to corrections that require clawing money back from Members due to overpayments. This is also the suggested approach to be taken by both the Fund's Actuary and Local Government Association, Scheme Advisory Board.

4. Financial Implications

4.1 The exit payment restrictions have the potential to reduce costs to the local authority, through capped redundancy costs, and the longer-term impact on employer pension contribution rates.

4.2 However, set against these potential cost reductions are the implications arising from the difficulties they are likely to create in, for example, the implementation of restructures, cost of employment tribunals, cost of implementing change and additional workloads, management of changes with other employers in the LGPS, communication with LGPS scheme members.

5. Environmental Implications

None

6. Supporting Information

None

7. Timescales associated with the decision and next steps

None

Appendices

- Appendix 1 – Response to Government consultation on the reform of exit payments in local government

Background Papers

1. Portfolio Holder Decision Making 8 September 2020 - Response to Government Consultation on the McCloud Remedy for the Local Government Pension Scheme

2. Portfolio Holder Decision Making 8 September 2020 Response to Government Consultation on the McCloud remedy and its impact on the Fire Fighters' Pension Scheme

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The report was circulated to the following members prior to publication:

Local Member(s): None
Other members: Councillors Kaur & Gifford

Appendix 1

Response to MHCLG Consultation: Reforming local government exit pay - A consultation on the reform of exit payments in local government

Thank you for the opportunity to respond to the consultation on the reform of exit payments in local government.

While the consultation is seeking views about implementation issues regarding the exit payment regulations, we would like to take the opportunity to flag that it had been understood that changes to the regulations were targeted towards higher earners leaving public sector employment with high value packages. The impact assessment conducted by the Government Actuary's Department indicates that in fact, these changes will affect 86% of people leaving on the grounds of redundancy, and that the average salary of those affected is less than £30,000. This penalises those who have worked loyally for public sector employers for many years and through no fault of their own are having benefits they could have expected to be entitled to withdrawn.

Warwickshire County Council also asks the government to note that the impact of these changes to regulations is taking place at a time when local government is already under major pressure in responding to local COVID-19 issues and is dealing with the considerable financial burden that has created.

Warwickshire County Council is part of a consortium of West Midlands Employers which will be submitting detailed responses to the specific consultation questions. However, we would like to take this opportunity to provide a broader, strategic response in order to make the following points:

1. The Restriction of Public Sector Exit Payments Regulations were approved by Parliament on 30 September 2020. In spite of strong representations from the local government sector, it appears that they are likely to come into force before corresponding changes can be made to Local Government Pension Scheme (LGPS) Regulations. This presents a significant issue for local authorities, who will be forced into non-compliance with either one set of regulations or the other.
2. Local authorities are now in a position where they cannot reliably determine the outcome of individual cases, without risking legal challenge. This will seriously inhibit their ability to complete reorganisation and redundancy exercises, and to the considerable detriment of those individuals who are part way through such processes.
3. Additionally, where local authorities operate their Local Government Pension Scheme on behalf of other employers who fall within the scope of these regulations, they are now unable to provide advice on how to proceed with redundancy cases, and are therefore unable to fulfil their duties as Scheme Manager.
4. As a result, councils may have to retain staff who they would otherwise have exited from their organisations. This will have the effect of:
   a) increasing costs at a time when local government can ill afford it;
   b) increasing the likelihood of legal challenge from those individuals being made redundant; and
   c) if staff are exited there is a real risk that they will be disadvantaged after years of service to local government.

5. Councils will also have to meet the additional costs of changing their pension administration systems and software to implement changes to pension strain factors, as and when a national strain factors scheme is introduced.