The Local Government Pension Scheme Advisory Board

Public Sector Exit Payments

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Update 9.11.2020 Information for administering authorities published

Update 5.11.2020 Information for scheme employers published

Update 30.10.2020 Exit payments interregnum - Commentary on legal advice

Update 30.10.2020

Exit payments interregnum - Commentary on legal advice

1. This commentary considers the position of LGPS administering authorities when a scheme member aged 55 or over who would, apart from the bringing into of force of the Public Sector Exit Payments Regulations 2020 (the Exit Cap Regulations) on 4th November 2020, qualify for an immediate unreduced pension under regulation 30(7) of the Local Government Pension Scheme Regulations 2013 (the LGPS Regulations). For the avoidance of doubt this commentary only applies to capped scheme members, those not subject to the cap should continue to receive unreduced pension benefits under regulation 30(7).

2. LGPS administering authorities and scheme employers should take their own view as to the course of action they take and in doing so may wish to seek their own legal advice. This commentary is designed to assist LGPS administering authorities and scheme employers in considering what action to take and what legal advice they may deem appropriate. It is not in itself legal advice nor an instruction to act in any particular manner.

3. Notwithstanding the above it is the Scheme Advisory Board's (the Board's) opinion that in the circumstances set out in in paragraph 1 the course of action presenting the least risk to both LGPS administering authorities and scheme employers is for the;

- LGPS administering authority to offer the member the opportunity to take a deferred benefit under LGPS regulation 6 or a fully actuarially reduced pension under LGPS regulation 30(5)
- Scheme employer to delay the payment of a cash alternative under regulation 8 of the Exit Cap Regulations

In the view of the Board this scenario allows for the maximum flexibility for both the LGPS administering authority and the scheme employer to minimise the financial risk which will result from the inevitable challenge from the scheme member denied what would appear to be their right to an unreduced pension under LGPS regulation 30(7).

4. This commentary refers to the written opinions of counsel obtained on the 6th and 20th October 2020 as well as a further advice following a discussion on the interpretation of regulation 8 of the Exit Cap Regulations received by email on 24th October 2020.

5. At the time of drafting this commentary HMT guidance, and Directions on the power to waive the cap, had just been received. These are currently being reviewed in detail and further information can be found on the LGA position paper on exit cap regulations, guidance and directions.

6. This commentary relates to the known situation as at 30th October 2020, developments after that date will be addressed in subsequent updates.

The position for LGPS administering authorities and scheme employers from 4th November 2020

7. The Exit Cap Regulations restrict the strain payment (along with any other payments defined as an exit payment by these regulations) made by the scheme employer under LGPS regulation 68 (2). However, while scheme employers determine the reason for the exit, the level of pension payable to a member is solely the responsibility of the LGPS administering authority (LGPS regulation 72(3)).

8. The LGPS Regulations do not appear to contain a clear conditional linkage between the payment of a strain cost under regulation 68(2) and the scheme member' right (and indeed obligation) to receive an immediate unreduced pension under regulation 30(7) resulting in a request by the LGPS administering authority for a strain cost from the scheme employer.

9. Amendments will be made to the LGPS Regulations (currently under consultation) to address capped strain costs and introduce partly reduced pensions, but these are not anticipated to be in force before the end of 2020 and possibly early 2021.

10. In a letter dated 28th October 2020 from MHCLG Minister, Luke Hall, to Chief Executives of Councils and LGPS administering authorities , the government set out its view that the Exit Cap Regulations effectively curtail the use of LGPS regulation 30(7) to pay an immediate unreduced pension when the cap is breached. Therefore, a capped member should only receive an immediate pension under LGPS regulation 30(5) (with full actuarial reductions applied) or a deferred pension, plus a cash alternative payable by the employer under regulation 8 of the Exit Cap Regulations.

11. LGPS administering authorities would therefore appear to be in the position of not acting in accordance with either the government' view or the LGPS Regulations. At the same time, scheme employers appear to be in the position of being asked to make a potentially sizeable cash alternative payment when it is uncertain if a strain cost request from the LGPS administering authority may also be forthcoming.

Considerations for administering authorities

12. In considering the appropriate course of action once the Exit Cap Regulations are in force, an LGPS administering authority will need to assess the level of risk of successful challenge it could

face. Unfortunately, there does not appear to be any course of action which does not result in the risk of challenge and as such, clarity may only be achieved once a challenge has been resolved through the courts.

13. According to the advice given to the Board by counsel (James Goudie QC 6th October 2020), not paying a pension under LGPS regulation 30(7) represents a high risk of successful challenge.

14. According to the same advice this risk could be mitigated to moderate if the government' view is followed and a cash alternative is paid by the scheme employer under regulation 8 of the Exit Cap Regulations, plus a fully reduced pension under LGPS regulation 30(5) or an award of a deferred pension.

15. However, if a cash alternative is paid and the LGPS administering authority subsequently loses a challenge, then the result could be the enforced payment of an unreduced pension on top of the cash alternative. Additionally, the LGPS administering authority may be unable to recoup any strain cost, due to the scheme employer having reached the maximum payable under the Exit Cap Regulations.

16. Alternatively, if the LGPS administering authority pays an unreduced pension under LGPS regulation 30(7), they will not be acting in accordance with the government' view and may also be subject to a challenge on the grounds of ' repeal'. Implied repeal suggests that LGPS regulation 30 (7) is curtailed as a consequence of the Exit Cap Regulations coming into force.

17. Although the advice given to the Board (James Goudie QC 20th October 2020) does not agree that the requirements for implied repeal have been met, that advice does not remove the risk of a challenge, which if successfully brought could result in the LGPS administering authority being found to have acted ultra vires and having to seek to reclaim the pension.

18. Given that clarity may only emerge following a challenge, the prudent course may be for the LGPS administering authority to state their intention to, and in the event of termination, offer the member a deferred pension or pay a fully reduced pension under LGPS regulation 30(5) and for the scheme employer to delay making any cash alternative payment until the inevitable claim is settled.

19. If the result of the claim is an order to pay an unreduced pension under LGPS regulation 30(7) the LGPS administering authority can then put the unreduced pension into payment and request a strain cost from the scheme employer.

20. If, however, the result of the claim is that LGPS regulation 30(7) is indeed overridden by the Exit Cap Regulations then the member can be paid a cash alternative by the scheme employer in addition to a fully reduced pension (or deferred pension) payable by the LGPS administering authority.

Considerations for scheme employers.

21. Scheme employers listed in the schedule to the Exit Cap Regulations are subject to the exit cap and cannot pay a combination of exit payments as defined by those regulations in excess of £95k. Pension strain is defined as an exit payment under regulation 5(2)(b) of these regulations.

22. Although the risk of challenge set out in the legal advice received by the Board relates to LGPS administering authorities, there are also risks which should be considered by other capped scheme employers.

23. To ensure that employees who are not subject to the cap continue to receive an unreduced pension, employers must notify the LGPS administering authority of any employees who are subject to the cap (including strain cost) prior to the exit.

24. Should a scheme employer pay a cash alternative under regulation 8 of the Exit Cap Regulations and the same employee is successful in a challenge against the LGPS administering

authority, then the LGPS administering authority will no doubt request a strain payment to cover the cost of putting an unreduced pension into payment.

25. In this situation, and depending on the amount of any cash alternative and other exit payments that have been made, the scheme employer may not be able to pay all or any of that strain cost as a result of the restrictions set down in the Exit Cap Regulations.

26. Where strain payments are not made at all or in full, the cost of unreduced pensions resulting from successful challenges will have to be met via increased scheme employer costs for all scheme employers within an LGPS Fund. There is therefore a risk that scheme employers could find themselves making cash alternative payments plus having to meet the increased scheme employer costs brought about by unfunded unreduced pensions.

27. Payment of a cash alternative to the scheme member will incur income tax and employer National Insurance Contributions (on the total of all termination payments in excess of £30,000).

28. HMT guidance (paragraph 4.4) states that a cash alternative may be paid to the scheme administrators. Following an unsuccessful challenge, a scheme member who receives a reduced pension may have preferred for the cash alternative to be paid into the LGPS in order to purchase additional pension rather than receiving it as cash. This will not be possible if the cash alternative has already been paid to the member.

29. It may therefore be prudent for a scheme employer to delay making a cash alternative payment until such time as the position is clarified following a challenge. The scheme employer must of course pay to the employee any exit payments due under statute and will need to take a view, and potentially take legal advice, on whether any other payments could be lawfully delayed until clarification is received to enable the maximum amount to be available for a strain cost.

30. With regard to the ability of scheme employers to make a part payment of a strain cost under regulation 8 of the Exit Cap Regulations, James Goudie QC confirmed by email on Friday 23rd October 2020 the following;

..notwithstanding the obscurities and oddities of Reg 8 of the Exit Cap Regulations, even if an employing authority cannot lawfully from 4 November 2020 pay to the LGPS Fund the amount by which the pension ' cost' exceeds the £95K cap, it at least can pay a strain cost up to the cap. If the amount of the strain cost means that the cap is exceeded that does not prevent the employer from paying strain cost at any rate up to the amount of the cap.

Update 28.10.2020 Letter from MHCLG

Update 21.10.2020 Legal advice being sought

Update 15.10.2020 Exit cap regulations made

Changes to legislation

Q&A

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