



## Employment Law Brief

*with*

### Darren Newman

**I have to admit that I am surprised that the Government has finally launched its consultation on capping public sector exit payments. I would have thought that they would have enough on their plate already. Nevertheless, some three years after the Enterprise Act 2016 introduced the power to limit public sector exit payments to £95,000, we have a new set of draft Regulations aiming to do just that. These replace the original draft Regulations issued in 2016, which the Government was forced to abandon.**

Three years on, you might expect that these Regulations would be carefully thought through, internally consistent, and that they would resolve the problems presented by the original draft. Think again. These Regulations are a work in progress which give some insight into the way in which the Government is thinking about the issue, but they cannot possibly be the final version. Despite the lengthy delay, they bear all the hallmarks of a rushed job.

For example, it has always been the Government's policy that the 'total amount of exit payments' made to a public sector employee in respect of the ending of their employment should not exceed £95,000. That policy is also reflected in the guidance published as part of this new consultation. This says:

*When calculating whether an individual's exit payment should be subject to the £95,000 cap, employers must take into account all payments related to exit received by the individual within a 28 day period.*

The problem, however is that this is not what the draft regulations say. The draft published in 2016 was clear that the cap applied to the aggregate payments made to an employee. The latest draft is not. There is certainly no reference to looking at all the payments made over a 28-day period. In fact, the way in which the Regulations are drafted means that the cap will apply to each individual element of the various exit payments made by the employer. This would allow you to have a £94,000 redundancy payment plus another £94,000 agreed in a settlement agreement, plus another £94,000 pension strain and so on.

So either the Government has changed the policy in a fundamental way – in which case the draft guidance is wrong - or the draft guidance accurately reflects the policy and the Regulations are wrong. Much as I would welcome a change in policy, I think this must be a drafting error in the Regulations. It does not say much about the care with which this draft has been prepared that such a mistake should get this far.

Elsewhere in the draft Regulations we do see a clear – and welcome – shift in policy. In



particular, the new draft includes a major new exception in relation to payments in lieu of notice. The Regulations specify that a payment in lieu of notice is not an exit payment if it 'does not exceed one quarter of the relevant person's salary'. This effectively means that for all employees on three months' notice or less, a payment in lieu of notice does not count towards the £95,000 cap.

More flexibility is also given in respect of settlement agreements. Payments under a settlement agreement or an Acas conciliated settlement do count towards the cap, but there is now a big exception. The Government proposes that directions from the Treasury would allow the cap to be relaxed when the employer believes that a case involving whistleblowing or discrimination would result in a finding favourable to the employee. There would be bureaucracy to overcome in terms of getting the Treasury to sign off on the settlement agreement in question – but at least this doesn't force a council to mount a hopeless defence against a strong claim and wait for the Tribunal to make an award.

The central problem for local government, however, remains the issue of pension strain. The cap covers 'any payment made to reduce or eliminate an actuarial reduction to a pension on early retirement or in respect of the cost of a pension scheme of such a reduction not being made'. This element is particularly important when it comes to the redundancy of long serving employees in local government who have reached the age of 55. The pension strain costs alone can exceed £95,000 for even modestly paid employees.

One of the reasons that the Government did not proceed with the draft Regulations issued in 2016 was that they failed to grapple with the relationship between the employer's obligation to make a payment into the

pension fund and the employee's clear entitlement to certain benefits under the Local Government Pension Scheme. It is one thing to instruct an employer not to make a payment, it is quite another to remove the legal entitlement that makes the payment necessary.

As far as I can tell the latest version of the Regulations takes us no further forward. Imposing the cap will not in my view affect the entitlement of an employee to an unreduced pension on being made redundant at the appropriate age. Quite how this would be resolved in an individual case is unclear – would the employee have to take a case to court in order to obtain the benefit to which they were entitled? It would be grossly irresponsible of the Government to proceed with the cap as set out in these Regulations without making appropriate changes to the scheme itself, but it is not clear how or even if they intend to do this. More work is clearly needed before they can take this policy forward. Being forced to look at this issue properly might also help the Government see that the proposed cap has a much wider impact than simply limiting huge cash pay-outs to highly paid executives.

We do not yet have an implementation date for these Regulations. The consultation runs until the beginning of July, so we might expect the final regulations to be laid before Parliament this autumn. But it is clear that further changes will need to be made before the Regulations are fit for purpose. Given the amount of political upheaval we can expect over the course of 2019, I would still be surprised if the Government manages to get this done by the end of the year.

**Don't forget to check more about Darren Newman on his blog at [A Range of Reasonable Responses](#) or on twitter at [@DazNewman](#)**