Employment Law Brief

with

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We now know that the £95,000 cap on public sector exit payments will come into force on 4th November. There may be legal challenges further down the line – the British Medical Association is seeking a judicial review and Unison has just written a formal 'letter before action' to the Government indicating that it too is considering that option.

It seems unlikely however that these developments will stop the Regulations from coming into force. So local authorities need to decide what to do when the Regulations cut across redundancy exercises that are already in train.

The first thing to be clear about is that the critical date is the date of the payment. It is the making of an exit payment in excess of £95,000 that is made unlawful, so it is the date on which the payment is made that counts. The fact that the employee may have left employment before the Regulations came into force does not matter. Nor will the fact that a binding settlement agreement was signed before the 4th November. If the payment hasn't been made by the 4th, then it will be subject to the cap. That may leave employers in the absurd position of being sued for a sum that they had previously agreed to pay and being unable to settle the case. The Regulations exclude payments made as a result of a court of tribunal order, so the employee will still get paid in full once the case is actually won.

Of course we have always known that in local government the key issue is pension strain. The cap includes the sum that employers must pay into the pension fund to cover the unreduced pension awarded to a qualifying employee made redundant over the age of 55. The issue here is that the cap only applies to that pension strain payment – it does not apply to the pension payment itself. Unfortunately, it is not entirely clear that the Government understands this. In a letter sent to council chief executives the Minister for Local Government – Luke Hall MP – has expressed the view that the cap applies not just to the pension strain payment but to the unreduced pension itself. The Governments position is that as a consequence employees must take a reduced pension – possibly accompanied by a lump sum (within the overall cap) to compensate them.

This is clearly wrong. The Regulations list the payments that are covered by the cap. They specifically include pension strain payments but do not mention pension payments made to an employee. Indeed, how could they? The cap applies to payments made by an employer to an employee who is leaving employment. Pension payments are made not by the employer but by the pension fund. Even when the employer in question is also the administering authority, it is clear that the pension payment is not being made in its capacity as an employer. Even more importantly, however, the actual pension payments are modest regular payments. Even if the payments being made to the employee did count towards the cap it would take several years for them to add up to more than £95,000.

The Minister seems to have been advised that the existence of the cap has the effect of limiting the actual pension rights of individual employees even before the pension scheme regulations are amended. But any pension scheme that follows this advice is certain to face legal challenge from employees who are not receiving the level of pension to which they are clearly entitled under the current rules of the scheme.

The real issue is not the payment of the pension to the employee but how to reconcile the conflict

[1] http://lgpsboard.org/images/PDF/letters/MHCLGtoLAs.pdf

between the newly imposed cap and the provision in the LGPS requiring the employer to make a pension strain payment to cover the cost of the unreduced pension. This conflict is caused by the Government's inexplicable decision to implement the Exit Payment Regulations while still consulting over the changes to the pension scheme that would make those Regulations workable.

Given some of the difficulties that this cap will cause, many will be looking to the ability of the whole council to waive the cap in particular cases. The Regulations do give councils that power – but in reality, it is likely to be very limited. The 'power to relax' – that really is what the legislation calls it - must be exercised only in compliance with any directions issued by the Treasury – or with the express permission of Treasury ministers. At the time of writing, the Directions have yet to be published – although they may well be out by the time you are reading this.

But we already know roughly what they will say because draft Directions were published back in 2019 alongside an earlier draft version of the Regulations. In its response to the consultation that followed, the Government indicated that it would widen their scope slightly, but it seems clear that the broad outline will remain the same.

So a council will be able to pay in excess of the cap in cases where the employee's entitlement is protected under TUPE. The council could also apply a waiver where it believes that the employee would be likely to win a claim of discrimination or a claim relating to whistleblowing or health and safety rights. This rules out settlements made on a commercial basis where the employer takes the view that it would win the case but that it would be too expensive to defend. It almost – though not quite – amounts to a public admission of liability. The settlement would also have to be approved by the whole council which would obviously mean that the normal confidentiality that surrounds such agreements could not be observed.

The other grounds on which the council could disapply the cap will cover situations in which not exercising the power would cause 'undue hardship' or 'significantly inhibit workforce reform'. There is also likely to be provision for cases where an agreement to exit was made before the Regulations came into force, but the employee's exit has been unexpectedly delayed. Note, however, that this will not apply where the exit is proceeding as scheduled but the Regulations themselves are being implemented sooner than expected.

Importantly a council must seek the consent of HM Treasury before adopting any waiver on one of these other grounds. On balance, I don't think that these provisions on waiver will be of much use to councils. But there is perhaps hope that the residual power of the Treasury to disapply the cap in particular cases can help resolve the tension between the cap applying to pension strain payments and the current rules of the pension scheme requiring those payments to be made. Once the Government acknowledges that this is a real problem that can't be got around by claiming that employees should be denied the unreduced pension to which they are clearly entitled, the obvious step is for Ministers to exclude pension strain payments from the scope of the cap until the pension scheme has been amended. If they do not do this then I really think that this hurried implementation of the cap will cause chaos.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman