Employment Law Brief

with

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I don't think I've ever seen a Government U-turn like it. On 12 February, the Government suddenly announced that it was withdrawing the £95,000 cap on public sector exit payments. While the mechanics of formally revoking the Regulations take place, a new Treasury Direction has been issued. This essentially provides for a blanket mandatory waiver of the cap across the public sector (In England at any rate) with immediate effect. What on earth has prompted this extraordinary turnaround?

The Government's statement is rather bland: "after extensive review of the application of the Cap, the Government has concluded that the Cap may have had unintended consequences and the Regulations should be revoked". So what were these "unintended consequences"? Could it be the fact that the main effect of the cap was to undermine the pension entitlement of long serving public sector employees? Was it the confusion caused by the fact that the cap was introduced before the Local Government Pension Scheme could be reformed? This created, after all, an impossible situation in which the pension fund was obliged to pay an unreduced pension to employees made redundant over the age of 55, but local authorities were prevented from making the pension strain payments that would fund that entitlement. Perhaps one unintended consequence was the uncertainty caused by the fact that provisions in the Regulations were contradictory or so badly drafted as to be unintelligible.

The Government might well argue that all of these consequences were unintended – but it could hardly claim that they were unforeseen. The difficulties in capping pension strain payments and the effect that this would have on modestly paid employees facing redundancy were clearly spelled out to the Government over a number of consultation exercises stretching back to 2015.

I suspect the biggest unintended consequence the Government was concerned about was the imminent Judicial Review of the Regulations themselves. It must have become clear to the Government that they were likely to lose and the Regulations would be struck down as being incoherent and unlawfully interfering with existing contractual and pension entitlements.

So what happens now? For those employees who have already had their exit payments capped – who left employment between 4 November and 12 February - the Government is encouraging employers to pay them any sums that were withheld. While there is no formal obligation to do this, the reality is that such employees would probably have a good contractual claim for any outstanding payments that should have been made to them directly – irrespective of whether or not the cap applied. The Government is essentially making it clear that there is now nothing to prevent employers from settling any outstanding claims. As for pension strain payments, the appropriate pensions funds will presumably be able to make a fresh request for payment from employers who were previously prevented by the cap from paying the full amount. I did hear that some pension funds had reduced the pension payable to members of the scheme whose employer was unable to make the full pension strain payment. That was always the wrong approach in my view – there was nothing in the Exit Pay Cap Regulations that affected an employee's actual pension entitlement – but the question is now academic. Pension funds should be paying an unreduced pension in full when the scheme provides for that. Any member who has not been given the pension due to them so far should of course now be paid any sum that was previously withheld.

And what of the Government's policy of limiting public sector exit payments? I was struck by how non-committal the Government's statement was. There is no suggestion that the Regulations are merely going to be tweaked and then reintroduced. All the Government says is that "HM Treasury will bring forward proposals at pace to tackle unjustified exit payments". This suggests a complete re-think of the policy – which would be welcome. But it is worth remembering that the £95,000 cap is actually enshrined in primary legislation (The Small Business Enterprise and Employment Act 2015). Coming up with an entirely new approach will take quite some time.

In the meantime, the Government's approach to redundancy payments in local government must also be in doubt. A consultation on reforming local government exit pay run by the Ministry of Housing, Communities and Local Government closed on 9 November 2020. That consultation proposed capping the salary on which enhanced redundancy payments in local government can be based to £80,000 with the redundancy payment itself limited to a maximum of 66 weeks' pay. More importantly, however, the Government was also proposing that no enhanced redundancy payment would be made if the employer was also making a pension strain payment.

While the Government will no doubt want to do something in relation to redundancy payments, it is difficult to see how this policy can go forward. Central to the proposal that the employer could not pay both a pension strain cost and an enhanced redundancy payment was a significant change to Local Government Pension Scheme. This would have given practical effect to the exit payment cap and introduced a more flexible range of pension options for an employee being made redundant over the age of 55. With the Exit Pay Cap gone, it would seem that this whole consultation will have to go with it.

As the Government goes back to the drawing board, I hope it learns some lessons from this fiasco. The problems with the Regulations, both in terms of their overall impact and also their rather shambolic drafting were clearly pointed out time and time again. There was an arrogance about the way in which the representations made by the Local Government Association and a range of other stakeholders were simply dismissed out of hand. The insistence on rushing through the Regulations without waiting until the relevant pension schemes could be changed first was irresponsible and a recipe for chaos. While the withdrawal of the Cap is a welcome development, many public servants have had to work long and hard to try to make sense of this ill-thought out policy when there was frankly more important work to be done. The least they deserve is an assurance that before the Government revisits this policy it will listen more carefully to those who will have to implement it.

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