



Employment Law Brief

with

Darren Newman

One of the surprises of the summer has been the revival of the Government's proposals for capping exit payments made to public sector workers at £95,000. This was first proposed in the Conservative Party manifesto in 2015 which pledged to abolish 'six figure pay-outs' for the 'best paid public sector workers'. The Regulations published in July this year were the expression of that policy – but far from being limited to the best paid public sector workers they have a potentially major impact on the pension entitlement of a wide range of long-serving local government employees.

The central problem is this. The payments which are included in the overall pay cap cover not just cash settlements and redundancy pay but also 'pension strain' - the sum that local authority employers must pay into the relevant pension fund when members of the scheme qualify for enhanced benefits after being made redundant at the age of 55 or over. The basis on which this sum is calculated varies between funds, but can easily exceed the £95,000 cap even without taking other elements such as redundancy pay into account. This is true not only of highly paid senior managers, but also long-serving employees in middle-ranking roles.

Technically the cap itself does not affect the entitlement of pension scheme members. While the Regulations prevent the employer from making payments which exceed the cap, they do not of themselves change the rules of the pension scheme. While the employer may therefore be prevented from making a full pension strain payment into the pension fund, that does not alter the fact that the individual member is still entitled to the same enhanced benefits. Quite how those benefits would be paid for is far from clear. There is a similar issue with contractual redundancy payments. The employer's

ability to pay them might be limited by the cap, but until there is a change in the contract itself, the entitlement of the employee being made redundant does not change.

So whatever you think of the merits of the cap itself, it is vital that it is not actually introduced until employers across the public sector have had the chance to renegotiate contracts where appropriate. Even more important, the rules of the local government pension scheme must be changed to reflect the operation of the cap before it comes into force. The Ministry for Housing, Communities and Local Government have launched a consultation on changing the rules of the pensions scheme and limiting local government redundancy payments. The consultation is scheduled to run until November 9th and so it is difficult to see how the necessary changes could be made before the end of the year. Nevertheless, if the Government has any sense at all, it will wait until that consultation is completed, and new rules put in place, before implementing the exit pay cap.

With that in mind it was worrying to see the Regulations making progress when Parliament returned from its summer break with the Government failing to give any assurances – or even



information – about timings. The Regulations have to be approved by a vote in both the House of Commons and the House of Lords. The Lords approved them on 23 September and the Commons debated them in committee on the 21st. Ordinarily they would then have come to a vote on the floor of the House of Commons the next day. In the event, however, the Government chose not to move the motion to approve them.

So we are left hanging. The Government could put the Regulations to a vote on very little notice – there is, under the procedure, no opportunity for any further debate. Once they have been approved the Minister needs to sign them (which is when they are said to be ‘made’) and they will then come into force three weeks later. That could happen before the end of October or it could happen some time next year. If I were a gambling man, I would bet on them not coming in before 2021 – but I wouldn’t bet much.

Whenever the Regulations come in, it seems certain that some employers will be caught on the hop – in the process of negotiating a settlement that exceeds the cap but running out of time to close the deal. The three week period between the Regulations being made and them coming in to force will hopefully allow both sides to focus their efforts – but it is important to remember that it will not be enough to just agree a deal in that period, the actual payment will also need to be made before the cap becomes law.

There will be a mechanism for waiving the cap in individual cases. Decisions to pay in excess of £95,000 will however have to be made by the whole council – they can’t just be decided by senior management. And the Council will not have a free hand. Any waivers must be granted in accordance with Treasury Directions or with the express

permission of ministers. We expect that the Directions will allow for a waiver when the employee is claiming for discrimination, whistleblowing or a breach of health and safety rights. However, it is likely that the Council would have to decide that such a claim would be likely to succeed – not just that it is a good idea to settle it. A waiver may also be possible when the application of the cap causes particular hardship – but this is the sort of thing that will need ministerial sign-off and would only be available in extreme cases.

It is highly unlikely that the Treasury Directions would allow the waiver of the cap just because the parties negotiated the exit before the cap came into force. There is some suggestion that a waiver might be appropriate if a previously agreed exit has been unexpectedly delayed for some reason, but that will not cover the more usual situation in which the cap just happened to come into force while a settlement agreement was being negotiated.

What is more, it is the date of the payment that counts, not the date of the exit. When the Regulations come in, they will also apply to ongoing tribunal claims that are in the process of reaching a settlement. Any decision to settle a case for more than £95,000 – even where that represents good value for money – will only be allowed if the Council agrees a waiver and complies with Treasury Directions. It may still be some months before the cap actually applies, but to be on the safe side it is probably better for both employers and employees to really apply their minds to any ongoing negotiations. If there is a deal to be done, it is best done quickly.

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