

The LGPS Scheme Advisory Board

Exit Cap Revocation Advice

17 February 2021



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Advice

1. Background

1.1 Following the issue of the HM Treasury Directions on 12 February 2021 disapproving the £95,000 exit payments cap (the “**Cap**”) until The Restriction of Public Sector Exit Payments Regulations 2020 (the “**Exit Payments Regulations**”) have been revoked, we have been asked to advise on the following scenarios:

- 1.1.1 If a member who left in December has had a reduced pension put into payment and a cash alternative (“**CA**”) payment paid to them, given that exit cap regulations will not be revoked retrospectively and therefore the CA payment remains legal, do they:
 - 1.1.1.1 Receive a full unreduced pension with full strain cost payable by the employer who then has to try and get the CA back; or
 - 1.1.1.2 Receive a part reduced pension taking into account that part of the strain cost paid as a CA?
- 1.1.2 If a member who left in December has opted for a deferred pension and has had a cash alternative payment paid to them, given that exit cap regulations will not be revoked retrospectively and therefore the CA payment remains legal, do they:
 - 1.1.2.1 Have their deferred replaced by a full unreduced immediate pension with full strain cost payable by the employer who then has to try and get the CA back; or
 - 1.1.2.2 Have their deferred replaced by a part reduced immediate pension taking into account that part of the strain cost paid as a CA; or
 - 1.1.2.3 Have the option to leave things as they are?

2. Advice – Reduced Pension Scenario

2.1 These points are going to hinge on whether:

- 2.1.1 the Exit Payments Regulations are revoked retrospectively or not; and
- 2.1.2 whether MHCLG change their guidance issued on 28 October 2020.

Retrospective Revocation

2.2 On the issue of whether the Exit Payments Regulations will be revoked retrospectively, we have been asked to provide this advice on the basis this will not be the case and therefore there will be a period from 4th November 2020 to 12th February 2021 when the Exit Payment Regulations, and more specifically the Cap, were validly in place.

2.3 However, there does appear to be mixed messages circulating on this point. For example, we have seen an email from Judith Cole of Local Government Finance and Workforce Partnerships Division at Welsh Government saying:

*“This means that the £95,000 exit cap will no longer apply: **the intention is that this will be retrospective** so that any payment which has been affected by the Regulations can be reconsidered.”*

- 2.4 If the Exit Payments Regulations are revoked with retrospective effect then the position is much clearer in that the Cap will be deemed to have never applied, Regulation 30(7) of The Local Government Pension Scheme Regulations 2013 (the “**LGPS Regulations**”) will have applied to any redundancies or business efficiency terminations in the intervening period and MHCLG guidance will then fall away.
- 2.5 However, we will advise on the basis that the revocation will not be retrospective.

MHCLG Guidance

- 2.6 The MHCLG guidance issued on 28 October 2020 stated:

“In the meantime, the recommended course of action for an administering authority to act consistently with its legal duties is that the provisions of Regulation 30(7) are subject to the cap and so the provisions of Regulation 8 of the 2020 Regulations and Regulation 30(5) of the LGPS 2013 Regulations should be engaged. The Government’s view is that LGPS members in that position should be able to elect to receive an immediate but fully reduced pension or, if they do not so elect, a deferred pension plus a lump sum equal to the capped strain cost”.

- 2.7 We understand that many LGPS administering authorities have followed this guidance.
- 2.8 The guidance appears to have been based on the doctrine of ‘implied repeal’ and that the LGPS Regulations should be viewed as being overridden and amended by the Exit Payments Regulations despite the fact that no specific amendments were made to the LGPS Regulations.
- 2.9 The Scheme Advisory Board obtained two legal opinions from James Goudie QC. The second opinion dated 20 October 2020 expressed a strong view that, in James Goudie QC’s opinion, the stringent requirements for an implied repeal of Regulation 30(7) of the LGPS Regulations were not met. We have no reason to disagree with that opinion.
- 2.10 In light of the Directions issued by HM Treasury and the fact the Exit Payments Regulations will be revoked (whether retrospectively or otherwise), it is difficult to see how MHCLG can continue to stand behind their October guidance. The guidance, which seemed uncertain at the time, is now even further compromised by the latest Directions.
- 2.11 If MHCLG do not change their guidance for the period from 4th November 2020 to 12 February 2021, this will put LGPS administering Authorities in a very difficult position. This would also be inconsistent with the messaging from HM Treasury around unintended consequences and the clear expectation that exits in this period will be revisited. As such, it would potentially be open to further challenge, given that HM Treasury and not MHCLG is the department laying out the primary policy intention here.
- 2.12 This will also result in a position of unfairness as Regulation 30(7) will now apply to terminations on and after 12 February 2021 following the disapplication of the Cap but would not apply to terminations before this date.
- 2.13 If MHCLG change their October 2020 guidance and confirm that Regulation 30(7) should not be treated as being subject to the Cap in the intervening period, then the administering authority would need to go back and pay the unreduced pension (and arrears) on the basis that Regulation 30(7) validly applied and the strain cost would be payable by the employer.
- 2.14 Even if MHCLG do not change their position, an administering authority could take its own legal advice on this point and potentially come to the conclusion that Regulation 30(7) was not subject to the Cap on the basis implied repeal did not apply. The MHCLG guidance is not legally binding statutory guidance that an administering authority has to follow (although clearly not following such guidance would put an administering authority in a politically difficult situation).

Recovery of Cash Alternative Payments

- 2.15 On the assumption that the Regulation 30(7) pension is payable, either because the 2020 Regulations are revoked with retrospective effect, MHCLG changes its October 2020 guidance and/or because an administering authority reaches its own conclusion on this point, then the employer would have to try to recover the Cash Alternative payment on the basis it was unknowingly paid in error under Regulation 8 of the Exit Payments Regulations (assuming such payments have in fact been made).
- 2.16 If the employer is unable, for whatever reason, to recover any Cash Alternative payment from the former employee then we do not see that the administering authority would be able to adjust the unreduced Regulation 30(7) benefit to take account of this double entitlement as the recovery of the Cash Alternative payment is effectively a matter between employer and former employee and is not connected to the LGPS fund.
- 2.17 Any attempt to exercise a set off against the LGPS pension is likely to breach Section 91 of the Pensions Act 1995 and be unenforceable as any monetary obligation owed to the employer will not arise out of a criminal, negligent or fraudulent act or omission by the former employee. In any event, such a set off would not come within the LGPS specific provisions of Regulation 91 (Forfeiture of pension rights after conviction for employment-related offences) or Regulation 93 (Recovery or retention where former member has misconduct obligation) of the LGPS Regulations.

3. Advice - Deferred Benefit Scenario

- 3.1 The analysis for the second scenario is very similar to the first scenario and will hinge upon the 2020 Regulations being revoked with retrospective effect, MHCLG changing its October 2020 guidance and/or the administering authority reaching its own view on the Regulation 30(7) pension.
- 3.2 In either case, the administering authority would need to go back and pay the unreduced pension (and arrears) on the basis that Regulation 30(7) applied and the strain cost would be payable by the employer.
- 3.3 The employer would have to try to recover the Cash Alternative payment on the basis it was unknowingly paid in error under Regulation 8 of the Exit Payments Regulations (assuming such payments have in fact been made).

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