

LOCAL GOVERNMENT PENSION SCHEME (LGPS)

OPINION

INTRODUCTION

1. I am instructed to advise the Local Government Association and the LGPS Advisory Board. My advice is sought with respect to guidance to be given to LGPS “ administering authorities” (AAs). They administer the LGPS on behalf of themselves and other “ scheme employers” (SEs). They owe duties to LGPS members employed or formerly employed by SEs.

2. My advice is sought in relation to the non-aligned gap period between : -

(1) The coming into force in England and Wales of the Restriction of Public Sector Exit Regulations 2020, the Cap Regulations, pursuant to Sections 153A-153C of the Small Business, enterprise and Employment Act 2015, inserted by the Enterprise Act 2016; and

(2) Amendments to the Local Government Pension Scheme Regulations (the LGPS Regulations) and other Regulations following a consultation in respect of which the consultation period is due to end on 9 November 2020.

THE CAP REGULATIONS

3. The £95K cap, and the Regulation 3 restriction, subject to waiver, under the Cap Regulations, will shortly apply, on “relevant public sector exits”, to a broad and extensive list of redundancy and other restricted “ exit payments”. These include, by Regulation 5(2)(b), pension strain payments, “ any payment to reduce or eliminate an actuarial reduction in a pension on early retirement or in respect to the cost to a pension scheme of such a reduction not being made”.

4. This, and Regulation 8 of the Cap Regulations, apply once a LGPS Member is aged 55 or over. Relevant public sector exits include redundancy and business efficiency departures. Relevant authorities include local authorities.

5. What is at issue is the impact on capped LGPS members, AAs and SEs during the period, likely to be months, between the Cap Regulations, now approved by both Houses of Parliament, coming into force 21 days after they are made, in accordance with Section 161 of the 2015 Act, and exit payments becoming subject

to the cap, and amendments to the LGPS Regulations, allowing for partially reduced pensions. Currently, such individuals receive a pension that is both immediate and unreduced.

6. This triggers pension strain costs, that are however subject to the cap. Amendments to the LGPS Regulations are expected to enable the payment of partially reduced pensions to individuals whose strain costs are limited by the Cap Regulations.

THE LGPS REGULATIONS

7. Under Regulation 30(5) of the LGPS Regulations, LGPS members can elect, from age 55, to receive payment of a pension reduced to take into account the cost of early receipt of that pension as determined actuarial.

8. At the heart of the matter for present purposes is Regulation 30(7). This provides that where an active LGPS member who has reached age 55 loses his or her employment by reason of redundancy or business efficiency, that member is ENTITLED TO, and must take IMMEDIATE payment of retirement pension under the LGPS Regulations WITHOUT REDUCTION.

9. The LGPS Regulations then provide power, not a duty, for AAs to require SEs “ to make additional payments to the LGPS to meet the cost of paying the unreduced benefits “ : Regulation 68(2) of the LGPS Regulations.

10. Paragraphs 7.3-7.5 inclusive of the Explanatory Notes for the Cap Regulations set out policy background to the prospective amendment of the LGPS Regulations consequent upon the Cap Regulations. There is no Impact Assessment for the Cap Regulations.

11. An important feature is that there is no ability under the unamended LGPS Regulations to pay a partially reduced pension. Pension under Regulation 30(5) is fully reduced. Pension under Regulation 30(7) is unreduced.

12. The question arises as to the duties of an AA with regard to the pension to be paid to an individual LGPS member whose exit payment from a SE is restricted by the £95K overall cap.

13. Another important feature is that there is no direct link between the LGPS member's immediately payable retirement pension and Regulation 30(7) entitlement to unreduced pension on the one hand, and on the other hand the restricted pension strain cost payable by the member's SE to the LGPS AA. Indeed,

the Regulation 68(2) requirement is discretionary; and the Regulation 30(7) entitlement of the LGPS member is not expressly subject to the AA receiving a pension strain cost payment from the SE under Regulation 68(2), if required.

14. So, during the unaligned gap period, if, for example SEs proceed with restructurings and redundancies : -

(1) Qualifying employees have entitlement to immediate payment of unreduced pension; BUT

(2) An SE payment to cover pension strain is capable of being wholly or partly unlawful.

ADVICE SOUGHT

15. In a situation of uncertainty and confusion during the unaligned period, and with respect to the duties of AAs, I am asked to advise on the position of a LGPS member who : -

(1) Is aged 55, or more;

(2) Is made redundant or dismissed by reason of business efficiency, or whose employment is terminated by mutual consent on grounds of business efficiency;

(3) Who would otherwise qualify for an immediate unreduced pension, under Regulation 30(7) of the current LGPS Regulations;

(4) Whose employer is subject to the Cap Regulations, and the £95K cap;

(5) Which would not allow a full strain cost payment to be made under Regulation 68(2) of the LGPS Regulations.

16. I am asked two questions. I address them in the order in which they are raised in my helpful Instructions dated 5 October 2020.

FIRST QUESTION

17. I am asked first what is the risk of challenge to an AA by a capped individual seeking to enforce their rights under Regulation 30(7) of the LGPS Regulations to an immediate unreduced pension regardless of the strain cost attributable to them.

18. Subject to the second question, my answer is : “ High Risk “.

19. Regulation 30(7) is clear that : -

(1) The individual is “entitled”;

(2) The entitlement is “immediate”; and

(3) The entitlement is “ without reduction”.

20. There can be no implication of reduction in conflict with the express requirement of payment without reduction.

21. Nor is there any link between the unqualified Regulation 30(7) entitlement and
:-

(1) What may happen under Regulation 68(2) of the LGPS Regulations; or

(2) The Cap Regulations, save for their application to strain costs, which is a matter between AA and SE.

SECOND QUESTION

22. I am asked what is the risk of challenge to an AA seeking to exercise their duties by deeming that the provisions of Regulation 30(7) cannot be followed in any way and that therefore the provisions of Regulation 8 of the Cap Regulations and Regulation 30(5) of the LGPS Regulations should be used, so that the LGPS member could elect to receive an immediate but fully reduced pension (or, if they do not so elect, a deferred pension) plus a lump sum not exceeding the strain cost.

23. My answer is : “ Moderate”.

24. To my mind, AAs do not have duties under the Cap Regulations. I see the relevant authorities under the Cap Regulations as being employers, including LGPS SEs, not LGPS AAs.

25. Nor do I see any power under either or both sets of Regulations for an AA to deem anything, still less to override Regulation 30(7) of the LGPS Regulations. I do not consider that the Cap Regulations can be carried that far. I believe that AAs must comply with Regulation 30(7) of the LGPS Regulations until amended; cannot require SEs to make strain cost payments in conflict with the cap, absent

waiver; and cannot require SEs to suspend redundancy/business efficiency dismissals.

26. However, I do consider that it is reasonably arguable that the effect of Regulation 8 of the Cap Regulations is potentially applicable, and that the SE must make a capped payment in relation to pension strain in lieu of pension strain being engaged, and thereby Regulation 30(7) is disapplied and Regulation 30(5) should apply.

27. In other words, there is, in addition possibly to waiver, a risk mitigation, but by no means risk elimination route, by invoking Regulation 30(5) of the LGPS Regulations through the route of Regulation 8 of the Cap Regulations. However, if that route is pursued, it gives rise to the far from straightforward question of the interpretation of Regulation 8.

28. What can be said is that : -

- (1) Regulation 8 does not give an unlimited discretion as to what must be paid;
- (2) The amount must be reasonable;

- (3) It must be based on an amount equal to the full value of the capped strain costs, the maximum allowed under the overall £95K cap; and
- (4) There is potential for the capped value to be put into the LGPS at the member's choice.

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