

**LOCAL GOVERNMENT PENSION SCHEME
(LGPS)**

**RESTRICTION OF PUBLIC SECTOR EXIT PAYMENT
REGULATIONS
(The Cap Regulations)**

**LGPS REGULATIONS 2013
(The LGPS Regulations)**

O P I N I O N

INTRODUCTION

1. I am asked, in relation to the advice I provided on 6 October 2020, whether my assessment of the risk of successful challenge to a LGPS “administering authority” as provided in that advice should be amended in any way by an argument that it is understood the Government is seeking to advance. My answer is : “ No”.

2. I have not seen any formulation of the argument. Nor have I seen any support for it.

3. The argument is believed to be that Regulation 30(7) of the LGPS Regulations is impliedly repealed, in whole or in part, by the CAP Regulations. It is certainly not expressly repealed. I do not agree that it is impliedly repealed.

BACKGROUND

4. The CAP Regulations were approved by the House of Lords on 21 September 2020. They were approved by the House of Commons on 30 September 2020. They were made on 14 October 2020.

5. By then, and importantly, on 7 September 2020, the Government launched a Consultation on reforming local government exit pay and amending the LGPS Regulations. The period for consultation responses runs until 9 November 2020.

6. It is to be presumed that this is intended to be a lawful consultation. This will include both that it was at a formative stage and that conscientious consideration will be given to consultation responses.

7. On 19 October 2020 the Government reissued their consultation document, together with draft Regulations, under the Public Services Pensions Act 2013, a draft GAD Note on exit payments, and draft GAD Guidance on redundancy. The Regulations would expressly amend the LGPS Regulations. Regulation 4 addresses the effect of the new restrictions on public sector exit payments. Regulation 15 contains transitional provisions.

8. Regulation 5 would amend the LGPS Regulations. This includes amending Regulation 30(7).

IMPLIED REPEAL

9. The starting points for present purposes are that : -

(1) Regulation 30(7) provides no less than an entitlement;

(2) It does so to individual employees, in connection with their retirement;

(3) it may be protected by ECHR Article 1/1;

(4) Parliament intended when it made the Cap Regulations to do so notwithstanding that there would be an extended interval between the coming into force of the CAP Regulations on 4 November 2020 and the enactment of draft Regulations to amend the LGPS Regulations being laid before Parliament significantly after 9 November 2020.

10. In order for there to be any question of implied repeal, including in the case of a non-constitutional enactment, there must be a clear inconsistency. Here it can be said that there is an incompatibility. But a lack of compatibility is not necessarily an inconsistency, still less the clear inconsistency that the law requires for any implied repeal.

11. The approach has been variously but similarly expressed. In *Hannett v Essex County Council* the Court of Appeal said that the implied repeal principle is “not to be lightly invoked”: (2017) EWCA Civ 6, paragraphs 22-31 inclusive.

12. In *H v Lord Advocate* (2012) UKSC 24, (2013) 1 AC 412, at paragraph 31, Lord Hope said:-

(1) The Courts presume that Parliament does not intend an implied repeal;

(2) The presumption against implied repeal is strong; and

(3) It is even stronger the more weighty the enactment that is said to have been impliedly repealed.

13. Here : -

(1) There is a weighty enactment, Regulation 30(7) of the LGPS Regulations;

(2) There is an issue as to compliance with ECHR law and the principle of legal certainty;

(3) When the CAP Regulations were made, Parliament intended to make express consequential amendments to the LGPS Regulations, but at a later date.

CONCLUSION

14. In my opinion, the stringent requirements for an implied repeal of Regulation 30(7) of the LGPS Regulations are not met.

11 King's Bench Walk
Temple EC4Y 7EQ

goudie@11kbw.com

JAMES GOUDIE QC
20 October 2020