Report Title:	**Public Sector Exit Pay Reform – Administering Authority Policy**
Contains Confidential or Exempt Information?	NO - Part I
Member reporting:	Councillor Julian Sharpe, Chairman Pension Fund Committee and Advisory Panel
Meeting and Date:	Pension Fund Committee and Advisory Panel – 14 December 2020
Responsible Officer(s):	Kevin Taylor, Pension Services Manager
Wards affected:	None

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Royal Borough of Windsor & Maidenhead

REPORT SUMMARY

1. This report sets out the current position with regard to the Government's Public Sector Exit Pay Reform (the £95k Cap) and the requirement .for a policy decision concerning payments of pensions where the exit cap is breached.

1 DETAILS OF RECOMMENDATION(S)

RECOMMENDATION: That Committee

i) Considers the report, attached Administering Authority guidance at Appendix 1 and Secretary of State letter at Appendix 2; and

ii) Agrees to adopt a policy of least financial risk as set out at Appendix 3.

2 REASON(S) FOR RECOMMENDATION(S) AND OPTIONS CONSIDERED

2.1 The Government first announced plans to cap exit payments in the public sector in 2015. Since then HM Treasury (HMT) launched a consultation in 2019 on draft regulations, guidance and Directions to implement the cap. HMT published its response to the consultation on 21st July 2020.

2.2 In September 2020 the Government moved swiftly to bring the proposed reforms before both Houses of Parliament with The Restriction of Public Sector Exit Payment Regulations 2020 coming into force on 4 November 2020.

2.3 With effect from 4 November 2020 the £95k exit payment cap came into force meaning that the total value of exit payments made to a Local Government employee who is made redundant or retired early for business efficiency reasons must not exceed the cap.

2.4 For an employee aged 55 or over, who is a member of the LGPS and who is made redundant or retired on business efficiency grounds, this exit cap has serious implications where the cap is breached upon exit.

2.5 Currently, Regulation 30(7) of the LGPS Regulations dictate that a scheme member as set out in paragraph 2.4 must receive immediately their accrued

pension benefits without any early retirement reduction being applied due to their early release. Therefore, The Restriction of Public Sector Exit Payment Regulations 2020 are in direct conflict with the LGPS Regulations 2013 until such time as the LGPS Regulations are amended to accommodate the requirements of the Exit Payment Regulations

2.6 Whilst it has been confirmed that until such time as the LGPS Regulations are amended scheme members can continue to receive unreduced benefits where the £95k cap is not been breached, the situation is more complicated where the cap is exceeded and in these cases it is impossible to meet the requirements of both the Exit Payment Regulations and the LGPS Regulations.

2.7 The Local Government Association (LGA) has issued guidance to administering authorities as attached at Appendix 1 stating that an Administering Authority should without delay set a policy on how it intends to pay pensions where the exit cap is breached and that *"Given the legal, financial and reputational risk involved it will be important to ensure that any policy decision is cleared at the relevant level within your organisation"*. The options that are available are:

2.7.1 - To continue to pay an unreduced pension in line with Regulation 30(7) of the LGPS Regulations (The Fund will not be able to receive the full pension strain from the employer); or

2.7.2 - To pay either a fully reduced pension under Regulation 30(5) of the LGPS Regulations; or

2.7.3 - To provide the member with deferred benefits in line with Regulation 6(1).

2.8 The LGA's position, whilst not advice, is one that presents the least financial risk to the scheme employer and administering authority i.e. to give the member the choice of options 2.7.2 or 2.7.3 above. It is highly likely, however, that the scheme member will challenge that decision as it does meet the requirements of current LGPS Regulation 30(7) to pay immediately an unreduced pension.

2.9 Consideration should also be given to a letter issued to the Chief Executives of all Councils and Administering Authorities by the Minister for Regional Growth and Local Government, Luke Hall MP, on 28 October 2020 (see Appendix 2 to this report) in which the Minister sets out his recommended course of action for Administering Authorities to dis-apply the requirements of Regulations 30(7) of the LGPS Regulations and instead offer the scheme member the options set out in sub-paragraphs 2.7.2 or 2.7.3 above.

2.10 The Pension Fund is in regular communication with affected Scheme Employers and working closely with the HR Departments of those employers to ensure that everyone is in receipt of the most up to date information at all times. The Pension Fund and the Scheme Employer will need to continue to work closely and to ensure that scheme members affected by the exit cap are provided with full details of the pension options and redundancy payments available to them.

3 KEY IMPLICATIONS

3.1 The exit payment reforms have significant implications for the majority of LGPS scheme members and employers. The proposed changes to scheme regulations will change/reduce scheme members' rights upon redundancy/employer-driven early retirement and affect employer decisions regarding transformation and restructuring.

4 FINANCIAL DETAILS / VALUE FOR MONEY

4.1 N/A

5 LEGAL IMPLICATIONS

5.1 Currently, there are two statutory instruments in force, The Restriction of Public Sector Exit Payment Regulations 2020 and the Local Government Pension Scheme Regulations 2013 that are in direct conflict with each other. The Administering Authority is open to legal challenge as it cannot fulfil the requirements of both sets of legislation.

6 RISK MANAGEMENT

The course of least risk would appear to be to follow the requirements of The Restriction of Public Sector Exit Payment Regulations 2020 over the Local Government Pension Scheme Regulations 2013 in line with Luke MP's letter and guidance provided by the LGA.

7 POTENTIAL IMPACTS

7.1 The impact of the Exit Reforms will had considerable implications for those Scheme Employers affected and the Pension Fund administrators in managing the expectations of scheme members and setting out extremely complex pension options that will affect scheme member's for the rest if their lives.

8 CONSULTATION

8.1 Not Applicable.

9 TIMETABLE FOR IMPLEMENTATION

9.1 Immediate

10 APPENDICES

10.1 The appendices to the report are as follows:

- Appendix 1 – LGA Exit Cap Information for Administering Authorities;
- Appendix 2 – Letter dated 28 October 2020 to Councils and Administering Authorities from Luke Hall MP
- Appendix 3 – Proposed policy statement

11 BACKGROUND DOCUMENTS

The Restriction of Public Sector Exit Payment Regulations 2020
The Local Government Pension Scheme Regulations 2013
Guidance issued by the Local Government Association and Scheme Advisory Board

12 CONSULTATION (MANDATORY)

Name of consultee	**Post held**	**Date issued for comment**	**Date returned with comments**
Cllr Julian Sharpe	Chairman – Berkshire Pension Fund Panel		
Adele Taylor	Director of Resources and Section 151 Officer		
Andrew Vallance	Head of Finance and Deputy Section 151 Officer		
Ian Coleman	Interim Pension Fund Manager		

Local Government Association

Exit cap information for LGPS administering authorities

The information below is for redundancy and business efficiency exits that occur from 4 November 2020 until revised LGPS regulations are in place. It applies to exits of **LGPS members who are aged 55 or over**. Information about other circumstances where a pension strain cost is payable will follow.

Immediate policy decision for administering authorities

You must decide on your policy for paying pensions where the exit payment cap is breached.

There is a conflict between the exit cap regulations and the LGPS regulations if the cap is breached when an LGPS member age 55 or over exits. The LGPS regulations still require the member to take payment of an unreduced pension, but the exit cap regulations prevent the employer from paying the full strain cost.

As an administering authority, you need to decide whether to pay an unreduced pension in line with regulation 30(7) or provide the option of either a deferred pension under regulation 6(1) or an immediate reduced pension under regulation 30(5) in line with the Government's recommendations.

To assist you with this decision, the Scheme Advisory Board (SAB) has obtained legal advice. You can read a commentary on that legal advice on the Public Sector Exit Payments page of the SAB website. You should also have regard to the letter from MHCLG to LGPS administering authorities dated 28 October 2020.

You must take your own decision regarding the pension to be paid. The SAB recommends that you offer a deferred or immediate reduced pension based on the considerations that follow.

If you decide to pay an unreduced pension, there is a risk that you could end up in the position of having to try and recover monies from the employer and/or the member:

- You will not be able to obtain the whole strain cost from the employer. The employer will be restricted to a maximum of £95k for all exit payments including the strain cost. If the employer has paid a cash alternative, they are unlikely to be able to pay any strain cost. The recommendation to the employer is that they do not pay the cash alternative to the member. If the employer decides to pay the cash alternative, they must notify you.
- If you cannot obtain a strain cost at the time of the exit, you should discuss with your actuary what options are open to you to ensure the benefits are fully funded in the future. You should be aware that there is a serious risk that you will not be able easily or quickly to make good the absence of the strain cost.
- You may also be at risk of challenge under the doctrine of implied repeal which, if proven, would result in you having to seek repayment of the overpaid element of the pension. The doctrine of implied repeal provides that where a piece of legislation conflicts with an earlier one, the later legislation takes precedence.

Offering a deferred or reduced pension also risks challenge, this time from the member seeking to enforce their rights under regulation 30(7). Regardless of the outcome of any challenge, this approach should result in the member receiving additional monies as:

- an unreduced pension, or
- a cash alternative payment to the member, or
- a cash alternative paid to you to provide additional pension under regulation 31 or waive reductions under regulation 30(8).

Given the legal, financial and reputational risks involved it will be important to ensure that any policy decision is cleared at the relevant level within your organisation.

Other immediate considerations for administering authorities

- Liaise with your actuary on the appropriateness of current strain cost calculations. There may be risks associated with making a change, particularly if the new methodology results in lower strain costs. Adopting the GAD methodology may be a reasonable approach, however, this is not without risk. If you adopt a new method of strain cost calculation that results in lower costs, there is a potential for challenge from employers who have recently paid higher strain costs based on the current methodology. The change could also be challenged if it is perceived as a means of avoiding the exit payment cap.

- If you change your strain cost methodology, ensure that new strain costs are provided to employers for all relevant exits where the leaving date is on or after 4 November 2020, including those already in progress.
- Ensure that your employers are aware of their status and obligations under the exit cap regulations (you can refer them to exit cap information for employers on www.lgpsregs.org) and how you will deal with pensions for capped members.
- Review your forms and processes for redundancy and efficiency exits to ensure that the employer is aware of the strain cost in good time and notifies you of the member's status under the exit cap regulations.
- Review your estimate process to ensure it matches your policy.
- Maintain close contact with your LGPS employers throughout the exit process.

Exits in progress

- Ask your employers to check and confirm the status of any exits already in progress where the leaving date is on or after 4 November 2020
- If you have adopted a new method of strain cost calculation, provide the employer with the new cost and ask whether the total exit package exceeds the cap
- If you have already provided a member with a formal pension quotation, you will need to contact them to advise them of their options if:
    - the employer notifies you that the cost of that exit would exceed the cap and
    - you have made a policy decision to offer members the option of deferred benefits or immediate reduced pension in this event.

Administering authority process for new exits

Follow these steps when you are notified that an LGPS member age 55 or over has left due to redundancy or business efficiency on or after 4 November 2020.

Step 1: Ask your employers to confirm whether or not they are covered by the cap (they can check the Schedule at the end of the Restriction of Public Sector Exit Payments Regulations 2020). If they are not, you should proceed as normal. The member is entitled to unreduced benefits and you should request a strain cost in line with your current process.

Step 2: If the employer is covered by the cap, you should calculate a full strain cost quote in respect of new exits for members who would normally qualify for benefits under regulation 30(7). Provide the cost to the employer and ask:

- Does the member's total exit package exceed the cap?
- If it does, have you applied for a waiver?

You should not become involved in any decision regarding the breaching of the cap as those regulations apply to the employer alone and any sanctions for a breach will be on the employer alone.

You should ensure that you are **notified of any waiver request,** and whether the waiver application has been successful**.** Until and unless the employer confirms that any waiver has been successful you should continue to assume the member exceeds the cap.

If the employer informs you that the total value of the exit payments (including strain cost) is less than or equal to £95,000, or that a waiver application has been successful, go to **step 3**. If the employer informs you that the total value of the exit payments (including strain cost) is more than is more than £95,000 go to **step 4**.

Step 3: If the employer informs you that the total of the exit payments is less than or equal to £95,000 or that a waiver request has been successful, process the exit as normal. The member is entitled to unreduced benefits and you should request a strain cost in line with your current process.

Step 4: The employer informs you that the total exit payment is over £95,000 and the cap will not be waived.

If your policy is to pay an unreduced pension go to **step 5**. If your policy is to offer a deferred or reduced pension go to **step 6**.

Step 5: If your decision is to pay an unreduced pension, you must inform the employer, ask them not to pay a cash alternative and request the full strain cost. It will be for the employer to determine how much, if any, of that cost it can meet under the exit cap regulations. Please be aware you will not be able to recover the full strain cost. Depending on what other payments the employer has made, you may not be able to recover any of the strain cost in these cases.

Step 6: If your decision is to offer the member the option of a deferred pension or a reduced pension, you must inform the employer of that decision. The employer must decide whether to make a cash alternative payment under regulation 8 of the exit cap regulations. We recommend that you remind the employer that decisions made by the administering authority and employer are open to challenge and could be reversed.

It is important that the employer understands that a successful legal challenge could result in a request for a strain cost payment. The employer should understand the implications of making an immediate cash alternative payment, or deferring payment until the result of any legal challenge is known. You may wish to direct them to the Exit cap information for LGPS employers and the SAB commentary on legal advice published on 30 October 2020 on the SAB Public Sector Exit Payments page.

You must notify the member of their option for either a deferred or a reduced pension and their right of appeal. You should maintain a record of all cases where an appeal might be received. You will need to revisit these cases once a resolution is known.

- If there is no claim or the member is unsuccessful in that claim, you must inform the employer who can then pay the cash alternative:
  - to the member or
  - to you to purchase additional pension for the member under regulation 31 or
  - to you to waive early payment reductions under regulation 30(8), if the member has elected for immediate payment.
- If the outcome of the claim is an order to pay the unreduced pension, you must inform the employer and request the full strain cost. It will be for the employer to determine how much, if any, of that cost it can meet under the exit cap regulations.

Disclaimer

Ministry of Housing, Communities & Local Government

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Chief Executives
Councils and LGPS Administering Authorities

28 October 2020

Dear Chief Executive,

The Restriction of Public Sector Exit Payments Regulations 2020 make it clear that public sector bodies must not make payments in relation to individual exits in excess of £95k. That includes local government employers and Local Government Pension Scheme administering authorities.

Previously, the Local Government Pension Scheme Regulations 2013 and to a lesser extent the Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 allowed for some individuals to receive benefits which would be in excess of the cap now set in the 2020 Regulations.

In considering the 2020 Regulations with existing provisions of the LGPS or Early Termination Regulations, public sector bodies should be mindful that the 2020 Regulations reflect Parliament's intention in section 153A of the Small Business, Enterprise and Employment Act 2015. Parliament was clear that it wished to limit total public sector exit payments to no more than £95,000, and the legislation provides a power to cap exit payments at that level.

This Department has published a policy consultation and issued draft regulations that will remove any remaining ambiguity in the legal position once they come into effect. Subject to consideration of views received through consultation, effect will be given to those proposals as soon as parliamentary time allows.

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.

The 2020 Regulations also identify circumstances where the application of the cap may be waived. I will issue more detailed guidance on this, but this also provides a route by which these transitional issues may be mitigated.

LUKE HALL MP

LOCAL GOVERNMENT PENSION SCHEME

ADMINISTERING AUTHORITY STATEMENT OF POLICY CONCERNING PAYMENT OF PENSIONS WHERE THE £95K EXIT CAP IS BREACHED

The Restriction of Public Sector Exit Payment Regulations 2020 came into force on 4 November 2020 meaning that with effect from that date the total value of any exit payments, as listed in those Regulations (including pension strain costs), made to or on behalf of any individual exiting a Public Service employment is limited to £95,000 (the £95k Cap).

For an employee aged 55 or over, who is a member of the LGPS and who is made redundant or retired on business efficiency grounds, this exit cap has implications where the £95k cap is breached.

Currently, Regulation 30(7) of the LGPS Regulations states that a scheme member who leaves employment by reason of redundancy or business efficiency must receive immediately the value of their accrued pension benefits without any early retirement reduction being applied irrespective of any exit cap being breached.

Where the £95k Exit Cap is breached it is currently not possible to meet the requirements of both the Exit Payment Regulations and the LGPS Regulations until such time as amendments are made to the LGPS Regulations to reflect the Exit Reform requirements.

In the interim, the Administering Authority is required to set a policy as to how it intends to make payments of pensions to scheme members aged 55 or over who breach the £95k Cap where their employment is terminated on the grounds of redundancy or business efficiency.

The options available are:

- To continue to pay an unreduced pension in line with Regulation 30(7) of the LGPS Regulations (The Fund will not be able to receive the full pension strain from the employer); or

- To pay either a fully reduced pension under Regulation 30(5) of the LGPS Regulations; or

- To provide the member with deferred benefits in line with Regulation 6(1) of the LGPS Regulations.

RESOLVED

The Berkshire Pension Fund Committee has considered the options available and has resolved that the route of least financial risk to scheme employers and members is to dis-apply Regulation 30(7) of the Local Government Pension Scheme Regulations 2013 (as amended). Officers are instructed to provide affected scheme members with the options of either:

1. **A fully reduced pension in line with Regulation 30(5) of the Local Government Pension Scheme Regulations 2013 (as amended); or**

2. **A Deferred Pension Benefit in line with Regulation 6(1) of the Local Government Pension Scheme Regulations 2013 (as amended).**

In formulating this policy, the Administering Authority has had regard to:

- A letter dated 28 October 2020 sent to the Chief Executives of all Councils and Administering Authorities by Luke Hall MP, Minister for Regional Growth and Local Government;
- Guidance issued to Administering Authorities by the Local Government Association (LGA);
- The legal, financial and reputational risk associated with this policy;
- The risk that affected scheme members may challenge this policy to dis-apply Regulation 30(7) of the LGPS Regulations 203 (as amended).

Approved by the Berkshire Pension Fund Committee: 14 December 2020