Restricting exit payments in the public sector: consultation on implementation of regulations

Response from West Midlands Employers, Regional Employers Organisation for the West Midlands

A representative response on behalf of our member Councils, 32 employing bodies impacted by the proposals covering the West Midlands Region who have contributed to this document.

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About West Midlands Employers (WME)

WME is a representative body owned by the 32 Local Authorities in the West Midlands Region and are registered with the Certification Office for Trade Unions and Employer Organisations. We are owned by our subscribing councils and we are governed by the Rules of the REO, our constitution. We have a representative body comprising the CEO of each subscribing member council who agrees our business plans, budgets and other constitutional matters.

We also report through an Elected Member Management Board nominated from sub-regional groupings covering Birmingham; Black Country; Coventry, Solihull and Warwickshire; Worcestershire; Herefordshire, Telford and Wrekin and Shropshire; and Staffordshire and Stoke with an additional member representing the District Councils. The chair of the WME Management Board is Cllr Ken Meeson, Cabinet Member for Solihull MBC.

The total public sector workforce WME represents through our employers is circa 80,000

A full list of our representative body is included in **Appendix A.**

Introduction

As a representative body of employers, the focus of the WME response to the consultation is on the implementation of the proposed legislation for employing bodies; specifically, the impact and consequence of this.

WME offers no opinion on behalf of our membership on the concept or ideology of an 'Exit Cap'; that represents a political policy and as such would generate a significant divergence of views across our Region which is outside the remit of an Employers Organisation.

WME Response

There are very significant concerns expressed by our membership, that relate to a number of themes within the consultation documentation. As employers, our members are all Councils, directly elected bodies that have robust governance processes in place and need to retain the ability to make changes to their workforce, in order to meet business needs and drive efficiencies. There is an over- riding feeling that the implementation of the 'Exit Cap' goes against the principles of devolution and local decision making on basic employment decisions relating to their workforce.

WME would encourage Government to consider working with the Regional Employers Organisations in order to better understand how Local Government employers could manage the Exit Cap implementation locally.

There were five key themes that cause significant concern for our membership:

- Proposed payments in-scope for the 'Exit Cap'
- Impact on low-earning long-service employees
- Bureaucracy and impact on employers seeking a waiver to 'Exit Cap' provisions
- Potential legal and financial risks to employers
- Implementation and preparing employers

1. Proposed Payments in-scope for the 'Exit Cap'

There is a significant concern relating to the payments that are proposed as in-scope for the 'Exit Cap' threshold.

There is a consistent view from across our membership that payments in scope should be limited to genuine exit payments such as redundancy payments.

Pension strain costs should not be included as these are not payments to the individual but rather to a pension fund to ensure the individual gains access to the pension they have earned.

This is particularly relevant, when data demonstrates that even employees that seek early retirement (no redundancy or Pay in Lieu of Notice) would be impacted.

"An employee on a salary of £40,000 with 37 years' service will be caught by the cap just on early retirement costs. In such a case the County Council would pay to the fund £96,250. That is without any redundancy pay, holiday pay or notice pay".

This will be compounded further, in the future, by the failure of the cap to be index linked at the very least and is highly likely to lead to future recruitment and retention problems in many areas where there are already national shortages, such as social workers. As drafted, the cap will limit the exit terms of some local government workers earning less than £24,000 a year – considerably less than the average UK full time employee salary and this will reduce further year on year.

Under current legislation, if a Local Government employee is made redundant (CR or VR) they currently must receive unreduced pension. The LGPS is the only funded pension scheme in the Public Sector and on this basis Local Govt employees are being treated inequitably to other Public servants, in that, the pension strain is included in the cap and in other Public sector services it is not included.

It appears to our member Councils that the Local Government workforce are being targeted unfairly in comparison to other parts of the public sector.

If the pension strain cost remains in scope, the Local Government Pension Scheme Regulations will need to be amended, prior to the implementation of the 'Exit Cap' to:

- remove the legal requirement for councils to pay the cost of pension strain, and
- allow the employee to choose to defer access to pension so as to avoid their employer incurring pension strain costs, or
- allow the employee to take a reduce pension so there is no strain.

Until these amendments are in place the exit pay cap should not be applied to the Local Government workforce.

2. Impact on low-earning long-serving employees

There is the risk of a disproportionate impact on low-earning long-service employees

It is the understanding of our membership that the purpose of the 'Exit Cap' was to reduce individual exit payments, for 'high earning' executives; however, there is a concern that the exit cap legislation, as currently proposed, will disproportionately impact on those 'low earning' employees with 'long service' due to the inclusion of pension strain costs (as outlined above).

This will not only affect the 'high earners' that are the target group but will also impact on mid-level staff with long service e.g. frontline senior practitioner and team leader roles where the post holders have 25 plus years' service.

Calculations provided by one of our Councils demonstrates this:

"The Council would have to pay £67,375 to the Pension Fund for an employee on £28,000 with 37 years' service. Therefore even with a very low redundancy payment the cap would be hit".

There is a concern that the impact of the proposed 'Exit Cap' across protected characteristics is not clear. The cap appears to disadvantage on the grounds of age and gender, as the group who are most likely to be affected by the cap are those over age 55, and who are members of the LGPS (or another public sector pension scheme). There is no adequate Equality Impact Assessment (EIA) and we would encourage the Government to work with the Regional Employers Organisations to carry out an EIA to understand the impact further.

We would ask that measures are taken to ensure the legislation is implemented in such a way that this impact is removed, and an appropriate equality impact assessment is carried out.

3. Bureaucracy and impact on employers seeking a waiver to an 'Exit Cap' provisions

Our membership, 32 Councils in the West Midlands are all democratically elected bodies and accountable to the public. As such, we believe they should have complete autonomy over how and when a waiver to the 'Exit Cap' should be applied.

At its most extreme, business cases appear to need approval from:

a) full council;

b) the permanent secretary at MHCLG;

c) a Minister of the Crown; and,

d) HM Treasury.

This will be incredibly time consuming, costly and overly bureaucratic. We cannot see how this is an efficient and appropriate approach. We believe this will 'bog' the sector down in process, and, be unable to make 'real-time' decisions to deliver efficiencies or service improvements.

We would encourage the Government to work with the WME and our member Councils to understand the rationale for the 'approval process' and to seek to build local assurances of how this can be managed.

We are of a strong view that Councils (through a Full Council decision) should have the ability to apply a waiver to the 'Exit Cap' through operating within clear guidelines should provide sufficient assurances that democratically elected representatives have considered the proposal, without the need for central government involvement.

4. Potential legal and financial risks to employers

All our member councils are continually striving to deliver challenging efficiency targets and reductions in budgets. There is a concern that the proposed 'Exit Cap' may disproportionately increase the cost of both making organisational changes and leave Councils open to potential legal challenge and employment tribunals.

Firstly, the proposed 'Exit Cap' will not give our member Councils the flexibility they need to be able to manage Organisational changes or any planned voluntary downsizing (to avoid compulsory redundancies) – particularly in relation to employees in the "high-earning, long-serving" category who will be hesitant to accept voluntary redundancy.

The cap in its current form will also constrain certain staff from early retirement who otherwise may have been part of a headcount reduction exercise, thus forcing councils to keep on their higher-paid - longer serving staff, instead of allowing them to retire; thus increasing the pay bill for Councils.

Furthermore this would limit the council's ability to address the age profile of the workforce. The ability to offer early retirement is very useful to positively address an ageing workforce and create opportunities for young people.

Secondly, the potential time required to exercise a 'waiver' over the 'Exit Cap' could involve the Council seeking to 'pause' any transformation or service improvement programmes, whilst seeking to seek approval. For our Councils to have to put these on hold, and potentially delay plans would have significant financial implications as many organisations are reliant upon organisational change and transformation programmes to deliver significant savings within a given financial year.

There is also the potential for challenges in employment relations as the 'Exit Cap' will significantly reduce a council's ability to achieve the necessary workforce reductions and savings targets through voluntary means, with the possibility to lead to more contentious negotiations with the increase in costs and time associated with that.

Thirdly, the discretionary exemption process for tribunal cases is problematic and we have a number of concerns that the process itself will prejudice an employer's position. In addition, we envisage significantly increased costs resulting from tribunal cases as individuals will be reluctant to accept a settlement when the 'Exit cap' means they could achieve a higher award in tribunal.

The potential exemption for settlements to avert tribunal awards for discrimination and whistleblowing only is a concern, as there is potential for challenge about the assessments made by councils in regard to the merits of cases and on what basis an authority is judging they would lose a case. We are also concerned that putting a case to full council on this basis may ultimately prejudice a case if it is subsequently pursued.

Finally, there is a risk, of legal challenge through the courts, relating to the 'Exit Cap' of claims being brought from older workers who will (if there are no changes to the pension regulations) see a reduction in their pension.

5. Implementation and preparing employers

WME and our member Councils are particularly concerned about the proposed start date for these Regulations. As stated, the 'Exit Cap' and associated provisions will come into force the day after the Regulations are made.

Given the need for the draft Regulations to be clarified and amended this provides far too little time for employers to change their policies, communications and, potentially, offers to individuals exiting over this period.

As outlined above there are some fundamental areas of concern for our Local Government employers relating to issues to be navigated before determining what exit payment can legitimately be paid to an individual, once these Regulations come into force.

We would encourage the Government to consider a phased implementation of the 'Exit Cap' to different parts of the public sector. We believe a 12-month timeframe for our Local Government employers would be appropriate and allow, ourselves, as the Regional Employers Organisation time to effectively support and prepare our member Councils.

Additional Comments

Further to the points raised above, there were areas of confusion, lack of clarity or where greater clarity is sought;

- There were questions amongst our membership as to why there is a proposed exemption for armed forces and security service employees. Very senior officers such as Generals, Admirals etc or Director of MI5 and GCHQ work until their mid-50's or beyond and earn relatively high salaries with good pensions. MOD salary data (March 2018) indicated Major Generals earn up to £115k - £125k, Lieutenant Generals up to £135k - £150k and the Chief of General Staff up to £185k, so not too dissimilar to Local Authority senior pay levels.

- There is a concern that Academies, will face particular challenges navigating these Regulations for teachers and support staff where both DfE and MHCLG may be deemed the appropriate sponsoring department (as support staff are members of the Local Government Pension Scheme) and there is no obvious Decision Maker at a local level. It would seem unnecessarily complicated if different frameworks operated for securing exemptions for different groups of school staff.

Appendix 1

WME Membership 2019

Organisation
Birmingham City Council
Bromsgrove DC
Cannock Chase DC
Coventry City Council
Dudley MBC
Herefordshire Council
Lichfield District Council
Malvern Hills DC
Newcastle-under-Lyme BC
North Warwickshire BC
Nuneaton and Bedworth BC
Redditch BC
Rugby BC Sandwell
MBC Shropshire
Council Solihull
MBC
South Staffordshire Council
Stafford Borough Council
Staffordshire CC
Staffordshire Moorlands DC
Stoke-on-Trent City Council
Stratford-on-Avon DC
Tamworth BC
Telford and Wrekin Council
Walsall MBC
Warwick DC
Warwickshire CC
Wolverhampton City Council
Worcester City Council
Worcestershire CC
Wychavon DC
Wyre Forest DC