

Consultation on Exit Payment Cap

This is the response from **Tonbridge & Malling Borough Council**.

Introduction

In view of the significant potential impacts on this Council of the proposals outlined in this consultation, it is disappointing that the response time is only four weeks, and that the timing falls within the “summer break” when we will be holding a bare minimum of meetings. Of necessity therefore the proposals have been considered by a small, but representative group of key members namely:

The Leader

The Deputy Executive Leader/ Cabinet Member for Finance, Innovation and Property
/Chair of the Joint Employee Consultative Committee

The Chair of the Overview & Scrutiny Committee

The Chair of the General Purposes Committee

The Leader of the Opposition.

The response set out below to the questions posed within the consultation constitutes our joint response on behalf of the Council as an employer.

In summary

This Council supports the majority of the proposals set out in the consultation, most particularly the proposal to limit exit payments, as set out in the list “Which payments for recovery” to £95,000, on the grounds of “value for money to the taxpayer”. Indeed, this approach reflects this Council’s prudent approach to exit payments including:

- the removal of the facility to add years to pension entitlements, and,
- the abolition of the multiplier to redundancy payments.

As an employer we consider it to be of great significance that all such steps have been fully supported by the staff side within the context of a shared endeavour to address the financial challenges facing the Council.

However, the Council does not support the proposal to include within the £95,000 cap the actuarial cost to the Local Government Pension Scheme of early retirement on the grounds of redundancy or efficiency of the service for employees aged 55+ (referred to below as the strain cost). This is currently unlawful, would breach the Council’s psychological contract with its workforce that has stood us in very good stead over many years – most specifically in dealing with unforeseen emergencies such as flooding. It would also impact adversely on our ability to retain much valued employees and to recruit, in particular, to posts requiring professionally qualified staff. Furthermore we believe the proposal to include the strain cost to the LGPS for employees aged 55+ whose employment has been terminated on the grounds of redundancy or

efficiency of the service within the proposed cap, could potentially be discriminatory. We have set out our concerns in greater detail in our responses to the questions below.

Question 1: What other forms of exit costs do you think are relevant in this context?

None identified.

Question 2: Do you agree that the government should introduce a cap on the value of public sector exit payments on the basis set out above?

The Council supports the general ethos of the proposals set out in the consultation document and the overall aim of offering value for money to the tax payer in the calculation of “exit payments”, which actually reflects our own approach². In recent years we have introduced many changes to various HR policies to ensure that exit payments are proportionate and supported by a defensible business case. Furthermore, we do not have a voluntary redundancy scheme, and have only very rarely (once within the past 15 years), needed to utilise the early retirement on the grounds of the efficiency of the service provisions within the Local Government Pension Scheme

However, this Council has a major concern with the proposal to include within the cap the cost to the employer of funding early access to unreduced pensions for members of the Local Government Pension Scheme (the LGPS) aged 55+ whose employment has terminated on the grounds of redundancy (the strain cost). The consultation acknowledges that this is a specific entitlement within the LGPS Regulations and proposes that employees would retain the right to take the unreduced pension immediately, but the consultation is not clear about what would happen in circumstances where the cap was exceeded as a result of the strain payment that this Council would need to make to the LGPS. Given that there is a **statutory entitlement** to immediate and unreduced benefits in the circumstances outlined above, **this Council does not support this particular proposal**. We have noted that the consultation appears to tacitly acknowledge our concern about potential legal challenge in that both the Summary and Section 3:3 contain the sentence “the Government is therefore considering further reforms to the calculation of compensation terms and to employer funded early retirement in circumstances of redundancy. The Government plans to consult on possible measures in these areas in due course”.

This Council welcomes the opportunity to comment on any proposed “further reforms” to the provisions of the LGPS “in due course”.

Question 3: Do you agree that the payments listed above should be subject to a cap on exit payments under the terms set out above? If you believe certain payment types should be excluded please provide a rationale and examples.

This Council supports the inclusion of the items listed in Section 4:1 in a cap on exit payments. We also endorse the proposal to exclude compensation payments in respect of death or injury attributable to the employment, as well as payments made following litigation for breach of contract or unfair dismissal (indeed we believe there is little “choice” in such circumstances).

This Council also supports the proposal to exclude from the cap the cost of serious ill health and ill health retirement. It is this Council’s view that this provision is perceived by those Council employees who are members of the LGPS as offering significant “peace of mind” if unforeseen health problems arise.

As an employer we believe that such a sense of security provides an invaluable tool in attempting to retain the services of highly skilled, experienced and highly qualified employees, particularly in the South East where there is significant competition for such employees from within both the public and private sectors. For this reason we would also have a concern about including within the cap the employer cost for eligible staff aged 55+ of early release of LGPS benefits where the reason for the dismissal is on the grounds of redundancy. The basis of our concern is that the funding arrangements for the LGPS are such that both the departing employee and the Council have **already contributed** to this entitlement in roughly a one-third/two-thirds proportion over a number of years and, the sense of security it has provided has been a mainstay of the psychological contract between the Council as an employer and its workforce, many of whom could very probably secure higher base salaries in employment in the private sector in either London or elsewhere in the South East..

Whilst we acknowledge the need for change given the financial challenges ahead, for a Council that has already faced severe difficulties in recruiting professionally qualified staff we are concerned that any erosion of the benefits of the LGPS could adversely affect our ability to retain suitably qualified and experienced staff and, if they leave, to recruit suitable replacements.

Question 4: Are there further payments that the government should include?

None identified.

Question 5: Do you agree that a cap on exit payments should be set at £95,000? If you think an alternative level would be more appropriate, please provide evidence and analysis to support your proposal.

We broadly agree with the proposed level of the cap with the proviso **that it does not include the strain cost of the early release of pension benefits in redundancy scenarios** as set out in our response to questions 2 and 3 above. This Council is concerned that such a proposal would disproportionately impact upon Local Government Employees who are member of the LGPS when compared with staff in other public sector organisations whose pension schemes are not “funded”.

According to figures from Aon Hewitt, the £95,000 limit would be breached in the following examples of LGPS members facing early retirement on the grounds of redundancy dismissal:

A member with 30 years' service and final pay of £39,000

A member with 10 years' service and final pay of £75,000

We doubt that this is the sort of payment the Government is looking to limit. As set out earlier the individual would have contributed themselves through the employee contribution about one third of the total cost of the pension, Furthermore, this Council has a robust approach to handling reorganisations and restructurings to the extent that the Council would not be advocating a redundancy scenario unless it had a coherent business case in which the Council would be making a saving.

Question 6: Are there other ways to ensure such arrangements are consistent with the cap on lump sum payments?

This Council is of the view that the limit needs to apply to severance payments **not early retirements in cases of redundancy** for the reasons set out above.

Question 7: Do you agree with the proposed approach of limiting early retirement benefits with reference to the cost for the employer? What alternative approaches would you suggest and why?

Section 3.1 in the consultation document refers to "early access to reduced benefits" and we wonder whether there is an element of confusion with early retirement due to redundancy. This Council's HR policies are such that there is very limited scope now for staff accessing their pension benefits other than due to redundancy and where an individual does opt to take their pension benefits in any other circumstances (other than ill-health) there are swingeing actuarial reductions made to the benefits paid, and so there is no cost to the employer.

Question 8: Do you agree that the government has established the correct scope for the implementation of this policy?

As outlined above we understand why the consultation specifies that compensation payments made following litigation for breach of contract or unfair dismissals are included in the cap. However, the inclusion in the cap of voluntary exits with compensation packages may present a further potential unintended consequence as illustrated below.

In a scenario in which someone agreed to go voluntarily following what is technically referred to as a 'protected conversation' the consultation appears to propose that their settlement payment would be subject to a maximum of £95,000. However, depending upon the specific circumstances, some individuals may decide that they

could potentially secure a greater settlement via the Employment Tribunal process, or, given the high cost of defending Tribunal cases, potentially the final cost of the settlement plus the costs of the Council defending its position, could exceed £95,000.

By way of context we wish to point out that due to balanced and considered approaches to addressing staffing issues this Council has not “within living memory” been required to defend a case at an Employment Tribunal. Furthermore, this Council has very rarely had the need to reach a settlement, and where it has the settlement figure has been way below the proposed £95,000 cap. It is therefore not anticipated that the unintended consequence scenarios outlined above will happen. However, we think it would be prudent to allow for such scenarios within the proposed “waiver process” outlined on page 13 of the consultation, given the uncharted waters ahead. Indeed, it may well be that this is the sort of scenario that is being alluded to in the phrase “where there are special circumstances pertaining to an individual employee or office holder”, in which case we broadly support the proposal for a “waiver process”.

Question 9: How do you think the government should approach the question of employees who are subject to different capping and recovery provisions under TUPE rules following a transfer to (or from) the private sector and whether there should be consistency with public sector employees in general?

Local authorities are adopting a wide range of delivery models, such as traditional outsourcing, setting up arms-length companies, trusts or working with the voluntary sector. We suggest that the overriding context is that as they are funded from public funds, it would appear equitable for the same rules to apply as they do directly to public sector bodies. However, we recognise that this raises potentially very complex issues, not least of all concerning transfers of pension funds between organisations within both the public and private sector. **Our perception of potential pension “minefields” reinforces our view that further very detailed analysis and consultation is required with respect to any proposed changes to the LGPS.**

Question 10: Do you agree with the proposed approach for waivers to the cap on exit payments?

Within the terms of Council policy, severance payments already need to be reported in the accounts.

We fully agree with the consultation’s recognition that “it may be desirable to grant a waiver...for some individuals from the exit payment cap. Payments in excess of the cap may be needed to support a particular programme of reorganisation where changes need to be made quickly to avoid undermining the continuing effectiveness of operational delivery, or where there are special circumstances pertaining to an

individual employee or office holder.” We also fully support the proposal that as the Council may need to have the ability to pay over the maximum level of the proposed cap there should be full transparency on this and the reporting of it, and that an appropriate “Waiver Policy” should be adopted by the Council. However, we do not support the proposal that such matters should be considered by Full Council. As there might need to be discussions concerning matters that could potentially constitute a breach of employee confidentiality we think that it would be appropriate to delegate this to a more suitable committee. This Council’s existing policy for dealing with changes to the Council’s establishment, (including redundancies and early retirements on the grounds of redundancy) necessitates such matters being considered by the General Purposes Committee. We therefore think that this would be the more suitable forum for addressing waivers to the cap.

As we have identified a potential risk of indirect discrimination in the imposition of a cap, we would wish to have the ability to mitigate against this risk in the Waiver Policy. In the hypothetical circumstance where a post has been deleted from the Council’s establishment, but the termination cost for the employee selected, by due process, for redundancy would be more than £95,000, there could be the unintended consequence of necessitating the retention of an “older” employee, in order to avoid an unlawful dismissal, in some other role until the cost of their termination falls within the cap. Taken across several cases there may therefore be a risk that the Council could indirectly discriminate against younger employees whose termination costs would fall below the cap (and who would not therefore need to be “retained”). In order to avoid the risk of legal challenge the Council would therefore wish to accommodate this type of risk mitigation in its Waiver Policy.

. Question 11: Are there other impacts not covered above which you would highlight in relation to the proposals in this consultation document?

It has occurred to us that a more detailed demographic analysis is required as part of the impact assessment of any proposals to amend the provisions of the LGPS to align with the proposed cap. We sense this may highlight potential adverse differential impacts upon older workers and men and thus pose an unintended risk of legal challenge on the grounds of indirect or even direct discrimination.

Question 12: Are you able to provide information and data in relation to the impacts set out above?

As part of any detailed impact analysis, and given specific parameters i.e. proposed dates of implementation, the Council would be able to supply the appropriate response/demographic information.