

FOR GENERAL RELEASE

REPORT TO:	PENSION COMMITTEE 8 December 2020
SUBJECT:	Exit Payment Cap
LEAD OFFICER:	Vicki Richardson Head of HR & Finance Service Centre
CABINET MEMBER:	Councillor Callton Young OBE Cabinet Member for Resources & Financial Governance
WARDS:	All

SUMMARY OF REPORT:

This report relates to the implementation of the Public Sector Exit Payments Regulations 2020 and the impact on the Local Government Pension Scheme

POLICY CONTEXT/AMBITIOUS FOR CROYDON:

Sound Financial Management: This report sets out the options available to the fund for payment of benefits whilst there is a conflict between the exit cap regulations and the LGPS regulations.

FINANCIAL IMPACT:

This report will impact on the level of benefits paid to scheme members.

KEY DECISION REFERENCE NO.: N/A

RECOMMENDATIONS:

The committee is asked to agree that whilst there is a conflict between the exit cap regulations and the LGPS regulations the funds policy will be to:

- i. offer scheme members the opportunity to take a deferred benefit under LGPS regulation 6 or a fully actuarially reduced pension under LGPS regulation 30(5) if the cap is breached when an LGPS member aged 55 or over exits, whilst there is a conflict between the exit cap regulations and the LGPS regulations.
- ii. adopt the factors and calculation methodology consistent with Government Actuary's Department (GAD's) draft guidance for calculating early retirement strain factors.

1. Background

- 1.1 The Restriction of Public Sector Exit Payments Regulations 2020 (Appendix A) implementing the £95k cap on exit payments came into force on 4th November 2020. An exit payment includes redundancy payments (including statutory redundancy payments), severance payments, pension strain costs that arise when a Local Government Pension Scheme (LGPS) pension is paid unreduced before a member's normal pension age, and other payments made as a result of termination of employment.
- 1.2 The Ministry of Housing, Communities & Local Government (MHCLG) has launched a consultation on changes to the LGPS and Discretionary Compensation Regulations (Appendix B). The consultation covers the required changes to compensation and pension regulations to comply with the £95K exit payment cap, which closes on 18 December 2020.
- 1.3 As the required changes to the LGPS regulations are still subject to consultation there is a conflict between the exit cap regulations and the LGPS regulations if the cap is breached when an LGPS member aged 55 or over exits. The LGPS regulations still entitle the member to receive and require them to take immediate payment of an unreduced pension, but the exit cap regulations prevent the employer from paying the full strain cost.
- 1.3 The Croydon Pension Fund (the fund), as an administering authority needs to decide whether to pay an unreduced pension in line with The Local Government Pension Scheme Regulations 2013 regulation 30(7) (Appendix C) or provide the option of either a deferred pension under regulation 6(1) (Appendix D) or an immediate reduced pension under regulation 30(5) in line with the Government's recommendations.

- 1.5 To assist administering authorities with this decision, the Scheme Advisory Board (SAB) has obtained legal advice (Appendix E). Following that advice the Scheme Advisory Board has expressed opinion that the course of action presenting the least risk to both LGPS administering authorities and scheme employers is for the;
- LGPS administering authority to offer the member the opportunity to take a deferred benefit under LGPS regulation 6 or a fully actuarially reduced pension under LGPS regulation 30(5)
 - Scheme employer to delay the payment of a cash alternative under regulation 8 of the Exit Cap Regulations
- 1.6 MHCLG also wrote to LGPS administering authorities on 28 October 2020 (Appendix F) advising 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.
- 1.7 The fund also needs to consider what factors to use when calculating strain costs. Until now, local factors supplied by the funds actuary have been used to calculate strain costs.

Issues

- 1.8 If the fund decides to pay an unreduced pension, there is a risk of challenge under the doctrine of implied repeal which, if successful, would result in the fund 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. This means that the fund could end up in the position of having to try and recover monies from the employer and/or the member. The fund 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.
- 1.9 Offering a deferred or reduced pension also risks challenge, this time from the member seeking to enforce their rights to an unreduced pension under regulation 30(7).
- 1.10 The funds actuaries have confirmed that early retirement strain factors provided to the Fund in the past used to calculate the strain charged to employers were developed to address the funding shortfall that would present itself due to paying a pension early and were never intended to impact member benefits.

They did not impact the benefits received by members and therefore they followed standard actuarial principles, also adopted in most if not all other LGPS funds, which result in:

- Them being based on the Fund's valuation funding assumptions which have an allowance for prudence built in; and
- Strains being larger for women than men as women tend to live, on average, longer than men.

Options

Payment of Benefits

1.11 The options available to the fund in relation to payment of benefits whilst 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 are:-

Option 1

- to pay an unreduced pension in line with The Local Government Pension Scheme Regulations 2013 regulation 30(7), which could result in breach of the Restriction of Public Sector Exit Payments Regulations and be subject to challenge under the doctrine of implied repeal which if successful would result in the fund having to seek repayment of the overpaid element of the pension.

Option 2

- to offer the member the opportunity to take a deferred benefit under LGPS regulation 6 or a fully actuarially reduced pension under LGPS regulation 30(5), which carries the risk of challenge from scheme members seeking to enforce their rights to an unreduced pension. It is noted that James Gouldie QC comments (at Appendix E) that he considers the risk of challenge to an administering authority 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 costs attributable to them, is high.

Early Retirement Strain Factors

1.12 In order to minimise the risk of challenge from employers or members, the Fund has two options in relation to the early retirement strain factors:

Option 1

- adopt the factors and calculation methodology consistent with Government Actuary's Department (GAD's) draft guidance. The benefit of this option is that these factors are expected to apply in the future once the LGPS Regulations are updated, so the calculations would be consistent over time. However, the Fund's admin software system cannot currently carry out these calculations. The funds actuaries are able to provide a calculator to allow the fund to efficiently carry out these calculations which attracts a cost of £7k which will need to be met by the fund.

Option 2

- adopt a halfway house approach until the new LGPS Regulations come into force. With this option there would be a step change in methodology and factors at the point new LGPS Regulations and the GAD factors come into force, meaning a quote for a retirement carried out 2 days apart, could yield different strains and therefore have different impacts on member benefits. Similar to option 1, there would remain a risk the Fund's admin software system is not updated in time for the new LGPS Regulations / GAD Guidance coming into force and an 'off the system' calculator would be required to allow the fund to efficiently carry out these calculations anyway.

Reasons for recommended options

Payment of Benefits

1.13 It is recommended that the fund offer scheme members the opportunity to take a deferred benefit under LGPS regulation 6 or a fully actuarially reduced pension under LGPS regulation 30(5) if the cap is breached when an LGPS member aged 55 or over exits, whilst there is a conflict between the exit cap regulations and the LGPS regulations.

Whilst there is a risk of challenge from scheme members this will negate the financial risk to the fund of having to try and recover monies from the employer and/or the member or being in a position where the employer is unable to meet the full strain costs.

This option would also negate the risk to scheme members of having made life changing decisions based on a pension that is later reduced and being in the position where the fund also needs to seek recovery of overpaid pension.

Early Retirement Strain Factors

- 1.14 It is recommended that the fund adopt the factors and calculation methodology consistent with Government Actuary's Department (GAD's) draft guidance for calculating early retirement strain factors, to ensure consistency of calculations over time.

2. CONSULTATION

- 2.1 No consultation is required

3. FINANCIAL AND RISK ASSESSMENT CONSIDERATIONS

- 3.1 There will impact on the level of benefits paid to scheme members. The recommended option on payment of benefits minimises the risk of financial loss to the fund.
- 3.2 There will be a cost of £7k for the purchase of a calculator to enable the fund to efficiently calculate strain costs using the Government Actuary's Department (GAD's) draft guidance, the cost of which will need to be met by the fund.

Approved by: Lisa Taylor, Director of Finance, Investment and Risk, S. 151 Officer

4. LEGAL CONSIDERATIONS

- 4.1 The Head of Litigation and Corporate Law comments on behalf of the Interim Director of Law and Governance that under Regulation 30(7) of the LGPS Regulations 2013 any pension paid to the member, including an entitlement to an unreduced pension, is payable by, and the responsibility of, the LGPS administering authority.

The LGPS administering authority can request a strain payment from the employer, which could be a sum which would result in a breach of the £95k cap. Under the **Restriction of Public Sector Exit Payments Regulations 2020** employers can make a strain payment up to that amount, taking into account of the value of other exit payments made to the individual.

[The letter of 28 October](#) from MHCLG Minister, Luke Hall, sent to LGPS administering authorities and local authority chief executives, set out the Government's view that the **Restriction of Public Sector Exit Payments Regulations** effectively curtail the use of LGPS Regulation 30(7) to pay an immediate unreduced pension when the cap is breached. According to this view, a 'capped' member should only receive an immediate pension under LGPS Regulation 30(5) (with actuarial reductions applied), or a deferred pension, together with a 'cash alternative' payable by the employer under Regulation 8 of the Exit Cap Regulations.

Until the LGPS Regulations are expressly amended to remove the entitlement to an unreduced pension under Regulation 30(7) the SAB opinion which is based on the legal advice it has obtained, is that the course of action presenting the least risk to both LGPS administering authorities and scheme employers is for the:

- LGPS administering authority to offer the member the opportunity to take a deferred benefit under LGPS regulation 6 or a fully actuarially reduced pension under LGPS regulation 30(5)
- Scheme employer to delay the payment of a cash alternative under regulation 8 of the Exit Cap Regulations

It is for the LGPS administering authority, (not the employer), to decide whether to pay an unreduced pension under LGPS Regulation 30(7) or a reduced pension under Regulation 30(5).

4.1 Approved by Sandra Herbert, Head of Litigation and Corporate Law on behalf of the Interim Director of Law and Governance & Deputy Monitoring Officer

5. HUMAN RESOURCES IMPACT

5.1 The report sets out the challenges for LGPS on the best way to ensure we provide our workforce with the best advice and information, until the revised pension regulations are in force following the current consultation. As the London Borough of Croydon is about to enter into consultation on workforce reductions, the interim position must be addressed urgently.

(Approved by: Sue Moorman on behalf of the Director of Human Resources)

6. EQUALITIES IMPACT

6.1 There are no equalities impacts arising from this report.

7. ENVIRONMENTAL IMPACT

7.1 There are no environmental impacts arising from this report.

8. CRIME AND DISORDER REDUCTION IMPACT

8.1 There are no crime and disorder impacts arising from this report.

9. DATA PROTECTION IMPLICATIONS

9.1 WILL THE SUBJECT OF THE REPORT INVOLVE THE PROCESSING OF 'PERSONAL DATA'?

YES/NO

(If yes, please provide brief details as to what 'personal data' will be processed and complete the next question).

(If no, please complete the sign off)

9.2 HAS A DATA PROTECTION IMPACT ASSESSMENT (DPIA) BEEN COMPLETED?

NO

The Director of Human Resources comments that this report contains only information which can be publically disclosed.

Approved by: Sue Moorman, Director of Human Resources

CONTACT OFFICER: Vicki Richardson, Head of HR & Finance Service Centre,
Extn. 62460

BACKGROUND DOCUMENTS:

A: The Restriction of Public Sector Exit Payments Regulations 2020
https://www.legislation.gov.uk/ukxi/2020/1122/pdfs/ukxi_20201122_en.pdf

B: MHCLG consultation

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916615/Reforming_local_government_exit_pay_consultation.pdf

C: The Local Government Pension Scheme Regulations 2013 – Regulation 30

<https://www.legislation.gov.uk/ukxi/2013/2356/regulation/30/made>

D: The Local Government Pension Scheme Regulations 2013 – Regulation 6

<https://www.legislation.gov.uk/ukxi/2013/2356/regulation/6/made>

E: SAB legal advice

<https://lgpsboard.org/images/Guidance/JGSAB061020201.pdf>

<https://lgpsboard.org/images/Guidance/JGSAB20102020.pdf>

F: MHCLG letter to LGPS administering authorities dated 28 October 2020

<https://lgpsboard.org/images/PDF/letters/MHCLGtoLAs.pdf>

APPENDICES: None