The Cap on Exit Payments: Practical Implications and Issues
Audience Questions

Based on long service of say 35 years, do you have any indication of the level of salary that will be caught by the cap? There appears to be a definite misconception in my own authority that this will indeed only affect those on very high salaries.

We have not got worked through examples but it is clear that moderate (i.e. not just high) earners with long service will be affected because of their pension entitlement. So, if they are made redundant after age 55 then the pension strain costs are likely to exceed the cap, particularly if you also include other payments, such as redundancy, because the cap applies to the total cost of the exit payments.

Re the mandatory relaxation for an ET claim, is this applicable if the employee has already left and is litigating? The claims are for constructive dismissal and age discrimination relating to an HR error in misidentifying the claimant as not redundant and there being a large pension strain due to his age (the redundancy pay, notice and pensions strain is under the cap level)

It is not expressly clear but, it would seem to be covered as the employer is prevented from making a payment in excess of the cap from 4 November onwards. However, if there is a court order to pay any amount it will no longer be an exit payment and if all the payments due are under the cap in *total* anyway, (as suggested in the question here) there should not be a problem with reaching a settlement agreement as the cap would not be breached in any event. If it does breach the cap, mandatory relaxation may be appropriate depending on the strength of the claim and likely exposure.

If there is a termination of employment before 4 November (via a settlement agreement) but the exit payments are made after 4 November is this still caught by the exit payment regulations? The wording of the regs does not make this clear whereas the explanatory note and the guidance says that the new regs apply to exits after 4 November.

As, above, again whilst it is not clear in the documents, our view is that the employer is prevented from making a payment in excess of the cap from 4 November onwards – even if the agreement to pay and the exit was before that date.

Who makes the waiver for staff of a police and crime commissioner?

The documents suggest that this must be done a Minister of the Crown as that power has not been delegated for these staff, (unlike with local authorities where is has been delegated to full Council – albeit still subject to certain approvals).

Do these regulations apply to members who retire normally. In other words, if a person just retires (by resignation and they have reached retirement age, does the £95K apply?

Again this is not dealt with expressly but it would seem to be covered. The question would be whether in practice it would be an issue as there would be no pension strain costs and no redundancy payment, so there may not be an exit payment payable which would breach the cap.

Is there any indication that the £95k cap figure will be reviewed as time will erode this further bringing more in to its range.

There is no provision for the figure to be index linked. (If the cap had been indexed by CPI since it was first proposed in 2015 then it would now be in excess of £110K). However, the Government response to the consultation stated:

The primary legislation allows the government to change the level of the cap through further secondary legislation. Whilst we do not propose to change the level of the cap at this stage, the level of the cap will be kept under review in order to allow for a flexible approach to make decisions on the level of the cap with reference to full contextual factors

How can you establish if, and in what circumstances, this will be likely to affect your own personal circumstances as it all seems very complex to establish this?

It is difficult to answer this as it will depend on the circumstances. However, the most likely scenario of the cap to be breached is where there would ordinarily be a redundancy payment and pension strain costs associated with an exit after 4 November.

In light of payments to third parties being covered would payment of legal fees in a settlement agreement also be covered?

Again, although not expressly set out in the Regulations or Guidance, it would seem they would be covered.

Just to be clear is the stat redundancy to be included as part of the £95k?

Statutory redundancy is covered in the calculation for the cap. It is just that, where there is a statutory redundancy payment payable as well as other types of exit payment, there are specific rules around the fact that an employer cannot reduce the statutory redundancy payment, e.g. to fund pension strain or make another type of exit payment. So, it has to be one of the other types of exit payment which has to be reduced if otherwise the total would take you over the cap.

What if you have two exits payments that are longer than 28 days apart? Can these exceed the cap in aggregate?

The multiple exit provisions relate to exit payments from two or more employers within 28 days. So it would not be possible for one employer to pay exit payments more than 28 days apart in order to avoid the cap. However, if someone exited from two separate employers more than 28 days apart, and received exit payments from each, it does not appear on the face of it that they would be aggregated.

If the legal view is that an ET discriminatory dismissal claim is on balance likely to succeed, does the mandatory relaxation rule mean that the claim has to be settled and would that settlement have to be over £95k?

Again, the documents are not entirely clear on this. However, it seems that in these circumstances it does not mean the claim has to be settled. In any litigation it is appropriate to consider whether settlement is appropriate but there is no obligation to settle. All that is required is that, *if* the decision is made to enter into a settlement agreement or COT3 to settle the litigation for these claims, and *if* that would mean paying in excess of the cap*, then* the cap must be relaxed.

If the legal view is that a relevant claim against a local authority will not succeed, does full council still have to consider exercising its mandatory power or its discretionary power of relaxation?

As above, there is no obligation on the council to consider relaxing the cap. Indeed, it would also only be likely to be justifiable from a value for money perspective and/or for securing final approval from MHCLG if the legal view is that the claim would succeed.

If agreement had been reached say 3rd Nov but payment will not be made until the end of Nov, is it still caught by the cap? I believe so, but what is Sarah's thoughts.

Agreed - it seems that the payment would be caught as the employer is not allowed to pay in excess of the cap from 4 November, whatever has been agreed prior to the Regulations coming into force.

Sorry I struggle to understand pensions. So, what happens above £95k? Does the fund just keep the money as a surplus?

Assuming this relates to the LGPS, the issue with pensions is that the scheme employer cannot pay pension strain costs which exceed £95K to fund a member's entitlement to an unreduced pension. So if the administering authority does pay the unreduced pension, the fund will be in deficit.

Would a £50-£100 payment (less PAYE deductions) for an employee entering into certain confidentiality undertakings in a settlement agreement be caught by the £95K pay cap?

Again, although not expressly clear, it would appear this sort of payment would be caught.

Is an employee required to declare the exit payments to their new public sector employer? If so, what are the circumstances?

Our understanding is that there is not a general obligation to declare payments to a new employer. The Regulations and Guidance state that when an individual is entitled to receive a payment in relation to an exit that has occurred *and* that individual is also employed by or is an office holder in respect of one or more other prescribed authorities, that individual must give certain information in relation to the exit payment received.

Reg 5(2) (b) refers to the additional payment (strain charge) "on early retirement". How does that extend to a redundancy "dismissal"?

Assuming this relates to the LGPS, Regulation 30(7) provides that where an active LGPS member who has reached age 55 loses his or her employment by reason of redundancy or business efficiency, that member is entitled to, and must take, immediate payment of retirement pension under the LGPS Regulations without reduction.

So, that would include a redundancy dismissal. Then the cost of funding that pension (on what is effectively early retirement) is the pension strain cost payable by the scheme employer, referred to in Reg 5(2)(b).