ISLINGTON

**Resources**
**7 Newington Barrow Way**
**London N7 7EP**

**Report of: Corporate Director Resources**

| **Meeting of** | **Date** | **Agenda Item** | **Ward(s)** |
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| Audit Committee | 25 January 2021 | | N/A |

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# SUBJECT: THE INTRODUCTION OF EXIT PAYMENTS CAP ON REDUNDANCY/EFFICIENCY RETIREMENTS

## 1. Synopsis

1.1 This report is an update on the introduction of restrictions, which cap an exit payment at £95k, in the light of three recent developments. Firstly, consultation on the Local Government Pension Scheme Regulations and draft amending Regulations. Secondly, Treasury Directions on waiver (relaxation) of the Exit Cap. Thirdly, judicial review challenges seeking to quash (invalidate) the Exit Cap Payment Regulations, permission for judicial review having been granted for the cases to be heard in March 2021.

1.2 The report explains the background to the exit cap rules and the current statutory provisions.

1.3 The report also provides information about the employer changes that need to be made in order to be compliant with the new legislation.

## 2. Recommendations

1.4 To note the contents of the report, and in particular to note paragraphs 3.7-3.9.

1.5 To agree to amend the current redundancy/efficiency policy so that where an employee's exit payments breach the £95K cap, the staff member can exercise the option of reducing elements of their redundancy package, other than pension strain cost and statutory redundancy payment, in order to bring the total to under £95K and therefore be eligible to claim an unreduced pension.

1.6 To agree that where the pension strain costs are in excess of £95K, an employee can use their own funds to lower the reductions applied to their LGPS benefits.

1.7 To agree that the changes proposed to the redundancy policy apply to all relevant Council employees, including at Islington schools.

1.8 To agree an option, in instances where the value of paying the pension strain would exceed the cap, of an additional discretion to allow exit payments to be made up to the balance of the £95K cap under Regulation 8 of the Restriction of Public Sector Exit Payment Regulations 2020 (as per paragraph 3.9).

1.9 To note that any significant individual decisions that need to be made in relation to the enacting of provisions within the change of the policy will be brought for approval to the Audit Committee meeting scheduled for the 16th March 2021.

## 3. Background

1.1 In the summer of 2015, the government released proposals for a public-sector exit-payment cap. Action by government was delayed on this topic and then on 10th April 2019, the government engaged in a 12-week consultation which closed on 3rd July 2019. The LGA, Public Sector Employers and Trade Unions made detailed submissions and suggestions for amendments, which are largely absent from the draft regulations published on the 22nd July 2020.

https://www.gov.uk/government/consultations/restricting-exit-payments-in-the-public-sector

3.2 The Restriction of Public Sector Exit Payment Regulations 2020 were made on 14th October 2020 and became law on 4th November 2020.

3.3 In September 2020, the Ministry of Housing, Communities and Local Government (MHCLG) opened a further consultation, specifically on proposals for reforming exit payment terms for local government workers. It included proposals for the treatment of the pension strain for members of the Local Government Pension Scheme (LGPS). The consultation closed on 9th November, after the exit cap regulations became law. The consultation response remains outstanding and responses are under consideration alongside a number of legal challenges.

3.4 A High Court judge has subsequently given permission for a number of judicial reviews over the exit cap regulations to proceed and therefore the impact on members' pension benefits will be subject to full consideration in the High Court. This will not take place until March 2021 at the earliest.

**What this means for members of the LGPS?**

3.5 The exit cap regulations affect all LGPS members in England who, prior to 4th November 2020, qualified for an unreduced pension as a result of a redundancy or efficiency retirement. There are a number of options as to how members can access redundancy packages but the changes have led to additional complexity and more importantly **reduced benefit payments**.

**What isn't covered?**

3.6 Payments related to death in service or ill health retirement, payments complying with an order made by a court or tribunal and payments in lieu of notice that do not exceed a quarter of a person's salary are not exit payments for the purposes of these regulations (exit cap regulations 6(g)).

**Period between 4 November and date LGPS Regulations are amended**

3.7 There is a conflict between the exit cap regulations and the LGPS regulations when a scheme member aged 55 or over is made redundant and the total exit payment exceeds £95,000. The LGPS regulations require the member to take payment of an unreduced pension, but the exit cap regulations prevent the employer from paying the full strain cost. The recommendation from the Pension Scheme Advisory Board (SAB) is that local authorities should only provide two options during this period: either the employee takes a reduced pension or their pension is deferred until their state retirement age. This argument is driven by the belief that this position limits the legal risk to the authority, but a risk still remains. It is highly probable that the trade unions would support their members and pursue a legal challenge if the Council were simply to follow the recommendations of SAB.

3.8 Another approach, permitted by the Treasury (exit cap regulations 7(2)(3)), is to provide an employee with the option, in cases where they have breached the £95k exit cap, of reducing other elements of their redundancy package (other than pension strain cost and statutory redundancy pay) to bring the total to under £95K; this may also include the employee using their own funds to lower the reductions applied to their LGPS benefits. This option is also not without legal risk because of the conflicting legislation.

3.9 Finally, should the employee opt for an immediate, actuarially reduced pension, the Council will not incur pension strain costs. Whilst this is more beneficial to the Council, it is likely to not be the most advantageous option to employees. The Council does have the legal ability to make a payment (under regulation 8 of The Restriction of Public Sector Exit Payments Regulations 2020 and subject to tax payable by the employee), in addition to redundancy up to the value of the exit cap. This could be used as a discretionary payment in order to arrive at an agreed settlement with employees during the period before the resolution of the conflicts between regulations.

**What this means for Islington Council's Pension Fund (ICPF)**

3.10 The implementation of exit cap regulations will involve significant resource from the Pensions Office. There will be a requirement to run more calculations for both employees and employers. Retirement processes will need to be revised and communication will need to be sent to all of our 32 external employers who are members of Islington Council's Pension Fund.

Our external employers will also need to provide details of statutory and discretionary redundancy payments to ICPF to enable the retirement calculations to be performed so that information can be provided to the member on the resultant costs and benefits.

## 4. Implications

### 4.1 Financial Implications

The cost of administering the LGPS is chargeable to the Pension Fund

### 4.2 Legal Implications

The current conflict between the provisions of the LGPS and exit cap regulations presents a risk of legal challenge by scheme members. That risk can to some extent be mitigated by allowing greater choice for employees as to how they can access their pension scheme benefits (as set out in paragraphs 3.7-3.9). The two paths to resolving the outstanding legal conflicts are: firstly, the outcome(s) of the judicial review challenges, which have been listed for hearing in the High Court in March 2021; and secondly, amendment to the LGPS Regulations.

### 4.3 Resident Impact Assessment

The council must, in the exercise of its functions, have due regard to the need to eliminate discrimination, harassment and victimisation, and to advance equality of opportunity, and foster good relations, between those who share a relevant protected characteristic and those who do not share it (section 149 Equality Act 2010). The council has a duty to have due regard to the need to remove or minimise disadvantages, take steps to meet needs, in particular steps to take account of disabled persons' disabilities, and encourage people to participate in public life. The council must have due regard to the need to tackle prejudice and promote understanding.

In respect of this report, a Resident Impact Assessment is not being made because the contents of the report relate to processes that are strictly in accordance with the statutory Local Government Pension Scheme Regulations. The LGPS Regulations are made under the Superannuation Act 1972, and the Council has a statutory duty to comply with the LGPS Regulations.

4.4 **Environmental Implications and contribution to achieving a net zero carbon Islington by 2030**

None.

## 5. Conclusion and reasons for recommendations

5.1 The two options set out in the SAB advice are for a deferred or reduced pension where an exit payment to an employee exceeds the cap. These options appear predicated on the assumption that any shortfall on the strain costs is mitigated only by a reduction in pension benefits. Following this approach alone would likely prove contentious and result in numerous complaints and possibly more legal challenges. By allowing for greater flexibility in pursuing additional options, which are transparent and provide more choice to the employee, the Council is likely to have a better chance of avoiding unnecessary disputes.

**Signed by:**

**Dave Hodgkinson, Corporate Director of Resources (Section 151 Officer)**

**Report Author:** Paul Clarke, Director of Finance

**Email :** Paul.clarke@islington.gov.uk