

Restriction of Public Sector Exit Payments Regulations 2020 (SI 2020/1122)

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These Regulations (the “Cap Regulations”) apply from 4 November 2020 to cap exit payments in the public sector to a maximum of £95,000.

It is not the purpose of this note to provide a comprehensive overview of the Cap Regulations which, in truth, is best achieved by reading the Regulations themselves plus supporting guidance. Rather, this note is intended to assist practitioners who may be negotiating/mediating terms of settlement on behalf of Public Sector employees, and who are informed that either the cap applies or no final decision can be made without ministerial or treasury approval.

Understanding how the Cap Regulations operate will assist in such circumstances, but it is also to be noted that the British Medical Association is understood to have applied for judicial review to challenge the cap on the basis that it ignores contractual obligations or prevents an employer from adequately compensating an employee for the employer’s unlawful acts. With that caveat in mind, this note is provided.

This note deliberately focusses on the part of the Cap Regulations and guidance which details the circumstances in which the power to relax the cap *must* be exercised in the context of tribunal claims.

Background

The statutory provisions governing the operation of the cap are:

The *Small Business, Enterprise and Employment Act 2015*:

- *section 153A* (sets out the power to make regulations to restrict public sector exit payments);

- *section 153B* (supplementary provision about regulations under section 153A); and
- *section 153C* (sets out the power to relax restriction on public sector exit payments).

The *Restriction of Public Sector Exit Payments Regulations 2020 (SI 2020/1122)* (“the Cap Regulations”).

Further guidance on the Cap Regulations:

- *Restriction of Public Sector Exit Payments: Guidance on the 2020 Regulations* (“the Cap Guidance”) – setting out how public sector authorities identified in the Cap Regulations should implement the legislation.
- *Restriction of Public Sector Exit Payments: HM Treasury Directions (Exit Payment Cap Directions 2020)* setting out those circumstances in which the power to relax the cap must be exercised (mandatory cases) and those in which the power to relax the cap may be exercised (discretionary cases).

The statutory scheme is intended to limit an exit payment that a public sector employee or office holder can receive in connection with loss of employment or office to a maximum of £95,000.

The Power to Relax the Cap

On 29 October 2020, HM Treasury published the *Exit Payment Cap Directions 2020* which came into force on 4 November 2020 and set out those circumstances in which the power to relax the cap must be exercised (*mandatory relaxation of the cap*) and those circumstances in which the power to relax the cap may be exercised (*discretionary relaxation of the cap*). This note deals with mandatory relaxation of the cap in the circumstances of tribunal claims.

The Cap Guidance notes that relaxation of the cap is expected to be granted only in exceptional circumstances and that all decisions should be supported by appropriate evidence, with an explanation of the business interests, a value for money assessment, and should be disclosed in the organisation's annual accounts (*paragraph 5.19*).

The power to relax the cap must be exercised in TUPE situations and in certain tribunal claims. The cap is intended to be relaxed in respect of claims for either detriment or unfair dismissal in health and safety and whistleblowing cases (albeit s.103A ERA 1996 appears to have been missed from the Exit Payment Cap Directions), and in respect of discrimination claims where:

- the payment relates to a complaint that an employment tribunal has the jurisdiction to consider under *sections 48(1)* (intended to refer to health and safety detriment claims), *48(1A)* (protected disclosure detriment claims) or *100* (health and safety dismissal claims) of the Employment Rights Act 1996 (ERA 1996) and/or *section 120(1)* of the Equality Act 2010 (EqA 2010) (discrimination claims); and
- the Decision Maker is satisfied on the balance of probabilities that an employment tribunal would make an award or order of compensation under *section 49(1)(b)* or *section 118(1)* of the ERA 1996 or *section 124(2)(b)* of the EqA 2010 if it considered the complaint.

At Paragraph 5.20 the Cap Guidance summarises as follows:

- Where a payment is made to avoid employment tribunal litigation in relation to a complaint that someone has suffered a detriment or been dismissed as a result of carrying out activities in connection with preventing or reducing risks to health and safety at work.
- Where a payment is made to avoid employment tribunal litigation in relation to a complaint that someone has suffered a detriment or been dismissed as a result of whistleblowing.
- Where a payment is made to avoid employment tribunal litigation in relation to a complaint of discrimination under the Equality Act 2010.

The Cap Guidance further provides that where an employee has made a protected disclosure and subsequently claims that they have been dismissed or subjected to a detriment as a result of that disclosure, potentially through a grievance or employment tribunal litigation, an employer *must consider whether litigation should be avoided*. Where it is considered appropriate to enter into a settlement or conciliation agreement involving an exit payment, if

the employer is satisfied that an employment tribunal would find in the employee's favour, the power to relax the cap must be exercised if the amount payable under the settlement agreement would otherwise lead to the cap being breached. It is expected that an employer will make legal advice available to the person exercising the power to relax the cap that demonstrates that, on the balance of probabilities, the employee has made a disclosure covered by whistleblowing law and that an employment tribunal would find that they had been dismissed or subjected to a detriment as a result of that disclosure. (*Paragraphs 5.26 and 5.27 of the Cap Guidance.*) A similar approach is taken in relation to health and safety claims (*paragraph 5.30 of the Cap Guidance*) and discrimination claims (*paragraphs 5.33 and 5.34 of the Cap Guidance*).

When negotiating, therefore, settlement awards in respect of public sector employees who claim to have suffered whistleblowing and/or health and safety detriment and/or dismissal and/or discrimination at the hands of their employer, a thorough understanding of the above legislation and guidance is advised, particularly those elements that provide for the mandatory relaxation of the cap.

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