

Report to Pensions Committee

25 January 2021

Scheme Changes

Report by Director of Finance and Support Services

Electoral division(s): N/A

Summary

The report includes a summary of significant developments that impact the Fund.

The Restriction of Public Sector Exit Payments Regulations 2020 will, through primary and secondary legislation, put in place an overall cap on the value of public sector exit payments at £95k. However due to amendments to the LGPS Regulations running to a later timetable to the primary legislation the Fund has needed to take advice on the appropriate steps required when a member is eligible for a redundancy package.

The McCloud judgement was determined in summer 2019 and the Government published a consultation on the remedy in July 2020. The Fund now needs to put in place procedures to ensure it complies with the amended Regulations introduced to comply with the judgement. The potential workload on the pension's administration team is summarised below. As a result of the McCloud judgement, the previously paused cost mechanism is now commenced with a proposed completion date in 2021.

The report also provides an update on:

- The Goodwin case whereby an Employment Tribunal has determined aspects of the Teachers' Pension Scheme (and therefore potentially affects the LGPS) are discriminatory on the grounds of sexual orientation.
- Further changes to the LGPS Regulations in relation to the ability for employer contributions to be reviewed between formal valuations, to agree payment plans when employers have an exit debt and the introduction of a deferred employer status – whereby an employer continues to contribute to the Scheme even after their last active leaves, rather than being considered an exiting employer.

Recommendations

- (1) The update, including the impact on the pension's administration team and the actuary to process the outcome of these scheme changes and the risks presented to the Administering Authority in respect of the restriction of Public Sector exit payments, is noted by the Committee.
 - (2) The completion of the Funding Strategy Statement consultation is noted by the Committee.
-

Proposal

1 Background and context

- 1.1 The benefit structure of the LGPS is set nationally. In April 2014, a series of changes were made to the Scheme to reform the benefits structure. These changes were implemented as part of a wider project across Government to reform public service pensions and put them on a more sustainable, affordable and fairer footing for the longer term. Some protections introduced as part of the reformed benefit structure have since been challenged on the grounds of age discrimination (the McCloud judgement), and a resultant pause was placed on the cost control mechanism introduced to determine how the McCloud judgement should be allowed for within the mechanism.
- 1.2 Separately the Government has introduced changes to limit exit packages from the public sector to £95,000
- 1.3 The Government has also faced further challenge about discriminatory provisions within public sector Schemes (Goodwin) and provided a further partial response on its May 2019 consultation on changes to the local valuation cycle and management of employer risk.

2 Rectification as a result of the McCloud judgement

- 2.1 As reported to the Committee in October 2020, the Supreme Court had rejected the Government's appeal against a ruling in June 2019, which found that the transitional protection introduced to the firefighters' and judges' pension schemes in 2015 amounted to age discrimination for younger workers. MHCLG [set out proposals](#) to remove the unlawful age discrimination identified in the McCloud judgment from the Local Government Pension Scheme and the County Council responded to the Consultation in line with the 8 October 2020 deadline. It is understood that a response from Government is expected immanently.

Potential scope of the administrative work required

- 2.2 The significance and challenges these changes present to administering authorities and to employers was noted by the Committee when it met in October 2020 with over 16,000 member records in scope for review as a result of the revised underpin.
- 2.3 To update the Committee, the administration team [wrote to all employers](#) of the data required to be provided to allow the Fund to comply with the legislative changes to calculate the final salary underpin. Employers were asked to acknowledge receipt of the information by 31 December 2020 and raise any concerns in being able to comply with the request. The deadline for completing the (national) data template is 31 March 2021.
- 2.4 Additional resources required to review and rectify member records will be chargeable to the Pension Fund.
- 2.5 The Fund Actuary does not expect the McCloud remedy to have a significant impact on liabilities or contributions rates for most employers.

3 Exit Payments in Local Government (£95k Cap)

- 3.1 In 2015 the Government first announced its proposals to prohibit six-figure exit packages from the public sector, by imposing a £95,000 cap on such packages.
- 3.1 The Committee received an update when it met in October 2020 on the Restriction of Public Sector Exit Payment Regulations 2020 primary legislation (the Cap Regulations) which was brought into effect on 4 November 2020 and places an overall cap on the value of public sector exit payments at £95k. This applies to all public sector employees in the LGPS (and the unfunded public sector schemes). At the same meeting, the Committee were advised that secondary legislation for the LGPS was out for [consultation by MHCLG](#), with a closing date of 9 November 2020. Therefore, the flexibilities for members to manage the £95k cap (and amendments to the compensation regulations which will impact on all LGPS members) would lag the primary legislative changes. As a result, there is a period of conflict between:
- Regulation 30(7) of the Local Government Pension Scheme Regulations (LGPS) 2013, which (broadly) entitles an active member who is made redundant on or after the age of 55 to an immediate, unreduced early retirement pension; and
 - the Cap Regulations, which restrict the overall value of exit payments to public sector employees to £95,000.
- 3.2 It is considered unlikely that the amendments to the LGPS Regulations will be in force before June 2021 and this timing difference has created a period of uncertainty for employees at risk of redundancy and for employers in understanding the costs.
- 3.3 A High Court judge has given LLG (Lawyers in Local Government) and ALACE (the Association of Local Authority Chief Executives and Senior Managers) permission to bring a judicial review challenge over the Cap Regulations. To date, the Actuary is aware of six potential judicial review challenges including that raised by LLG and ALACE. The reviews are expected in March.

Guidance

- 3.4 The Minister for Regional Growth and Local Government wrote to the Chief Executives of Councils and LGPS administering authorities on 28 October to set out the view of the Ministry of Housing, Communities and Local Government (MHCLG). The key message was that the Government considered that the Cap Regulations effectively curtail the use of LGPS Regulation 30(7) to pay an immediate unreduced pension, when the exit payment cap is breached. Therefore, a member whose overall exit payment exceeds £95,000 should only receive an immediate, fully reduced, pension under LGPS Regulation 30(5) or a deferred pension, plus a cash alternative payable by the employer under regulation 8 of the Exit Payment Regulations.
- 3.5 The LGPS Scheme Advisory Board (SAB) also issued updates to administering authorities on this matter, including following receipt of advice from Leading Counsel. The SAB recommends that for employers covered by the Exit Payments Regulations, and where the member is over 55, made redundant or retired through business efficiency and their overall exit payment exceeds £95,000, the administering authority should:

- offer a deferred pension; or
- pay the member a fully reduced early retirement pension.

Legal Advice

3.6 The Fund has collaborated with the ten other ACCESS Authorities to commission legal advice on the matter. This was received on 20 November 2020.

3.7 The legal advice concludes that

There is presently a direct conflict between Regulation 30(7) and the Cap Regulations, where the strain cost for an individual member would result in the aggregate exit payment exceeding the Capped Amount. Although the Government has stated it considers the Cap Regulations take precedence over the LGPS Regulations, there is no obvious justification for that argument from a legal perspective. The LGPS Regulations are expected to be amended in 2021 to resolve the position but, in the meantime, there is no risk-free approach that Administering Authorities can follow in these circumstances.

3.8 The legal advice sets out there is no risk-free approach that Administering Authorities can take but on the balance of risks it was agreed by the Director of Finance and Support Services that the Fund should:

- Ask employers to explore whether proposed redundancy or business efficiency cases can be delayed until the LGPS Regulations are brought into force.
- Adopt the SAB's recommended approach where the cap is exceeded and
 - Pay a member a fully reduced early retirement pension (based on factors including the members age); or
 - offer a deferred pension; and
 - request that the scheme employer refrains at this point from paying a cash payment to the member equivalent to the capped strain cost.

Calculation of Strain

3.9 Administering Authorities are currently entitled to claim additional contributions from scheme employers where an unreduced early retirement pension is paid on redundancy or business efficiency. Any payment made to the Fund to meet the additional cost of paying a member's pension early constitutes part of the exit payment under the Cap Regulations.

3.10 The Fund's factors were set by the Actuary based on his local valuation assumptions. In the current circumstances this presents a risk of challenge on the grounds of strain costs differing between Administering Authorities and between GAD factors and local factors – which could impact on member benefits.

3.11 The Fund has now adopted a spreadsheet calculator using the Government Actuaries Department (GAD) factors for early retirement strain cost calculations for all employers, including those out of scope for the Cap Regulations.

Communication

- 3.12 Information has been [included on the website](#) to update members on the changes.
- 3.13 Employers received an email from the Fund on 5 November 2020 announcing the suspension of early retirement estimates and a further update on 4 December 2020 advising that early retirement estimates could now be provided.

4 Unpausing of the Cost Mechanism

- 4.1 The Committee were advised in October 2020 that work on the cost control mechanism (introduced to protect the taxpayer from unforeseen increases in scheme costs) has been restarted following a pause whilst the remedy to address the unlawful discrimination by the court (McCloud) was determined.
- 4.2 No timetable has been set for completing this process. At present this is being kept under review but there is no immediate action.
- 4.3 Separately the Government has signalled its intention to review the cost cap mechanism (in totality) following the current review.

5 Discrimination on the grounds of sexual orientation (Goodwin)

- 5.1 The Committee were also advised in October 2020 that a tribunal had found that some survivor benefits were less favourable, dependent on whether they were payable to a male spouse of a female member or a female spouse of a female member (the Goodwin case).
- 5.2 This only impacts the male survivor pensions of female members with pre-1988 service who die after 2005. It remains unclear if the Government intend to challenge this ruling and to date, there are no draft regulations or consultation on how to rectify impacted members. It is anticipated that there will be a very small overall impact on liabilities. At present this is being kept under review but there is no immediate action.

6 Further changes to the LGPS Regulations - Employer Flexibilities

- 6.1 Following MHCLG's [new Regulations](#) on employer flexibilities which will come into force from 23 September 2020 the Committee agreed amendments to its Funding Strategy Statement in relation to the ability to review contribution rates between formal valuations, the power to agree payment plans when employers have exit debts and the introduction of deferred employer status. Other options considered (and reasons for not proposing).
- 6.2 The changes were subject to consultation with employers between 26 October 2020 and 7 December 2020. There were no substantive comments to require amendments to the Strategy and it will therefore be published.

7 Consultation, engagement and advice

The County Council receives advice from its actuarial advisers, Hymans Robertson, SPB in relation to Exit Payments, the Local Government Association and Scheme Advisory Board in relation to Scheme matters.

8 Finance

The Pension Fund will be required to cover additional resourcing costs associated with the changes set out above, not limited to the McCloud rectification work. The impact will be discussed with the administration team.

9 Risk implications and mitigations

The following risks from the Pension Fund's risk register are considered relevant in the context of this report:

Risk	Mitigating Action (in place or planned)
Insufficient resources to comply with the Administering Authority's Regulatory responsibilities.	Work closely with the administration team on the response to the Scheme changes and the resource impact.
Insufficient guidance or Regulations to support the Administering Authority's statutory duties.	Legal advice has been sought but this sets out there is no risk-free approach that Administering Authorities can take.
Risk of challenge by a member / complaint to the Pension Ombudsman.	It is anticipated that clarity on the approach Administering Authorities should take will only come following legal challenge. It is possible that West Sussex are one of the Administering Authorities subject to legal challenge due to the approach taken.
The adoption of the GAD factors for all early retirement strain costs calculations presents a risk of 'under charging' employers for early retirement costs, which will present as a cost at the next valuation.	Position to be kept under review but considered low risk and most likely to impact smaller or short-term employers.

10 Policy alignment and compliance

The Business Plan includes the objective to implement Scheme changes and consider, respond to and communicate with stakeholders on relevant matters.

Katharine Eberhart

Director of Finance and Support Services

Contact Officer: Rachel Wood, Pension Fund Strategist, 0330 222 3387, rachel.wood@westsussex.gov.uk

Appendices

N/A

Background papers

N/A