

A Severance Policy for Scotland

ALACE (The Association of Local Authority Chief Executives) Scotland Response

1 - What types of bodies or bodies themselves do you think should be covered?

ALACE Scotland, believes that a standardised one-size-fits-all approach to severance payments is unnecessary, will create barriers to effective workforce planning by public authorities at a time of reducing resources, will not deliver Best Value, is contrary to the principle of subsidiarity of tailoring solutions to local needs, and is contrary to the principles which the Government sets out in the consultation paper.

Regulation should only cover those bodies where there is sound factual evidence that the principles detailed in the consultation paper are being undermined, namely:-

- Delivering Best Value to tax payers,
- Flexible and responsive public services,
- Fair deal for public sector employees,
- Commitment to a policy of no compulsory redundancy,
- Partnership work between employers and trade unions.

The statistics provided in section 3.3 and 3.4 of the consultation document excludes local government. In the absence of any sound and proportionate evidence there is also significant doubt as to whether application of these rules to local government is a) within the legislative competence of the Scottish Government; b) a breach of individuals' ECHR right to property; and c) age discriminatory. For these reasons, local authorities should not be covered.

2. What types of bodies or bodies themselves do you think should not be covered?

Regulation should only cover those bodies where there is sound factual evidence that the principles detailed in the consultation paper are being undermined. It should not cover local authorities for the reasons set out in question 1.

3. Given the variation exit in schemes across the public sector, is there benefit in seeking to make this more consistent to deliver best value and Fair Work outcomes?

There would be merit in attempting to standardise the tests which Public Authorities require to take when developing early retirement schemes and considering individual cases. The Audit Scotland guidance on 'Bye Now, Pay Later' is a good example of

such an approach. The emphasis should be on ensuring that any decisions represent best value, are transparent and there are effective corporate governance processes in place to guard against misuse.

In many cases the individual pension scheme will contain provisions which limit the extent to which discretion can be exercised. Such schemes take into account the affordability of the pension scheme.

There are two caveats to this however. Firstly, at a time of increasing demand and decreasing resource it is absolutely essential that the public sector is able to effectively manage its workforce and to reduce workforce numbers to align with local priorities. Consistency should aim to support public authorities in this exercise and to impose minimum standards which must be met. It should not attempt to take a 'one size fits all' approach which will in many cases result in greater cost to the public body.

Secondly it should be noted that in many cases, such as the Local Government pension scheme, employees have contributed to the scheme in an expectation of receiving a pension as set out in that scheme. This is a property right in terms of ECHR, which should not be interfered with unless such interference is proportionate. While it is accepted that schemes need to be revised to make them affordable, it is an entirely different matter for a Government to impose a cap which has no factual basis in either the affordability of the scheme or Best Value.

Finally, it should be noted that the details contained in table four of page 21 are misleading since they do not include any information from Local Government. ALACE understands that 82% of exits took place within Local Authorities. The absence of this data undermines any case for change, particularly in the local government sector.

4 – Do you think it is necessary to set an exit payment cap for the devolved public sector?

No - It is not necessary to set an exit cap for the devolved public sector.

There are two underlying principles which should apply. The first is Best Value, that public bodies should deliver Best Value, being an effective balance between efficiency, effectiveness and economy. There will be cases where it is in the financial interest of an authority to allow either a highly paid employee or an employee between 50-55 years old to depart with early access to their pension. While the redundancy payment together with any pension strain on the fund and other pension related costs may well exceed £95,000, this should not be an issue if Best Value can be demonstrated. The important factor is the saving secured. The length of the payback period (i.e. the time which it takes for the savings to exceed the cost) is often the key criteria.

Each early retirement or exit decision should be determined on its merits having regard to the cost and the savings. For Government to impose a one size fits all approach would be entirely counterproductive and will be an impediment to effective workforce management and Best Value. At a time when public bodies are seeking to reduce their headcount this is the worst possible time to introduce such a cap.

The consultation paper helpfully sets out a number of principles which should guide this decision. These are detailed at pages five, six and nine and are:-

- Delivering Best Value to tax payers,
- Flexible and responsive public services,
- Fair deal for public sector employees,
- Commitment to a policy of no compulsory redundancy,
- Partnership work between employers and trade unions.

Page nine reiterates that these are “key drivers of any decision around the implementation of an exit cap or recovery arrangements”. Any exit cap based on a financial figure (as opposed to say a three year payback period) would fail all of these tests. It would interfere with effective workforce management, be contrary to Best Value, result in unsustainable costs for the public sector at a time of reducing resources and result in staff remaining in the organisation because they could not afford to retire. It is also worth noting that as VER and other exit packages are useful tools to encourage voluntary departure, removal of these in individual cases could result in compulsory redundancy. Employees who were unable to agree an acceptable package could be forced into compulsory redundancy.

5 - Which of the following exit payment arrangements (included in the UK Government’s exit payment cap proposals) should Scottish Ministers include in the event that a cap was to be introduced in Scotland for the devolved public sector?

ALACE Scotland is opposed to the introduction of any exit payment cap. We are unaware of any case where a collective agreements is relevant to the exit of individual employees.

6- Are there any other exit payments situations where you think a cap should apply?

No.

7 - Which of the following exit payments (included in the UK Government’s exit payment cap proposals) should Scottish Ministers include if a cap were to be introduced for the devolved public sector?

It is unclear what many of these terms mean other than being a catch-all to ensure that any conceivable payment is caught. We do not think any of these payments should be included. The key principles should be those of a)- allowing sufficient flexibility to achieve Best Value in individual cases and b) – subsidiarity’ of delegating the decision to the level best placed to make the decision (rather than adopting an inflexible one-size-fits-all policy which ends up costing the public purse more in the long run).

8 - Which of the following payments should Scottish Ministers exclude, in the event that a cap were to be introduced in the devolved public sector? Please select all that apply.

All of these payments should be excluded along with payments relating to whistleblowing. If these payments are included, they essentially cap any liability at the limit of the statutory cap, regardless of the negligence, bad practice, criminality or other conduct by an employer. Such payments should be regulated by the Courts and Tribunals on normal legal principles. There is also a danger that arbitrary caps imposed in such areas would not be viewed as a proportionate restriction of human rights (right to property, namely an employees' entitlement under their pension scheme).

9 - Should Scottish Ministers introduce a threshold for recovery arrangements in the devolved public sector for high earners?

No – whilst it may appear attractive to introduce recovery arrangements for high earners who return to the public sector there are a number of problems with this.

Firstly in principle, just because someone may be made redundant and gained access to their pension because this helps one authority manage their workforce numbers, does not necessarily mean that the person's skills are not required elsewhere. Employers in the public sector should be free to employ the best candidates for a post.

Secondly it does not recognise the circumstances of individuals who may require to seek employment for financial security, but will be excluded from careers in which they have expertise.

Thirdly, there are already restrictions on the extent to which persons can be quickly re-engaged. The Redundancy Modifications Order, Local Authority Pension Schemes and SPPA scheme provide such restrictions.

Fourthly there is the question of how this could possibly be enforced. Would candidates be obliged to declare such payments in applications? Would this be age discrimination? And in the absence of any real factual basis for the changes, would this be proportionate discrimination? What if such payments form part of a compromise agreement, the terms of which were confidential?

It is also worth noting that such recovery arrangements only operate in the private sector where the employee has signed a restrictive covenant. There is extensive case law which makes it clear that such restrictions are inherently unfair, unless they are restricted in geographical area and time, and need to be justified on the basis of being essential to ensure the security of commercially confidential knowledge. They can represent a restriction on the free movement of labour, in breach of EU rules. It is likely that the proposed recovery arrangements would also have to face the same legal tests.

10 – Over what time period should recovery arrangements begin?

We do not agree with recovery.

11 – Which of the following payments should Scottish Ministers include in the exit payment recovery arrangements, if introduced for the devolved public sector?

None, on the basis we do not believe there is either a factual or legal basis for recovery. If an employee has contributed to a Pension Scheme and has a right to payments under the rules of that scheme, this is a property right under ECHR. While that right can be interfered with in a proportionate manner, in the absence of any sound factual basis for recovery, such interference is not proportionate and a breach of ECHR

12 - Do you think that enforcement mechanisms should be introduced for the devolved public sector?

No. Sufficient safeguards already exist.

13 - If in the event of an exit payment cap and recovery should Scottish Ministers have?

If a cap was imposed, in accordance with the principles of subsidiarity, the Scottish Minister should delegate the power to waive this to individual employers.

14 - Are there other forms of reporting you think would be helpful, across the devolved public sector in Scotland?

No. Audit Scotland rules on reporting of exit costs ensure sufficient transparency. Local authorities already publish this in their annual accounts and report to their Audit or Scrutiny Committee.

15 – Do you think there would be value in changing exit payment tariff terms along the lines of the UK Government’s proposals?

No. Audit Scotland guidance is effective in regulating this area and the data shows that relatively few individuals are affected. In the absence of any data to suggest that there is a problem, Government should not legislate. The political context in England and Wales is very different from that in Scotland. In Scotland there is a general commitment to the public sector, one which enables it to achieve Best Value without imposing artificial obstacles. This is an approach which is to be commended and should continue.

16 - What would be an appropriate payback period for exit payments that balances affordability with operational effectiveness?

In the event of a pay back period there still should be discretion available to waive in exceptional cases provided best value can be demonstrated.

17 - Should Scottish Ministers apply any of the following restrictions, for devolved public sector employers?

No for the reasons set out in question four.

18 – You are invited to provide evidence of where an exit cap or other changes to exit payment terms would further support your organisation’s ability to manage paybill costs.

There is no evidence that an exit cap or other changes to exit payment terms would support a Council’s ability to manage paybill costs. The exact opposite is the case. Arbitrary caps would stop a Council from being able to effectively manage its workforce and stop the Council from exiting people from the organisation when it makes financial sense to do so. The likely end result would be an increase in compulsory redundancies, reduced staff morale, and tension in terms of wider industrial/employee relations.

19 - What do you think are the positive and negative economic and fiscal impacts of an exit cap, changes to exit payment terms and recovery arrangements?

The negative impacts of an exit cap are that it is inflexible, stops effective workforce planning, will result in decisions which are not Best Value, will cost money, will be contrary to the principle of subsidiarity and will result in practical difficulties in managing redundancies and departures. We are not aware of any data which supports a positive impact of an exit cap.

20 - What do you think are the positive and negative social impacts of an exit cap, changes to exit payment terms and recovery arrangements?

An exit cap will make it difficult to avoid compulsory redundancy. Our evidence also suggests that relatively low paid employees could be hit by a £95,000 cap, particularly those who are in 50-55 age group.

21 – What do you think are the positive and negative environmental and / or regulatory impacts of an exit cap, changes to exit payment terms and recovery arrangements?

Regulatory impacts should be judged in terms of the principles of better regulation which are proportionality, accountability, consistency, transparency and targeted. An exit cap fails all of these tests and is an arbitrary action not based on sound factual evidence.

22 – What do you think are the positive and negative financial impacts of an exit cap, changes to exit payment terms and recovery arrangements?

An exit cap will have a detrimental impact on the financial sustainability of Local Authorities.

23 – What do you think are the positive and negative equalities impacts of an exit cap, changes to exit payment terms and recovery arrangements?

In terms of age, those most likely to breach the cap would be where there is early access to pension. Inevitably those are people over the age of 50-55. In the absence of any real data to support an exit cap in particular, there are no proportionate reasons to discriminate against this age group.

24 -What unintended consequences do you think might arise from proposals that go beyond the status quo?

A person's entitlement to their pension, particularly one such as the Local Authority one, to which employee and employer contribute, almost certainly falls within the ECHR right to property. Any interference with this requires to be proportionate. Where there is no factual basis for the proposed cap and where it cannot be justified having regard to the affordability of the individual person scheme, the cap is likely to be a non-proportionate interference with a property right, and breach ECHR.

25 – Do you think the following are the appropriate factors to consider when making the case for change to severance arrangements in the devolved public sector?

No - we disagree with the inclusion of the factor which aims to ensure there is greater consistency of application across sectors, including between the reformed civil service compensation scheme and devolved schemes.

Employees have contributed to different schemes, each of which has different terms and conditions depending on contributions and the affordability of the scheme. It does not make good sense that the imposition of an exit cap by the UK Government, for reasons which seem to have no factual basis, result in other schemes being aligned to it.

The other principles detailed in the consultation paper which require to be taken into account are those detailed in pages five and six of the consultation namely:-Best value and maintenance of a no compulsory redundancies policy.

Government should not interfere with pension schemes which employees have contributed into unless there is a clear risk to the affordability of the scheme. In these circumstances the individual pension scheme should be responsible for any changes.

The following legal factors require to be considered:-

a) in the absence of any factual basis for change it will be difficult to demonstrate a proportionate interference with an individuals' ECHR right to property; b) the proposals are age discriminatory and c) recovery of payments from people moving into a new job or requiring their dismissal is a breach of EU principles of free movement of labour, conflicts with existing employment law rules and the ECHR right to a fair hearing;.

26 - Are there any other risks you think should be part of Scottish Ministers decision making on this issue?

No

27 – Which of the following options best reflects your views of reform of severance arrangements across the devolved public sector?

Option 1- No reform

28 – Final Comments

Key Points are:-

- Within the local government sector (and almost certainly the public sector as a whole) there is no factual evidence which demonstrates any problem which requires legislation. Scrutiny is best left to Audit Scotland;
- The key principle must remain one of Best Value. The amount of savings delivered through severance is the key criteria, not the cost of the exit. The average payback period is the most important factor;
- Such legislation will create barriers to effective workforce planning by public authorities at a time of reducing resources. It will cost money, and stop savings being made;
- Such legislation is contrary to the principle of subsidiarity, of tailoring solutions to local needs. One size fits all is counterproductive.
- Legally there are the following issues a) it is doubtful whether application of these rules to local government is within the legislative competence of the Scottish Government; b) in the absence of any factual basis to demonstrate proportionality they are breach of individuals' ECHR right to property; c) they are age discriminatory and d) recovery of payments from people moving into a new job or requiring their dismissal is a breach of EU principles of free movement of labour, conflicts with existing employment law rules and the ECHR right to a fair hearing;.
- It does not deliver a Fair deal for public sector employees, particularly those who have paid into a pension scheme in the expectation of receiving defined benefits;
- Such rules remove one of the tools to avoid compulsory redundancy.

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