



Birmingham
Law Society

Public sector exit payment recovery regulations

HM Treasury Consultation
December 2015

January 2016

Response to Consultation on Public Sector Exit Payment Recovery Regulations

Consultation Question

The government invites you to comment specifically on the draft regulations and Schedule 1 (which lists public sector authorities and offices in scope of the regulations), and changes to the proposal for the recovery of public sector exit payments. In particular, do these regulations achieve the policy intention of ensuring the mechanism for the recovery of exit payments is fair, proportionate and represents value for money to the tax payer?

Response to Consultation

Response on the draft regulations

1. Definition of “relevant contract for services” (regulation 3(1)(g))

Reference is made to “50% of the exit payee’s employment or self-employment”. While the intention is understood, the drafting is not as clear as it might be. Should reference be made to the amount of monthly contracted hours with a public sector employer as a proportion of the total contracted hours? Alternatively would it not be simpler to delete this element of the definition (which will be difficult to verify) and rely on the pro-rating provisions in regulation 7(2)?

In addition we believe there is currently a gap in the scope of the repayment obligations, which catches employees and the self-employed but implicitly excludes non-employee workers who are not self-employed. This could be addressed by widening this definition to cover individuals who contract as workers, but are neither self-employed nor have employment status. Alternatively a definition of employee could be included in the regulations incorporating non-employee workers (see for example the definition of worker in the Working Time Regulations).

2. Definition of return to public sector (regulation 3(3))

In its response to consultation published in October 2014 the Government promised to look at the issue of TUPE protected terms (see extract below). However the only reference to TUPE in the revised regulations is in the definition of a return to the public sector, where becoming an employee as a result of a TUPE transfer is excluded from the definition. There

is no reference in the consultation document on the revised draft regulations about why this it thought necessary. It does not in any event address the difficulty identified below.

“4.16 The Government is carefully considering how to deal with exit payments that may be protected under the Transfer of Undertakings (Protection of Employment) Regulations 2006, as amended (‘TUPE’). It is our intention to extend the scope of the regulations as far as we can, but we recognise that some TUPE protections that confer rights to exit payments may need to be upheld. We are working through these issues and will set out more detailed proposals when we consult on draft regulations.”

3. Calculation of repayment amount (regulation 7)

A number of comments can be made on this regulation:

- In the formula A should be the amount received by the exit payee and B should refer to the amount of tax paid or payable by the exit payee. Employee national insurance would we believe have already been deducted by the employer. There is currently a confusion between tax deducted from the payment by the employee and tax for which the payee has to account. This may not be payable immediately.
- In regulation 7(2) the syntax needs adjusting – it should say “are fewer” rather than “is less” in the first line
- With regard to regulation 7(3), looking at the previous draft of the regulations it seems that the intention is that the payee should be entitled to keep the equivalent of the statutory redundancy payment (i.e. the minimum amount as defined in regulation 7(5)(a)). The regulations fail to spell this out clearly.
- As presently drafted, while taking on a reduced number of hours triggers an adjustment to the repayment amount, that is not the case if the exit payee takes a job at a reduced salary. This is a change from previous proposal, and is not flagged in the consultation published with the final draft regulations.

5. Restrictions on return to the public sector and arrangements to repay – regulation 8

Regulation 8(1) provides for no return within 12 months where an exit payee has received a qualifying exit payment and a hiring authority must not permit such a return unless the exit payee has repaid the repayment amount or has made arrangements to do so. These are mandatory provisions but regulation 8(3) refers to there being a grace period of three months

if regulation 8(1) is breached. This appears to be contradictory. A better approach would be to amend regulation 8(1)(a) and (b) so that “may” is substituted for “must”.

4. Disputes over repayment amounts

In view of the complexity of these provisions, we wondered whether there should be a mechanism in the regulations for a binding (or semi-binding) determination of the re-payment amount in the event of a dispute.

5. Waivers

The mechanism looks to be onerous, slow and unwieldy, and would act as a disincentive to securing the appointment of exit employees. We would propose that public sector bodies are provided with delegated authority to agree waivers in prescribed situations, for example when considering shortage occupations.

Response to Schedule 1

We have no comments on the list of public sector authorities and public sector offices.

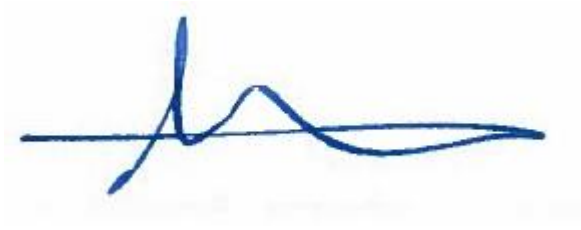
Specific comments on changes to the proposal for the recovery of public sector exit payments. In particular, do these regulations achieve the policy intention of ensuring the mechanism for the recovery of exit payments is fair, proportionate and represents value for money to the tax payer?

We are concerned that the minimum earnings threshold of £80,000 (from £100,00 as originally proposed) will impact upon a larger group of exit employees who may as a consequence of these provisions be dis-incentivised from a return to the public sector, resulting in the risk of a skills shortage within certain occupational categories in the public sector. In addition treating the public sector as a whole rather than in particular sub-sectors such as health or education would again reduce skills especially where for example the exit was driven by redundancy.

We propose that specific exemptions from the regulations should be considered for shortage occupations within the public sector.

Save for the above, we concur that the regulations largely achieve the policy intention.

Dated: 14 January 2016

A handwritten signature in blue ink, appearing to be 'Mushtaq Khan', written over a horizontal line. The signature is stylized and cursive.

Mushtaq Khan
President
Birmingham Law Society