

The Restriction of Public Sector Exit Payments Regulations 2020

Parliamentary briefing

About the BMA

The BMA (British Medical Association) is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives.

Executive summary

- We urge MPs/Peers to reject the Regulations
- The Regulations are unlawful, and the UK Government should withdraw them from consideration.

We believe the Regulations that have been put to Parliament for approval to implement the restriction of public sector exit payments are unlawful: they ignore the legal parameters of the enabling statute and existing contractual agreements between employers and employees, with far reaching consequences. We have sought permission from the courts to apply for a judicial review of the Regulations¹.

What is the effect of the Regulations?

- (1) The cap unlawfully includes sums due to former employees for matters arising *during a contract of employment* (such as equal pay or sums due for race or sex discrimination during employment), despite the fact that the enabling statute only allows restrictions for sums paid in relation to an employee's departure.
- (2) They impose a cap on the ability of public bodies to pay sums legally due to former employees, and thus require public bodies to act unlawfully by failing to pay sums owing to former employees.
- (3) They impose a new statutory duty on *every* exiting public sector employee to fulfil a complex administrative obligation, specifying any payments that they are owed, regardless of the amount involved. This is despite the fact that (a) this is not permitted by the enabling statute and (b) it would cover any employee who was owed an exit payment regardless of the amount concerned, even a payment of £200, which is nowhere near the statutory limit and not covered by the statutory scheme.

Introducing these unfair and unlawful Regulations, especially at a time when doctors have gone above and beyond to support the national effort to tackle the COVID-19 pandemic, will have a catastrophic impact to the profession's morale and motivation.

¹ Read more about the BMA's legal challenge in our news article: www.bma.org.uk/news-and-opinion/bma-launches-legal-challenge-to-public-sector-payment-cap-2



The cap

The UK Government legislated for a cap on exit payments to public sector employees in the Enterprise Act 2016 via amendments to the Small Business Enterprise and Employment Act 2015.² These new provisions legislated that: *“Regulations may make provision to secure that the total amount of exit payments made to a person in respect of a relevant public sector exit does not exceed £95,000”*. Importantly, the 2015 Act states that payments can only be considered as an “exit payment” if they are “in consequence of the employee leaving employment”.

The issue

The BMA believes that the Regulations the UK Government has brought forward are unlawful for three reasons:

- (1) The 2015 Act only permits a cap on payments which are made to an “existing employee” in consequence of the employee **leaving** the employment of a public sector body. However, the Regulations include payments that are owed to the exiting employee by the public sector body in relation to matters which occurred **during** their time in employment.³
- (2) The 2015 Act does not allow Regulations to change the terms of existing contracts of employment. However, the Regulations require public sector bodies to act unlawfully by breaching contracts if the sum legally owing is more than £95,000. Thus, the Regulations require public sector bodies, like NHS trusts, to act in breach of their existing legal obligations by prohibiting them from paying an exiting employee a contractually agreed sum, e.g. a payment pre-agreed in their contract in the event they are made redundant.
- (3) The 2015 Act is concerned with imposing restrictions on **public sector bodies** in relation to certain payments made to an exiting employee – it does not provide grounds for Regulations to be made which impose legal obligations on **the individual**, i.e. the exiting employee. However, the Regulations would impose a legal duty on all exiting employees to disclose that they are owed money and to calculate how much, regardless of the sum owed.

These issues are examined in more detail in the following section.

The definition of ‘exit payment’ in the Regulations

Exit payments can be owed to an individual for a number of reasons⁴. According to the 2015 Act, the cap on public sector exit payments must only apply to a payment made to an individual as a result of them **leaving** their employment⁵, e.g. a voluntary payment by the public sector body to the exiting employee in consequence of them leaving their job.

² The statutory basis for Proposed Regulations arises in amendments which were made to the 2015 Act by section 41 of the Enterprise Act 2016 (“the 2016 Act”). The 2016 Act introduced sections 153A to 153C to the 2015 Act.

³ The existing wording of Proposed Regulation 5(2)(c) covers any form of award to an exiting employee in respect of any claims which can be advanced in a tribunal case whether as a result of (i) an ACAS negotiated conciliation agreement or (ii) a settlement agreement reached by the parties themselves.

⁴ We have identified at least 4 different types of circumstances in which a public body may make a payment to an Existing Employee at or soon after that person’s contract of employment has come to an end. These are: a ‘termination payment’; a ‘termination damages payment claim’; a ‘pre-existing employment payment claim’; a ‘voluntary payment’.

⁵ See Section 153A(3) of the 2015 Act

The BMA has no difficulty with a cap on voluntary payments. However, the Regulations are not entitled to require public sector bodies to cap payments in respect of their legal liability to an exiting employee in relation to matters which took place **during** their employment, **before** their exit⁶ (such as where the employee was subjected to race or sex discrimination or harassment by a colleague). The settlement of a legal claim which arose prior to the termination of the employee's employment does not meet the conditions of the 2015 Act.

For example: An employee's treatment at work may give rise to an equal pay claim, an unpaid wage claim, a claim for damages for race or sex discrimination, or a claim based on any other form of discrimination under the Equality Act 2010.

Any such payment – which is proposed to be made to an employee to compensate them for events which occurred during the employment relationship – would fall outside of the 2015 statutory wording.

Extending the scope of the definition of “exit payments” to include payments which are made to compensate an exiting employee for infringement of their legal rights during their employment is unlawful. These payments owed to public sector workers should not be capped.

Prohibiting public bodies from complying with their legal duties to make payments to exiting employees

The Employment Rights Act 1996 requires that all employers (including public sector bodies) make **statutory** redundancy payments to eligible employees. The statutory payments are a minimum. In addition, across the public and private sector, many employees have contracts of employment which provide that they are entitled to a **contractual** redundancy payment. This applies in the NHS where contracts are collectively negotiated contracts of employment.

The 2015 Act does not empower public sector bodies, like NHS trusts, to break the law by breaching these contracts of employment. However, the Regulations purport to prohibit public sector bodies from paying an exiting employee a contractually agreed sum, such as a redundancy payment pre-agreed in their employment terms and conditions, if it would exceed £95,000.

For example: an NHS consultant who is employed under the *2003 Standard Terms and Conditions of Service*⁷ has a contractual entitlement to one month's redundancy pay for every year of service up to a maximum of 24 years.

So, if an NHS consultant with 20 years' service on the standard pay rates and holding the standard form of contract were to be made redundant, the Trust who had employed them would come under an immediate contractual obligation to make an exit payment to the consultant that would inevitably exceed the £95,000 exit payment cap.

If the total 'exit payment' the Trust is legally obliged to pay exceeds the exit payment cap, the Regulations purport to impose a statutory duty on the Trust to "reduce the amount of one or more of the other exit payments" to the consultant – i.e. not to pay sums which the Trust is under a legal duty to pay, denying the consultant what he or she is legally owed.

⁶ We believe Regulation 5(2) is unlawful in that it seeks to extend the scope of "exit payments" to payments which are not made "*in consequence of the employee leaving employment*" but are made in consequence of events during an employee's employment.

⁷ As negotiated on behalf of NHS Trusts and NHS Foundation Trusts by NHS Employers and recommended to NHS bodies

Doctors' contractual redundancy arrangements have been negotiated and agreed with the recognised trade union to provide a contractual entitlement that fairly reflects their service to the NHS and the damaging impact redundancy can have. It is rare that doctors are made redundant, but when they are it is often later in their careers when they are working at a highly specialist level. Those who have ultimately reached a high point on their pay scale, after decades of commitment to patient care in the NHS, should not see the payments they are contractually entitled to diminished.

As an employer of well over a million workers in England, the NHS depends on using centralised standard contracts for doctors and other clinical and non-clinical staff in order to operate effectively. Mechanisms for national negotiations are entered into in good faith and are essential to reach agreement. Employers and employees rely on the terms of the employment contracts and it is deeply worrying that the Government proposes to take powers, in effect, to override those contracts insofar as they relate to redundancy and associated payments for public sector staff.

Furthermore, interfering with an exiting employee's right to claim such a payment would be a breach of the *European Convention on Human Rights (Article 1, Protocol 1)*. In effect, the Regulations impose a requirement on an exiting employee to either wait until the public sector body obtains a discretionary decision from a minister that they can comply with their legal obligation to pay the employee, or the exiting employee has to sue the public sector body for monies that they are legally entitled to and owed.

There is no basis in the 2015 Act to entitle the Government to make Regulations which prevent public bodies from paying money that is owed to their exiting employee – money the employee is entitled to under existing lawful contracts of employment. In effect, the Regulations impose a statutory duty on public bodies to act unlawfully.

The attempt to impose a legal duty on individuals

The 2015 Act is concerned with imposing restrictions on public sector bodies in relation to payments made to exiting employees. The Act does not provide grounds for Regulations to be made which impose legal obligations on exiting employees, themselves. In the absence of any statutory power in the 2015 Act for Regulations to impose duties on anyone other than the public sector body, the Regulations cannot place an exiting employee under a legal obligation to take specified steps. However, the Regulations impose a blanket duty on all exiting employees to calculate the amount of the payment due to them and to inform his or her employer, regardless of the amount concerned, even if the sum is nowhere near the statutory limit.

Even if there were a power in the 2015 Act to impose legal duties on exiting employees – which there is not – in order for it to be lawful, there would need to be a reasonable degree of proportionality between the statutory purpose of the legislation, namely to prohibit payments of more than £95,000 to relevant exiting employees, and the imposition of such a duty on the exiting employee. Yet, the Regulations seek to impose a statutory duty on **all** public sector exiting employees who are entitled to an exit payment of **any** amount whatsoever.

This obligation would arise whenever a public sector worker moved employment from one public sector body to another – which, absurdly, in the case of junior doctors whose rotation system involves them moving from one NHS employer to another NHS employer (often with some

frequency)⁸ would require them to report and request the money they are owed each and every time.

For example: Junior doctors, employed under the national contract known as the TCS,⁹ are usually owed amounts of money at the end of a 6 month placement for a number of reasons:

- Not leaving their employment on a pay day.
- Payments owed for extra shifts or duties to cover sickness, staff shortages or to meet additional demands – this is very common in today's NHS. There is often a delay before payment.
- Reimbursement for expenses incurred as part of the job or to cover other allowances.

Often the sum owed will be a few hundred pounds but the statutory duty would still apply – a junior doctor owed *any* of these payments would have to calculate the amount they are owed and inform his or her employer, even if the sum is nowhere near the statutory limit.

It is far from a straightforward exercise for a junior doctor to be able to reliably calculate the sum they are owed by their employer on exiting their employment and can often be particularly complex, e.g. because of premia payable for particular types of duties or work done at particular times – the administrative burden will be time consuming and unpaid. Indeed, Trusts have medical staffing departments with employees who are TCS specialists, using bespoke computer systems used to work out payments in accordance with the TCS rules.

It is also unclear what the consequences of a failure to report amounts owed might be which, again, is likely to cause further anxiety for junior doctors not least because they are professionally regulated by the General Medical Council who require high standards of probity and integrity.

We believe it is not only unlawful to impose this reporting duty on exiting employees, but it is also highly objectionable – in the case of thousands of junior doctors who change employer regularly through their training, the sums due to them will be nowhere near the £95,000 limit and relate to payments of arrears, paid on exit, rather than payments for an exit. They are not relevant to the stated policy objective of the cap.

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⁸ It is not uncommon for junior doctors to move employers between foundation years and to move around up to three times (in terms of specialties/ posts) during that period.

⁹ Terms and Conditions of Service for NHS Doctors and Dentists in Training (England) 2016